# Real Property Law and Procedure in the European Union

## Report for the Netherlands

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*January 15, 2005*

Real Property Law – The Netherlands

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# 1. Real Property Law – Introduction

## 1.1 General Features and Short History

The Dutch real property law finds its most important root in the Napoleonic Civil Code, as it was introduced in the Netherlands in the early 19th century, most profoundly in 1810, when the Netherlands were incorporated into the French Empire. Replacing the Napoleonic Civil Code with a national one was attempted during the decades after 1814, but –also due to differences with the southern parts of the new Dutch Kingdom, an area that is now Belgium– several drafts were made but not introduced. After the independence of Belgium a successful attempt was concluded by 1838: the Dutch Civil Code. It can be argued that this Civil Code contained some Germanic influences on top of the French, Napoleonic base. A clear example is the fact that registration of the deed is a constitutive demand for transfer of ownership and other real property rights.

Discussion on our civil law and the underlying legal doctrines continued and was very clear for instance around 1900. Shortly after the end of WW II it was decided to design a New Civil Code. Although the first drafts were available soon, it took decades before the books of this New Civil Code were enacted. The most important provisions relating to real property law can be found in Books 3, 5 and 6 of the Civil Code and finally became effective on January 1st 1992, although many ideas were already taken into practice, court rulings, teaching and doctrine before this date. Although not meant as a very big change several topics related to real property law underwent change and in other cases more clarity was brought into longstanding (doctrinal) debates.

Related issues of special contracts (like tenancy, renting, sale, time-sharing, building contracts, etc.) are gradually being re-enacted into Book 7. For instance consumer sale of houses (including the introduction of a cooling off period) and pre-registration of sales contracts (priority notice / *Vormerkung*) became effective on 1 September 2003. Some regulations dealt with in special laws are being incorporated into the main body of the Civil Code. The part of the code relating to inheritance has after lengthy discussions been modernized in 2003 by putting Book 4 into effect.

The relevant administrative regulations are dealt with in many different laws, which in general are changed rather often. Since 1994 there is basic law on the general principles of administrative law, but it is not a code incorporating the different areas of administrative legislation.

Between the two is the cadastre law, Law on the Cadastre and the Public Registers, which refines the provisions for registration from the Civil Code (Book 3, section 1.2), as well as forms the basis for the cadastral registration and mapping. This law is complemented by by-laws at different levels. It became effective together with the New Civil Code in 1992.

Also relevant is the Law on the notarial profession, originally from 1842, which has been replaced by a new one in 1999. The changes include the abolition of the system of a limited number of notarial positions in the country, as well as the introduction of price competition between the notaries.

Although the Civil Code 1838 became effective a few years later in the South-Eastern province of Limburg, since then the real property legislation has been uniform throughout the country. Some pre-Napoleonic real property rights are still recognized (and can be transferred, though not vested anymore). Some of these can only be found in certain regions. For a number of them special legislation has been enacted to slowly phase them out.

Ownership (possession) is protected in the Constitution by article 14. This article guarantees compensation in case of expropriation. The only other (indirect) reference to (real) property law in the Constitution is article 107 that states that the rules of civil law are codificated in a civil code.

## 1.2 Property and Estates

### 1.2.1. Estate versus Property

There is not such a thing as 'estate' in Dutch legislation. The different property rights can be hold by more than one person in joint ownership. A special case deals with the *appartementsrecht* (apartment right / condominium), based on the unitary system (*système unitaire)*. The Dutch law considers all holder of the apartment rights as co-owners of the whole complex (building, common areas and all apartment units). Each of them has an exclusive use right to one (or more) apartment units. As soon as the owner of the building (existing or to be constructed) has drawn up and registered a 'splitting deed' and he transfers the 'apartment right' of one apartment to someone else a mandatory apartments association will be formed.

A very limited number of pre-Napoleonic feudal rights still exist (usually called old real property rights). The best example is the so-called `*dertiende penning'* (thirteenth penny), the right of the land lord on a part of the value of the land to be paid at every transfer of ownership. Rights like that can still be transferred, but they can not be vested anymore. For a number of them special laws to phase them out are in place. They can all be described as strong use rights, where the underlying (feudal) owner receives payments in specific cases (percentage of the sales price, certain sum at family happenings of the right holder, etc.).

### 1.2.2. Superficies solo cedit

The rule *superficies solo cedit* (vertical accession) is one of the main principle of Dutch land law. He who owns the land, owns what is attached to it (article 5:20 BW). Exceptions are only possible if allowed by the law: the Civil Code or special legislation. Examples of the latter are the Act on the Telecommunication (Article 5.6: telecommunication networks are owned by the constructor, and can be transferred to a new operator) and the former Mining Act 1810 (the holder of the concession is owner of the minerals in the soil, also before extraction).[1]

In the Civil Code, only two exceptions on the superficies rule are possible. First is the rule of horizontal accession, also mentioned in article 5:20 BW:

> 'ownership of land comprises (...) buildings and works forming a permanent part of the land, either directly or through incorporation with other buildings or works, to the extent that they are not part of an immoveable thing of another person.'

For instance if a cellar is a constructive part of your house, you own it, even if it extends beyond the boundary of your property under someone else his property.[2] The rule can cause complications, and has done so recently with regard to utility networks. It is not clear if it can

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1 The Mining Act 1810 was of French origin: Loi concernant les Mines, les Minières et les Cerrières du 21 avril 1810. This act has been replaced by a new Mining Act (*Mijnbouwwet*) in 2003. This new act abolished the idea of an owership of not extracted minerals. Minerals under a depth of 100 meters are property of the State. The holder of a permit to extract, will become owner of the minerals after the extraction has been finished. However ownership rights based on a concession granted before 1-1-2003 will be respected.

2 The part over the boundary must be a constructive part of the main part on the other parcel. It is not sufficient that the construction can only be accessed from the other pacel. *Hoge Raad* 28 oktober 1994, *Nederlandse Jurisprudentie* 1995, 96 (Makkee/De Werdt).

apply to whole constructions as such.

The second exception allowed by the Civil Code is the real right of superficies (*opstal*). This rights allows the holder to own a construction on (under or above) someone else his land (article 5:101 BW). Since 1992 this right is also used to deal with situations where the land owner allows for cables and pipelines to be put through his land.

Large urban areas created between the early and late 20th century in some of the larger municipalities are built on basis of the real right of emphytheusis (*erfpacht*). This allowed the holder to possess and use a property as if he were the owner (article 5:85 BW). If the house built on such land should be regarded as ownership of the land owner (municipality) or that a superficies right is implied is a matter of opinion (also depending on the exact wording of the 'general conditions' applied in most of these municipalities and the contracts). It is not a big issue, since it has little or none material consequences.

If we do not count the *erfpacht* and cables and pipelines situations, only a fraction of the buildings is owned by someone else than the land owner (under 5%).[3]

## 1.3 Interests in Land

### 1.3.1. Numerus clausus

The Dutch Civil Code is based on the numerus clausus principle. For real estate, we have the following real property rights:

*Eigendom* (ownership)

*Erfpacht* (building lease: emphytheusis)

*Opstal* (building lease: superficies)

*Vruchtgebruik* (usufruct)

*Recht van gebruik en bewoning* (usus et habitatio)

*Appartementsrecht* (appartment ownership)

*Mandeligheid* (joint ownership)

*Erfdienstbaarheden* (servitudes, easements)

*Hypotheek* (mortgage).

However, for most of these rights only a limited amount of mandatory regulations is included in the civil code, making it possible to make a lot of variety by contract. The municipalities that use (or used) *erfpacht* a lot, have special 'general conditions' established (and registered) which are referred to in the contracts and deeds vesting the right.

*Vruchtgebruik* and *Recht van gebruik en bewoning* are two varieties of usufruct. The right ends when the beneficiary dies, although *vruchtgebruik* can still be transferred, with the risk of the seller dying (soon) for the buyer. They are not seen as a part of the genus servitude in the Netherlands.

*Mandeligheid* means joint ownership of a parcel of land (e.g. a common way out) attached to the ownership of neighbouring properties. Next to this *mandeligheid* that has to be established by the joint owners of the land, there is the party wall and common hedges, etc; the *mitoyen-*

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[3] A search in the Dutch cadastral database of september 2003 resulted in the following numbers of registeed rights (on a total of 6.595.393 parcels): *erfpacht:* 331.809, *opstal*: 63.538, *opstal* for pipes and cables: 1.062.481 (including the pre-1992 rights established under article 5 of the *Belemmeringenwet Privaatrecht*).

*neté* as known in the French *Code Civil*.

*Erfdienstbaarheden* are the easements in appurtenance, through which the possessor of one property has to allow or abstain certain activities. The beneficiary is the possessor of the dominant tenement, usually a neighbouring property. Before 1992 several categories of servitudes were distinguished, dealing with their nature (being permanent or occasional and/or noticeable or unnoticeable). By and large the situation with regard to easements is not very easy to determine, also because not all categories had to be registered before 1992, and they have not been separately indexed (since 1929).

From the perspective of real property law, there is only one type of mortgage, the *hypotheek*. It is by law accessory, although it can be established allowing for later (or increased) debts. If the debt is paid off, the mortgage by law ceases to exist, except in the case of a *krediethypotheek* or *bankhypotheek*.

### 1.3.2. System of Interests in Land and Numerus Clausus

In the limited rights in land a distinction is made between the rights to use (*genotsrechten*): *erfpacht, opstalrecht, vruchtgebruik, gebruik en bewoning* and *erfdienstbaarheden* on one hand and the security right *hypotheek* on the other hand.

*Appartementsrecht* and *mandeligheid* are species of joint ownership.

### 1.3.3. Servitudes (usus)

The Dutch Civil Code gives a general description of a servitude (*erfdienstbaarheid*) in article 3:70 BW:

'A servitude is a charge imposed upon an immoveable thing, the servient property, in favour of another immoveable thing, the dominant property.'

In article 3:71 BW the actual content of the servitude is more elaborated:

'1. The charge imposed by a servitude upon the servient property consists of an obligation to tolerate or not to do something on, above or under either of the properties. The deed of establishment may stipulate that the charge also includes an obligation to construct buildings or works or to grow plants, necessary for the exercise of the servitude, provided such buildings, works and plants are wholly or partially situated on the servient property.

2. The charge imposed by a servitude upon the servient property may also consist of an obligation to maintain the servient property or the buildings, works or plants which are or will be wholly or partially situated on the servient property.'

In Dutch law only easements in appurtenance are known. However, a contractual contruction is known, that leads more or less to the same result as the retrictive covenant in common law, or the *persönliche Dienstbarkeit* in German law, the so called *kwalitatieve verplichting*. See under 1.3.6.

### 1.3.4. Mortgages and Rent Charges

In Dutch law there is only one security right in registered property: the in principle accessory right of mortgage (*hypotheek*). This is established by a notarial deed drawn up between parties and registered in the public registers. Legal mortgages are not known.

### 1.3.5. Rights in Rem to Acquire Real Property

In Dutch law no rights in rem to acquire real property exist.

### 1.3.6. Other Interests in Land

The *kwalitatieve verplichting*, literally qualitative obligation, is a contract between the owner of real estate and another person, in which the owner takes on him a obligation not to do or to tolerate. After registration of the contract in the public registers all the legal successors are bound by the same obligation. See the definition in article 6:252 par. 1 and 2 BW:

`(1) A contract may stipulate that the obligation of one of the parties to tolerate or not to do something in respect of his registered property, will be transferred to the persons who will acquire the property by particular title, and that the stipulation may also bind those who will acquire a right to use the property from the titleholder.

(2) For the stipulation referred to in paragraph 1 to have effect, a notarial deed must be drawn up of the contract between the parties, followed by its registration in the public registers. The creditor of the obligation to which the stipulation relates must, in the deed, elect domicile in The Netherlands for the purpose of registration'.

However the *kwalitatieve verplichting* is not a real right, but a contract, and therefore regulated by the general principles for contracts (found in Book 6 of the Civil Code). In the way of establishment (notarial deed and registration) and in the practical result, it resembles the limited real right of servitude. Therefore in Dutch literature it is sometimes referred to as the servitude without a dominant property.

## 1.4 Apartment Ownership (Condominiums)

Apartment ownership is known in the Netherlands since 1951. In 1972 this statue was revised and the articles incorporated in the Civil Code. More or less without changes the same articles were incorporated in the new Civil Code (title 9 of Book 5) in 1992. Before 1951 experiments with other forms of more contractual co-ownership have been in use, especially the cooperative association. Some of those old apartment ownership substitutes can still be found.

A limited adjustment of the current rules is in preparation.[4] When the draft will be enacted it will for instance be possible to split only land in apartment rights (according to the current article 5:106 BW the complex must consist out of land and one or more buildings). An important improvement will be that changing the splitting deed will be more easy (decision by majority of apartment rightholders, instead of unanimity, see below).

The Dutch law considers all apartment rightholders as co-owners of the whole complex: land, building, common areas and all apartment units. Each of them has a exclusive right to use one (or more) apartment units (*système unitaire*). As soon as the owner of the building (existing or to be constructed) has drawn up and registered a 'splitting deed' and he transfers the "apartment right" of one apartment to someone else a mandatory apartments association will be formed.

The association of owners (*vereniging van eigenaren*) is not the owner of common parts, but takes care of the daily management of the complex. This association is bound by the law, as

[4] Draft 28.614.

well as by the splitting deed. Together with the deed, and included in it the *reglement* and the statutes of the association (charter) have to be drawn up. In addition to this the association will establish house rules (*huishoudelijk reglement*). The house rules can be changed by the members meeting of the association. The charter, however, has to be changed by deed, and be registered. Buyers of an apartment right are bound by all of these rules, as long as they do not contravene any other and higher regulation. The house rules are not registered, and can only be found by inquiring with the association (either its secretary or an outsourced manager).

Rules on the daily use and holding of pets, etc can in general be established by the association (majority). The cost distribution however must be in the splitting deed. The same applies for restrictions other than those of the factual use of the apartment units itself, e.g. a limitation of the right to rent the apartment.[5]

In case the splitting deed must be changed, for instance in case of enlargement or reduction of the complex, or important constructive changes all the holders of the apartment rights, and holders of limited rights (e.g. mortgagees!) must agree with the change.[6] In case of a refusal to cooperate a court decision can requested.

The apartment right is considered a normal real property right (like ownership), that can be mortgaged by the right holder.

Insurance of the complex is legally mandated. If the building burns down all right holders have a joint claim in the insurance claim, article 5:136 BW. In this case the apartment holders have the option to reconstruct the building or to give up the reconstruction. In the latter case the final result will most likely be the annulment (*opheffing*) of the splitting. In all cases the mortgagees are protected by the rule of article 3:229 BW:

"The right of pledge or hypothec (*mortgage*) entails, by law, a right of pledge over all claims for compensation which take the place of the secured property, including claims resulting from its reduction in value."

## 1.5 Building Lease (emphytéose – bail à construction/ Erbbaurecht)

Building lease as such does not exist in the Netherlands. Actually the lease is known in two forms, both rights in rem, and giving the holder the right to use the land of the owner for the construction of buildings. The difference between can only be understood from the historical background.

The first one is the *erfpacht*, regulated in title 7 of Book 5 Civil Code. Historically this was the right to hold and use the land for agricultural means. Since 1900 the instrument of *erf-pacht* is used (and further developed) by municipalities. As mentioned above *erfpacht* doesn't break the vertical accession, so the (nude) owner of the land is also owner of all constructions build on the land by the holder of the building lease. This building lease can be established for a limited time, or for perpetually.

However historically intended for building houses (and other constructions like bridges, dikes, pipelines, etc) only in a limited number of cases the right of superficies (*opstalrecht*) is used. In this case the holder of this limited right in rem is also owner of the building.

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5 *Hoge Raad* 10 maart 1995, *Nederlandse Jurisprudentie* 1996, 594 (Ameland State) and *Hoge Raad* 10 maart 1995, *Nederlandse Jurisprudentie* 1996, 595 (Duinroos-Duindistel).

6 *Hoge Raad* 24 mei 2002, *Nederlandse Jurisprudentie* 2004, 1 (Winkelhof).

## 1.6 The Public Law Context of Real Property Transactions

There are virtually no public law restrictions on real property transactions. Municipalities can under certain conditions introduce some, but this affects only small parts of the market. However *erfpacht* is sometimes applied to "smuggle in" conditions about the use of the land and buildings (see under 1.5). Municipalities can vest a pre-emption right under certain conditions and for a few years in case they plan on expanded urban development (greenfields) or urban renewal (*Wet Voorkeursrecht Gemeenten*). Furthermore a municipal housing bylaw can demand a housing permit for the use of certain (price) categories of houses, usually limiting use to people with ties (economical or social) to the city or region, but this does not hinder buying the house. It only makes it illegal to live in it. The same bylaw may under certain conditions demand a permit before the splitting deed can be drawn up (to prevent selling of flats that almost need big maintenance and/or to prevent the selling of low priced rented flats).

The 6% transfer tax needs to be paid on any real property transaction, as soon as the economic possession is transferred. Only in case VAT (presently 19%) has to be paid for a construction the building (or doing major groundworks; jurisprudence sets the limits) the sales tax does not have to be paid. No tax has to be paid on establishing mortgages.

Although the 6% transfer tax is sometimes referred to as the 'moving penalty', the general governmental policy is stimulating home ownership. The interest paid on the mortgage loan taken to finance the purchase of the house you live in, is fully tax deductible (although the rules are slowly being tightened). Subsidies for poorer families to buy a house are also available to some extend.

## 1.7 Brief Summary on "Real Property Law in Action"

Throughout the mid nineties and early 21st century the housing market was very active. The demand for houses was enormous, and quickly rising incomes combined with a very low interest rates led to prices rising very fast. Houses were often sold very quickly after they came unto the market, and buyers in certain 'hot' areas even overbid the advertised prize, just to get hold of the property. These extreme cases obviously were limited to just-above-average houses in the Randstad area (the axis Amsterdam – Den Haag – Rotterdam), but the whole market was very active and doing well.

So far the prices have levelled of a bit, but are on average still rising. In the expensive market segment (villa's etc.) the prices have dropped a bit. All over the market the sales take longer. It is more a buyer's market now.

Mortgages are extremely important in the economy. Over 50% of the families now own the house they live in, and almost all of them have a mortgage on the house (it is sensible for tax reasons not to pay too much of the mortgage to the bank). The last 10 years between 1,5 and 2 times as many mortgage deeds have been registered than transfer deeds. Many people take a new or second mortgage. The market is full of special offers by national and foreign banks.

The real estate market forms an important part of the notary's work (and esp. income). Not only all transfer deeds, but also all mortgage deeds have to be drawn up mandatory by a notary. Especially in recent days many people have changed their mortgage, or established a second one. All notaries are mandatory member of the KNB, Royal Notarial Professional Body, which can make bylaws and has a Professional and Conduct Code in force. There is a complaint system to deal with complaints and keep control. This is based on the law. The notaries have to carry liability insurance. Now that price competition has been introduced, there is likely to be more pressure on quality than before.

The registrars (there are only a few left) are employed by the Cadastre Agency.

The real estate agents and/or mortgage advisors do no longer have any legal regulation for their profession(s). Several associations exist and a voluntary Register of Brokers has been established. Price competition and quality differences make it hard to describe the present situation.

52% of household lives in a house their own house (to which they have a property right, be it ownership, leasehold or an apartment right) (www.cbs.nl - 13 Aug. 2004) For couples with children the percentage is even 76%.

The average (real estate tax) value of a house differs a lot from the urbanized West (often called *Randstad*, with the province of Utrecht being the highest), to the more rural areas (esp. the North East and South West). The provincial average of Utrecht is nearly twice that of the North Eastern province Groningen.

The percentage of houses encumbered with a right of mortgage cannot be found so far. On a yearly basis about double the number of mortgages is registered on houses than transactions. Many people take a second mortgage (when value of the house has increased a lot) or replace their mortgage (when interest rate is lower).

Dutch law doesn't provide for special courts or procedures for real property law disputes. Compared with the 19th century, cases of real property law nowadays make up for a smaller part of all court cases in the Netherlands. Like in all other cases of legal disputes alternative dispute resolution (arbitration or mediation) is possible, but this is a choice of both parties involved.

Real property law can be considered as a stable part of Dutch civil law. The doctrines (like the concept of ownership, limited rights in rem) have been elaborated since 1838. The actual Civil Code is for an important part a (re)codification of the Civil Code of 1838, taking in account the case law developed by the High Court . It is interesting to note that two recent major disputes (the case law on the distinction between movable and immovable things[7] and the ownership of cable networks[8] have been triggered by fiscal disputes.

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7 *Hoge Raad* 23 February 1994, *Nederlandse Jurisprudentie* 1995, 465 (windmills) and *Hoge Raad* 31 October 1997, *Nederlandse Jurisprudentie* 1998, 97 (portocabin)

8 *Hoge Raad* 6 juni 2003, *Bouwrecht* 2003, p. 819.

# 2. Land Registration

## 2.1 Organisation

### 2.1.1. Statutory basis

The Civil Code states in article 3:16 BW that "Entries concerning the juridical status of registered property are made in public registers, kept for that purpose." The second paragraph refers to regulation of form, contents, etc. of the keeping of these registers by law. This is done in the 'Law containing rules with regard to the public registers for registered goods, as well as with regard to the cadastre', usually abbreviated as Cadastre Law (Kadasterwet = Kw). The legal effects of registration or lack thereof in general and with regard to third party protection in particular are regulated in the articles 3:17-3:31 BW.

This system is the same for all parts of the country.

### 2.1.2. Relevant institutions

The Agency for Cadastre and Public Registers (for short 'the Cadastre' (het Kadaster)), deals with the registration of land.[9] Its competences are summed up in article 3 Kw and include:

- keeping of the public registers of register goods (a);
- keeping and maintaining the cadastral registration and the production, keeping and maintaining of the cadastral maps and the underlying documentation (b);
- giving out of the information the Agency has acquired during the execution of its competences listed under a through f (h)

This includes the acceptance and filing of (notarial) deeds in the public registers, as well as keeping those accessible through referencing to those in the cadastral registration, which also functions as the (only) entry to the public registers. In addition the Agency performs the necessary boundary surveys when a part of an existing property (parcel) is being sold,[10] archives the field survey notes and updates the cadastral (index) map, depicting all these parcels.

The second group of institutions involved are the notaries. Almost all documents (deeds) that must or can be registered in the public registers have to be notarial deeds (article 89 part 1 BW). In practice the role of the Dutch notary with regard of real property transactions is very extensive. All notaries have had on-line access to the cadastral registration for over a decade, and recently the registered deeds of the last years have been scanned and can be accessed on-line as well. The legislation to allow for the notaries to electronically register deeds was approved by Parliament on 18 January 2005. Its enactment is foreseen for 1 September 2005, if the notification procedure with the European Commission is completed as planned.

### 2.1.3. Land register/registre foncier/Grundbuch

The Agency for cadastre and public registers is run as an authority at arms length of the government (self-administrating state body (*zelfstandig bestuursorgaan* = zbo). In addition to the Cadastre Law, its organisational structure and relations with the government (in casu the Min-

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[9] Since 1 January 2004 the National Mapping Agency (*Topografische Dienst*), previously part of the Ministry of Defense became part of the Cadastre. Its legal mandated has been widened accordingly.

[10] In most cases this is done after the ownership of the part of the parcel has been tranferred. Dutch law doesn't require that the part must be surveyed before the transfer.

istry of Housing, Physical Planning and Environment) are laid down in the Organisation Law Cadastre (*Organisatiewet Kadaster*), which came into effect 1 May 1994 when the independent status started).

The Agency has 15 regional office (at least one in each of the 12 provinces, but two in the three most populous provinces). Historically the 'juridical-administrative' functions and the surveying functions were strictly separated, with the former being headed by a registrar (*bewaarder*) in each office.[11] Introduction of ICT (information and communication technology) and modern management principles, have changed this. There are only a few registrars left which reside in the national headquarters (the 2005 law gives a minimum of two). The day-to-day work is performed by internally trained staff, who will contact a registrar in case of an unclear of very complicated case. Presently the public registers for each office are regarded as separate ones, but the 2005 law introduces one nation wide (digital) public register (for real property).

See also www.kadaster.nl/english.

### 2.1.4. Is all real property registered?

The whole of the territory of the Netherlands (all the land, water was added later) was put into the cadastre between 1811 and 1832, both on cadastral maps and in the cadastral registration (via the OAT, the original adjudication table). However that was primarily meant as a tax register. The public registers are kept in their present form since 1839. So if no deed has been drawn up regarding a property (parcel) since then – e.g. in the case of a church building - nothing might be present. Occasionally documents from earlier, partial registers could be present. However, there is no difference in the procedure for selling and registering the latter type of property.

All real property is treated the same, regardless if it owned by a private person or a public body. A concept like the French *domaine public* is unknown in Dutch law.

## 2.2 Contents of Registration

### 2.2.1. Which data are registered?

The public records are an 'archive' of documents (mainly notarial deeds), bound in books in the order they are presented for registration. They are identified by the volume (of the book) and the number (of the document within the book). Based on the history of the system a separate series is kept for mortgages and seizures (*Hypotheken 3*) and for other documents (*Hypotheken 4*), although there is no legal reason for this since 1992. Until 1947 staff of the Agency would copy (re-write) every document that was registered into the book. Since then the notary hands in a duplicate of the deed prepared on special paper he has to acquire from the Agency, and the notary signs for the authenticity of that duplicate[12]. In reality microfilm duplicates were made of these and used, and recently all are being scanned to form the base of the future digital public register once the 2005 law will be enacted.

The content of the documents in the public registers is mainly prescribed by the Cadastre Law (article 18 and following Kw), although in practice an integral duplicate of the notarial deed is used, which has to adhere to the Law on the Notarial Profession (*Wet op het notarisambt*). The real property has to be identified (specialization principle) by it cadastral attributes (being

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11 The registrar has a legal training (article 6 Kw).

12 In certain cases an extract could be used, as long as all the vital information which should be made public is contained therein. Before 1992 with regard to mortgages it was actually prescribed to use a special extract (called *borderel*) in case of mortgages. The notary signs for the authenticity of the extract as well.

the name of the cadastral municipality, the letter (or two letters) of the section and the parcel number. When possible the local address is also added (mainly streetname, housenumber and name of town). In case of the sale of a part of an existing real property (parcel) a verbal description of the subdivision, an attached sketch or even only reference to markers in the field are enough according to present law and jurisprudence, although occasionally confusion may arise due to this.

The same cadastral attributes form the base for the administrative cadastral registration, which also forms the index on name, document number and street address to the public registers. Its contents could be seen on www.eulis.org, but it is not the Dutch land registration in its most strict definition.

### 2.2.2. Sample of Registration (annex 1)

Theoretically the register as such is the public register, that is the volumes of books containing (copies of) the transfer deeds. As the main index to this there is the cadastral administrative database, which contains a summary of the most relevant information (and looks the same as any abstract of title would). In the EULIS-demonstrator (www.eulis.org) this database is actually referred to as 'land registry'. Examples of the data relating to mortgages and encumbrances (register 3) and to other deeds (mainly ownership and other real property rights) (register 4) are given there as well.

Annexed to this report is the information of the apartment of one of the authors, which was requested on the Internet, via Kadaster-on-line for € 2.83 paid by credit card.[13] This on-line service does not include data from register 3 (on mortgages and encumbrances).

On the top left it reads 'cadastral report ownership', to distinguish it from other reports (like cadastral report object or mortgage report object). Directly under the first line we can see which of the 15 regional offices is responsible in this case (in bold, ZOETERMEER, which is close to The Hague and takes care of the northern half of the province of Zuid-Holland). The next line indicates that the data is derived from the cadastral registration, with the exception of data regarding mortgages and encumbrances). After '*betreft*' (which means regarding), we find the cadastral attributes: the (cadastral) municipality, here being 's-Gravenhage (official name of The Hague, colloquially *Den Haag*); the one or two letters of the section, here XX; and the parcel number, here being 5357. Since this is an apartment right, this is followed by the letter 'A' for apartment, and a number identifying the apartment, here 261. Furthermore one finds the street address. The last text above the second line indicates that the information is updated until the 16 September (whereas the request was made on the 17th, as one can see more to the right).

Below the second line we find more information about the **cadastral object**:

- first the cadastral attributes again
- secondly a short description of the object, here apartment flat on the third floor with cellar box nr. 22
- thirdly the location, giving the street address again (here the 307 is a more internal number of the flats within the complex, which is not very common in the Netherlands)
- fourthly the price and year of the last sale (the strange figure is caused by translation of the price of 195,000 guilder into euro)
- fifthly it gives the name of the association of owners

[13] 'Kadastraal bericht eigendom', annex 1

- sixthly the person (here a company) who acts as administrator of the association and the complex

Added to this is the **Notes cadastral object**, usually dealing with public law restrictions. In this case two are mentioned:

- protected monument (historical) with reference to the relevant law and decision
- soil pollution, indicating that a decision regarding soil pollution has been made that needs to be noted by virtue of article 55 *Wet bodembescherming* (Law on soil protection).

After the third line it lists the **right holder**, beginning with the share (here 1/1 is 100%) and the real property right at hand (here ownership). Then follows the name of the owner and his residence (here he lives in the property at hand).

## 2.3 Registration Procedure

### 2.3.1. Application for Registration

Application for registration is done by presenting (in person or by post) the duplicate of the notarial deed (or occasionally other document). This copy must be printed on the special forms to be acquired from the Agency. A receipt is handed over or faxed immediately (article 3:18 BW). In addition a second duplicate on normal paper is handed in as well. This second duplicate will be stamped by the Agency adding the date of registration and the office, volume and number where the first duplicate is registered. The second duplicate is returned to the notary after that and when all is over is send by the notary to the buyer, usually with a cover stating (legally not completely true): 'proof of ownership'.

Although the law speaks about the seller and buyer being allowed to do the application for the registration (article 3:89 par. 1 BW), in practice it is the staff of the notary office who takes care of this. This is also necessary to safely conduct the function the notary fulfils as escrow, so it is considered as his duty to record his deed as soon as possible.

### 2.3.2. Duties of the Registrar

The registrar controls whether the (duplicate of the) document fulfils the formal requirements as listed in the Civil Code and Kadasterwet (article 18 par. 1 and 19 par. 2 Kw). The registrar does not investigate the right of the seller to sell or the legality of the transaction as such. In doctrine this is called the 'inactiveness' of the registrar. Since 1992 the registrar can inform the notary (or a party) when he thinks that the cadastral attributes are wrong or the seller was not entitled to do so (article 19 par. 4), but he would still have to register the document in the public registers in that case. In his role as registrar of the administrative cadastral registration he has some more discretionary authority, and might not enter the name of the buyer, but add a warning that additional (not-processed) documents exist. Due to the good cooperation between registrars and notaries not many of such cases exist.

The buyer and seller are not informed about the registration as such. Eventually the second duplicate will reach the buyer (see 2.3.1). More importantly is the notice that is send after the changes have been incorporated in the administrative cadastral database. Those are sent to both the person whose name is taken out as well as the one that is entered. Since updating the administrative cadastral registration is ultimately an administrative activity, one can object and finally appeal to the court about this (although formally acting as an administrative court in these cases, the procedure is done before a civil judge (panel)).

## 2.4 Access to information

The administrative cadastral registration has been kept electronically since about 1990. The public registers are compiled on paper, but after a year or so replaced with microfilm. Since 2003 more and more deeds are being scanned and kept electronically as the base for the digital public register included in the law approved by Parliament on 18 January 2005.[14]

As the name public registers indicates all information is in the public domain and can be accessed on request. The request may also ask 'who owns this' or 'what does he own'. Subscribers can access all information on line, and a selection is available through the Internet (kadaster-on-line). The only restriction is that you need to pay for the information per parcel. If someone owns many parcels you end up paying more money. Article 107b Kw creates the possibility to limit the availability of some information for private reasons by by-law. That by-law has not been drafted yet.

The access to the register is very open. Access is available for anyone, regardless if he has any right in the real property or is a creditor with an enforceable title or another interest. So if the press (or even a private person) want to inquire on how much real property a politician owns, this is possible.

A search for information can be made by address, by registration number of land (the cadastral attributes are used as such) or by holders of rights on it.

## 2.5 Substantive Effects of the Registration

Registration has constitutive effect in the Netherlands (article 3:84 jo 3:89 BW). It proves that the party have undertaken the transaction, but does not prove that the intended effect of the transaction did actually occur, nor repair substantive flaws in the transaction or underlying contract (the so called "negative system").

To a certain extent third parties in good faith relying on the registered facts are protected, but not fully (art. 3:24-3:26 BW). The reasoning is that the one relying on the registers is protected against one who stands to lose, in cases that the latter could (and should) have taken action to get the registers in order (either by registering a fact that was unregistered or correcting a fact that was incorrectly registered). In practice this means that you cannot blindly rely on what is registered, but you can assume that what is not registered is not there (at least does not count). Some exceptions relate to matrimonial and inheritance situations (article 3:24 par 2 and 3 BW).

There is no specific statutory requirement to search for additional information apart from the content of the registration to get a full picture. The professional and conduct code for the notaries prescribes searches as necessary. It will depend on the situation if for instance records of the municipal registry office marriage register, bankruptcy register, chamber of commerce, or information on public restrictions (like zoning) will be searched by the notary's office. Now that more and more of these searches can be made on-line this is likely to increase.

The answer on the question how parties that have relied on the information from the register (abstract of title) are protected if this information proves to have been wrong depends on the exact situation. If the seller did not become owner because of a defect in the underlying transaction or the previous conveyance procedure as such, the one who buys from him will be pro-

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**14** Draft nr. 28.443 (Wijziging Kadasterwet); enactment expected for 1 September 2005.

tected if he was unaware of this and could not have been aware of it through checking the registers. If, however, the seller did not become owner, because the one who has sold it to him was not authorized to do so (either because he was not the owner or he was legally incapacitated), then the one buying it from him will not be protected. Article 3: 88 BW.

## 2.6 Rank and Priority Notice

### 2.6.1. Rank (rang/Rang)

The rank of registrations is determined by the order of handing in the documents at the registry during office hours (9.00-15.00 for acceptance on normal working days). Every document is time-stamped upon arrival. All documents arriving by post are considered to have been registered at 9.00, and have the same rank of registration.

See article 3:19 part 2 BW:

> "Als tijdstip van inschrijving geldt het tijdstip van aanbieding van de voor de inschrijving vereiste stukken."
>
> "The entry is deemed to have taken place at the time of filing of the documents required for registration".

**Case**: Owner grants first a mortgage to A, afterwards another mortgage to B. After that, creditor C has a third mortgage registered on the same property in an execution procedure. The time of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

Like for other rights registration of the deed is a constitutive act for the creation of the mortgage. So in this case the rank of the mortgage will be: B – C – A.

Article 7:3 BW (enacted 1 September 2003) makes it possible to register the sales contract. This protects (only) the buyer against a number of later occurring facts and/or registrations (incl. most later sales and bankruptcy of the seller). It does not block any of these facts and/or registrations, which could still become effective if the registered sales contract is not followed by the deed of conveyance within six months.

The effect of this priority notice loses its effect after six months, and cannot be re-established between the same parties for another six months.

A summary of article 7:3 BW in English:

Par.1 The sale of registered property can be registered in the public registers ('priority notice'). In case of a consumer purchasing a house this is impartitive law.

Par. 2 During the period of three days as mentioned in article 7:2 par. 2 (time of reflection for the buyer), the contract of sale can only be registered if it is in writing, and the contract has been signed by a notary.

Par. 3 sums up cases in which persons are not affected by the registration of the contract of sale. E.g. a bankruptcy of the seller on the same day as the registration.

Par. 4 The sold real estate should be transferred within 6 months after registration. Otherwise the registration will be void.

Par. 5 After a void registration as mentioned in paragraph 4, the same parties cannot register again sale of the same real estate for 6 months.

Par. 6 The contract of sale can only be registered if signed by a notary, who will also mention that the checked that the rules in paragraph 1, 2 and 5 obstracle for registeration.

Par. 7 This article is not applicable on the contract of financial lease (*huurkoop*)

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

## 3.1 Procedure in general

### 3.1.1. Main steps of a real estate sale

Usually the seller, and often also the buyer, use a real estate agent to assist them in concluding their contract. Normally after the negotiations are finished, a written contract is drawn (often use is made of a unified form made in cooperation between several relevant organisations). When the buyer is a natural person, not acting as a professional, the contract has to be in writing (in other cases this is not obligatory, although very common). In most cases the contract is drawn up by a real estate agent or a notary (see under 3.2.2.).

A notary is selected (usually by the buyer) who gets a copy of the contract and the intended date of conveyance. The notary's office makes on-line searches in the cadastral administrative database (and probably some other registers), and gets a copy of the previous deed of conveyance (often this is the earlier mentioned "evidence of ownership" supplied by the seller, but it can also be a new copy / print-out made from the public register). The notary will register the sale in the public registers (priority notice). The buyer will first pay a guarantee (10% of the purchase price into the notary's account. The notary will draft the deed of conveyance and sent the draft it to the parties involved. The buyer pays all monies into the notary's account (the purchase price, the notary's fee, registration and other fees), and the cadastral administrative database is checked for the second time. Then the deed of conveyance is signed by or in the name of the parties involved. Usually only the highlights from the deed are read to the parties present just before the signing. The notary is the last who signs and also puts the hour and minute of him doing so under his signature (this can set the rank in case two conflicting documents are registered simultaneously). Only the notary signs the identical copies (or extracts) that will be sent for registration.

Those two copies are usually posted to the cadastral office. When they arrive they are registered with rank of 9.00 in the morning. The notary checks the cadastral administrative database for the third time, and when no interdictions or other problems are found, pays out the monies. By far the most cases also involve a mortgage being lifted on the side of the seller (and his bank being paid the remaining debt) and a new mortgage being created by the buyer. In practice staff of the notary's office act under proxy in the name of the banks (see article 7:26 par. 3).

### 3.1.2. Time frame

Normally the biggest time lies between the sales contract being drawn and the date of conveyance. This has to do with the buyer needing time to get credit (often the contract allows 2 or 3 weeks to do so, with a termination clause if the buyer can not find the credit he needs). Also it might be that the physical moving of the persons is only foreseen after one or a few months (this can be related to ending a rental agreement, a chain of transactions or taking up a new job in another area).

The notary would like enough working days to make the searches and prepare the documentation, but it could be done within a week (if necessary in a day, if no searches by post have to be performed).

The post will take one or two working days to get the deed to the cadastral office, which normally processes it the same day (a note that documents have arrived is entered into the cadas-

tral administrative databases almost immediately).

## 3.2 Real Estate Sales Contract

### 3.2.1. Form

Basically Dutch law doesn't require any form for the sale of real estate. Only in the case a 'consumer' wants to buy a house (*woning*: a real property with the destination housing) since 2003 the written form is mandatory (article 7:2 BW). There is no need for the parties to be together for the signing. The (half-signed) contract could even be exchanged by post between them.

If the contract does not meet the formal requirements, or lacks the names / signatures, a description of the real estate or the price, it will be void (article 3:39 BW).

The deed of conveyance has to be an authentic deed, drafted by a Dutch notary.

In case of the deed of conveyance, the registrar will not accept a deed, which is not an authentic (notarial) deed, and thus no transfer of rights will take place. If the registrar accepts a document that misses some formal requirement, the registration thereby repairs this formal imperfection (article 3:22 BW). This, however, does not apply to requirements for the coming into being of the agreement, or material shortfalls!

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

The sales contract can be drafted by anyone, including (one of) the parties. In practice in most cases a unified form is used. Almost always in the Amsterdam region, and sometimes also in other areas, the notary is involved in the drafting and signing of the sales contract. This, however, does not make it an authentic deed, and does not change the legal meaning of the document (and a deed of conveyance will still be needed at a later date).

Only a Dutch notary can draft the deed of conveyance (article 3:31 BW). One and the same notary will act on behalf of both parties, although in most cases the buyer pays him (and selects him).

### 3.2.3. Preliminary contract

There is not a preliminary contract as such, because the Dutch system distinguishes between the sale (contract of sale) and the transfer, *traditio* (deed of conveyance). Since the sales contract has to be followed by the deed of conveyance (which according to doctrine includes a second contract (*zakenrechtelijke overeenkomst* = real property agreement), there is nothing preliminary about it. Laymen, however, often call the sales contract 'preliminary (sales) contract'. Reversely the deed of conveyance has to contain a reference to the underlying 'title' (mostly the sales contract – article 3:89 part 2). Therefore both are needed.

### 3.2.4. Typical Real Estate Sales Contract

There is not any standard form for a sales contract by law. However a number of professional bodies and consumer unions have drawn up a standard sales contract together, which is often used. In case of notarial involvement in the sales contract usually another standard is used. The standard forms make it hard for parties to forget to discuss certain aspects.

The standard form developed by the NVM (association of real estate agents), Consumentenbond (association of consumers) and Vereniging Eigen Huis (association of home owners) has

been included as annex 2.

## 3.3 Transfer of Ownership and Payment

### 3.3.1. Requirements for Transfer of Ownership

The Netherlands follows the causal system. The transfer of ownership requires, a valid obligation contract (causa), consent on the transfer of ownership (implied in the deed of conveyance) and registration with the land register.

The law states the requirements as follows:

"Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property." (article 3:84 part 1 BW)

"Delivery required for the transfer of immoveable things is made by notarial deed intended for that purpose and drawn up between the parties, followed by its entry in the public registers provided for that purpose. Either the acquirer or the alienator may have the deed registered." (article 3:89 part 1).

Payment of the purchase price is not needed. The payment of the purchase price is in the average case not really an issue, since all money streams are routed through the notary's office. Is it the result of the rule of article 7:26 part 3 BW:

"In case a notarial deed and the registration of it in the public registers is needed for the transfer of ownership, the purchase price must be out of the power of the buyer before signing of the deed, and has only to be paid to the seller after the registration of the deed".

However, this rule is not compulsory. Parties can agree that the purchase price will be paid directly from buyer to seller at a certain moment after the ownership has been transferred.

The consent on the transfer of ownership is not specifically mentioned, but can be seen as an implied part of the 'real property law contract' and can also be read into the generally used phrase in the deed of conveyance "seller declares to transfer …" (verkoper verklaart in eigendom over te dragen…).

### 3.3.2. Payment due

All payments pass through the hands of the notary, who keeps as an escrow the money under him from before the signing of the deed of conveyance until the registration of the deed, and the registry has confirmed that no sequestration has been laid by third parties between signing of the deed and the registration.

In the case parties agree the payment will be postponed until a moment after the ownership has been transferred, in practise the position of the seller will be ensured by the clause that the sale will be dissolved if the purchase price has not been paid before a certain date. As result of the causal system the ownership will return to the seller.

The buyer has to pay an amount (typically 10%) to show good faith. This money is paid into the account of the notary's office. In certain cases of breach of contract the damaged party can keep this money. The rest should be in the hands of the notary at the moment of signing. Similarly the bank (or other creditor) will deposit the loan money into the notary's account.

Insurance for risks inherent to the payment and the transfer of the property is not needed. One could say it is implied in the notary's functions (and so in his fee). The notary has to keep the money he has under him in his escrow function separate from his business funds to avoid

complications, esp. when he would go bankrupt. This is guaranteed by the law (*kwaliteits rekening*) Notaries have to carry general liability insurance for professional liability.

### 3.3.3. Ways of the seller to enforce the payment

The seller can enforce the payment by claiming the guarantee (see 3.1.1) and/or by a court descision.

### 3.3.4. Transfer of possession to the buyer

In the normal case the property has to be vacated before the signing of the deed of transfer (and the buyer might pass by to have a quick look if this is the case). The property passes immediately into possession of the buyer, who usually receives keys and related information (security codes, etc.) after signing in the presence of the notary.

## 3.4 Seller's Title

### 3.5.1. Title Search: Ascertaining the seller's title

The buyer can ascertain the title of the seller by studying the previous deed of conveyance and any other document registered related to this property (if any) since the last conveyance.

Usually he will rely on the scrutiny of the notary administering the previous conveyance for having done the same for the period before that conveyance. Theoretically one might want to go back the 'whole' prescription period, which since 1992 has been reduced to 20 years (and 10 years in case of good faith). As a rule the seller supplies the agent or the notary preparing the conveyance with his copy of the recorded deed (which the registrar stamped and coded with the registration number). The cadastral administrative database makes it easy to check if the numbers are the same and if there have been other documents relating to this property (parcel). If needed a copy of any document can be acquired by the notary (more and more on line, before by fax or post). The notaries mention in the deed the way the seller got his right (title), including the information about the registration thereof (name of cadastral office, type of records, volume and number of deed). In the standard case it is sufficient to refer to (registered) deed of conveyance by which the seller got his right. In other words, the notary trusts the work done by the previous notary.

In case an unregistered step is included (usually inheritance), the description is more elaborate and ends with the most recent step that was recorded. Title Search: Absence of Encumbrances

There are different types of encumbrances, and the division of roles between the seller and purchaser is not identical for each of them. Appropriate are article 7:15 or 7:17 BW. "The seller is obliged to transfer the ownership of the sold property free of any special encumbrance or restriction, with the exception of those the purchaser has explicitly accepted" (art. 7:15 part 1 BW). The second part makes it explicit that the seller guarantees (and can not contract otherwise) that there are no encumbrances or restrictions that could have been registered, but are not. There is some discussion on how far this provision goes, but it is clear that it includes all private law encumbrances and restrictions. In practice, however, the notarial deed will sum up all the known ones (generally copied from the previous deed), but still contain a general provision saying that the purchaser also accepts all others that exist at the time of the transfer.

For factual and public law restrictions (as far as they are not included in the previous paragraph), article 7:17 BW applies. Starting with

‘1. The delivered good should adhere to the contract.

2. A good does not adhere to the contract, if it, taking into account the type of good and the statements made by the purchaser regarding to the good, does not possess the attributes which the purchaser is allowed to have based on the contract. The purchaser may expect that the good possesses the attributes that are needed for normal use thereof and of whose presence he should not have doubted, as well as the attributes that are needed for a special use that was foreseen in the contract. (…)

5. The purchaser cannot complain that the good does not adhere to the contract when at the time the contract was completed he knew or reasonable should have known of this. (…)

6. In case of a sale of real estate the information regarding the surface (area) is assumed to be only a means for identification, without the obligation that the good adheres to it.’

The main point here is that the property should be fit for the ‘normal’ use. When the purchaser is looking for a specific use or has other specific requirements, it is his obligation to inform the seller of these, so the seller can inform him if there is anything relevant applying to this. With regard to public law restrictions there is a difference of opinion to which extend they fall under article 7:15 or 7:17 BW. We take the opinion that restrictions of which the owner (the seller or his predecessor) has been informed individually should be handled under article 7:15 BW, whereas more general restrictions (e.g. zoning) should be handled under article 7:17 BW. A new law introducing systematic registration of public law restriction has been approved by Parliament on 15 June 2004, but its enactment awaits harmonisation of other laws.[15] When enacted all restriction registered under that law should fall under article 7:15 BW.

### 3.5.2. Title Insurance or Liability

Title insurance did not develop, since the risks in practice are very small. Furthermore the notary can be held liable in cases where he did not fulfil his ‘duty of care’ well enough (and he has to be insured for his professional liabilities). The Cadastral Agency is also liable for mistakes and delays by its staff that causes damages (article 117 Kw), both with regard to the keeping and updating of the cadastral registers and the public registers. Ultimately in special cases where a good faith third party protection rule causes you to lose your right, the government is liable when you did not contribute to the third party being of good faith (3:30 BW).

### 3.5.3. Leases

The buyer makes sure that there are no leases on the sold property by inspecting the property in the field (and asking around). Normally the seller will guarantee their absence (or mention the extent) in the deed of conveyance (and the sales contract), by explicitly stating that the property is free for use by the buyer or listing the leases.

If such contract exist the buyer will be bound by the lease contract in his relation to the user of it. This unless the contract was established after the priority notice was registered. However, he can sue the seller for breach of contract (primarily demanding him to deliver the property ‘empty’ as agreed (so the seller might have to try to move the user of the lease), pay him compensation for the difference in purchase price or even turn back the transfer (with all costs for the seller).

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[15] Draft nr. 28.218 (Wet kenbaarheid publiekrechtelijke beperkingen onroerende zaken).

## 3.5 Defects and Warranties

### 3.5.1. Legal rules

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

concerning a defect of title: as a rule the notary will be responsible.

concerning defects affecting the quality of the property: sometimes the estate agent will be responsible.

concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract? The answer depends on the question if this falls under article 7:15 or 7:17 BW (see above, nr. 3.4.2). In general the purchaser also has to look into such things on his own accord, unless the seller has made certain statements that implied a guarantee. The real estate agents will also have their responsibilities.

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

The standard form developed by the NVM (association of real estate agents), Consumentenbond (association of consumers) and Vereniging Eigen Huis (association of home ownerers) as mentioned above nr. 3.2.4. mentions the following (possible) warranties:[16]

- The property will be transferred in ownership free of mortgages (5.1).
- The property will have on the date of transfer all the qualities that are needed for a normal use. Seller doesn't guarantee other qualities. Seller doesn't guarantee the absence of defects that are an obstruction for a normal use of the property and that were known (or could be known) to the purchaser at the moment of signing of the contract (5.3).
- Seller is not known with any pollution that could interfere with the normal use of the property, or could oblige to clean the property (5.4.1).
- As far as known to the seller the property does / doesn't contain any underground storage tank for fluids (5.4.2).
- Seller is (not) known that asbestos is incorporated in the property (5.4.3).
- Seller is (not) known that the property is (or will be assigned to be) a protected monument (5.8).
- Seller guarantees that no obligations to third parties exists that are the result of a priority right (*voorkeursrecht*), an option to buy, or lease (5.9).
- Seller guarantees that the property is (not) subject to a municipal priority right according to the *Wet Voorkeursrecht Gemeenten* (5.10).
- Any difference between the surface area of the property as mentioned in the contract, and the real area gives no right to seller or purchaser (5.11).
- Seller guarantees that all the taxes and charges has been paid (5.12).
- The property will be transferred in ownership free of lease (6.1).

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**16** See annex 2.

A seller may exclude all remedies of his buyer except legal provisions, e.g. the transfer of ownership without encumbrances that could be registered (see 3.4.2). Sometimes the law will give some restrictions (section on 'general conditions', title 5 of Book 6 BW), or the notary will mitigate the conditions by persuasion.

Courts exercise control over the fairness of such clauses in a very restrictive way. In most cases the notary will use his influence to prevent such contracts.

### 3.5.3. Liability of the Buyer for Debts of the Seller

In most cases the contract of sale will stipulate that the buyer will pay all taxes and charges from the day of transfer of the ownership. Seller guarantees that all the taxes and charges are paid until that day. A balance will be cleared between buyer and seller on the day of transfer, at the occasion of the payment of the purchase price.

The buyer is not liable for arrears of the seller, regarding real estate taxes or other taxes related to the buildings on the property. The proprietor component of this tax (there is also a users part) will be settled by seller and purchaser to the ration of the days in the year each of them owns it (the same applies to water board taxes for keeping the area dry). In the normal case the office of the notary will make the balance, and deduct this in the payment of the purchase price.

The charges for water and gas delivery, is no problem because parties arrange for the water and gas company to come when they move out and in (often it is done on the same day). The purchaser will have to arrange himself for being connected. The buyer will not be liable for outstanding debts of the seller.

In the case of charges for the administration of condominium apartments buyer is with the seller jointly and severally liable for the charges in the current or preceding financial year. Article 5:122 par. 3 BW. To prevent this liablity the notary corresponds with the association of owners and deducts existing charges from the purchase price.

## 3.6 Administrative Permits and Restrictions

### 3.6.1. Standard Requirements

In most cases of conveyance of a residential estate no permits are necessary. In some municipalities for the cheaper category of houses you may need a housing permit, for which you have to be connected to the municipality (or region), economically or socially. The impact of this permit is limited to smaller areas than before.

Sometimes a municipality sells land with restrictions for sale during a certain period (anti-speculation conditions). See under 1.6.

In case the area the real estate lies in falls under the (municipal) pre-emption right (*Wet Voorkeursrecht Gemeenten*, see above nr. 1.6), the property has to be offered to the municipality before it is sold to someone else (or the municipality has rejected such an offer not so long ago). However, only a small percentage of the area of the country is under this pre-emption right (it has to be specifically vested for areas in a limited number of cases, and it also loses its effect after a number of years (depending on the underlying zoning type).

The notary has to check for the pre-emption right. This check is mostly done in the cadastral administrative database. But immediately after the vesting it might not yet be visible their and therefore a special register kept at the Notary Chamber (KNB), based on the publication of the vesting in the *Staatscourant* has to be checked as well. The notary signs under each deed that

he has looked into this, and that the pre-emption right is not applicable here (if this is missing the deed can not be accepted for registration). An anti-speculation condition will be found in the title of the seller.

For other restrictions the situation is not so clear. At present asbestos is becoming an issue, as was (is) soil pollution before.

### 3.6.2. Requirements for certain types of real estate sales only

Another pre-emption right for (certain) agricultural areas is not considered to be in effect. The tenant farmer has a legal pre-emption right.

### 3.6.3. Control of administrative permits and restrictions

The (municipal) pre-emption right is specifically assigned to the notary. All other restrictions are not dealt with by law. In practice there are differences. Notaries in general do not look into all of them.

## 3.7 Transfer Costs

### 3.7.1. Contract and Registration

Standard contract forms are available. In most cases they will be supplied by real estate agent if involved; his fee can be negotiated, both parties can have one, one website says 1,85% of the sales price for each real estate agent, their association gives no guidelines)

The notary fee for a (standard) contract and deed plus searches can also be negotiated, look for instance on the website 'the cheapest notary.nl' (www.degoedkoopstenotaris.nl). The offers in the western part of our country were on 20-9-2004 for the deed of conveyance of a house of € 136,134 between € 475 and € 818 and for a house of €317.646 it was in the range of € 650 and € 1039 (prices excl. VAT). In addition about € 35 (plus VAT) for searches has to be paid, but of course this can be higher if more must be searched. This fee is on the very low side, and will not apply if the situation knows any kind of complication. The fees can easily be twice as high.

The registration in the land register costs € 75.94 per deed. If a subdivision will be involved it will be higher.

The priority notice costs € 19,50.

### 3.7.2. Transfer Taxes

The transfer tax is 6% to be paid by the buyer. Basically it is based on the purchase price (but the tax department can verify if it is realistic - for most tradable properties a value is determined every 4 years for the local real estate tax). The tax is already due when a property is transferred economically. This could be when the contract of sale is signed, but the deed of conveyance is not signed or not registered for a long time (for instance for strategic reasons).

Due payment of the taxes is not a requirement for the registration of the transfer of a property. But the notary will not administer the deed when the money for the tax is not in his possession. According to law he is liable for non-payment of the tax by the buyer. The notary acts as tax collector on behalf of the tax department.

### 3.7.3. Real Estate Agents

How often a real estate agent is involved in the sale of residential property among private persons, differs for the seller and the purchaser. For the seller we estimate this to be 75-95%, for the buyer 25-50%

The agent's fee is negotiable. Usually 2-3%. Recently it has become possible to hire the real estate agent only for parts of the process; against lower fees.

The seller and the buyer has to pay his own real estate agent.

## 3.8 Buyer's Mortgage

The notary drafts both the deed of conveyance and the deed of mortgage. He acts as escrow for the monies and also people for his office act on behalf of the mortgage bank during the signing. What also helps is the fact that by law the mortgage of the seller disappears at the moment the debt has been repaid (even though the register still shows the 'old' mortgage). So the purchaser's bank will transfer the money to the notary, instructing him to establish the mortgage for them. The notary will pay out the seller's mortgage bank the next day, through which his mortgage has legally ended. About once a week notary offices usually make combined deed summing up all the mortgages that have ended to be registered in the public register. Occasionally it is possible that the mortgage stays on the property and that the purchaser takes over the debt from the seller.

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

## 4.1 The Conclusion of the Contract

After inspection, the buyer tells the seller that he wants to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

This contract is the title for transfer of the ownership. Practically it binds the parties to cooperate in the execution of the deed at a later stage. If the seller would remain refusing to sign the deed, the buyer may replace his signature with a court decision (article 3:297 BW):

"If a performance of an obligation is enforced by the execution of an executory title, this has the same juridical effect as that of voluntary performance of the obligation to be performed pursuant to that title".

The court decision itself can be used as a title of conveyance: article 3:300 BW.

But because it is a case of contract law, problems can still arise. The owner can still sell the same house for a second time to a third party, and even transfer the ownership and not to the first buyer. The buyer can nowadays register the contract to protect has position by a priority notice (article 7:3 BW).

### 4.2.1. Consequences of an invalid Sales Contract

**Case:** A has sold real property to B. Now, B wants to sell it to C. However, before entering into the contract, C finds out that the sales contract concluded between A and B was invalid,

a) because it lacked the required form;

b) because A did not possess legal capacity;

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

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

**Answer:** No, if he finds this out he will no longer be a bona fide third party. Hence he is not protected anymore.

### 4.2.2. The Seller is not the owner

**Case:** A sells his property to B, who pays the purchase price and has the transfer registered with the land register. Only afterwards, it turns out that A was not the owner, with B having however relied in good faith on A's title. (This may happen e.g. when the seller was believed to have inherited the property from his uncle by a will, but a subsequent will is found in which the uncle leaves his entire assets to a charity. To make it a case, let us suppose further that the seller has become insolvent and cannot repay the money.)

**Answer**:

B is not protected because he did not (could not) acquire ownership.

### 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 judgement against the latter.

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

**Answer:** No, assumed there is a priority notice for the benefit of the buyer.

How may the buyer be protected (e.g. in drafting the sales contract)?

**Answer:** By registration of a priority notice immediately after the signing of the sales contract.

## 4.3 Payment

### 4.2.1. Delay in payment

If the buyer pays late the seller has to default the buyer. After some time he can rescind the contract. The buyer is liable for damages. In most contracts a penalty of 10% of the purchase price will be stipulated.

## 4.4 Defects and Warranties

### 4.4.1. Misrepresentation

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

**Answer:** The seller has no responsibility in such a case. The buyer might have recourse on the real estate agent or a technical advisor he hired, or on a special insurance some real estate agents offer for this.

**Question:** 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.

**Answer:** The buyer can still complain about this when no mention was made of this, especially if he has inquired about water damage (normally ask this with regard to leaking roofs, not for flooding). The seller should have volunteered this information. Assuming that the flooding does not make the house useless for the stated use of the buyer, the seller might have to pay the buyer for the lower value the house has with this flooding risk.

**Question:** 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.

**Answer:** If the sellers story checks out, the buyer can not make him responsible. In that case the municipality will likely have their tear down order turned over by administrative court anyway, since they have tolerated the situation so long.

**Question:** For which of these defects is the owner liable if the contract contains a clause, which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state, in which it is at the date of the conclusion of the contract? What are the buyer's remedies?

**Answer:** None, except for serious hidden defects known to the seller, but concealed by him.

### 4.4.2. Destruction of the house

**Case:** 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?

**Answer:** He may rescind the contract, unless rebuilding can be accomplished soon

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

**Answer:** No, until the signing at the notary the house is his property and he is liable. He will normally be insured, and the insurance risk changes over due to contract, usually at the signing at the notary (when possession changes hands), even though ownership is usually transferred one or two days later (when the deed is registered).

# 5. Sale of a house or apartment by the building company (vente d'immeuble à construire/Bauträgervertrag)

## 5.1 Statutory Basis

### 5.1.1. National Law

This contract has not been regulated. It is a mix of the contract of sale for the ground (Title 1 of Book 7 BW) and the building contract (*aanneming van werk*, Title 12 of Book 7 BW). According to article 7:8 BW in the case the buyer is a consumer the articles 7:767 and 768 BW of the latter title, referring to payments, are imperative law.

### 5.1.2. Influences of EU law

Dutch law is considered to be in accordance with the EU policy for consumer protection. There are no direct influences of EU law, with the exception of the sale of a time share (article 7:48a-f BW.

## 5.2 Procedure in general

### 5.2.1. Single houses

According to article 7:2 BW (for the sale) and article 7:666 BW 9 (for the building contract) the contract in case of a "consumer" must be in writing. Usually the builder makes use of a standard form, like the one provided by the *Garantie Instituut Woningbouw* (GIW). A copy of this form can be found on their website: www.giw.nl. After the buyer received a copy of the signed contract he has three days to withdraw. the GIW standard form even allow him one week to think it over (article 1A of the GIW standard contract). The buyer will pay the purchase price according to the progress of the construction works. According to article 7:767 BW the contract cannot stipulate that the buyer will pay more than 10% of the purchase price in advance. If he paid more, he can re-claim the surplus from the building company. The buyer has the right to keep 5% of the last instalment in deposit with the notary as guaranty for good repair of defects by the builder. For material defects in the building the rules of article 7:758-762 BW apply. The buyer has to check the building for defects on the day of completion. The builder is after the check not liable for defects the buyer should have noticed.

### 5.2.2. Condominiums

The same applies for condominiums. The GIW has special standards forms for the sale and building of condominiums.

### 5.2.3. Renovation

The general rules of article 7:750-764 BW will apply.

## 5.3 Conclusion of the Contract

The contract must be in writing, see above. There is no preliminary contract, nor any manda-

tory waiting period before the contract can be concluded. A consumer can dissolve the contract within a period of 3 days, see above.

## 5.4 Payment

### 5.4.1. Payment date

Normally payment is due at the moment of transfer of the ownership of the land, and further in parts (instalments) as the construction proceeds. The purchase price of the land will be paid to the escrow account of the notary. Payments for the construction are made directly to the builder, except of the 5% of the last instalment kept in deposit with the notary as guaranty for repair of defects (see above 5.2.1).

### 5.4.2. Securities

Most contracts are closed under operation of the Dutch Housing Guarantee Institute, GIW. About 1.600 construction companies are connected to this institute. According to their website GIW issues 40.000 GIW certificates each year. A total number of 750.000 houses have been build under this guarantee. See www.giw.nl.

### 5.4.3. Acquisition of Ownership

It is ensured that the buyer is granted ownership free of existing liens because of the search by the notary in the public registers before the moment of signing of the deed of transfer and a second search after registration of the deed (moment of transfer of ownership). Before the signing of the deed of conveyance the notary must have a written consent of the mortgage bank of the seller (construction company).

### 5.4.4. Building

The buyer will pay the purchase price according to the progress of the construction works. According to article 7:767 BW the contract cannot stipulate that the buyer will pay more than 10% of the purchase price in advance.

### 5.4.5. Financing of the Buyer

The buyer can establish a mortgage after the transfer of the land. The existing mortgage of the seller (building company) has to be cancelled. The money that is not needed yet is put in a deposit at a special account. The mortgage bank thus can pay the account of the builder.

## 5.5 Builder's Duties - Protection of Buyer

### 5.5.1. Description of the Building

The building is described by way of a brochure with drawings, etc. Such a brochure is not always sufficient in practise.

### 5.5.2. Late Termination of the Building

The contract usually provide for an exact delay for the termination of the building, as a rule x work-days after the signing of the contract, or the start of the construction.

In the event that the delay is not respected the buyer has to pay a fixed fine for every day of delay.

### 5.5.3. Material Defects

The seller is liable to repair all defects. For hidden defects the buyer has to clam as soon as possible,. For hidden defects known to the constructor there is a term of limitation of 20 years (article 7:762 BW).

Usually the GIW guarantee will also be applicable.

## 5.6 Builder's Insolvency

### 5.6.1. Unfinished Building

In case the builder goes insolvent before completing the building, the buyer will only be protected in case of a contract under operation of the GIW guarantee.

### 5.6.2. Repayment

**Case:** Let us suppose that the buyer rescinds the contract because the builder is late in finishing the building and that there are many material defects in the already completed parts of the building. However, after the buyer has terminated the contract, the builder goes insolvent. May the buyer expect repayment if he has already paid some instalments?

No, except in the case of a GIW guarantee. The GIW will look for another builder for the completion without extra payments. In such a case the buyer should not dissolve the contract.

# 6. Private International Law

## 6.1 Contract Law

### 6.1.1. Conflict of Law Rule

Contract law is ruled by article 3 par. 1 and 4 par. 3 of the Rome Convention (*EEG Verdrag op Verbintenissen uit Overeenkomsten* = EVO). This refers to the *lex rei sitae*, unless parties have agreed otherwise. So is not compulsory that the title for the transfer (contract of sale, gift) is governed by Dutch law.

### 6.1.2. Formal Requirements

As a rule an informal contract is sufficient. Only in the case of a consumer buying a house the contract must be in writing (article 7:2 BW). According to the rules of Dutch Private International Law (see article 9 par. 6 EVO) the contract of sale of a house in the Netherlands by a consumer must be in writing, even when the contract has been celebrated outside the country.

## 6.2 Real Property Law

### 6.2.1. Conflict of Law Rule

According to article 7 *Wet Algemeene Bepalingen* (Act General Rules) the *lex rei sitae* will be applied:

'For immovable property the rules are applied of the country, or the place were they are situated.'

### 6.2.2. Formal Requirements

The deed of conveyance must be drawn by a Dutch notary, according to article 3:31 BW.

## 6.3 Restrictions for Foreigners to acquire Land

### 6.3.1. Restrictions limited to Foreigners

In the Netherlands there are no restrictions for foreigners to acquire real property.

### 6.3.2. Other Restrictions

Foreigners do not require any special permits to acquire real property, nor do any 'hidden' restrictions apply.

## 6.4 Practical Case: Transfer of Real Estate among Foreigners

Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider to transfer the ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the parties want to conclude all necessary contracts in their state of origin. They ask a local law-

yer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties. What way do you recommend – or what is considered to be the best practice?

**Answer:** The contract will be prepared by the local (foreign) notary/lawyer, who will make contact with a notary/lawyer in the state where the vacation home is situated. The easiest way to deal is signing the contract in the foreign country together with two powers of attorney: parties confer full powers upon the notary/lawyer in the state where the vacation home is situated. The foreign notary/lawyer legalizes all signatures and sends all documents by fax and by post to the other notary/lawyer, who may sign the deed of conveyance when required the same day.

# 7. Encumbrances/Mortgages (and Land Charges)

## 7.1 Types of mortgages/land charges

### 7.1.1. Types of mortgages

The Dutch Civil Code mentiones in Title 9 of Book 3 two types of security rights: pledge (*pand*) and mortgage (*hypotheek*). The security right established on registered property (and so on real estate) is always mortgage (article 3:227 par. 1 BW). However, if explicitly stipulated in the mortgage deed a right of pledge on movables which, according to common opinion, are intended for permanent use with the mortaged immoveable and which by their form are recognisable as such, or where such a right has been established on machinery or tools intended to be used in carrying out a business in a specific factory or workshop set up for this purpose, can be executed together with the mortgaged property, and according to the rules governing the mortgage (article 3:254 BW).

### 7.1.2. Legal nature

The mortgage is an *ius in rem*. It is also accessory to the debt it secures, with the exception of the *krediethypotheek* (credit mortage) and the *bankhypotheek* (a mortgage for all debts to a bank). These last types of mortgage are founded on the rule of article 3:231 BW: 'A right of pledge or mortgage can be established for an existing as well as a future claim.'

## 7.2 Setting up a mortgage

### 7.2.1. Example

In general through the agency of a specialised advisor, the bank and the debtor will enter in a credit agreement. Part of the credit agreement is the promise of the debtor to give a mortgage as security for the loan.

For the establishment of the mortgage itself the same rules apply as for the establishment of limited real rights on registered property in general (article 3:84 jo 89 jo 98 BW). Article 3:260 BW sums up explicit the requirements: A mortgage is established by a notarial deed drawn up between the parties in which the grantor grants a mortgage to the creditor (*mortgagee*) over registered property, followed by the entry of the deed in the public registers.

In general the notarial deed of mortage will refer to the general conditions used by the bank. Because the general conditions are mentioned in the deed those conditions are considered to be part of the actual notarial deed of mortgage. In practise the bank will provide the notary involved with a model of the notarial deed, and the information about the debtor and the real estate that will be mortgaged. Immediately after the signing of the deed the notary sends a notaries declaration (*notarisverklaring*) to the bank inserted in a certified copy of the deed with a guarantee that the mortgage has been established in the right way.

### 7.2.2. Legal requirements for the loan contract affecting the mortgage

An act is in preparation to improve the consumer protection in this field: de *Wet financiële denstverlening*.[17] Enactment is scheduled for 2005. This act intends to put quality standards for credit institutions, advisors and agents. This Act is not limited to mortgages and credits, but is also applicable on other financial products like investments and insurances. As a general rule all parties who offer a financial product must have a permit, issued by a supervisory institution. Consumers must be given proper information. In order to give the consumer good advice the advisor or bank must obtain all relevant information from him. Although the Act explicitly puts a duty of care on the bank, advisor or agent, it doesn't provide any special remedies for the consumer. So the normal remedies offered by the Civil Code will be applicable. E.g. annulment of the contract because of misrepresentation, article 6:228 BW or damages because of tort (article 6:162 BW).

Expect in the case of a distance agreement, this Act doesn't provide any cooling down period.

### 7.2.3 Formal requirements

In Dutch law there are no formal requirements for the establishment of a mortgage, other than those mentioned above (notarial deed and registration in the public registers). The deed must contain an indication of the claim for which the mortgage serves as security, or of the facts, on the basis of which that claim can be determined in the case of a *krediethypotheek* or a *bankhypotheek*. The amount for which the mortgage is granted must also be mentioned or, if this amount has not yet been established, the maximum amount for which recourse may be had against the property pursuant to the mortgage. See article 3:260 BW. The deed can contain the following special stipulations mentioned in the Civil Code: article 3:254 BW: pledge on moveable things serving the mortaged real estate (*hulpzakenbeding*); article 3:264 BW the prohibition of renting the encumbered property (*huurbeding*), article 3:265 BW the prohibion of altering the encumbered property without consent of the bank (*beding van niet verhandering*) and article 3:267 BW the right that the creditor shall be entitled to take over the management of the property if the grantor seriously fails in the performance of his obligations owed to him (*beheersbeding*).

### 7.2.4 Registration

Registration of the notarial deed in the public registers is needed for the establishment of the mortgage (article 3:98 BW jo 3:89 BW).

### 7.2.5. Time and Costs

Registration of a deed of mortage will take as much (or less) time as it takes for any other deed regarding a registered property. A statute for on-line registration is expected to be enacted in near future.

The mortgage will take rank according to the moment of registration of the notarial deed. In case of an older right of mortage (or another right *in rem*), article 3:262 BW allows the so called *rangregeling*.

„1. A notarial deed entered in the registers may stipulate that a mortgage shall have a higher rank in respect of one or more mortgages over the same property than would result from the time of its registration, provided that the deed shows that the title-holders of the other hypo-

[17] Draft nr. 29.507 (Wet financiële dienstverlening). Implementing directives 1997/92/EEG, 2002/65/EG and 2002/65/EG.

thec or hypothecs consent to it.

2. Applying paragraph 1, *mutatis mutandis*, it may also be stipulated that a hypothec and another limited right are deemed to have been created in respect of each other in an order different from the one which actually occurred."

The notary fee for deed plus searches can be negotiated, look for instance on the website 'the cheapest notary.nl' (www.degoedkoopstenotaris.nl). The offers in the western part of our country were on 20-9-2004 for a mortgage of € 136,134 between € 430 and € 499 and for a house of €317.646 it was in the range of € 523 and € 696 (excl. VAT). In addition about € 35 (plus VAT) for searches has to be paid.

Registration in the land register costs at this moment € 94.22 per deed.[18]

A tax of € 3 per deed is due to be paid for registration of the deed of mortgage by the tax office. The notary acts as tax collector on behalf of the tax department. No registration or transfer tax is due over the mortgage itself (article 5 *Wet Belastingen op Rechtsverkeer*).

## 7.3 Causality and Accessoriness

### 7.3.1. Invalid loan contract

The right of mortgage is accessory to the debt it secures. If the loan contract is invalid the result will be that the mortgage will be void because there is no debt to be secured.

### 7.3.2. Right of withdrawal

If the debtor-consumer has a right to withdraw from the loan contract, the mortgage will end with the withdrawal from the loan contract. This because the right of mortgage is accessory to the debt it secures,

### 7.3.3. Changing the secured debt

If the debtor has repaid the loan for which the mortgage was granted, the question if the old mortgage can be used to secure for a new loan depends on the description of the debt in the mortgage deed. According to article 3:231 a right of mortgage can be established for existing as well as future debts. The only requisite is that debt for which mortgage is given must be sufficiently determinable. Sufficient is that at the moment of execution of the right of mortgage it is possible to determine the debts (and so the exact amounts) the mortgage secures. In practise in the contract between bank and debtor will stipulate that the administation of the bank will be conclusive, unless the debtor can proof otherwise. If mortgage is given for one, specific debt, the right will end automatically at the moment of repayment. If the bank and debtor agree on a mortgage that will secure all existing and future debts of the debtor of the bank, the mortgage will take rank from the moment of registration.

In the case the bank and the mortgagor have agreed on a mortgage loan for a five year term at a fixed interest rate, and both sides want to agree on a new loan for another five years, after the period is over the old mortgage can secure the new loan. This because it is not a new loan, but a prolongation of the existing loan (under new interest).

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[18] The registration fee is fixed by the Netherlands' Kadaster, after approval by the minister of VROM (Ministry of housing, spatial planning and the environment).

If the mortgagee wants the new loan from another bank, the first bank, if willing, can transfer the debt to the second bank. Because of the accessory nature of the right of mortgage, this right will also be transferred to the new creditor.

Even when the new loan is not designed to finance a property but a car or the mortgagee's company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation, this is no problem when one could consider the new loan as a prolongation of the existing loan.

In case the mortgagee runs a business and is in permanent need for credit, and he agrees with his bank on a maximum credit line, this credit can be secured by a mortgage. See article 3:231: 'A right of pledge or mortgage can be established for an existing as well as a future claim.' This kind of mortage is called *krediethypotheek* (credit mortage), or *bankhypotheek* (a mortgage for all debts to a bank).

### 7.3.4 Independent/abstract promise of payment

In Dutch law an independent/abstract promise of payment is unknown.

### 7.3.6. Mortgage for the land owner himself

A mortgage cannot be set up also for the land owner. A principle of property law in Dutch law is that limited rights and the (nude) ownership of the thing cannot be in one and the same hand (*vermenging*). See also article 3:81 par. 2 sub e BW: a limited right *in rem* ends by merger (confusion) or real right and ownership.

In the case he transfers the property to a third person the owner may reserve a mortgage to himself (e.g. when he furnishes a loan to the new owner). But this will be established on the moment of the transfer of the ownership (encumbered by the right of mortgage) to the new owner. See article 3:81 par 1 BW.

## 7.4 Enforcement and other rights of the bank

In case the debtor did not pay the interest or did not repay the loan, the bank must communicate the debtor that he is in default before the enforcement procedure can start. When the debtor doesn't pay the bank will go to a notary and ask him to sell the property at a public auction. Because the mortgage is direct enforceable a court decision is not necessary (article 3:268 BW). The creditor has the right to have the secured property sold in public before a notary with authority to do so. At the request of the creditor or the debtor a judge (the *voorzieningenrechter van de rechtbank,* president of the district court) may determine that there be a private sale. In this case it is needed that the contract of sale will be submitted to him for approval.

There are no instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons.

In general the creditor can continue the execution even in case of a insolvency (article 57 Faillissementswet). However the curator can suspend the execution for some time. On the other hand the curator can force the mortgagee to start the execution within a reasonable period of time.

The enforcement procedure regularly takes three months. The debtor can slow down for some months by asking for bankruptcy or moratorium with a cooling off period.

## 7.5 Overriding interests and priority

### 7.5.1. Distribution of proceeds

The bank can enforce his mortgage independent of third parties (article 3:268 BW).

### 7.5.2. Overriding interests

Unless otherwise provided for by law, pledge and hypothec (*mortgage*) shall rank before privileges (article 3:279 BW). .Preference to the mortgage take the privilege of the builder of the home (article 3:285 BW), or in case of an apartment right, the privilege for the contributions which the owner of an apartment owes to the joint owners of the apartments or to the association of owners, which have become exigible *(due)* during the current or preceding calendar year (article 3:286 BW). There are no other overriding interests.

## 7.6 Scope of the mortgage

### 7.6.1. Buildings

Article 3:227 par 2 BW reads: 'A right of pledge or mortgage upon a thing attaches to all that the ownership of the thing encompasses'. This means that, according to the rule *superficies solo cedit* (article 5:20 BW) a right of mortgage on the land also encompasses all the buidlings in or on the land embumbrered, unless they are owned by an other than the land owner. A mortgage on only the buildings on the land (or only one specific building) is not possible, except in the case ofa right of superficies. In that case in fact the mortgage is established on that limted right.

### 7.6.2 Machinery

With the introduction of Book 3, 5 and 6 of the Civil Code, Dutch law abolished the under the old Civil Code of 1838 excising concept of immovable by destination (comparable with the concept of *immeuble par destination* in the French Civil Code. However according to article 3:254 BW it is possible to establish a pledge over moveable things which, according to common opinion, are intended for permanent use with a specific immoveable thing and which by their form are recognisable as such, or where such a right has been established on machinery or tools intended to be used in carrying out a business in a specific factory or workshop set up for this purpose, and where this right of pledge has been established in respect of a claim for which a mortgage has also been established upon that immoveable thing, factory or workshop (or a limited right encumbering the same), it may be stipulated that the obligee is entitled to execute against the pledged and hypothecated property together according to the rules governing hypothec. In practise this stipulation is always made by the banks, even in the case of mortgages on houses.

### 7.6.2. Insurance

By law (article 3:229 BW) the right of mortgage entails a right of pledge over all claims for compensation which take the place of the secured property, including claims resulting from its reduction in value. This right of pledge has preference over any other right of pledge established on the claim.

### 7.7.3. Right to redeem

Unless mentioned in the contract the mortgagor can only redeem the mortgage in the case of foreclosure (article 3:269 BW). It is not possible to restrict the mortgagor's statutory right of redemption in case of foreclosure.

### 7.7.4. Redemption after foreclosure

The mortgagor cannot redeem the mortgage after foreclosure, i.e. after the moment of adjudication at public auction or the approval by the judge of the private sale (article 3:269 BW, first part). In that case he is too late.

## 7.8 Security granted by a third party

Mortgages granted by a third party (*derdenhypotheek*) are common. A good example is parents that want to give (extra) security for a loan taken by their child for buying a house. In case of a married grantor of the mortgage article 1:88 BW demands the written approval of the spouse.

If both property of both the debtor and a third party has mortgaged to secure the same debt, the third person can require execution of the property of the debtor as well. This must be sold first (article 3:234 BW).

## 7.9 Plurality of mortgages

A second mortgage is always possible, even when the consent of the first bank is needed. The second bank has a valid claim, but he cannot execute without consent of the first bank, with the exception of a refusal of the first bank to execute himself. After the foreclosure the right of mortgage will end.

The second mortgage will get the first rank in case the first loan is completely repaid. This is only not the case if the first mortgage is a *bankypotheek* or a *crediethypotheek*.

Mortgages can be of equal ranking. In case of registration of the deeds on the same moment, the rank of the mortgage will be decided by the day, hour and minute the deed has been signed by the notary. The notary can sign both deeds at the same time.

The ranks of mortgages can be exchanged or altered by agreement of the parties involved. See article 3:262 BW. In a notarial deed (registered in the public registers) can be stipulated that a mortgage will have a higher rank in respect of one or more mortgages over the same property than would result from the time of its registration. The same deed must show that the holders of the other mortgages consent to it. It may also be stipulated that a mortgage and another limited right have another rank in respect of each other (*rangregeling)*

## 7.10 Several properties

The right of mortgage can cover several properties. In practise all properties are liable.

If one of the properties is encumbered with a limited right which the creditor need not respect on execution, the holder of the dismembered right can equire execution of the other (unrestricted) property of the debtor as well. This must be sold first (artcicle 3:234 par 2 BW).

## 7.11 Transfer of the mortgage

### 7.11.1. Transfer of the mortgage in general

The debtor has set up a mortgage/land charge to the benefit of bank 1 to secure a loan granted to him. Now, bank 1 wants to refinance the loan with bank 2. Bank 1 can transfer the mortgage to bank 2 by transfer of the debt secured by the mortgage. This is done accordingly to article 3:94 BW. Needed is a deed of transfer, and notice thereof given by the alienator or acquirer to the debtor. No registration of the transfer is needed in the public registers, but this is advisable. Without such a registration third parties acting in good faith are protected according to article 3:26 BW.

The costs for the transfer of a mortgage will be only the costs for the deed (and the notarial statement needed for registration of the notice the transfer occurred).

Bank 1 cannot transfer the mortgage without transferring also the secured claim because mortgage is an accessory right.

In the case bank 1 does not have a valid claim (as mentioned in 7.3.1), bank 2, cannot acquire the mortgage in good faith.

The same applies in the case the claim is valid, but the the setting up of the mortgage is invalid.

In the case bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, the transfer of the debt and mortgage is valid. Bank 2 can enforce the mortgage. Third parties acting in good faith are protected by article 3:26 BW.

Both banks are entitled to have the deed of transfer of the debt registered in the public registers.

### 7.11.2. Transfer to more than one creditor

Typically the bank may want to split up and syndicate the loan. Can the loan and the mortgage be split up and only a portion be transferred to bank 2? Can portions be transferred to different banks? Could those banks transfer the loans and the mortgage(s) to other banks later?

Yes, there will be several mortgages.

### 7.11.3. Administration of the mortgage by a trustee or fiduciary

In the case there is only one mortgage (with a parallel debt construction) the anglo-saxon trust is recognized in the Netherlands; a mortgage in favour of such a trustee is possible.

## 7.12 Conflict of Laws Issues

The real estate is situated on national territory whereas the debtor (who is also the owner of the real estate) resides in another EU-country.

### 7.12.1. Bank loan taken by a foreign debtor in the host country

When the debtor takes a loan with a bank in the host country where the real estate is situated (to the loan contract, the security contract and the mortgage) the mortgage will be governed by the *lex rei sitae*. A different law may govern the loan agreement.

### 7.12.2. Bank loan taken in the debtor's country of residence

When the debtor takes a loan with a bank in his country of residence (to the loan contract, the security contract and the mortgage) the law of the country of both parties involved.

### 7.12.3. Bank loan taken in a third EU-country

When the debtor takes a loan with a bank in a third EU-country (to the loan contract, the security contract and the mortgage)? A law different from the law governing the property can be chosen for the loan contract, i.e. the loan agreement may be governed by the law of the country of the bank.

### 7.12.4 National Restrictions on the Right of a Debtor to Secure Debt with a Mortgage assessed under EU Law

Dutch national law doesn't contain restrictions or de facto disadvantages for foreign debtors.

# 8. Bibliography

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BW, Burgerlijk Wetboek (Civil Code); consists of 9 Books (plus one extra temporary Book 7A with remaining parts from the old code). The drafting project started in 1949 and has not finished yet fully. For real property law Books 3, 5 and 6 are the most important. Those Books were introduced as of 1-1-1992. No major changes have taken place in the substance of real property law since. In Book 7 (special contracts) the consumer protection for house sales, building contract and rent of non-agricultural real property have been included in here of the last few years. An important revision of the rules for apartment ownership in Book 5 is foreseen to be enacted in the near future.

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