LEGALINK

INTERNATIONAL BUT PERSONAL

GUIDELINES FOR INVESTMENTS IN **REAL ESTATE**

2019

INTRODUCTION

The world has changed a lot since we launched the 2nd edition of this book in 2012 with an overview regarding Investments in Real Estate all over the world.

In recent years the world has faced some difficult situations not only in the political, but the economic world. We face a crisis in the EU with the never-ending Brexit discussion over the last two years. Some important political leaders, both inside and outside of the EU, seem to lack the ability to carefully listen to others or take diverse views into account and sacrifice compromise and "win-win" solutions on the altar of egoism. Such attitudes jeopardize not only the political but the economic relationships between countries, and disrupt the balance needed for good relations over the long term.

In these times it is very important to have personal contacts and friends in the world you really can trust, who are familiar with the laws in their area. Our Legalink network, which is grown internationally over the last 25 years, is exactly what is needed these days, because our prominent experts in the network know each other personally from attending at least two meetings a year. At our conferences, therefore, we meet as friends, and not just as lawyers.

In uncertain political times many people look to diversify their investments into safe havens, but still want something more than the interest banks pay on simple monetary investments, which do not even keep pace with the inflation rates in most countries. Therefore, in addition to investments in the stock markets, we see not only in Germany, but in other stable economies throughout the world, substantial investment in real estate, with accompanying increases in prices. Such price increases, however, while seemingly rewarding the investor, make it more necessary than ever before to carefully evaluate the long-term viability of investments in the real estate market, keeping in mind that history shows that if investments are professionally reviewed and professionally executed, then most are ultimately successful.

We are very happy to have in our growing Legalink network, which has more than 3000 lawyers in about 70 independent law firms located in most business centers on all five continents, recognized experts in the field of real estate acquisition and finance. These lawyers are ready to advise and assist investors in all aspects of investments and transactions involving residential and commercial real estate, and all other real property issues, as well.

From working together on cross-border projects in our network and in discussions with our clients, we found that many of them, as well as other potential investors, would like to receive an introduction to the rules governing investing in real estate throughout the world, as well as other aspects that have to be taken into account in real estate transactions. In this 3rd edition of our book we are pleased to give potential investors a first overview of various factors which must be considered when investing in residential or commercial real estate in many countries of the world in which they might be interested. Of course, every single transaction is unique and the laws and tax aspects of it must be reviewed in detail by specialists.

You will find contact data of the firms within this book and on the website of our Legalink network (www. Legalink.ch). All firms are pleased to assist in this field and will give you professional advice.

If you require a cross-border analysis of diverse law aspects, a joint effort to facilitate a cross-border transaction, or if you have any questions concerning how our network can get you the most advantageous solutions for investments in commercial real estate, please do not hesitate to contact us. We will be happy to refer you to the specialists of our network who can best assist you in your case.

Berlin, October 2019

Markus Jakoby
Jakoby Rechtsanwälte
Berlin, Germany

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I. Procedure of a real estate transaction

1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country, starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?

In the Netherlands the transfer of title of real estate (ground and/or structures erected on it) takes place and is completed by registration of a notarial deed of transfer in the national land register ('*Kadaster*'). A civil law notary is by training a lawyer, holding a public appointment. His duty is to render advice and draft contracts on the basis of impartiality.

In the notarial deed the agreement of purchase and sale and the title (legal basis of the transfer) have to be incorporated. The details of the purchase agreement and deed of transfer can be combined in one document (in cases where parties are fully in agreement or close to it), but mostly a separate purchase agreement is negotiated and executed, which document is referred to in the deed of transport.

Parties to a prospective sale of real estate will usually negotiate the terms of agreements of purchase and sale with the assistance of real estate agents or lawyers (in most instances, '*advocaten*'). Purchase and sale agreements usually contain representations and warranties (e.g. regarding environmental aspects and the absence of third-party rights, attachments and governmental claims). In particular, the fact that, according to Dutch law, tenancy agreements are not affected by the sale of the property emphasises the importance of these warranties and a proper due diligence. For straightforward transactions, standard forms for representations and warranties are in common use. Additionally, the relevant sections of the Netherlands Civil Code will be applicable.

It is to be noted that in the case of a sale of commercial real estate, agreements will be binding even if only made verbally. Foreign investors may wish to stipulate in the early stages of negotiations that no agreement comes about unless and until made in writing, in order to ensure that their negotiations about the representations and warranties do not lead to premature inconvenient obligations.

Purchase and sale agreements will usually contain conditions precedent and a scheduled date for the delivery (transfer of title). Subject to stipulation in the purchase agreement it is common in the Netherlands to pay a deposit of (usually) 10% of the purchase sum to the notary public of choice (usually made by the buyer) after signing the purchase agreement.

If there are no commercial reasons for agreeing a longer period (such as a condition precedent relating to obtaining the required finance) parties will commonly agree periods varying from one month to three months between the execution of the purchase agreement and the instrument of delivery.

The instrument of delivery (deed of transfer of title) must be signed in the presence of a civil law notary, officiating in his capacity. Mostly a notarial power of attorney (to one of the assistants of the notary) is

used to avoid impractical multiple party travelling.

Besides the deposit, it is almost invariably agreed that the purchase sum is paid into the third-party account of the civil law notary a few days prior to the date scheduled for delivery. After checking whether the real estate is indeed clear from liens and encumbrances and upon the signing of the instrument, the civil law notary will deposit the signed instrument of delivery with the registrar of the land register and pay out the purchase sum to the seller. Usually, it is agreed that, in the completion statement of the notary at delivery, current rents (if applicable) and costs are settled on a pro rata basis relating to the proportion of relevant time periods lapsed.

2. Does your legal system permit different sorts of ownership, like ownership of the whole land and construction or ownership, for example, only of one unit or lots of units (condominium) of the improvements?

The normal position is that the ownership of land comprises the ownership of the surface, the buildings and the works forming a permanent part of the land.

For the owners of land it is possible to create rights in rem on their property, such as the right of leasehold (*emphyteusis*) and the right of superficies (in which ownership of land and ownership of structures on that land are separated). Such rights give control to the surface, the land and the works to the extent provided in the deed pursuant to which such rights were created. Such rights can be transferred to third parties separate from the ownership of the land from which they are derived. Any remaining rights remain with the registered owner. The creation and delivery of rights of leasehold, superficies and apartment rights are to be established the same way as bare ownership: a notarial deed of transfer must be registered in the national land register.

A special chapter of the Dutch Civil Code is reserved for apartment rights (condominium). The main feature of an apartment right is the circumstance that more than one owner uses the same ground on which the complex is situated and the joint features of that complex. The ownership of an apartment right is exclusive and to be transferred the same way as bare ownership of other real estate property. The difference is that the apartment owners are undividable joint owners of the ground and joint features of the complex. As this joint ownership forms an integral part of the apartment right, the owner of the right can only dispose of his part of the joint ownership together with the apartment right itself.

3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?

Yes, the legal system of The Netherlands permits joint ownership of real estate (community property). In the Dutch Civil Code a distinction is made between a 'common' community (joint ownership of one or more possessions) and 'special' communities (e.g. inheritance, dissolved marriage, dissolved companies and partnerships etc.)

Both natural persons and legal persons can be owners of real estate. Entities with legal personality are (limitative): associations with legal capacity, cooperative societies, mutual insurance associations, private companies with limited liability, public companies and foundations.

This would include foreign legal persons.

Unlimited partnerships would not qualify as registered owners: one or more managing partners would be registered.

4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well, and/or is it possible to have different owners of the land and the building erected on it?

In The Netherlands, the ownership of the ground implies the ownership of building erected on that land. Every part added to a building in the process of construction of that building therefore automatically adds to the ownership.

To prevent this basic assumption and to separate the ownership of land and the ownership of property in or on top of that land, the right of superficies has to be established by the owner of the land and granted to the owner of the building. As these rights have to be registered in the national land register, knowledge of the existence of such rights is publicly available.

5. Is the land and/or the building registered in a formal register, and is a good-faith purchaser protected with regard to the entries in this formal register?

In the Netherlands, all land is registered in the national land register ('*Kadaster*') referred to above. As title to ownership and rights in rem may only be transferred by registering the same on the land register, the land register is very accurate. There is a very limited number of title defects which would not appear from the register.

Notwithstanding that accuracy, the Dutch system is at bottom negative and incomplete. Registration does not imply that what is registered is correct; the custodians of the register depend fully on the offered documents. Registration could also be incomplete; there are facts (regarding real estate also) that do not have registration as a constitutive condition, for example inheritance and prescription.

A good-faith purchaser would be conditionally protected with regard to title defects (which, as implied, hardly ever occur). For a successful appeal on good faith it is necessary that the facts involved would be subject to registration and were not registered, without previous knowledge of the purchaser. Purchaser is also protected against certain defaults in the registration itself. Title insurance is not available.

A purchaser would rely on the normally rather thorough title search performed by the civil law notary. Defects, if any, would in the course of time lose effect through prescription.

II. Costs for transaction

6. What tax aspects are directly involved in a purchase of real property – for example, real property transfer tax – and what is the percentage of it?

There is a national transfer tax of 2% for domestic buildings and 6% for other objects of the assessed value of existing real estate. The sale of the shares of companies which qualify as real estate companies

is also subject to the 6% transfer tax. The notary will retain the tax.

There is a limited number of exemptions.

Worth mentioning is the exemption in case of a subsequent transfer within six months from a transfer already taxed (except to the extent the purchase price of the second transaction is in excess of the purchase price of the first transaction). Furthermore, the sale of plots on which construction is yet to take place, and the new construction itself, are not subject to transfer tax, but to VAT. The current rate is 21%. Because of this obligation, the liability to pay VAT on the construction work itself – during the course of construction – under some circumstances can be transferred to the obligation of the end user to pay VAT for the whole. As the paid VAT under these circumstances is deductible for companies, a transaction under VAT could be preferable.

7. Do you have to hold the property for a specific time with respect to tax reasons, or is it in this context no problem to buy and sell property on a short-term basis – for example, within a year?

It is generally not a problem to buy and sell property on a short-term basis. Tax wise, a sale within the first ten years from delivery may be unattractive in the case of sale of plots used for construction if the aforementioned exemption from transfer tax was used.

8. Can the seller get his money out of your country after the transaction (repatriation of funds)?

In The Netherlands, there are no restrictions on transfer of capital to foreign countries.

9. If you buy real estate that is leased to one or more persons, are you allowed to terminate the lease contract(s), or which restrictions have to be taken into account?

In the Netherlands, purchase does not end lease. Leases pursuant to a tenancy agreement (i.e. a contract, the most common type of lease) can therefore not be terminated with effect any earlier than the agreed term or any agreed option to extend.

The Dutch system differs for different kind of leased subjects. In the case of residential premises the Dutch system is very protective for tenants. It is for the owner very difficult to terminate the lease, even upon expiration of the agreed term.

In the case of certain types of commercial real estate (primarily shops and catering establishments like hotels, bars and restaurants) the owner may only effectively terminate if and when its interests in terminating the lease override the interests of the tenant.

In the cases of all other commercial real estate such as plants and offices, the tenant may upon the expiration of the agreed term at best rely on a grace period for eviction of three years at most, normally less. Leasehold rights are rights in rem and can therefore not be terminated unilaterally prior to the term stated in the instrument of creation of the same.

10. Are you allowed to change the use of a building from residential use to office space or do you

need official approval for doing so, or is it not allowed at all?

Whether changing the use of a building from residential use to office space is allowed depends on the municipal zoning restrictions applicable to the area in which the real estate is situated. The municipality is obliged to permit construction/renovation activities within the activities defined and allowed in the prevailing zoning plan.

If the prevailing zoning plan does not allow the pursued use and the zoning plan itself is not to be altered, an exemption or a special statutory arrangement for minor deviations could be tried.

Exemptions from the current zoning restrictions may usually be obtained if a change of use conforms to future public plans for the area.

If and when the residential real estate is held as a leasehold right, the owner would have to agree to a change of use and would usually make this agreement subject to an increase of the retribution payable for the leasehold.

11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of €5 million, particularly

- **notarial costs?**
- **land register?**
- **real property transfer tax?**
- **advising lawyer (due diligence)?**
- **estate agent?**
- **others?**

The purchaser normally pays the notarial fees, and usually for that reason has the privilege to choose the notary to be employed. The fees will depend on the agreement made by the purchaser with the notary and could be a fixed amount or a percentage of the purchase price. The percentage (to about 0.75%) also depends on the purchase sum.

Costs of entry in the land register depend on the assessed value of the land. These costs are negligible.

Transfer tax normally amounts to 2% or 6% of the assessed value. In some cases VAT is due instead. See above.

The fees of advising lawyers are calculated on the basis of agreement with their clients. Such fees would in most cases be based on time spent and the agreed rate. Title search would in most cases be included in the notarial services. For other due diligence (for example regarding prevailing lease contracts and possibilities to change the use) lawyers are usually involved.

The fees of the real estate agent also depend on the agreement with the client and could be a fixed amount or a percentage. Often a success fee is agreed, stating a percentage (ranging from 1% to 1.5%) of the purchase price.

VAT (currently 21%) is charged on most fees and costs.

In order to develop (or transform) real estate a building permit has to be acquired from the municipality, based upon detailed construction plans (final design), surveys and environmental investigations. Not only are costs involved in preparing the necessary documents, but also a special municipal tax (planning application charges) has to be paid. The charges vary from 3.8% to 1.5% of the construction costs on different brackets thereof.

Sustainability measurements

A special point of attention in the category 'others' would be the (relatively new) Dutch statutory obligations regarding sustainability:

- Energy Performance Labels for all real estate objects (in force, but not subject to widespread observance yet);

- Obligations for new real estate developments as from 1st January 2020 regarding compliance to 'Almost Energy Neutral Buildings'. To be enforced by means of the building permit.

- The obligation for office buildings to comply with Energy Label C as from 1st January 2023 (a prohibition to use office buildings from that moment with lower labels!) and to comply with Energy Label A as from 1st January 2030.

A relevant part of the current supply of office buildings (mostly buildings constructed before 1999) does not comply yet with the Label C obligations. Compliance, of course, could have serious investment consequences.

It is calculated (by the Economic Institute for Construction) that, depending on the current Label, the yearly revenues of the improvements on average should be 22% of the investment to reach Label C and 17% to reach Label A. The payback time for investments should be 3.5 to six years to comply with Label C and 3.5 to 13.5 years to reach Label A. Because of the lower energy consumption costs, in theory the investments should not lead to relevant capital losses.

III. Costs for holding real estate

12. What tax aspects are directly involved when holding a property – for example, yearly land tax after the transfer of ownership – and what is the percentage of it?

In The Netherlands, the municipality in which the real estate is located charges a real estate holding tax. The municipality will charge a percentage of the assessed value of the real estate, divided in a part for the owner and a part for the user (only not domestic real estate). Assessment will automatically take place by the municipality on a yearly basis.

The percentage of the tax differs from municipality to municipality. For example in 2019 the following percentages in Amsterdam are due:

- domestic buildings: 0.38% of the value

- owners* of other real estate: 0.15% of the value
- users* of other real estate: 0.12% of the value

*owner/users pay both

13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

Professional caretakers will often charge on the basis of the value of the property or on rental income. Some will charge on the basis of time spent. Charges may range from 4.5% (shops) to 6% (residential) of the rental income.

IV. Foreign investors

14. Would you advise foreign investors at the moment to invest in your country
- **directly in real estate?**
- **through real property funds, open or closed ones?**
- **through other clear and secure financial products?**
- **at the moment not because of the impacts of the worldwide financial crisis?**

Most foreign investors have the choice between investing directly or through companies, depending on tax considerations. It will primarily depend on the country of origin of the investor whether a foreign or a Dutch vehicle is used.

There are a number of real estate funds which invest in Dutch real estate. The choice depends on the foreign investor's strategy.

As interest rates are very low at this moment and investments in real estate – especially long-term investments – proved reasonably secure, investments in real estate are very popular nowadays. The other side of the coin is that real estate prices rose considerably in the last few years.

15. Is any individual person and legal entity allowed to buy property in your country, or are there restrictions with regard, for example, to nationality or registered office of legal entities? If there are restrictions, are there ways to organise a domestic entity for the purchase on a valid legal structure notwithstanding?

There are no restrictions with respect to nationality or registered office of foreign investors.

16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed, and what time and effort are needed normally to get it?

It depends on the type of business concerned whether local permits are required to run such business. In the case of EU nationals and nationals from treaty countries, requirements may not discriminate and can in most instances easily be obtained. In the case of nationals from other countries it would depend on the type of business concerned.

17. Could your firm assist foreign investors in

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

We can make introductions to real estate agents personally known to us and to other clients owning and/or developing real estate. We can also make introductions to valuation experts who can double-check any value assessed.

The real estate, administrative law and construction law section of our firms will, where required and practical, jointly assist in developing construction projects from A to Z:

- Financial contracts and tax aspects;
- Company structures;
- Purchase of the land;
- Third-party rights;
- Set up of rights in rem;
- Administrative law counselling (zoning plans and permits);
- Legal planning;
- Advice on all of the widely used general contracting terms in the Netherlands (i.e. UAV and DNR);
- Drafting of contracts with contractors and advisors (i.e. architects);
- Monitoring contractual compliance during construction process (risk management and progress);
- Dispute resolution (both court and arbitration);
- Alignment of delivery protocols with contractors and end users;
- Claims regarding construction term overruns, guarantees and (hidden) defects;
- Lease contracts.

We can assist with all legal aspects of negotiating and assessing real estate transactions. Due diligence as to title (other than introductory searches) and the responsibility for transfer of title are in The Netherlands in the hands of civil law notaries. We have good working relationships with many civil law notaries and tax planners in Amsterdam, The Hague and around the country.

CONTACT

Janhein Berkvens (Partner)
berkvens@jonkerabeln.nl

Hein Stroeve MRICS (Partner)
stroeve@ekelmansenmeijer.nl

www.jonkerabeln.nl