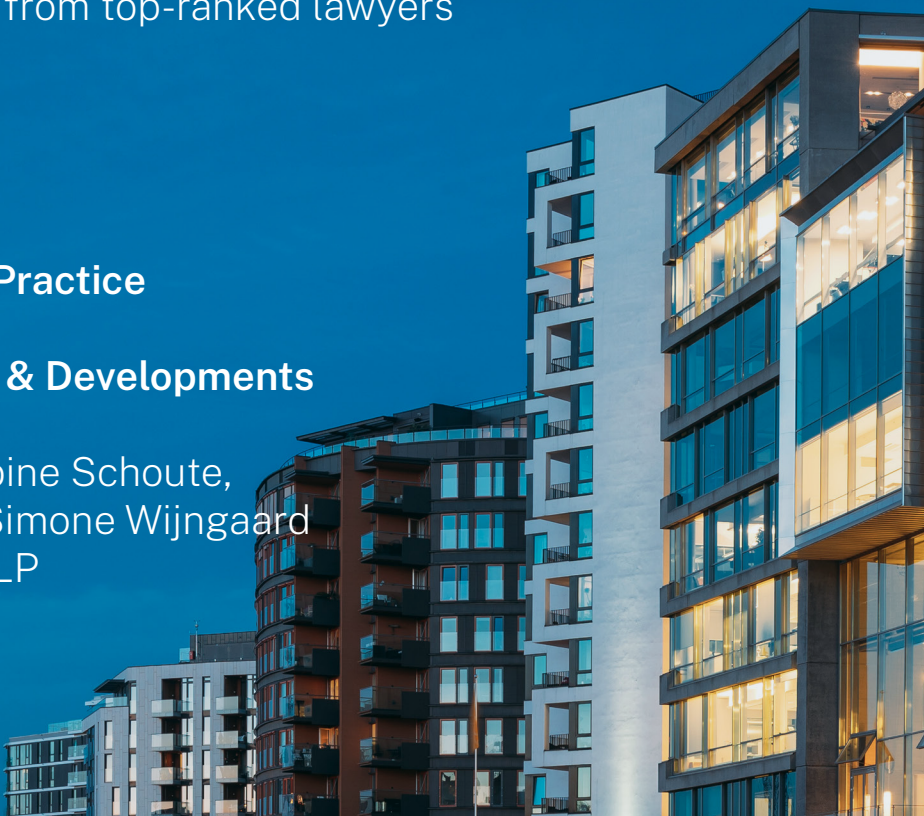

CHAMBERS GLOBAL PRACTICE GUIDES

Real Estate 2023

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**Netherlands: Law & Practice
and
Netherlands: Trends & Developments**

Coco van Zuiden, Sabine Schoute,
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NETHERLANDS



Law and Practice

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Greenberg Traurig, LLP is an international law firm with approximately 2,650 attorneys serving clients from 44 offices in the United States, Latin America, Europe, Asia and the Middle East. Greenberg Traurig's real estate practice is a cornerstone of the firm and a recognised leader in the industry. Property developers, lenders, investment managers, private equity funds, operators, joint ventures, sovereign wealth funds, international developers and private owners look to Greenberg Traurig for diversified and

broad legal services. Greenberg Traurig applies its expertise to the full cycle of a deal, providing a holistic approach for clients. It handles property acquisition and investment, development, management and leasing, financing, restructuring, and disposition of all asset classes of real estate. It advises on a broad spectrum of commercial, recreational and residential real estate. The company has a skilled hospitality legal team, including attorneys who have pioneered major developments within the industry.

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1. General

1.1 Main Sources of Law

The primary source of real estate law in the Netherlands is the Dutch Civil Code (DCC). Other sources include the Dutch Land Registration Act and the Dutch Agricultural Tenancies Act.

The Dutch Code of Civil Procedure contains special rules on attachments in execution against real estate and on the foreclosure of mortgages. The rules on transfer tax are set out in the Dutch Legal Transactions Act and those on VAT in the Dutch Turnover Tax Act. In addition, many specific provisions of public law apply.

1.2 Main Market Trends and Deals

The widespread economic uncertainty in the past 12 months did not prevent investors from investing in real estate and implementing their strategies, with residential and logistic real estate proving particularly sought-after asset classes. Sale-and-leasebacks were (and are) also on the rise. Another big trend is that both investors and lenders are increasing their focus on ESG, not only because it may be part of their core values or to meet governmental obligations, but also because sustainability performance can have a financial impact, either downward or upward.

1.3 Impact of Disruptive Technologies

The use of blockchain, AI and other disruptive technologies in the real estate industry has been limited so far, but there is interest in these types of technology. AI could, for example, be beneficial to the real estate sector.

1.4 Proposals for Reform

Several Supreme Court rulings relating to the consequences of the COVID-19 pandemic and the sale of development land by municipalities to real estate investors have already had a sig-

nificant impact on the real estate development and investment industry in the Netherlands. As these judgments were very recent, the practical interpretation is still ongoing. Furthermore, the proposed revision of the Dutch real estate transfer tax (RETT) scheme share deal for real estate acquisitions, due to which current RETT exemption on the acquisition of shares in a real estate entity holding newly developed real estate would cease to exist, could also have a significant impact on the real estate market.

2. Sale and Purchase

2.1 Categories of Property Rights

Under the DCC, rights in real estate can either be in rem or personal.

Rights in rem, such as ownership and leasehold, are called absolute rights because they can be invoked against all other parties. Such rights grant the holder certain legally protected powers over the real estate.

Personal rights are mainly contractual in nature and have what is called relative effect – they can only be invoked against one or more specific parties. Examples of personal rights in real estate are rights under a sale, lease or construction contract. There is a distinction between a leasehold, which is a right in rem, and the rights under a lease contract, which are personal. The DCC contains rules on, among other things, the creation, transfer and encumbrance of rights in rem as well as on many aspects of contracts.

The most comprehensive right in rem in real estate is ownership. This right encompasses the power to possess, use, encumber and transfer the real estate, with due observance of the law. Other rights in rem are derived from

and “encumber” the right of ownership and are known as “limited rights”. Such limited rights include leaseholds, servitudes/easements, rights of superficies, usufructs and mortgages.

2.2 Laws Applicable to Transfer of Title

See 1.1 Main Sources of Law.

2.3 Effecting Lawful and Proper Transfer of Title

Under Dutch law, the involvement of a civil law notary is mandatory for a variety of legal transactions, including the creation and transfer of rights in rem in real estate. A notary is both a legal practitioner and a public official with several prescribed duties and is required to be impartial, which means that they must act in the interest of all parties to a transaction and also consider possible third-party interests.

The ownership of real estate is transferred by the execution of a deed before a civil law notary, followed by the filing of a certified copy of the deed in the public register maintained by the Land Registry Office. Rights in rem derived from ownership are created and transferred in the same way.

Before the deed is executed, the notary is required to investigate whether the owner (or the transferor or party creating the relevant right) has the power of disposal over the real estate and whether any mortgages (or other limited rights) are vested therein. This is done by, among other things, reviewing the owner’s/transferor’s “chain of title” and by checking the land register. If the land register shows any inconsistencies, these must be further investigated by other means.

The registration process set out above offers the buyer an appropriate level of security. In the Netherlands, the Land Registry records all

important information concerning real estate. It is impossible to transfer property without registration, so title insurance is not common in the Netherlands.

2.4 Real Estate Due Diligence

It is common practice for real estate due diligence to cover the legal, tax, environmental, technical and commercial aspects of the subject of sale.

The scope of the due diligence usually depends on the investment type and value, the current state of the subject of the sale and the requirements of the purchaser in that respect.

A “standard” legal due diligence comprises a review of the following, among other things:

- title documentation;
- leases;
- zoning plans;
- environmental permits;
- soil/environmental surveys;
- legionella surveys/management plans;
- construction agreements;
- warranty certificates;
- insurance documentation; and
- maintenance contracts.

The results of the various legal, tax, environmental, technical and commercial reviews are recorded in due diligence reports drawn up by the purchaser’s respective advisers.

2.5 Typical Representations and Warranties

Besides case-specific warranties, it is common for the SPA for commercial real estate transactions to contain a set of more or less “standard” other warranties.

The number and scope of these other warranties obviously depend on the type of transaction agreed. In an “as is, where is” transaction the SPA usually contains title warranties and only a few others, whereas the warranties in a more balanced SPA are usually quite extensive. In the latter case, the subjects commonly covered include:

- legal title;
- leases;
- other agreements that will or will not be transferred to the purchaser;
- zoning plans;
- environmental permits;
- legal proceedings, if any;
- any claims of contractors and other third parties; and
- the due diligence documentation provided by the vendor.

The SPA often contains provisions limiting the vendor’s liability relating to (i) the liability period, (ii) the maximum amount of any such claims, and (iii) thresholds for filing a claim.

Warranty and indemnity (W&I) insurance policies can also be part of a commercial real estate transaction.

2.6 Important Areas of Law for Investors

See 1.1 Main Sources of Law.

2.7 Soil Pollution or Environmental Contamination

The Dutch government’s general policy regarding soil pollution is that all contaminated soil and groundwater at existing industrial sites must be cleaned up by the polluter, the owner of the site and/or the operator of the facility. Voluntary clean-ups are preferred; however, administrative orders to carry out investigations or clean-ups

will be issued if necessary. Should a clean-up involve public money, the government may start a cost recovery action against any party that has been unjustly enriched by the clean-up and, in the event of wrongful pollution, the party responsible for the pollution.

Soil pollution is mainly regulated via the Dutch Soil Protection Act which, together with the Dutch Environmental Management Act, contains general rules intended to prevent soil contamination, and requires that special permits be obtained before certain activities are performed. Such permits may require the company in question to take protective measures and to return the soil to its original state afterwards. In most cases, these permits are issued by municipal and/or provincial authorities.

Other important soil pollution rules are laid down in the Soil Quality Decree and the Soil Quality Regulation. Land issuance deeds from public authorities may also contain requirements on soil remediation.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

In the Netherlands, the use of land within a particular area must be in line with the applicable zoning plan. A zoning plan determines where homes, offices and other types of businesses or uses may be located and contains detailed rules on, for example, the maximum permissible heights of buildings.

Longer-term and more general spatial planning policy is set out in framework policy documents called “structure visions” drawn up by municipal, provincial and/or central government authorities. Zoning plans (including draft plans) and policy documents can be viewed at www.ruimtelijkeplannen.nl.

If a business wants to (re)build or expand in a manner that deviates from the existing zoning plan, it must usually obtain an “integrated environmental permit” for this purpose. In some situations, the municipality may be willing to adopt a new zoning plan.

2.9 Condemnation, Expropriation or Compulsory Purchase

A business may be required to relocate because of expropriation. Under the Dutch Expropriation Act, private property may be taken by the municipal, provincial or central government authorities for public use or public benefit, provided the owner is compensated. Before an expropriation order is sought, an effort must be made to reach an amicable settlement with the owner. Only if these negotiations fail may the relevant authorities apply to the court to issue such an order. At municipal level, an expropriation is often preceded by the adoption of a new zoning plan.

Municipal authorities may also acquire private property (eg, for the construction of a road) by establishing a preferential right on that property pursuant to the Dutch Municipalities Preferential Rights Act. If the owner decides to sell the property, it must first be offered to the relevant municipality (or other relevant public authority).

2.10 Taxes Applicable to a Transaction

No stamp duties or similar documentary taxes are levied in the Netherlands.

The acquisition of real estate is generally subject to 10.48% RETT, levied from the acquirer, on the property’s fair market value (or, if higher, the purchase price).

The acquisition of (partial) beneficial ownership of real estate located in the Netherlands is also subject to RETT.

Furthermore, the acquisition of shares in a qualifying real estate company is a deemed acquisition of real estate, which is subject to 10.4% RETT if the acquirer obtains a “substantial interest” (of at least one third) in such company.

RETT exemptions may apply where the acquisition concerns newly constructed real estate or building land (see 8.2 Mitigation of Tax Liability) or if the acquisition takes place within six months of a previous acquisition of the same real estate.

2.11 Legal Restrictions on Foreign Investors

There are no legal restrictions on foreign investors acquiring real estate in the Netherlands.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions of commercial real estate typically entail a special purpose vehicle (SPV) attracting senior (or mezzanine, via a holding company of the SPV) financing from banks, alternative or institutional lenders, while receiving equity from a holding company. Equity will be provided by the investor(s), in the form of share capital, a share premium or (although legally not considered as equity) subordinated (shareholder) loans.

Terms of the financing depend on the size and complexity of the financing and the relevant property, and whether the relevant lender(s) has a syndication strategy, in which case documentation will be based on Loan Market Association (LMA) standard forms. For smaller and more straightforward financings by a single Dutch lender, financing will typically be provided on the basis of standard bank documentation.

3.2 Typical Security Created by Commercial Investors

The main types of security for a lender are in rem security rights (mortgage and pledge) and security rights in personam (guarantees), albeit that real estate finance is generally non-recourse, which means that lenders will not have recourse (via guarantees or similar security) against the investors of the borrower.

A Dutch law in rem security right can only secure monetary payment obligations. Typically in Dutch real estate financings, lenders will require the following:

- a right of mortgage on the land and building – this is the most relevant asset;
- a right of pledge on movable assets;
- a right of pledge on receivables (including bank accounts, lease receivables, intercompany receivables, insurance receivables, etc); and
- a right of pledge on the shares in the borrower.

If Dutch law in rem security is created in favour of an agent or trustee for the benefit of other parties, a parallel debt is required, as it is generally assumed that a Dutch law right of mortgage or pledge cannot be validly created in favour of a person who is not the creditor of the secured liabilities. There is no statutory law or case law available on the parallel debt. However, in the general view of leading authors in Dutch legal literature, a parallel debt creates a claim of the mortgagee or pledgee which can be validly secured by a right of mortgage or right of pledge.

3.3 Restrictions on Granting Security Over Real Estate to Foreign Lenders

There are no specific restrictions on granting security in favour of a foreign lender. The same

goes for making repayments to a foreign lender under any finance document. Generally speaking, in both cases, the Money Laundering and Terrorist Financing Prevention Act will apply. Banks, civil law notaries and lawyers involved will have to perform a client due diligence on both national and foreign clients and report to the Netherlands Financial Intelligence Unit any suspicious transaction; that is, transactions that could involve money laundering or terrorist financing.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

No stamp duties or documentary taxes are payable in the case of creation or enforcement of a right of mortgage over real estate.

For the creation of the right of mortgage, a deed of mortgage will need to be executed by a Dutch civil law notary and registered with the Dutch Land Registry. Notarial fees and registration fees will need to be paid.

A right of mortgage is usually enforced by way of a public auction (see **3.6 Formalities when a Borrower Is in Default**). Execution costs will be deducted from the sales proceeds.

3.5 Legal Requirements Before an Entity Can Give Valid Security

Under Dutch law, prior to the granting of security, certain considerations need to be taken into account.

Financial Assistance

The DCC includes a prohibition on Dutch public limited liability companies providing financial assistance in connection with the acquisition of their shares. Such prohibition has been abolished for Dutch private limited liability companies.

Corporate Interest

Any legal act performed by a Dutch legal entity must be in the corporate interest of such entity. If this is not the case, the act may exceed the entity's corporate power and therefore be nullified by the Dutch legal entity if the counterparty knew, or should have known, that such legal act was not in the entity's corporate interest. The statutory object clause, although an important element, is not in itself decisive. In case law, the Dutch Supreme Court has ruled that a Dutch court, when objectively determining whether a specific legal act should be regarded as exceeding a company's corporate objects, not only the description of the objects in the articles of association is decisive, but all relevant circumstances (eg, the company's commercial interest, group relations, etc) must be taken into consideration. This includes, in particular, whether the interests of the legal entity were served by entering into the transactions. The board of directors of the Dutch legal entity must carefully make (and, ideally, document) the relevant analyses.

Conflict of Interest

It is not permitted for a director of a Dutch company to participate in deliberations and decision-making if they have a direct or indirect personal conflict of interest with the company in respect of the contemplated transaction.

Spouse's Consent

If a natural person (eg, a director), other than in the ordinary course of business, grants a guarantee, surety, accepts joint and several liability, or any other form of personal security as security for the debt of a third party, such person's spouse must give their consent to the granting of such form of security. If such consent is required but has not been obtained, the relevant spouse may annul the granting of the relevant security.

3.6 Formalities When a Borrower Is in Default

Under Dutch law, security rights can be enforced in the event that the borrower is in default in the performance of secured liabilities (ie, a payment default). Any other default would therefore need to result in accelerating the loan to force a payment default.

In case of a payment default, a mortgagee (and a pledgee) has the right of summary execution and, in the case of bankruptcy or suspension of payments, may in principle enforce its security rights as if there were no bankruptcy or suspension of payments (see 3.9 Effects of a Borrower Becoming Insolvent for nuances).

A right of mortgage can be enforced by way of (i) a public auction (without court order) or (ii) a private sale authorised by the competent Dutch court, all with due observance of the applicable Dutch law provisions. Appropriation by the mortgagee is not allowed, but the mortgagee may bid on the assets in a public auction and, if a private sale is requested and the mortgagee submits a more favourable bid before the end of the hearing of such request, the Dutch competent court may authorise that the assets are sold to the mortgagee.

If the mortgagee wishes to enforce its right of mortgage and sell the property free of leases, the mortgagee must invoke the lease clause (*huurbeding*), which must be explicitly agreed upon in the deed of mortgage. The mortgagee must invoke such lease clause before executing the mortgage. Several formalities must be considered in the enforcement of the lease clause.

Obstacles

A creditor with control over the property (eg, a contractor) may, under certain circumstances,

invoke its right of retention which may (subject to certain conditions, and depending on which right is of older date) give such creditor priority over the right of mortgage.

Execution by Other Creditors

There are no additional steps to be taken to give priority of the lender's security interest over the interests of other creditors. If a lower-ranking mortgagee proceeds with enforcement of its right of mortgage (if at all permitted in the context of the applicable financing), the first-ranking mortgagee may take over the execution, but that is not required for it to keep its priority over the other creditors. The first-ranking mortgagee may recover its claim on the borrower from the proceeds of the execution regardless of whether it initiated the execution.

3.7 Subordinating Existing Debt to Newly Created Debt

Existing secured debt may become subordinated to newly created debt either (i) by changing the rank of the relevant in rem security rights (this was already possible on the basis of explicit legal provision for rights of mortgage, and recently, as confirmed in Dutch case law, also for rights of pledge), or (ii) pursuant to an intercreditor and/or agreement among the relevant lending parties, which only results in a contractual change in rank.

3.8 Lenders' Liability Under Environmental Laws

In principle, a mortgagee cannot be held liable under environmental laws for pollution of real estate, unless it has been involved in causing the pollution. However, the position of the mortgagee is no different from any other third party involved. This could change, however, if the mortgagee becomes the property owner.

3.9 Effects of a Borrower Becoming Insolvent

Generally speaking, Dutch law security interest created in favour of a mortgagee/pledgee cannot be made void in the case of insolvency of the borrower. There are, however, certain things to consider in case a borrower becomes insolvent.

Impact on Security Rights

Generally speaking, under Dutch law, assets over which a Dutch law or non-Dutch law security right is purported to be created, which are acquired or come into existence after a pledgor has been granted a suspension of payments or has been declared bankrupt, will not become subject to such security right.

With respect to bank accounts, this means that payments that are booked in a pledged account after the pledgor has been granted a suspension of payments or has been declared bankrupt, will not be subject to the security right created by the relevant security agreement and will therefore become part of the bankrupt estate of such pledgor. A pledgee may not enforce a security right over an account in respect of payments that are booked in such pledged account after the pledgor (with whom the pledged account is maintained) should reasonably have been aware that the pledgor would be granted a suspension of payments or be declared bankrupt.

With respect to lease payments, any payments to be made by the lessee under a lease which become due after the pledgor has been granted a suspension of payments or has been declared bankrupt, will not be subject to the security right created by the relevant security agreement and will become part of the bankrupt estate of such pledgor.

With respect to a right of pledge over receivables in general, a pledgee may only collect a receivable subject to a Dutch law right of pledge after the debtor has been notified of such right of pledge. Until notification, the right to collect remains with the pledgor. Payments made by a debtor to the pledgor, or its bankruptcy trustee, prior to notification but after bankruptcy or suspension of payments of the pledgor will form part of the bankruptcy estate. The pledgee has a priority right with respect to the proceeds of such payments but will not be paid until the bankruptcy estate is distributed and will thus have to share in the bankruptcy costs.

Fraudulent Conveyance

The bankruptcy trustee may annul legal acts performed by the insolvent borrower based on fraudulent conveyance (*actio pauliana*) if certain conditions have been met. A distinction is made between voluntarily performed legal acts and non-voluntarily performed legal acts.

Cooling-Down Period/Deadline for Enforcement

As said, a mortgagee and a pledgee may in principle enforce their security rights as if there were no bankruptcy or suspension of payments. A security right gives the lender priority over other creditors; the lender has a priority claim over the proceeds resulting from enforcement of its security (subject to limited exceptions). If the borrower has been declared bankrupt, then this can even be done without the bankruptcy trustee's co-operation. A court may nonetheless order a two-month general stay, the "cooling down period" (which can be extended by an additional two months), during which security rights cannot be enforced. The pledgee/mortgagee does not need to contribute to the bankruptcy costs.

A bankruptcy trustee has the right to impose a (reasonable) deadline on pledgees/mortgagees to enforce their security rights. If a pledgee/mortgagee does not enforce its security rights by this deadline, then the trustee may take over the enforcement. In that case, the pledgee or mortgagee retains its priority claim on the proceeds from the enforcement sale, but it must bear a proportionate part of the bankruptcy costs (which can be considerable).

Powers of Attorney

Any power of attorney or mandate contained in the finance or security documents, whether or not it is irrevocable, granted by the Dutch borrower, will terminate without notice by force of law upon bankruptcy, and will cease to be effective in case of a suspension of payments of the Dutch borrower or in the event of the Dutch borrower being subjected to an intervention, recovery or resolution measure.

Statutory Priority Right of Dutch Tax Authorities

The Dutch tax authorities have a statutory priority right over equipment and other movable assets (the priority assets) which are intended for furnishing and which are located at the premises of the debtor of certain tax claims in the Netherlands. This statutory priority right prevails over a non-possessory right of pledge over such assets, even if the pledgor is not the debtor of the tax claim.

3.10 Consequences of LIBOR Index Expiry

Dutch real estate financing, depending on the interest rate structure, is usually based on EURIBOR. LMA documentation does include mechanisms in case the applicable benchmark is no longer available.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Municipal zoning plans provide for the allowed use of plots of land, and the type and dimensions of the buildings that are permitted. Deviations from a zoning plan require a permit. It is illegal to use a property contrary to zoning plan stipulations. The central government and provinces can also adopt zoning plans if a national or provincial interest is at stake. Provinces can implement ordinances that limit the municipal council's power to adopt a zoning plan (by, for example, banning certain activities altogether or in certain areas).

In certain specific areas additional controls apply, for example, in the vicinity of airports, where residential use is banned in some areas or where maximum building heights apply.

A significant overhaul of Dutch planning and environmental laws will come into force on 1 January 2024. From that date, the new Environment and Planning Act will apply.

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

A building permit is required to perform construction works, except if an exemption applies. A building permit application is tested against the zoning plan, the Building Decree, municipal building by-laws and reasonable requirements with respect to the external appearance of buildings. The Building Decree is a national decree which sets out technical requirements with respect to fire safety, health, energy efficiency, technical installations, etc. In many cases,

municipalities adopt a policy document on the external appearance of buildings.

4.3 Regulatory Authorities

The municipal council is primarily responsible for adopting zoning plans. The municipal executive has the power to issue building permits and permits to deviate from the zoning plan. These activities are mainly governed by the General Administrative Law Act, the Environmental Permitting (General Provisions) Act and the Spatial Planning Act. Provincial and national bodies may play a role as well (see also 4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning).

4.4 Obtaining Entitlements to Develop a New Project

If a project fits within the zoning plan, the authorities generally cannot prevent it from a planning perspective (except if they issue a decree before an application is filed). If the statutory technical requirements are met and the envisaged property meets the requirements with respect to buildings, the municipal executive in principle must issue a building permit if requested. If the project is not in line with the zoning plan, the process to obtain permission to develop a project generally starts with informal discussions with the municipality to understand whether the local government can support the initiative. If so, a permit application to deviate from the zoning plan can be filed. Depending on the basis for the permit application (and the nature of the deviation), the maximum decision term is either 14 weeks or six months and six weeks. In the first instance, if the maximum decision term is exceeded, the permit will be issued by operation of law. This does not apply, however, if the decision term is six months and six weeks.

4.5 Right of Appeal Against an Authority's Decision

Interested third parties can object and/or appeal against the adoption of a zoning plan and a permit to deviate from a zoning plan. The procedure depends on the permission and the third party.

A draft zoning plan is open to opinions from anyone. Based on recent case law, all parties that have filed an opinion are also eligible to appeal against the zoning plan once it is adopted. Zoning plans are open to appeal in the first and only instance with the Administrative Law Division of the Council of State. Parties that have not filed an opinion cannot file an appeal, except if they can show they are an interested party.

The regular procedure for a permit to deviate from a zoning plan entails that it is open to objections from interested third parties with the municipal executive, which will then take a new decision. Interested third parties that have filed an objection also have right of appeal with the district court and of further appeal with the Administrative Law Division of the Council of State. If the extended procedure applies, the objection phase does not apply. Instead, the draft permit is published for opinions from anyone. Subsequently, all parties that have filed an opinion can file an appeal and further appeal. Parties that have not filed an opinion can file an appeal if they can demonstrate that they are an interested party, by showing that they have a specific, personal interest that is directly involved in the decision. For legal entities, this can be demonstrated by referring to the entity's by-laws and its activities.

4.6 Agreements With Local or Governmental Authorities

It is possible to enter into agreements to facilitate a project development. Generally, such agreements are referred to as "anterior agreements".

If an anterior agreement is in place, this will allow the authority to abstain from adopting a so-called development plan, which is a statutory requirement for certain types of developments. In such agreement, the local authorities must then recover certain planning costs from the developer. In turn, the developing party then requires the authority's confirmation that it will apply its best efforts to issuing the relevant permissions. Note that the authorities under Dutch case law cannot commit to more than such a "best efforts" obligation (even if the wording indicates a more far-reaching obligation).

4.7 Enforcement of Restrictions on Development and Designated Use

The competent authority can issue administrative orders in the event of non-compliance with a zoning plan or other environmental provisions. Such order can be under the threat of a penalty payment. If a third party requests enforcement, the competent authority generally has an obligation to do so in the case of a violation (except under certain circumstances). Violations of planning law and environmental law are generally also open to criminal enforcement. There does not, however, appear to have been any actual criminal prosecution for planning law violations (unlike violations of environmental law).

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

In principle, there are no restrictions under Dutch law as to whom can hold legal title to real estate in the Netherlands. Consequently, Dutch real estate can be acquired and owned by any individual or legal entity (provided its organisational documents allow this), including foreign individuals or entities.

Dutch law does not provide for a special vehicle for investments in real estate, although there may be a special tax regime available for vehicles investing in Dutch real estate, if certain conditions are met.

The Dutch vehicles commonly used to invest in/hold real estate in the Netherlands are:

- the public limited liability company (“NV”);
- the private limited liability company (“BV”);
- the limited partnership (“CV”); and
- the mutual fund, the “fonds” (“FGR”).

5.2 Main Features of the Constitution of Each Type of Entity

NVs/BVs

Both the NV and the BV are companies with limited liability and a capital divided into shares. The shareholders are not liable for the company’s obligations; their liability is limited to any amount still owing on their shares.

An NV is subject to the various EU Company Law Directives, which set out certain rules on – among other things – the maintenance and alteration of capital. An NV is the Dutch entity of choice for a listing of shares or other securities on a stock exchange. Although shares in a BV can in principle be listed, this is not done in practice. A BV is subject to fewer of the above-mentioned directives and is governed by simpler statutory rules that offer a large degree of flexibility in the company’s governance structure.

CV

A CV is a partnership entered into by one or more general partners and one or more limited partners. A general partner is fully liable for all the CV’s obligations, whereas a limited partner is only liable up to the amount contributed or committed to the CV. The business of the CV is

conducted by the general partner(s). A limited partner will lose its limited liability if it participates in the CV’s management or purports to act in the name of the CV towards third parties.

FGR

The FGR, also known as a “fund for joint account”, is a creature of Dutch tax law. It is not considered to be a legal entity or partnership but rather a contractual arrangement, usually between the investors, a manager and a custodian.

5.3 Minimum Capital Requirement NVs

An NV may issue both bearer and registered shares. Its articles must state the authorised share capital, the number of shares (the number of shares per class, if applicable) and the nominal value, in euro, of the shares (class).

The incorporation deed must state the amount of the issued share capital, which must be at least 20% of the authorised share capital (or 10%, after the deduction of the nominal value of any treasury shares, if the NV is an investment company with variable capital). The deed must also state the amount paid up on the issued shares at incorporation (to be at least 25% of the issued share capital and at least EUR45,000). The NV and a shareholder can agree that part of the nominal value of the shares issued to that shareholder (up to 75% of the nominal value per share) need not be paid up until the NV calls for payment.

Until the paid-up portion of the share capital amounts to at least EUR45,000 and to at least 25% of the issued share capital as set out in the incorporation deed and until the NV is duly registered in the trade register, the board members are jointly and severally liable, together with the

NV, for all legal acts performed in the company's name.

BVs

A BV may only issue registered shares. At all times there must be at least one share with voting rights held by a party other than, and not on behalf of, the BV itself (or its subsidiaries, if any). The articles must state the shares' nominal value (which can be in any currency) and, if the BV has different classes of shares, the nominal value of the shares in each class. The articles may also provide for authorised share capital, but this is not mandatory and, in fact, would restrict a BV's flexibility to restructure its share capital.

The deed of incorporation must state the amount of the issued share capital and the amount paid up on the issued shares. It may be agreed between the BV and a shareholder that payment of all or part of the shares' nominal value will be deferred until the BV calls for payment. Consequently, and because no minimum share capital requirement applies, a BV may be incorporated with an issued share capital as low as EUR0.01, comprising one share with voting rights, and a paid-up share capital of zero.

CVs

Although a CV is not an entity with capital divided into shares, it may issue shares or participations to its partners, which is particularly important if the partners wish the CV to be classified as a real estate vehicle for Dutch real estate transfer tax purposes.

5.4 Applicable Governance Requirements

Governance NVs/BVs

Management board (executive)

NVs and BVs must have a management board consisting of at least one member.

Where an NV or a BV is subject to the "structure regime" its management board members are, in principle, appointed by the company's supervisory board. The structure regime applies if certain conditions are met for three consecutive years.

Individuals and legal entities may be management board members and no requirements as to nationality or residence apply. However, from a tax perspective it may be desirable for at least 50% of the members (preferably individuals) to be resident in the Netherlands and for board meetings to be held in the Netherlands and be attended by all members in person.

The management board is responsible for the company's management.

Both the management board collectively and each board member individually has the power to represent (ie, legally bind) the NV or BV. However, the articles may provide that this power vests only in one or more specific board members or in two or more board members acting jointly. The power to represent the company is unrestricted and unconditional (except in a limited number of cases).

Supervisory board (non-executive)

An NV's or BV's articles may provide for a supervisory board, consisting of one or more members, with the duty to supervise the policies pursued by the management board and the general course of affairs of the company and its business. The supervisory board also advises the management board. Only individuals may be appointed as supervisory board members.

It is mandatory for a "structure-regime" NV or BV to have a supervisory board (or a one-tier board; see below) and special provisions apply

to the appointment, duties and powers of the supervisory board of such a company.

One-tier board (executive and non-executive)

Instead of a separate management board and supervisory board, an NV or BV may also have a one-tier board, comprising both executive and non-executive board members.

In the case of a one-tier board, the articles or board rules drawn up pursuant to the articles may provide for the delegation to an individual board member of the authority to adopt board resolutions on the matters falling within that member's sphere of responsibility.

General meeting of shareholders

The general meeting of shareholders is a corporate body formed by all shareholders and all other persons with meeting rights, if any, and has authority over all matters that are not specifically assigned to another corporate body by law or under the articles. At least one general meeting must be convened each year but in the case of a BV this is not required if, during that year, at least one shareholder resolution is passed without a meeting being held.

Both the management and supervisory boards have the power to convene a general meeting of shareholders; other parties may also be granted this power under the articles.

Management and supervisory board members have an advisory vote at all general meetings.

Only shareholders and, if so provided in the articles, holders of a pledge or usufruct on shares, have voting rights.

5.5 Annual Entity Maintenance and Accounting Compliance

Annual entity maintenance and accounting compliance with clear process and procedure is highly important for all companies, including investors in real estate. The costs depend on the scope of works required.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

The main agreements allowing the use of real estate for a limited period are lease or user agreements.

6.2 Types of Commercial Leases

All leases are subject to the general statutory provisions, which are laid down in Sections 7:201-231 (excluding Section 7:230a), DCC.

Depending on the use of property, a lease of immovable property will be subject to one of the following legal regimes in addition to the above-mentioned general provisions:

- the regime for leases of residential premises;
- the regime for leases of "230a premises"; and
- the regime for leases of "290 business premises".

Leases of premises that are used as a retail, handicrafts or camping establishment or as a hotel, restaurant or café are governed by Section 7:290 et seq DCC. Such premises are therefore referred to here as 290 business premises. A lease of immovable property that is not used as 290 business premises or as residential premises is subject to the regime laid down in Section 7:230a, DCC (eg, office space and warehouses).

The degree to which the lessee enjoys security of tenure varies depending on the regime applicable to the lease.

6.3 Regulation of Rents or Lease Terms

For commercial leases, parties are free to agree on the rent.

For the purposes of the rules on rent in the DCC, residential premises in the Netherlands fall into one of two categories: social housing and “liberalised” (private sector) housing.

Leases of social housing are subject to detailed rules on, among other things, the factors to be taken into account when calculating the rent and the maximum amount of rent payable (a ceiling applies).

In the case of private-sector housing, fewer rules apply and the lessee and lessor are free to agree the rent and services provided.

6.4 Typical Terms of a Lease

Parties are free to draft their own contract, but in the Netherlands, lease contracts are often based on one of the templates drawn up by – and governed by the general terms and conditions of – the Dutch Real Estate Council (“ROZ”). These templates, which are frequently used in the Netherlands, generally tend to favour the lessor.

Standard lease terms are:

- purpose of the lease;
- designated use;
- term;
- rent and payment terms;
- service charges;
- security; and
- maintenance and repair obligations.

6.5 Rent Variation

Rent is usually subject to (an annual) indexation.

Residential rent indexation may only take place once a year. Furthermore, in regulated residential properties the rent may be indexed by a maximum percentage set by the government.

Furthermore, the 290 business premises regime entitles each of the parties to a judicial rent review at the end of each lease term or, in the case of a lease for an indefinite period, five years after the last review took place. The review will be based on the rent paid for comparable premises in the preceding five years and can therefore lead to either an increase or a reduction in the rent. The application to the court must be accompanied by a report drawn up by one or more experts appointed jointly by the parties. If the parties are unable to agree on the expert(s) to be appointed, either party can request the court to appoint the expert(s). This statutory right to a rent review is mandatory law and therefore supersedes any contractual provisions, unless such provisions are approved by the court or deviate to the benefit of the lessee.

6.6 Determination of New Rent

Indexation of rent is usually based on the consumer price index (CPI).

6.7 Payment of VAT

Generally speaking, an option to tax letting and leasing is possible for all non-residential real estate (including rights in rem which are treated as a supply or services). The advantage of an option is that the lessor can recover input VAT on costs with respect to the real estate. Under certain conditions, it is possible to integrate the option in the lease. An important condition is that the lease clearly states that the lease will be subject to VAT and contains a declaration in

which the lessee declares that the real estate will be used for purposes giving the lessee a right to at least 90% (or 70%) recovery of input VAT. The VAT option in the lease can have a retroactive effect limited to three months.

Generally, the letting of real estate is a relatively passive activity. If, in addition to the more passive letting, other services are offered, the letting may qualify as “letting plus”. It is important to determine whether the additional services are embodied in the letting performance or should be regarded as multiple separate services, of which the VAT treatment may differ.

In certain cases, the lessor also charges the lessee service charges when letting real estate. In principle, service charges are taken separately from the rent and are taxed with VAT. Service charges paid by tenants of residential properties are considered to be embodied in the letting performance and are treated the same way for VAT purposes.

6.8 Costs Payable by a Tenant at the Start of a Lease

The payment obligation of a lessee usually consists of rent and service charges plus VAT (compensation).

6.9 Payment of Maintenance and Repair

The general statutory provisions impose only a few maintenance and repair obligations on lessees. In short, the lessee must carry out all minor and day-to-day maintenance, including but not limited to the maintenance of technical installations, the replacement of bulbs, locks, taps and glass, and painting the interior of the premises. Other maintenance and repairs are for the lessor.

6.10 Payment of Utilities and Telecommunications

Utilities and telecommunications that serve a property occupied by several tenants can in principle be shared (pro rata) via the service charges.

6.11 Insurance Issues

The common practice in the Netherlands is that insurance of the property is taken out by the lessor. The lessor is not obliged to insure furniture and other objects belonging to the lessee that are in the leased premises, however, nor is the lessor obliged to take out business interruption insurance.

Leases for business premises often provide that if a higher than normal premium for fire insurance is charged as a result of the lessee's activities, the lessee must reimburse the lessor for the amount in excess of the normal premium.

6.12 Restrictions on the Use of Real Estate

Restrictions can be imposed by a lessor on how a lessee uses the real estate. It is market standard, in any case, to agree upon the designated use of the real estate.

6.13 Tenant's Ability to Alter and Improve Real Estate

Lessees are not permitted to change the fixtures and fittings of the leased real estate without the written approval of the lessor. The lessor can impose conditions on such work, and parties can make arrangements about the reversal of any changes at the end of the lease.

6.14 Specific Regulations

Specific regulations apply to residential leases, for example, the Dutch Housing Act 2014 gives municipalities the right to regulate short stay

through the issuance of a housing regulation, and the Minor Repairs (Tenant's Liability) Decree sets out the rules for lessees and lessors regarding minor repairs of the leased real estate.

6.15 Effect of the Tenant's Insolvency

By law, either party can terminate the lease contract with due observance of a three-month notice period in the event of the lessee's bankruptcy.

6.16 Forms of Security to Protect Against a Failure of the Tenant to Meet Its Obligations

Bank guarantees, parent guarantees and/or security deposits are the most common forms of security provided by tenants.

6.17 Right to Occupy After Termination or Expiry of a Lease

With regard to "230a premises" (see 6.2 Types of Commercial Leases), mandatory provisions apply with regard to eviction protection for the lessee at the end of the lease.

Pursuant to these rules, if the lessee is given notice to vacate the premises following the end of the term of the lease or, in the case of a lease for an indefinite period, the date on which termination of the lease by notice is to take effect, the lessee cannot be evicted for a period of two months following the date of the notice to vacate the premises. During this period, the lessee can petition the district court to extend this term (up to one year). The court will weigh the interests of the parties in deciding whether to grant an extension. The lessee can subsequently petition for two more extensions (for a maximum of one year each). During the time that the lessee enjoys protection from eviction, the lessor must be paid for the use of the premises.

The eviction protection rules do not apply to lessees that have terminated the lease, explicitly agreed to termination of the lease, or have been ordered to vacate the premises due to a breach of contract.

6.18 Right to Assign a Leasehold Interest

Under Dutch law, the general rule is that a party must have the other party's consent in order to assign its contractual rights and obligations to a third party.

However, in the case of 290 business premises (see 6.2 Types of Commercial Leases), special statutory rules enable a tenant that wishes to sell its business under conditions to obtain a court decision authorising the assignment of the lease.

6.19 Right to Terminate a Lease

Termination of a lease can be effected by mutual consent, following notice given by the lessor or by the lessee, dissolution (termination) of the lease in the event of a serious breach or termination in the event of the tenant going bankrupt.

Kindly note that if the lessor gives notice and the lessee does not agree to the termination, the lease will continue unless and until it is terminated by the competent court.

6.20 Registration Requirements

Leases are not registered in the Netherlands.

6.21 Forced Eviction

Where the lessee is in breach of its obligations under the lease (eg, non-payment of the rent for at least three months), the lessor may dissolve a lease prematurely, resulting in a forced eviction.

6.22 Termination by a Third Party

Termination can be effected by the parties to the agreement and, in the bankruptcy of the lessee, by a bankruptcy trustee.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Parties can make various agreements on which payment(s) can be based, but construction contracts are generally concluded based on a fixed price.

7.2 Assigning Responsibility for the Design and Construction of a Project

Parties are free to assign the responsibility for the design and construction of a project. Generally, the contractor bears the risk of the work until the moment of delivery.

Several contract formats/general terms exist in the Netherlands, including the so-called UAV and UAV-GC. The latter relates to integrated contract structures. Other variations are building team structures and co-design structures. The applicability of the use of a specific type of structure depends on the complexity of the project and the risk profile of the developer.

It is common in the Netherlands to involve the contractor in the design process as well, in which case the contractor takes partial responsibility for the design and in turn has a preferred position to pitch for the contracting work.

It is worth noting that parties can take out insurance to mitigate the risks relating to the responsibility for design and construction.

7.3 Management of Construction Risk

Parties usually manage the construction risk on a project by agreeing upon indemnifications, representations and warranties, securities, insurances as well as limitations of liability.

7.4 Management of Schedule-Related Risk

To manage schedule-related risk, parties often agree upon a specific payment schedule (by means of which the payment is related to the status of the works) and a penalty clause for late performance/delivery (which penalties can replace the actual damages incurred).

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Additional forms of security to guarantee a contractor's performance on a project, such as step-in arrangements, credit letters, bank guarantees, parent guarantees, escrow arrangements and/or specific payment arrangements, are common.

7.6 Liens or Encumbrances in the Event of Non-payment

Under Dutch law, a contractor working on or still exercising actual control over its work on site of a property, can exercise a right of retention for its unpaid invoices for work done, or suspend working on the development until payments are made.

By means of rather strong right, the contractor can take possession of the property and continue to do so until it gets paid, but parties can deviate from this (so a waiver/restriction is often agreed upon).

7.7 Requirements Before Use or Inhabitation

There are requirements that must be met (under certain conditions) before a project can be

inhabited or used for its intended purpose, such as, notification of fire-safe use, notification in the sense of the Activities Degree – a report to the competent authority about, among other things, the location, activities, processes and layout, and the performance of a company that must be submitted by specific types of companies – and a valid energy label.

8. Tax

8.1 VAT

The supply of real estate is exempt from VAT, but exceptions apply:

- the supply of newly constructed real estate is subject to VAT by virtue of law if the supply takes place before or within two years after the asset was first occupied;
- the supply of building land is subject to VAT by virtue of law; and
- if the purchaser of the real estate is entitled to at least 90% deduction of input VAT incurred during the period elapsing between the time of supply and the end of the calendar year following the year in which supply took place, parties may under certain conditions opt for the supply to be subject to VAT.

In addition, the supply of real estate that has been leased out may qualify as a transfer of a going concern. Provided that certain conditions are met, the transfer will not in that case be treated as a supply for VAT purposes.

The VAT rate is 21%.

Kindly note that if real estate is sold by means of the transfer of shares in a company owning the real estate, no VAT is due on such transfer,

since share transactions are generally exempt from VAT.

8.2 Mitigation of Tax Liability

No stamp duties apply in the Netherlands.

The acquisition of real estate located in the Netherlands is generally subject to RETT.

In addition, the acquisition of shares in a qualifying real estate company is deemed acquisition of real estate, which is subject to RETT if the acquirer obtains a “substantial interest” (of at least one third) in such company.

A RETT exemption may apply where the acquisition is subject to VAT by virtue of law (ie, in the case of newly constructed real estate or building land, see **8.1 VAT**). The RETT exemption may also apply upon the acquisition of shares in a real estate company that owns newly constructed real estate or building land.

8.3 Municipal Taxes

Owners and users of real estate are liable for a variety of local taxes and charges imposed by municipalities, provinces and water boards (which are a distinctly Dutch institution).

Municipalities impose an annual property tax on real estate owners and/or users (at varying rates). In principle, these taxes are based on the property’s fair market value. This value (called the “WOZ value”) is determined by the local authorities based on the Dutch Property Valuation Act. Taxpayers can file an objection if they do not agree with the assessed WOZ value.

Other local taxes and charges include permit fees, energy tax and sewerage charges, as well as water system levies and pollution levies (the latter two being imposed by the water boards).

8.4 Income Tax Withholding for Foreign Investors

If an investment in Dutch real estate is held by a foreign investor through a Dutch company owning the real estate, dividend withholding tax at a general rate of 15% applies to distributions made by such Dutch entity to the foreign investor. A lower treaty rate may be available. Distributions to qualifying corporate shareholders (with an interest of 5% or more) that are resident in the EU or a jurisdiction that has concluded a tax treaty with the Netherlands, may be fully exempt from dividend withholding tax, subject to certain anti-abuse provisions.

Since 1 January 2021 the Netherlands has implemented a withholding tax on interest and royalties in abusive situations. Briefly put, abusive situations arise if interest or royalties are paid to an entity in a low-tax jurisdiction, or if an artificial construction is set up to avoid tax.

Foreign corporate investors as well as Dutch companies investing in Dutch real estate are generally liable for Dutch corporate income tax on rental income and/or capital gains realised from real estate located in the Netherlands, at a rate of 19% on profits up to EUR200,000 and 25.8% on profits exceeding EUR200,000.

A special tax regime exists for fiscal investment institutions (“FBIs”).

Furthermore, special rules apply to qualifying exempt investment institutions (“VBIs”). A VBI is exempt from corporate income tax and dividend withholding tax. However, it is only allowed to invest in financial instruments and not directly in real estate.

Foreign individual investors investing in Dutch real estate are generally liable for Dutch per-

sonal income tax in Box 3 (taxable income from savings and investments) of the Dutch personal income tax act, at a fixed rate of 32% calculated on notional yields. Actual gains from savings and investments are not subject to tax. Different rates may apply if the real estate investment is attributable to an enterprise carried out by an individual foreign investor.

8.5 Tax Benefits

Annual tax depreciation on Dutch real estate is determined on the basis of:

- the cost price of the real estate (minus the part that is allocated to the land, as land is not depreciable);
- the residual value; and
- the economic life of the property.

There are no statutory provisions regarding the last two criteria. Under Dutch law, tax depreciation on real estate that is held as an investment is allowed only to the extent that the tax book value of the real estate is higher than the WOZ value.

In addition, certain tax deductions may be available for environmental and/or energy-friendly investments in Dutch real estate.

Trends and Developments

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Greenberg Traurig, LLP is an international law firm with approximately 2,650 attorneys serving clients from 44 offices in the United States, Latin America, Europe, Asia and the Middle East. Greenberg Traurig's real estate practice is a cornerstone of the firm and a recognised leader in the industry. Property developers, lenders, investment managers, private equity funds, operators, joint ventures, sovereign wealth funds, international developers and private owners look to Greenberg Traurig for diversified and

broad legal services. Greenberg Traurig applies its expertise to the full cycle of a deal, providing a holistic approach for clients. It handles property acquisition and investment, development, management and leasing, financing, restructuring, and disposition of all asset classes of real estate. It advises on a broad spectrum of commercial, recreational and residential real estate. The company has a skilled hospitality legal team, including attorneys who have pioneered major developments within the industry.

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NETHERLANDS TRENDS AND DEVELOPMENTS

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NETHERLANDS TRENDS AND DEVELOPMENTS

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Overview

The Dutch real estate market in 2023 is characterised by the following trends and developments:

- sustainability;
- sale-and-leasebacks;
- further development of the industrial, logistic and data centre sectors;
- forward-funding deals;
- alternative lenders; and
- proposed revision of the Dutch RETT Scheme.

Sustainability

The importance of sustainability cannot be overstated. All aspects of real estate are touched by it and will be more so in the future. The design and construction of (nearly) energy-neutral new buildings became mandatory in 2021 in the Netherlands. In addition, existing buildings face ever-increasing sustainability demands. As of 1 January this year (2023), non-residential buildings, in principle, must have an energy label “C” if they are to be rented out. This requirement is likely to be tightened to energy label “A” by 2030. In this context, it is not surprising that property owners are incorporating the production of renewable energy into their assets. This, however, entails new challenges for real estate operators and managers, as they should be wary of new risks such as availability of grid capacity, energy taxes, and investment laws restricting business operations, among other things.

It is not an option for real estate market players to avoid these developments as investors are likely to add value to property sustainability. Some investors will also want to invest only in properties that qualify as a “sustainable investment” under the EU Taxonomy Regulation. This regulation sets out what qualifies as sustain-

able and what does not. Its aim is to promote transparency and to prevent greenwashing. The thresholds that are set forth by the Taxonomy Regulation are, therefore, likely to become a key factor for investors.

Sale-and-Leasebacks

The sale-and-leaseback of real estate involves the owner of a real estate asset selling it to a third party after which that party then immediately leases the asset back for a term at an agreed rent.

Although this trend is not new (it started during the COVID-19 pandemic), we see that sale-and-leasebacks are still on the rise. Some companies are facing difficulties with raising capital, which makes them financially fragile. To limit any negative financial impact, many companies have turned to alternative ways of raising financing, for example, by means of liquidating their real estate assets and leasing them back. In addition, distressed sales and non-performing loans have resulted in various sale-and-leaseback transactions. From an investor’s perspective, sale-and-leasebacks are also quite popular as an asset class because stock markets are clearly more volatile.

Other key advantages of sale-and-leaseback transactions include:

- immediate cash injection;
- freed-up capital;
- no relocation of activities;
- debt reduction; and
- increased flexibility.

Further Development of the Industrial, Logistic and Data Centre Sectors

Not only in the Netherlands, but across the European markets there is growing demand for urban

logistics real estate, as well as industrial logistics, due to the constantly growing e-commerce business combined with the fact that the Netherlands is Europe's logistic hotspot due to its high-quality infrastructure, large ports and central location. There are still a lot of developments in the more southerly part of the Netherlands, which are mostly arranged via a forward-funding structure (see the next section), although many transactions also relate to existing assets.

There is also a strong appetite for data centres in the Netherlands. The data centre market is booming and the Netherlands is often seen as the data hub in the heart of Europe with a unique infrastructure and ecosystem for the data-driven economy. Although the interest is there, government regulations make the expansion of the data centre market in the Netherlands quite challenging.

Forward-Funding Structures

In the Netherlands, real estate developments are often acquired in future state of completion. This kind of transaction can be structured as a forward funding, but also as a forward purchase (also known as a "forward sale").

In a forward-funding structure, the sale – and thus the transfer of ownership – occurs prior to the completion of the construction works and the purchase price is paid upfront, most often in instalments over the construction process.

Contrary to a forward-funding structure, the transfer of ownership in the case of a forward purchase occurs at completion of the construction works. The purchase price will be paid upon completion and the developer or seller is responsible for financing the development. This means that the investor or buyer will neither bear the

construction risk nor the risk of insolvency of the developer/seller.

Nowadays, many new developments are acquired by means of a forward-funding structure to limit the involvement of external financiers for the developer.

Some pros and cons of a forward-funding structure

Due to the early participation of the investor/buyer, it is possible to tailor the development to make sure it matches the envisaged use and the investor/buyer can stay involved with and in control of the development process. Although this is a real advantage, forward funding also has a high-risk profile for the investor/buyer, since they will be exposed if the developer/seller does not perform or becomes insolvent.

To mitigate this, parties usually agree on a condition precedent of definitive permits and appropriate contractual protection mechanisms for the investor/buyer (eg, step-in rights, escrow arrangements or guarantees). In addition, it is also important that a detailed arrangement is made about the payment of the instalments. In most cases, payments are only due based on the status of the works, to limit the financial exposure of the investor/buyer, and the profit margin of the development is paid upon its completion. Furthermore, the investor/buyer is usually entitled to receive interest from a forward funding (a percentage per annum) from the developer/seller over the paid purchase/instalments up to completion, with a penalty being paid in case of late completion.

Alternative Lenders

Non-bank lenders are increasingly active in the Dutch real estate market to finance deals. This seems to be a trend in more jurisdictions as tra-

ditional banks are becoming more risk averse, subject to more stringent regulations and cautious about taking on new clients. This is due to increased scrutiny of banks' compliance policies, as a result of certain scandals. Due to the current economic uncertainties, banks are more carefully managing their balance sheets and shifting to property deals with more certain cash flows, and alternative lenders are looking to fill a gap that continues to widen.

Proposed Revision of Dutch RETT Scheme

The Dutch legislator is considering changing the Dutch RETT (real estate transfer tax) scheme regarding acquisitions of Dutch real estate via share deals. If this change is indeed implemented, then effective from 1 January 2024, the current RETT exemption on the acquisition of shares in a real estate entity holding newly developed real estate would cease to exist. If this new scheme is adopted, from 1 January 2024, the acquisition of new (residential) real estate via a share deal will become more expensive. This means that developers will have to adjust the valuations of their projects.

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