Chambers
Global Practice
Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Real Estate 2022

Belgium: Law & Practice
Christophe Laurent and Ariane Brohez
Loyens & Loeff

Belgium: Trends & Developments
Ariane Brohez, Christophe Laurent and Wim Vande Velde
Loyens & Loeff

practiceguides.chambers.com

BELGIUM

Law and Practice

Contributed by:
Christophe Laurent and Ariane Brohez
Loyens & Loeff see p.23

CONTENTS

1. GENERAL

1.1 Main Sources of Law

The federal Civil Code regulates the main aspects of real estate law: property rights, contract law and common leases.

Considering the institutional organisation of Belgium around the Federal State and the three Regions (Brussels, Flanders and Wallonia), the following sources must be mentioned:

- retail lease – the (federal) Commercial Lease Act of 30 April 1951, it being understood that the Regions are competent to modify this law;
- residential lease – a specific regulation for each Region;
- zoning, planning and environmental matters – a specific set of regulations for each Region, supplemented by municipal planning regulations;
- transfer taxes – the competences in this matter are divided between the Federal State and the Regions; and
- federal regulations applicable to investments and investment structures – the Code of Companies and Association, the Income Tax Code, the VAT Code, the law of 12 May 2014 on Belgian REITs, the law of 19 April 2014 on alternative investment funds and their managers and the related decree of 9 November 2016 on the Belgian SREIF (specialised real estate investment fund).

1.2 Main Market Trends and Deals

After a record year boosted by the Finance Tower deal, the investment market has dropped again to return to its previous standards, with around EUR4 billion investment value. Office and core investments remain predominant, and the trend towards the development of a residential market remains visible. The demand for logistics assets (core and value-add) remains high, with limited products on the market; project developers tend to seek to form joint ventures with investors to secure their return on future pipelines and to retain property management functions.

The top ten deals of 2021 are as follows, with estimated values:

- Astro Tower – EUR240 million (office);
- Ghent Logistics Campus – EUR180 million (industrial);
- Quares Student Housing Portfolio – EUR155 million (residential);
- Stephanie Square – EUR146 million (office);
- PwC Campus – EUR131 million (office);
- Espace Orban – EUR122 million (office);
- Commerce 46 – EUR120 million (office);
- Tweed – EUR112 million (office);
- AXS Namur Offices – EUR110 million (office); and
- Portfolio Care-Ion – EUR103 million (residential).

1.3 Impact of Disruptive Technologies

The impact of new technologies remains limited, considering the publicity and enforceability requirements. However, the COVID-19 crisis has boosted the evolution towards a (more) digital world. Belgian law recognises electronic signatures as legal and enforceable (or at least it stipulates that they shall not be denied legal effect or admissibility as evidence in legal proceedings) and, under certain conditions, they are fully assimilated to wet ink signatures. For notarial deeds (eg, acquisition, mortgage), a data bank managed by the Federal of Notaries to store electronic signed deeds has been created, combined with the possibility to grant a digital power of attorney to execute notarial deeds, although only via a qualified electronic signature.

1.4 Proposals for Reform

The Belgian government has started a major reform of the (old) Civil Code. For the real estate sector, this involved a reform of property rights,

which entered into force on 1 September 2021. A reform of contract law has also recently been adopted by the relevant commission of the Parliament, and shall undoubtedly have major consequences for the real estate market, including on transactions, leases and development contracts.

2. SALE AND PURCHASE

2.1 Categories of Property Rights

The property rights under Belgian law are as follows.

- Ownership (*propriété/eigendom*) is the most complete right of enjoyment of a property and a perpetual right.
- The right to build (*droit de superficie/opstalrecht*) is a property right on a volume, on, above or below the property of another person. Except for property in volume, the right to build has a maximum duration of 99 years. Upon termination, the owner of the land becomes the owner of the erected constructions.
- The long-term lease right (*droit d'emphytéose/erfpachtrecht*) is the right to use a property and collect all income deriving from it as if the long-term lessee was the owner. A long-term lease right can be granted on the land and/or on existing buildings. The long-term lessee shall be the owner of the constructions erected by it until the expiry of the long-term lease right. The long-term lease right is granted for a minimum duration of 15 years and a maximum duration of 99 years.
- Usufruct (*usufruit/vruchtgebruik*) is the right to enjoy a property that is owned by another person. It is a temporary right (99 years maximum), which terminates upon the beneficiary's death (in the case of an individual) or upon its bankruptcy or dissolution (in the case of a corporation).
- Easements (*servitudes/erfdienstbaarheden*) are rights in rem vested on a property to the benefit of another property. They are indivisible and accessory rights that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property.

2.2 Laws Applicable to Transfer of Title

The Civil Code applies to transfers of title and provides for a consensual regime where a transfer is perfected between parties once there is an agreement on the object and the price; to be valid, the price must be determined or determinable.

In terms of formalities to perform a valid and/or enforceable transfer, specific attention must be paid to:

- zoning and planning regulations listing the information that must be delivered to a buyer prior to an acquisition;
- environmental regulations listing the information that must be delivered to a buyer prior to an acquisition and prescribing which formalities must be complied with in the case of potential contamination of the ground; and
- transcription and registration formalities to perfect the transfer.

These formalities apply in an asset deal.

No specific legal requirement applies in a share deal, except the recordation of the share transfer in the share register.

2.3 Effecting Lawful and Proper Transfer of Title

The title must be transcribed in the mortgage register. Only notarial deeds can be transcribed, and these deeds must also be registered, which triggers the payment of transfer taxes. The mortgage register keeps track of transfers of property rights over the past 30 years; it also indicates

whether the property is burdened with a mortgage or has been subject to title or zoning litigation.

There is no state guarantee on the title. "Title insurance" is starting to develop in the framework of real estate transactions, but it is not yet common.

For share deals, the recordation of the share transfer in the share register is required.

The COVID-19 pandemic and related lockdown measures have not had a major impact on the transaction flow. Notaries and lawyers were recognised as "essential" and their offices remained open but the market has rapidly shifted towards digital signatures, including for notarial powers of attorney.

2.4 Real Estate Due Diligence

Real estate due diligence is usually carried out by lawyers and covers the following topics:

- title;
- use;
- building and environmental permits;
- leases;
- construction and management contracts;
- the soil situation;
- VAT and transfer taxes; and
- litigation.

Technical and environmental advisers usually carry out technical due diligence on the physical status of the property and compliance with conditions under the permits.

In share transactions, extensive corporate and tax due diligence is performed.

2.5 Typical Representations and Warranties

Representations and warranties will typically be limited by the seller's disclosures, including the data room, so it is essential to agree on a representation about this data room. Parties should also pay attention to disclosures covering "all publicly available information" and at least agree on a closed list and a cut-off date, since not all this information is available online.

Sale in General

By law, the seller is bound by two obligations:

- the delivery of the object of the sale; and
- the guarantee of the object of the sale.

This guarantee is twofold, covering peaceful possession (a guarantee against eviction) and any hidden defects. From a legal standpoint, the seller cannot exclude liability for hidden defects of which they were aware.

These two obligations apply to both asset and share transactions.

The parties can contractually limit these guarantees, which often occurs in transactions between institutional investors.

The sale and purchase agreement shall also contain standard representations on the capacity of both parties to contract and execute their respective obligations.

Asset Transactions

As a starting point, it must be said that asset transactions are regulated in terms of information to be provided to the candidate buyer on zoning, environment, soil, etc. The absence of such information is often a ground for annulment of the sale.

Parties are free to agree on a set of representations and warranties, mainly concerning title, leases, permits and contracts.

Share Transactions

As the guarantees provided by law are limited to the shares, it is market practice to agree on an extensive set of representations and warranties covering all real estate-related items, corporate matters, litigation and taxes.

State of the Building

The practice is to agree on an "as is, where is" status, and to reflect potential issues in the price.

Buyer's Remedies

Under Belgian law, the buyer can request the annulment of the sale if their consent has been vitiated, and can claim damages if there has been any misrepresentation. A claim for damages must demonstrate the damage suffered, the fault of the seller (ie, the misrepresentation) and the link between the damage and the fault.

In share transactions, specific attention is required when defining the damage and drafting the claim procedure in order to ensure that a misrepresentation at target level (eg, compliance with tax law) can qualify as damage (and for which amount) in the hands of the buyer.

Parties usually agree on exclusive remedy clauses limiting the possibility for the buyer to claim damages exclusively in accordance with the provisions of the sale and purchase agreement, meaning they can only claim damages for misrepresentation and within the indemnification limits, except in cases of fraud. When the seller is an SPV and presents potential issues in terms of financial robustness (eg, the risk for future liquidation), a parent guarantee is often negotiated as a security mechanism.

COVID-19 Impact

The COVID-19 pandemic has not had an impact on representations and warranties, but has influenced due diligence, especially on lease aspects (with a focus on tenants' requests for rent reductions and/or payment schemes) and technical aspects (with a focus on the ventilation of buildings).

W&I Insurance

A minority of share deals involve the conclusion of W&I insurance, often in large transactions and/or when the foreign buyer is used to having such insurance in place. However, this product is attracting increasing interest in the market.

2.6 Important Areas of Law for Investors

The investor must first have a complete view of the conditions that might affect the title, particularly pre-emption rights and specific conditions that might be imposed in the property title. The existence of such specific conditions is usual for logistics assets, mainly consisting in economic conditions (eg, employment conditions). These conditions might impede an investor's full enjoyment and, more fundamentally, the bankability of a project.

The investor should then have a comprehensive understanding of the lease law, especially when the asset involves retail or residential elements. The legislation on retail leases and residential leases contains a series of provisions that are mandatory and protective for the tenant.

In an investment in view of a development, the zoning regulations are to be reviewed carefully as they will determine whether the contemplated development is authorised in terms of destination and size.

2.7 Soil Pollution or Environmental Contamination

As a matter of principle, the "polluter pays" principle is applicable in Belgium, so an investor (landowner) should not be held liable for contamination caused by another person. However, the legislation on this subject in each Region provides for a "waterfall" responsibility, with the first in line being the polluter but, in the absence of identification or in the case of bankruptcy, there will be recourse to the owner. It is therefore highly recommended to have appropriate verifications carried out, from both an environmental and an insolvency standpoint.

The potential responsibility for soil contamination depends on the structure of the acquisition, with legal protection being available only in asset transactions.

Share Transactions

In a share transaction, the risks and liabilities, if any, remain with the target company and are inherited by the investor, including for any historical environmental damage. The applicable regulations do not protect the investor in share transactions since no specific (soil) formalities are provided for. Therefore, this should be part of a regular due diligence exercise.

Asset Transactions

The (most relevant) trigger event of soil formalities and sanitation is the "transfer of a risk land". Although the concept might differ depending on the Region concerned, an "asset deal" – being a straightforward purchase or the granting of a right in rem – shall most often qualify as a "transfer" in Brussels and Flanders. The question of whether one can speak about a "risk land" shall depend on the activities effectively carried out in the premises (with or without an environmental permit). If the asset transaction concerns a "risk land", then the transferor has the obligation to perform a soil study and, depending on the results, to execute sanitation measures prior to the transfer. Even if the responsibility for complying with these soil formalities lies with the transferor, it can be shifted to the transferee if certain conditions are met.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

In each Region, the general legal framework for zoning and planning is embodied in a Town Planning Act. In relation to the permitted use, zoning plans have been enacted that contain binding conditions on the nature of the buildings and the activities that can be authorised in each area. These zoning plans exist at the level of the Region, the province and the municipality.

A buyer can ascertain the permitted use by requesting the "town planning information" at the municipality in which the real estate is located. This official document mentions the applicable zoning plan and lists the permits requested. The detailed prescriptions of the zoning plan are available online most of the time.

2.9 Condemnation, Expropriation or Compulsory Purchase

There are three possibilities for a governmental entity to take (back) a land or real estate asset.

The Expropriation Procedure

An authority may decide to expropriate a property based on public interest (eg, the redevelopment of an area within a municipality). The authority shall then enact an expropriation plan that can be disputed before administrative courts. In the execution phase, the authority is obliged to pay fair and prior compensation for the expropriated property. The Constitutional Court has ruled that partial expropriations are valid and compatible with the property right protected by the Constitution if the following conditions are met:

- the fair compensation includes a depreciation for the non-expropriated portion of the property; and
- the owner has the right to oblige the authority to acquire the remaining part of the property for a price corresponding to its normal selling value after expropriation.

The Pre-emption Right

By law or contractually, authorities may benefit from pre-emption rights. This situation is frequently seen for logistics or residential assets. Subject to a review of each relevant provision, the authority has the right to be preferred if it matches the price and other conditions offered. The absence of the exercise of such pre-emption right is always a condition precedent to the sale.

The Repurchase Right

It is common for property titles related to logistics properties in Belgium to contain special conditions. This is due to the fact that most of the industrial ground on which logistics buildings are currently located was initially purchased from public authorities and/or most of the logistics buildings have been built by means of subsidies.

The law on economic expansion – which has now become a regional competence – clearly defines the conditions under which private investors can acquire, develop, operate and sell these industrial grounds. Each deed pertaining to the sale of these industrial grounds must provide the economic activity to be carried out as well as the other conditions of use.

The clear goal of this legislation (and the related special conditions that are included in property titles) is to ensure that an economic activity is effectively deployed on the site. Consequently, all deeds of sale related to these industrial grounds contain the obligation for the purchaser to carry out a certain economic activity. The deeds usually also include an obligation for the purchaser to construct certain industrial buildings and to request the prior written approval of the public authority if they intend "to alienate" the ground (and, as the case may be, the buildings constructed thereon), whereby the term "to alienate" is often broadly defined (sale, lease, granting a personal right/right in rem, contribution in kind, etc). In certain cases, a minimum level of employment is also required.

If the purchaser ceases the economic activity or does not comply with the other conditions of use mentioned in the deed, the authority has the right to repurchase the ground and the buildings constructed thereon for a pre-determined price.

2.10 Taxes Applicable to a Transaction

Asset Transactions

Asset deals are subject to either transfer tax or VAT, depending on whether or not the asset qualifies as "new" for VAT purposes. The standard VAT rate is 21%. The transfer tax rate is 12% in Flanders and 12.5% in Brussels and Wallonia. The transfer tax rate is 2% for long-term lease rights and rights to build.

Share Transactions

Share deals (including in changes of control or corporate restructurings) are not subject to transfer tax, stamp duty or VAT, unless the tax administration demonstrates that an abuse has occurred.

2.11 Legal Restrictions on Foreign Investors

There are no specific restrictions on foreign investors, but attention must be paid to the EU regulations on the prevention of money laundering and the financing of terrorism, and on sanctions, since economic operators might be prevented from entering into a business relationship with parties that are subject to restrictive measures or for which client due diligence is not conclusive.

3. REAL ESTATE FINANCE

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions of commercial real estate are generally financed by equity, senior debt and intragroup (subordinated) debt. The structuring of the financing depends on the acquisition structure.

- Asset deal – the senior debt shall be drawn down by the acquisition vehicle and the purpose of the loan is to finance the acquisition.
- Share deal – the senior debt can take the form of an acquisition debt whose purpose is the acquisition of the shares and/or of a refinancing debt whose purpose is to refinance the existing indebtedness of the target company.

3.2 Typical Security Created by Commercial Investors

The typical security package consists in a mortgage over the property right and a pledge of related receivables (rents, bank accounts, insurances).

In addition, it is frequent to have:

- a pledge of shares (the investor pledging the shares of the borrower), in which case particular attention must be paid to the appropriation clause and the price determination formula; and
- a pledge on the counterparty's receivables (the investor pledging the claim receivables and guarantees against the seller, the contractor), in which case it must first be determined whether these receivables are transferable to the lenders.

The investor shall also agree on the subordination of any intragroup loan, most of the time subject to a specific waterfall mechanism allowing the repatriation of free cash flows.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no specific restrictions on the granting of security interests to foreign lenders, nor on making repayment to those lenders. Under tax laws, payments to persons established in non-co-operative jurisdictions are subject to reporting obligations and, in most cases, to interest withholding tax. The borrowers usually protect themselves via restrictions to transfer in the finance documents.

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

Mortgages are subject to 1% transfer tax and 0.3% inscription duty computed on the amount for which they are inscribed. Notary fees and mortgage keeper fees are also due, and are calculated based on sliding scales. The enforcement of a mortgage results in a sale being subject to transfer taxes.

3.5 Legal Requirements before an Entity Can Give Valid Security

The validity of the security package must be assessed against the corporate purpose and interest and the financial assistance prohibition.

Corporate Purpose and Interest

A company can validly enter into transactions if the following conditions are met:

- it derives a certain economic benefit in return;
- the transactions favour the realisation of the specific corporate purpose as laid down in the articles of association; and
- the transactions are in the company's best interest.

These questions are relevant in the case of cross-collateralisation and should be carefully justified in the corporate resolutions.

Financial Assistance

Belgian corporations are prohibited from making advances or granting security interests in relation to the acquisition of their own shares, unless very strict conditions are met. The financial assistance prohibition is a particular concern in share transactions, where the investor must first assess the leverage capacity at the target's level to determine the refinancing debt. Ordinary limited partnerships are not subject to this prohibition.

3.6 Formalities when a Borrower Is in Default

The rank of securities will determine their priority in the case of insolvency and enforcement.

A mortgage requires a notarial deed to be registered and inscribed, and the ranking is determined by the inscription in the mortgage register. For a pledge of shares, the pledge shall be inscribed in the share register of the company.

The creation and perfection of commercial pledges are effected by the sole conclusion of the pledge agreement, provided that the pledgee has the right to notify the debtors of the pledge. However, to make the pledge enforceable, the debtor will have to be notified of, or acknowledge, the pledge. Following notification or acknowledgment, the debtor's obligations can no longer be discharged by payment to the pledgor. Therefore, in the case of the borrower's default, and provided the pledges were not yet notified, the first action is to proceed with such notification.

During the pandemic, a general and temporary moratorium was put in place, preventing enforcement, and therefore decreasing the risk of bankruptcy. This measure was not specific to the real estate sector.

3.7 Subordinating Existing Debt to Newly Created Debt

Contractual subordination of existing debt or new debt is authorised under Belgian law, and is agreed via a subordination agreement or an intercreditor agreement determining the rights of each type of creditor.

3.8 Lenders' Liability under Environmental Laws

Generally, lenders will not be liable for the borrower's environmental damages and breaches of environmental law as the "polluter pays" principle applies, and it can be assumed that the lender has not caused the environmental damage.

3.9 Effects of a Borrower Becoming Insolvent

In principle, security interests remain valid in the subsequent insolvency of the borrower.

Bankruptcy

Certain transactions made between the date of cessation of payments and the date of bankruptcy may not be enforceable against third parties. The cessation of payments is deemed to fall on the date the court sets the adjudication of bankruptcy, unless there are serious and objective reasons that unmistakably indicate otherwise. If – and only if – such reasons exist, the court can bring forward the date of the cessation of payments, to the date of the commencement of the "suspect period" before bankruptcy. In principle, the date of cessation of payments cannot be set to more than six months before the adjudication of the bankruptcy (unless the company was dissolved more than six months prior to its declaration into bankruptcy, in which case the date of cessation of payments can be brought forward to the date of the winding-up decision (or the company's factual liquidation) if there are indications that the company was wound up to prejudice its creditors). Security interests granted during the suspect period shall be nullified

and accordingly not be enforceable to the extent they secure pre-existing debt.

Judicial Reorganisation

There is no "suspect period" prior to judicial reorganisation. However, if the debtor applied for judicial reorganisation but is later declared bankrupt, the date of cessation may be brought forward in accordance with the rules set forth above. In a judicial reorganisation, with few exceptions (certain secured creditors), enforcement procedures against the company's assets are suspended for a maximum of six months, with a possible extension of a further six months (or 12 months in exceptional circumstances).

3.10 Consequences of LIBOR Index Expiry

The Belgian financing market is driven by EURIBOR, so the expiry of the LIBOR index is expected to have no impact.

4. PLANNING AND ZONING

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Zoning plans have been enacted that contain binding conditions on the nature of the buildings and the activities that can be authorised in each area. These zoning plans exist at the level of the Region, the province and the municipality.

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

The construction, modification, renovation and extension of a building require a building permit, as does a change of the use of a property (office, retail, etc). Via the permit application, the authority can control the design and appearance, and the compliance with the zoning plan. Other conditions may then apply, depending on the facts (the results of the public inquiry, environmental impact assessment, fire safety, etc).

4.3 Regulatory Authorities

The authority to grant a permit for a development or refurbishment lies primarily with the municipality in which the real estate is located. For large-scale projects, the competence is shifted to the Region. The authority shall apply the regional and local zoning regulations and rely on different compulsory advices.

4.4 Obtaining Entitlements to Develop a New Project

The procedure to obtain a permit varies from Region to Region, but the main common characteristics can be summarised as follows:

- the filing of a permit application together with, depending on the type and/or size of the project, an environmental impact assessment;
- obtaining the advice of various authorities (eg, regional town planning service, fire brigade); and
- the organisation of a public inquiry, allowing interested third parties to file their objections.

The length of the procedure varies depending on the Region and the projects, but four to six months is a fair estimate.

4.5 Right of Appeal against an Authority's Decision

The authority's decision can be appealed by any parties showing an interest before the administrative college or jurisdiction.

4.6 Agreements with Local or Governmental Authorities

Provided that the public procurement regulations are complied with, it is permitted to enter into agreements for development with local

authorities (eg, for a specific development to be carried out on land belonging to an authority).

4.7 Enforcement of Restrictions on Development and Designated Use

Various sanctions can apply if permit requirements are breached or if a development is carried out without the adequate permit. These sanctions include:

- administrative sanctions or measures, such as an order to cease the infringement, to carry out adaptation works or to reinstate to the initial state, and fines and penalties; and
- criminal sanctions subject to actual legal action by the public prosecutor. For companies, the imprisonment sanctions are converted into fines.

5. INVESTMENT VEHICLES

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

Direct Acquisition

Foreign investors can directly acquire the property right.

Indirect Acquisition

Three main types of entity are available to hold real estate assets:

- a corporation (SPV) – ie, a private limited liability company (*société à responsabilité limitée/besloten vennootschap* – SRL/BV) or a public limited liability company (*société anonyme/naamloze vennootschap* – SA/NV);
- an ordinary limited partnership (*société en commandite simple/gewone commanditaire vennootschap* – SCS/CommV) – this type of vehicle is not subject to capital protection rules, including the prohibition of financial assistance; or
- a specialised real estate investment fund (*fonds d'investissement immobilier spécialisé/gespecialiseerde vastgoedbeleggingsfonds* – FIIS/GVBF) incorporated under the form of an SA/NV or an SCS/CommV.

Investors might opt for a FIIS/GVBF either as the acquisition vehicle (of the shares or the asset) or by converting an SPV. The main advantage is its accounting regime and its tax regime. Financial statements must be established under IFRS and the investment income is not subject to corporate income tax. The FIIS/GVBF should also allow the qualification of the investment as "real estate" in accordance with the Solvency II regulation. However, the following tax cost is associated with this structure:

- the entering into this regime triggers "exit tax" – ie, taxation of the latent gain on the asset at a rate of 15%; and
- the entity must distribute most of its profits annually, which will trigger withholding tax based on any applicable tax treaty. In this respect, dividends distributed to foreign pension funds should benefit from a withholding tax exemption based on Belgian tax law.

From a regulatory standpoint, the FIIS/GVBF is an alternative investment fund, either by option if it only has one investor or is a joint venture, or by law in the case of multiple investors.

5.2 Main Features of the Constitution of Each Type of Entity

The incorporation of each type of entity requires a notarial deed containing the articles of association of said entity. Prior to the execution of the incorporation deed, the founding shareholders must:

- fulfil all know-your-customer requirements;
- open a bank account to which the amount of the share capital shall be wired; and

- justify the funding of the company through the establishment of a financial plan to be annexed to the incorporation deed.

5.3 Minimum Capital Requirement

No minimum share capital is provided by law for SRL/BV and SCS/CommV. For SA/NV, the minimum share capital amounts to EUR61,500.

5.4 Applicable Governance Requirements

SRL/BV

The shareholders of an SRL/BV can appoint one or more persons as directors, acting individually or as a board. If a legal entity is appointed as director, it must designate a permanent representative who must no longer be chosen from amongst its shareholders, managers, directors or employees. Daily management powers can be delegated to one or several persons.

SA/NV

In terms of governance, a public limited liability company must choose between different options:

- a monistic structure, whereby the company is governed by a board of directors;
- a true "dual system", whereby the company is governed by a management board, under supervision of a supervisory board; or
- a sole directorship.

Daily management powers can be delegated to one or several persons.

SCS/CommV

The partners are free to determine their governance rule, it being understood that the SCS must have at least two partners, one of whom is the general partner entrusted with the management of the SCS and bears unlimited liability in relation to its debts and obligations.

FIIS/GVBF

In addition to the requirements applying to an SA/NV or an SCS/CommV, the FIIS/GVBF (as an alternative investment fund) may also be obliged to appoint a licensed manager, unless an exemption applies. Note that by derogation to common law, a FIIS/GVBF incorporated as an SCS/CommV might have only one shareholder.

5.5 Annual Entity Maintenance and Accounting Compliance

For ordinary companies, the annual entity maintenance can range between EUR20,000 and EUR40,000 and covers an external accountant, a domiciliation agent and directorship and the yearly audit process.

In a FIIS/GVBF, a licensed manager may be appointed and a yearly compliance questionnaire must be answered and submitted to the tax administration. Depending on whether or not an external licensed manager must be appointed, the annual entity maintenance cost can exceed EUR75,000.

6. COMMERCIAL LEASES

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

Two types of arrangements can be considered: a personal right (ie, a lease agreement) or a property right (ie, a usufruct right).

6.2 Types of Commercial Leases

Commercial premises are rented via a common lease or a retail lease.

- Common leases (eg, for office spaces) are regulated by the Civil Code and, contrary to the retail lease, those legal provisions are not mandatory except for the prohibition of perpetual leases.

- Retail leases apply to professionals that are in direct contact with the public in the leased premises, which are primarily used for retail activities. These leases are governed by the Commercial Lease Act, which includes a wide raft of mandatory legal provisions, mostly for the benefit of the tenant.

6.3 Regulation of Rents or Lease Terms

The parties are free to negotiate the rent level and the type of rent. The most frequent form remains a fixed rent, but hotel businesses and shopping centres also apply variable rent based on turnover, subject to a minimum guaranteed rent. Under a retail lease, a rent review mechanism applies.

Several regional incentives were enacted in response to the COVID-19 pandemic, mostly combining a rent reduction with a financing for the authority to guarantee the rent payment to the landlord, but most of these measures have been used by individuals. In general, parties have negotiated rent reductions, often in combination with other advantages for the landlord (eg, lease term extension, green provisions in leases). The market has not seen a wave of evictions or litigation.

6.4 Typical Terms of a Lease

Length of Lease Term

No specific provision applies in a common lease, subject to a prohibition on perpetual leases.

The minimum duration of a retail lease is nine years, subject to a tenant's break option every three years and a tenant's option to renew three times.

Survey of the Premises

The parties must draw up a survey report of the premises within one month of occupancy. In order to establish whether the tenant is responsible for damages to the leased premises at the end of the lease, the survey report upon entry must be compared with the survey report drawn up at the end of the lease. This measure is protective to the landlord. If no survey report is drafted at the beginning of the lease, the tenant is deemed to have received the leased premises in the same condition as that in which they are returned at the end of the lease (except for normal wear and tear). Consequently, the burden of proof regarding damages caused by the tenant to the leased premises lies with the landlord.

Maintenance and Repairs

The default rule is a tenant-friendly provision where the tenant will only be liable for small maintenance and repair works. However, parties frequently derogate from this, providing for a landlord-friendly provision where the landlord shall only support major repairs (structure, roof, weathertightness, etc). In certain sale and lease-back transactions, lease agreements stipulate that all maintenance and repairs, including major repairs, are the tenant's responsibility.

Impact of COVID-19 Crisis

Force majeure in the strict sense of the legislation does not apply to payment obligations, and hardship is not recognised under Belgian law. Because of the COVID-19 crisis, parties have recently been negotiating ad hoc force majeure or hardship clauses into their agreements.

6.5 Rent Variation

Indexation

Lease agreements may contain different types of price variation clauses, including the traditional indexation clause that provides for an adjustment of the rent to the costs of living on a yearly basis.

Rent Review

Under a retail lease, for a period of three months prior to the end of each three-year period, each party can file a request to review the rent, pro-

vided that the rent value of the leased premises has changed by at least 15% due to new circumstances.

6.6 Determination of New Rent

Regular Indexation (Cost of Living)

The indexation formula is set by law, and it is common to agree that indexation will apply automatically.

Retail Lease

The rent revision under a retail lease is subject to legal proceedings, with the new rent being determined by the judge based on the arguments of the parties, usually substantiated by third-party experts.

6.7 Payment of VAT

Real estate letting is (mainly) a VAT-exempt activity, but a VAT option for B2B leases has existed since 1 January 2019, as well as other alternatives.

B2B VAT Leases since 1 January 2019

The parties to a lease agreement can jointly opt to subject rent to VAT, provided that:

- the letting concerns a "new building" (or part thereof) – ie, buildings for which VAT on construction or refurbishment cost became chargeable for the first time on 1 October 2018 at the earliest;
- the building is used for the economic activity of the tenant; and
- the option is valid for the entire duration of the lease.

Performing a VAT-taxable letting activity allows the landlord to deduct input VAT on the construction or refurbishment cost but shall at the same time extend the VAT clawback period to 25 years.

Other alternatives to a VAT-exempt letting include the following:

- the renting out of warehouse space;
- the renting out of a parking space;
- the provision of hotel accommodation;
- a financial VAT lease;
- the granting of the right to perform a professional activity in the building;
- the granting of a property right on a "new" building;
- a special regime for shopping centres; and
- a special regime for "business centres" or "service centres".

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

Payments on top of the rent at the start of a lease are not common. In the retail sector, such payment can be envisaged in the case of a transfer of business and lease.

6.9 Payment of Maintenance and Repair

In a multi-tenant situation, maintenance and repair are usually allocated in proportion to the square metreage of rented private premises.

6.10 Payment of Utilities and Telecommunications

Most of the time, the tenants take care of a private connection to utilities and communications.

6.11 Insurance Issues

Two types of insurance should be considered:

- property insurance, which is usually taken out by the landlord and the cost of which is recharged to the tenant, covering the events of destruction, fire, explosion, water damage, terrorism, etc; and
- the tenant's insurance, which covers its own operation and liability as well as the tenant's fit-out and furniture. With respect to business interruption insurance policies, practice has

shown that the COVID-19 pandemic was usually excluded, resulting in the tenant not being able to seek indemnification.

6.12 Restrictions on the Use of Real Estate

The use (office, retail, etc) and activities determined for the premises should comply with the zoning regulations. The parties are free to further determine any specific restrictions in the lease agreement.

6.13 Tenant's Ability to Alter and Improve Real Estate

Common Lease

Unless otherwise agreed, tenants are only allowed to alter the premises if the alterations can be removed at the end of the lease without damaging the premises. If the landlord did not agree to the removable alterations, the landlord may keep the alterations, provided an indemnity is paid to the tenant. However, if non-removable alterations were made without the landlord's consent, the landlord can either request their removal at the tenant's expense or maintain the alteration without paying an indemnity to the tenant.

Retail Lease

In addition to these general principles, a tenant is allowed to perform any necessary useful and important works to adjust the premises to their business needs, provided the following conditions are met:

- the works do not permanently alter the structure of the property;
- the total cost does not exceed three years' rent; and
- the works do not affect the safety of the property, its aesthetic value or its health aspects.

Prior to carrying out such works, the tenant must request the approval of the landlord by way of a formal procedure and may submit the matter to the judge in the case of disagreement.

6.14 Specific Regulations

For residential leases, in addition to the housing standards established by the Regions, the leased premises must also respect the basic safety, health and habitability requirements. If these basics standards are not met, the tenant is entitled to require the execution of the necessary works or to terminate the lease and claim damages.

6.15 Effect of the Tenant's Insolvency

Termination Clause and Termination Condition

The lease agreement may contain a termination condition, pursuant to which the lease automatically ends in the event of the tenant's bankruptcy. Such clause is valid in principle. This kind of clause must be distinguished from a mere termination clause, which does not provide for the automatic termination of the contract and relies upon the fault of the other party. A termination clause is ineffective.

Payment or Enforcement of the Claim

Once an order in bankruptcy has been issued, the individual enforcement of creditors' rights is suspended, subject to limited exceptions. In other words, the landlord can no longer enforce its claim on the tenant's assets. The landlord will have to file (in due time) a statement of claim, which includes all the unpaid rent (past and future) and his preferential status granted by law. In a judicial reorganisation scenario, a moratorium is granted to the debtor in judicial reorganisation, which entails the general suspension of any creditors' enforcement rights, preventing the landlord from claiming payment of the outstanding rent that dates from before the opening of the reorganisation proceedings. However, it does not preclude the landlord from enforcing their claim on the debtor's assets for

unpaid rent relating to the period following the opening of the judicial reorganisation.

Eviction of the Tenant

In the event of the tenant's bankruptcy, the landlord is entitled by law to repossess the premises but this may be delayed as the receiver in bankruptcy must, among other things, have the necessary time to sell off any movable assets in the premises. In a judicial reorganisation, the eviction of a tenant based on unpaid rent for the period following the opening of the judicial reorganisation should be permitted, as such a debt is not subject to the moratorium granted to the tenant. For debts that are subject to the moratorium, it is most likely that the landlord could not evict the tenant, especially if the building is the place where the tenant carries out their commercial activities.

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

Rental Guarantee

There is no specific provision dealing with rental guarantees. In practice, it is usual for a landlord to request a guarantee equivalent to three or six months' rent, in the form of a deposit or a bank guarantee, or a higher amount depending on the duration of the lease and payment frequency.

Priority Right

Landlords also benefit from a statutory priority right (*voorrecht*/*privilège*) on the movable assets that furnish the leased premises.

6.17 Right to Occupy after Termination or Expiry of a Lease

A lease terminates automatically upon its expiry date, and the tenant is not allowed to occupy the premises beyond this date. However, in retail leases, if a tenant who lost their right to renewal remains in the premises after the expiry date, the lease agreement will be tacitly renewed for an indefinite period. The landlord is entitled to terminate the new lease by giving prior notice of 18 months or more, without prejudice to the right of the tenant to request the renewal of the lease. This provision is mandatory in favour of the tenant.

6.18 Right to Assign a Leasehold Interest

Unless otherwise agreed, tenants are free to sublease or assign the leased premises to third parties; only subleases or assignments to third parties intending to have their main residence in the leased premises are prohibited. To protect landlords against any adverse consequences of such assignments or subleases, most leases include restrictions on assignment or sublease. For retail leases, no restriction of assignment will be given effect if the assignment or sublease is done in conjunction with the transfer of the business, unless the landlord themself or their close relatives have their residence in the premises. The tenant must nevertheless comply with a strict formal procedure.

6.19 Right to Terminate a Lease

Lease agreements can be terminated in the following manner prior to their expiry date, subject to contractual arrangement:

- following the transfer of the leased premises, provided that the lease contains an eviction clause;
- by mutual consent;
- if the property is totally destroyed by force majeure during the lease. However, if the property is only partly destroyed, the tenant may choose between a rent reduction or the termination of the lease (in which case the landlord cannot claim any damages from the tenant); or
- by court decision following a contractual breach and subject to the assessment of the

judge as to whether the breach is sufficiently serious to justify the termination of the lease.

If explicitly stipulated in the retail lease, the landlord may also terminate the lease every three years if they give notice by registered letter or by bailiff's writ, no later than one year prior to the end of the three-year period, and they or a close relative intend to run a business in the leased property. In such case, the tenant can claim an eviction indemnity, the amount of which depends on the nature of the new business.

6.20 Registration Requirements

Registration

Registration of the lease is a legal obligation that usually lies with the landlord, although the associated costs are borne by the tenant. Registration gives the lease a "fixed date", limiting the eviction possibilities by a third party claiming property right on the leased premises, such as the purchaser of the asset.

Notarisation

All leases exceeding nine years or including the discharge of a three-year rent must be executed before a notary and recorded in the mortgage register. If these formalities are not satisfied, the lease will not be enforceable beyond the nine-year term against bona fide third parties claiming a property right on the leased premises.

6.21 Forced Eviction

In the case of default, a tenant can be forced to leave and vacate the premises. Legal proceedings can take around six months or more.

6.22 Termination by a Third Party

The lease as such cannot be terminated by a third party, but shall terminate if the leased premises are expropriated. The tenant can claim an indemnity in such a case.

7. CONSTRUCTION

7.1 Common Structures Used to Price Construction Projects

The most common price structure is the fixed price contract, subject to adjustment if changes are requested by the owner.

7.2 Assigning Responsibility for the Design and Construction of a Project

Three entities are assigned responsibility for design and construction:

- the architect is liable for the design and must also supervise the execution;
- the contractor is liable for the execution of the construction, including in case of sub-contracting; and
- the consulting engineers have a controlling role at the design and execution stage.

7.3 Management of Construction Risk

Owners benefit from a mandatory legal protection – ie, the ten-year liability for structural defaults. A contractual relationship must exist between the victim and the author of the damage. However, the ten-year liability is asset-bound and will pass to the transferee in its capacity as the new owner. It is a liability and not a guarantee, and therefore the fault must be proven. It runs for ten years from the acceptance of the works (provisional or definitive acceptance as determined contractually).

The parties may then agree on the following series of contractual provisions, it being understand that they may be jeopardised in the transfer of the property:

- with respect to hidden defects, a ten-year liability may also apply as of (provisional or final) acceptance, subject to contractual limitations in scope and/or time. In such a case, the fault, damage and causal link must be

demonstrated, and the owner must act without any delay as of the moment the default is discovered;
- guarantee provisions for defects detected within a certain period of time (eg, two years from provisional acceptance for heating, ventilation and air conditioning);
- retainer or bank guarantee, usually amounting to 5% of the construction price, to guarantee the curing of the snag items and to be released on final acceptance;
- penalties in case of delay; and
- a set of warranties and indemnities.

7.4 Management of Schedule-Related Risk

Parties shall usually agree on a construction schedule and mitigate the risk with ad hoc force majeure clauses on the contractor's side, and with penalties on the owner's side.

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

The most common guarantee is the retention of a bank guarantee, usually representing 5% to 10% of the agreed construction price. In forward transactions, parties usually agree on a completion guarantee (eg, bank guarantee) covering all sums necessary to terminate the works or to reimburse the sums paid by the (future) owner in case of the termination of the contract because of non-completion of the works, and step-in rights in case of default prior to the delivery of the premises.

7.6 Liens or Encumbrances in the Event of Non-payment

Architects and contractors benefit from a lien on the real estate for an amount corresponding to the gain in value upon the sale of the property resulting from the works.

Contractually, the parties usually agree on a direct payment from the bank to the contractor (in the case of external financing) and/or a parent guarantee or bank guarantee for the price of the contract.

7.7 Requirements before Use or Inhabitation

Parties are free to determine the requirements to consider a project completed and fit for its intended use. Contrary to other countries, there is no verification by the authority.

When the intended use is residential, in the broad sense, regional regulations often impose a specific permit (for letting, hotel operation, etc).

8. TAX

8.1 VAT

Asset deals are subject to either transfer tax or VAT, depending on whether the asset qualifies as "new" for VAT purposes.

- A building is deemed new for VAT purposes until 31 December of the second year following its first use or occupancy. Heavy refurbishment allows the qualification as "new building" in the following circumstances:
  (a) when a drastic modification of essential elements (ie, the nature, structure or destination, whatever the costs of the works might be) is executed; or
  (b) when modifications are executed, the cost of which (excluding VAT) equals at least 60% of the market value of the building (excluding ground) at the end of the works.
- Compulsory VAT taxable transaction for new buildings – if the owner is a professional developer (ie, performs construction and sales as a regular activity, or has the intention to do so), the sale of the asset or the granting of a property right (ie, long-term lease, right to build or usufruct) must be subject to VAT at

the standard rate of 21%. Under specific conditions for the residential sector, a reduced rate of 6% can apply.
- Optional VAT taxable transaction for new buildings – when the owner is not a professional developer, they can opt to subject the transaction to VAT instead of transfer taxes. This option must be clearly mentioned to the purchaser and included in the (private) purchase agreement. Specific reporting formalities apply.
- Transfer taxes – in a straightforward sale or the granting of a usufruct right, the applicable rate is 12% in Flanders and 12.5% in Brussels and Wallonia, computed on the sale price or the market value, whichever is higher. Long-term lease rights and rights to build are subject to 2% transfer tax computed on the total of the fees paid to the owner over the full duration of the right increased by the charges contractually borne by the beneficiary.

8.2 Mitigation of Tax Liability

Share Transaction

Share deals are not subject to transfer tax, stamp duty or VAT, unless the tax administration demonstrates that an abuse has occurred. The seller should also realise a tax-exempt capital gain but at the same time the purchaser shall, indirectly, inherit from the book value of the underlying asset (ie, no step-up in value). Market practice is to share the expected future tax costs between seller and buyer, by agreeing on a discount for tax latency most of the time equal to half of the corporate income tax that would have been due in the case of an asset transaction.

Asset Transaction

A new form of "asset deal" is being seen on the market, where an investor shall acquire a long-term lease right, subject to 2% transfer tax, and a third party shall acquire the residual property rights, subject to 12% or 12.5% transfer tax. To guarantee the liquidity of the asset, the transferee of the long-term lease right usually benefits from an option to acquire the residual property rights at market value.

8.3 Municipal Taxes

An annual property tax (*précompte immobilier/onroerende voorheffing*) applies for all locations and types of business, the rate of which depends on the Region and the municipality. In addition, depending on the location and the type of business, regional taxes and municipal taxes apply – eg, local taxes on office spaces or parking spaces, or unoccupied premises. These local taxes are usually recharged to the occupant, with the notable exemption of property tax for residence premises, which is by law borne by the owner.

8.4 Income Tax Withholding for Foreign Investors

Direct Acquisition by Foreign Investors

Foreign investors can directly acquire ownership or the long-term lease right. In such a case, the revenues and capital gain shall be subject to tax in Belgium, at the ordinary corporate income tax rate of 25%. No profit branch tax applies.

Indirect Acquisition by Foreign Investors via an SPV

Revenue from real estate income and capital gains shall be subject, for their net amount, to corporate income tax at a rate of 25% in the hands of the SPV.

Belgian source dividends shall benefit from a withholding tax exemption if the shareholder is subject to regular income tax, is resident in a treaty country and has no dual residence, is incorporated in one of the forms listed in the annex to the EU Parent-Subsidiary Directive or in an analogous form, and holds at least 10% of the capital of the Belgian subsidiary. Beside these formal conditions, specific attention is required for substance requirements and benefi-

cial ownership entitlements. Reduced rates also apply to shareholders that are treaty protected.

In the absence of protection, the standard withholding tax rate is 30% (reduced as the case may be by any applicable tax treaty).

Indirect Acquisition by Foreign Investors via a FIIS/GVBF

If the investment vehicle is a REIT or an S-REIF, real estate income and capital gains are excluded from the taxable base, but the taxation is shifted to the investor via the compulsory annual dividend distribution. Such distribution is subject to withholding tax, albeit at a reduced rate if there is treaty protection.

Specific Dividend Withholding Tax Exemption for Foreign Pension Funds

In accordance with domestic law, a withholding tax exemption applies to the benefit of foreign pension funds, provided that the pension fund:

- is a non-resident legal person with the sole purpose of managing and investing funds collected for the purpose of paying statutory or supplementary pensions;
- engages in these management and investment activities without the aim of making profit and in the framework of its statutory purpose;
- is exempt from income taxes in its country of residence;
- is the owner or usufructuary of the income-generating assets; and
- is not obliged to transfer the income of such assets to the beneficial owner by virtue of a contractual obligation.

8.5 Tax Benefits

No specific tax benefit is linked to the owning of real estate. Tax laws follow accounting rules in Belgium, unless a specific derogation exists. In this respect, real estate assets (excluding land) are depreciable assets from an accounting standpoint, and such depreciation – corresponding to a straight-line depreciation over the economic lifetime – should be tax deductible.

Loyens & Loeff has a real estate law practice that is part of a fully integrated (law and tax) firm with home markets in the Benelux countries and in Switzerland, as well as offices in all the major financial centres. In Belgium, the real estate law practice is made up of two partners, two counsels and ten associates. The firm has extended its reputation for tax excellence to all legal aspects of real estate, becoming the only truly integrated (tax and legal) real estate department of a major law firm in Belgium providing full-service support to investors in real estate assets. Loyens & Loeff partners with clients at all stages of their investments in real estate assets – from the design and implementation of the investment structure through to the development, acquisition, hold period and disposal of the assets.

AUTHORS

Christophe Laurent heads the Belgian real estate practice group at Loyens & Loeff. He advises on real estate investment structuring and leads negotiations on real estate transactions (both asset and share deals), including sale and leaseback and real estate asset management (eg, leases and all real estate-related contracts). He has acquired a reputation for excellence in the tax aspects of real estate investments in Belgium, both at fund level (eg, efficient fund structuring, tax forecasts, financing) and at local level (due diligence, deal structuring), including tax and accounting aspects related to developments and public-private partnerships.

Ariane Brohez is a partner in Loyens & Loeff's real estate practice group, and has particular expertise in structuring real estate funds, real estate investments and financing. She assists clients in real estate transactions (portfolios, share deals, asset deals, sale and leaseback, (re)financing), negotiating deals from initial offer or term sheet until closing, and advising on all tax, regulatory and legal aspects. Ariane also specialises in Belgian corporate tax law and withholding taxes, including international tax developments and GAAR (general anti-avoidance rule), as well as European law and Constitutional law.

Loyens & Loeff

Tervurenlaan 2
1040 Brussels
Belgium

Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
Email: ine.heymbeeck@loyensloeff.com
Web: www.loyensloeff.com

Trends and Developments

Contributed by:
Ariane Brohez, Christophe Laurent and Wim Vande Velde
Loyens & Loeff see p.30

Real Estate in Belgium: Market Trends

The investment market continues to be dominated by (large) office and logistics deals, although the residential sector is developing rapidly and hotel (portfolio) deals have been announced following the stalling of this asset class due to the COVID-19 pandemic.

The most visible market trend is the multiplication of (large) development projects combined with a desire among developers to either team up with investors and form joint ventures, or to enter into forward sales. Although these projects are beneficial for the market and the parties involved, they encounter significant pressure and challenges in negotiations because of the extreme rise in construction prices. In that regard, hard renegotiations of contractual terms can be expected, and even litigation, combined with delays in projects.

Major Legal Development: Renovation Obligations in Flanders

ESG, climate change and environmental concerns are high on the agenda of politicians and investors. The Flemish Region has adopted a strict agenda for the period 2020–2050 and introduced a series of renovation obligations. By 2050, dwellings must have an average energy label A, and non-residential buildings must be carbon neutral.

The following obligations apply as of 1 January 2022:

- when selling or renting residential premises, the energy performance certificate (EPC) remains mandatory but only a "new" EPC will be considered – ie, not older than 1 January 2019. Older certificates are no longer valid and must be replaced; and
- the renovation obligation applies to every non-residential building unit "acquired" after 1 January 2022, either by notarial transfer in full ownership or by establishing a property right. The renovation obligation does not apply if the unit is part of a building that will be demolished within five years of the acquisition, nor if the transfer is the result of a merger or demerger of a company.

The following will apply as of 1 January 2023:

- large non-residential buildings must achieve a minimum renewable energy share of 5% within five years of their transfer; and
- an EPC for the sale and rental of large non-residential buildings will be mandatory.

Major Legal Development: Upcoming Reform of Contract Law

As part of a more general modernisation of Belgian civil law, Belgian contract law is expected to be amended and updated in the course of 2022. A new Book V of the Civil Code, containing general Belgian contract law, is expected to be approved by parliament during the second quarter of 2022. Following a six-month transition period, the new contract law is expected to enter into effect during the last quarter of 2022.

The legislator's aim is to increase legal certainty for parties, as many important principles of Belgian contract law are currently not confirmed by law but result from case law and legal doctrine; these will now be included in Book V of the Civil

Code. At the same time, the legislator intends to modernise Belgian contract law, while maintaining the freedom of contract as the cornerstone thereof. Most provisions of the new Belgian contract law are therefore not mandatory and can be set aside by the contracting parties.

At the time of writing, the legal texts are still being discussed in parliament, but the new contract law provides several features that may be of particular importance to real estate practice, as follows.

Introduction of a "hardship" principle

Under current Belgian contract law, hardship is not acknowledged as a legal principle, so a party will only be able to benefit from hardship clauses if they are expressly included in the agreement. This principle will change under the new contract law: even in the absence of contractual provisions, a party will be allowed to ask its counterparty (or the competent court) to amend an agreement if the execution of its contractual obligations has become excessively burdensome due to unforeseeable circumstances beyond its control (unless this possibility is excluded by law or by the agreement itself).

This reversal of the hardship principle may be of particular importance for (the drafting and negotiation of) long-term agreements, such as project development agreements, building agreements or leases.

The setting aside of unfair clauses

In addition to existing legislation prohibiting unfair clauses in B2B and B2C agreements, the new contract law provides for a legal provision setting aside unfair clauses – ie, clauses that cannot be negotiated and that create a clear imbalance between the rights and obligations of the parties.

The unclear scope of this provision as well as the unclear relation between this general provision and similar provisions in B2B and B2C legislation may well give rise to debate and uncertainty, specifically in agreements that are not (heavily) negotiated.

Abuse of circumstances

The legislator's intent to protect weaker parties is reflected not only in the above-mentioned prohibition of unfair clauses: the new Book V also confirms that an "abuse of circumstances" can be a ground for the nullity of an agreement (or a legal ground to amend a party's contractual obligations).

An abuse of circumstances requires the existence, at the time of signing the contract, of a clear imbalance between the parties' respective obligations as a result of one party abusing the other party's weaker (negotiation) position. Following extensive legal debate and case law on the principle of "abuse of circumstances", this principle as well as its application to all types of contracts is confirmed in the new Book V. Some legal debate concerning this principle can be expected in all real estate contracts between parties who may not have the same negotiation power at the time the contract is negotiated.

Confirmation of freedom to negotiate (and to end negotiations)

The new Book V confirms not only the freedom of contract as a guiding principle but also the parties' freedom to negotiate and to end negotiations. In accordance with case law, Book V confirms that the freedom to negotiate/end negotiations is only limited by the general duty to act in good faith. The new contract law furthermore explicitly provides that, if a party is considered to have stopped negotiations in a way that is in breach of its good faith obligations, the sanction will, in principle, be limited to an indemnification required to put the other party

in the situation it would have been in if there had not been any negotiations. In practice, this means that the indemnification will be limited to the "costs of negotiation" incurred by the other party. The indemnification due will only include compensation for the "lost net profits of the contract" if the other party could legitimately expect that the contract would undoubtedly have been concluded (which is a high burden of proof).

The confirmation of these general principles, and specifically the clarification on the indemnity due in case of breach of contract, is important to real estate transactional practice as it clarifies the scope and limits of the freedom to negotiate.

Unilateral rights in case of breach of contract

The new Book V explicitly confirms the right for a party suffering from a counterparty's breach of contract to take unilateral (and sometimes even pre-emptive) action, without being required to first go to court. While the validity of some of these actions has recently been confirmed in case law under current Belgian contract law, the statutory confirmation of these remedies is important to enhance legal certainty. Some of these remedies can be of particular importance to real estate contracts such as development contracts, as they include the possibility to unilaterally terminate a contract and the possibility to unilaterally have work (not – properly – performed by the counterparty) performed by a third party at the cost of the counterparty.

Statutory regime on transfer of debts and transfer of contracts

For the first time in Belgian civil law, the new Book V provides statutory mechanisms for a transfer of debt and/or a transfer of contract. Under current contract law, the law only provides for a statutory mechanism for a transfer of claim. This mechanism is maintained but complemented by mechanisms setting out the conditions for a valid transfer of debt and/or contracts, which is effective towards third parties and the counterparty to the contract. This new regime will increase the legal certainty for the transfer of real estate contracts, in the framework of either transactions or intra-group restructurings.

In accordance with the transitional provisions of the new Book V, the new contract law will only apply to contracts entered into as of the date of entry into force of the new Book V, which is expected during the last quarter of 2022; contracts entered into before that date will remain subject to the "old" contract law. This results in the co-existence of the "old" and "new" contract law, which of particular importance for the real estate sector as real estate agreements are often entered into for lengthy terms. Any long-term agreements entered into prior to the entry into force of the new Book V will therefore continue to be subject to the "old" contract law. This complexity can be mitigated by taking the new Book V into account when negotiating/drafting long-term agreements or by amending existing agreements to confirm the application of the new Book V.

Major Legal Development: Upcoming New Treaty between Belgium and France

Belgium and France have entered into a new tax treaty, the entry into force of which depends on the (speed of the) ratification process, with the earliest date being 1 January 2023. The most relevant items for the real estate sector are summarised below.

Tax residence

In order for a tax treaty to apply to a particular person (an individual, company or association of persons), that person must be considered to be "resident" in a Contracting State.

In contrast to many tax treaties, the current tax treaty does not provide for any condition of taxation or even any "subject-to-tax" condition on

the part of legal persons in order for the latter to benefit from the old treaty. The new tax treaty now includes a definition of "tax resident", taken directly from the OECD model: "the term resident of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of the person's domicile, residence, place of management or any other criterion of a similar nature [...]"

In principle, the consequence of this "subject-to-tax" condition will be to deny resident status to investment funds that benefit from a "non-taxable" regime. However, the Protocol to this new treaty will provide that, notwithstanding any other provision, collective investment undertakings and pension funds established in France or Belgium will benefit from the advantages of Articles 10 and 11 of the new tax treaty (ie, dividends and interest).

In addition, the new tax treaty deals with the special case of "transparent" and "translucent" French companies. The status of resident is also granted to companies or groups of persons:

- whose place of effective management is in France;
- that are subject to tax in France; and
- of which all unit holders, partners or members are, under French tax law, personally liable for tax on their share for the profits of these companies or associations of persons.

On this basis, partnerships under French law that are subject to a tax-translucent regime should benefit from the advantages of the new tax treaty.

Immovable property

With regard to "income from immovable property", the new tax treaty follows the OECD model, which does not differ in substance from the old tax treaty. In this respect, income from immovable property (including income from agriculture or forestry) derived by a resident of a Contracting State situated in the other Contracting State may be taxed in that other State, and the term "immovable property" shall have the same meaning as under the law of the Contracting State where the property is situated.

Dividends

The general provision is that the maximum dividend withholding tax rate is reduced to 12.8%, compared to 10% or 15% under the old tax treaty. A full exemption from withholding tax is also available for dividends paid by a company of a Contracting State to a company resident in the other Contracting State that holds directly at least 10% of the share capital of the distributing company for a period of 365 days, including the date of payment of the dividend.

For real estate investment funds, different situations may arise. Firstly, with regard to "funds" and depending on their tax regime, they will either qualify as residents within the meaning of the new tax treaty or be able to benefit from the protection of the new tax treaty by virtue of the Protocol. This second category includes only undertakings or funds that come within the meaning of Directive 2009/65/EC (UCITS) or within the meaning of Directive 2011/61/EU (AIF), as well as, on the Belgian side, regulated real estate companies (BE-REITs). Funds that are neither resident nor included in this second category do not benefit from the protection of the new tax treaty. In the following cases, the "fund" is treaty protected:

- Belgian-sourced dividends paid by a normally taxed company to a French "fund" – under the new tax treaty, and provided the minimum shareholding condition is reached, these dividends will benefit from an exemption from withholding tax;

- French-sourced dividends paid by a normally taxed company to a Belgian "fund" – under the new treaty, and provided the minimum shareholding is reached, these dividends will benefit from an exemption from withholding tax; and
- dividends of Belgian or French source that are distributed by an investment vehicle that distributes the largest part of its income annually and whose income or gains from real estate are tax exempt – a withholding tax reduction will be available if and only if the beneficial owner of the dividends holds directly or indirectly a participation of less than 10% in the capital of the investment fund. In other cases (ie, 10% or more), the dividends will be taxable at the rate provided for by the domestic law of the Contracting State where they arise. In this case, a withholding tax of 30% will apply to Belgian-sourced dividends; it is then to be determined to what extent the French investor will be able to benefit from the tax credit provided for by the new tax treaty.

Interests

According to Article 11 of the new tax treaty, interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that State. No withholding tax would apply on interest payments under the new tax treaty. This provision will be welcomed in Belgium, where domestic law still provides for a 30% withholding tax, which was reduced to 15% under the old tax treaty, provided no other exemption under domestic law was applicable.

Capital gains

Not surprisingly, the new tax treaty includes a "real estate-rich" clause, which was absent from the old tax treaty. Capital gains from the sale of shares of a company listed on a regulated stock market in the European Economic Area are not covered by this provision.

This "real estate-rich" clause provides that gains from the alienation of shares or other rights in a company, trust or comparable institution, the value of whose assets consists, directly or indirectly, by more than 50% of real estate and which is situated in a Contracting State, may be taxed in that State if they are subject, under the laws of that State, to the same taxation regime as gains deriving from the alienation of real estate. Two conditions apply in order for the Contracting State in which the immovable property is situated to be given the power to tax:

- the value of the assets of the company whose shares are sold must derive, directly or indirectly, by more than 50% from immovable property located in that State; and
- that State, according to its own legislation, must subject this sale of shares to the same tax regime as the sale of immovable assets.

If this "real estate-rich" clause does not apply, the residual rule continues to be that the power to tax is allocated to the State of residence of the seller.

From a Belgian point of view and as the legislation currently stands, this clause will not apply, as Belgium does not assimilate transfers of shares to transfers of real estate assets for tax purposes. This has the following effects:

- if the target company is Belgian resident and the seller is a French resident, France is given the power to tax the realised capital gain; and
- if the target company is French resident and the seller is a Belgian resident, France will be granted the power of taxation if the quantitative criterion of the preponderance of real estate is met; otherwise this power will be attributed to Belgium.

Elimination of double taxation

For French residents, the new tax treaty uses the tax credit method to avoid double taxation on the income of a French resident that is taxable (only) in Belgium, where such income is not already exempt from French corporate income tax.

This tax credit, which can be deducted from French taxation, corresponds to:

- the amount of the Belgian taxation, but without exceeding the French taxes that are due, when the income in question is (inter alia) Belgian-sourced dividends; and
- the amount of French taxation corresponding to this income, provided that it is actually subject to Belgian taxation.

A legal entity that is resident in France within the meaning of the new tax treaty and has invested in real estate in Belgium through a BE-SREIF (FIIS/GVBF) could therefore benefit from a tax credit corresponding to the Belgian withholding tax on the dividends distributed by this BE-SREIF (FIIS/GVBF), with this tax credit itself being limited to French taxation on these dividends.

As regards Belgian residents, the new tax treaty provides for a double system of exemption and imputation.

In this respect, income taxed in France and received by a Belgian resident is exempt from tax in Belgium (subject to progressivity) when it does not consist of dividends, interest or royalties. However, this income will be taken into account in the determination of the additional Belgian municipal taxes.

Dividends received by a Belgian resident company from a French resident company are exempt from corporate income tax in Belgium under the conditions provided for by Belgian law. When these dividends are distributed by a (civil) company or a grouping of persons, they are also exempt from corporate income tax in Belgium under the conditions provided for by Belgian law, but the so-called taxation condition does not apply, subject to the taxation of the Belgian resident company in France on the result of the (civil) company or the grouping of persons in proportion to the rights held.

Finally, if the dividends received by a Belgian resident company cannot be exempted from corporate income tax in Belgium under the conditions provided for by Belgian law, the French withholding tax is deducted from the Belgian tax relating to these dividends, but without exceeding the Belgian taxes that are due on these dividends.

Loyens & Loeff has a real estate law practice that is part of a fully integrated (law and tax) firm with home markets in the Benelux countries and in Switzerland, as well as offices in all the major financial centres. In Belgium, the real estate law practice is made up of two partners, two counsels and ten associates. The firm has extended its reputation for tax excellence to all legal aspects of real estate, becoming the only truly integrated (tax and legal) real estate department of a major law firm in Belgium providing full-service support to investors in real estate assets. Loyens & Loeff partners with clients at all stages of their investments in real estate assets – from the design and implementation of the investment structure through to the development, acquisition, hold period and disposal of the assets.

AUTHORS

Ariane Brohez is a partner in Loyens & Loeff's real estate practice group, and has particular expertise in structuring real estate funds, real estate investments and financing. She assists clients in real estate transactions (portfolios, share deals, asset deals, sale and leaseback, (re)financing), negotiating deals from initial offer or term sheet until closing, and advising on all tax, regulatory and legal aspects. Ariane also specialises in Belgian corporate tax law and withholding taxes, including international tax developments and GAAR (general anti-avoidance rule), as well as European law and Constitutional law.

Christophe Laurent heads the Belgian real estate practice group at Loyens & Loeff. He advises on real estate investment structuring and leads negotiations on real estate transactions (both asset and share deals), including sale and leaseback and real estate asset management (eg, leases and all real estate-related contracts). He has acquired a reputation for excellence in the tax aspects of real estate investments in Belgium, both at fund level (eg, efficient fund structuring, tax forecasts, financing) and at local level (due diligence, deal structuring), including tax and accounting aspects related to developments and public-private partnerships.

Contributed by: *Ariane Brohez, Christophe Laurent and Wim Vande Velde,* ***Loyens & Loeff***

Wim Vande Velde is a partner in the corporate and M&A practice group at Loyens & Loeff. He has extensive experience in national and international M&A transactions for both listed and non-listed companies, as well as in corporate restructuring. Wim's focus is on the real estate and private equity sector. His clients include buyout funds, investment funds and national and international industrial corporations. Wim is a regular speaker at conferences on corporate and M&A matters, and has written various articles on these topics.

Loyens & Loeff

Tervurenlaan 2
1040 Brussels
Belgium

Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
Email: ine.heymbeeck@loyensloeff.com
Web: www.loyensloeff.com

Chambers Guides to the Legal Profession

Chambers Directories are research-based, assessing law firms and individuals through thousands of interviews with clients and lawyers. The guides are objective and independent.

practiceguides.chambers.com