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Real Estate

Belgium
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BELGIUM

Law and Practice

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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

A record year for real estate investment was reported in the specialised press, despite the COVID-19 crisis, with almost EUR6.2 billion investment. However, it should be noted that this investment volume has been influenced by the Finance Tower deal.

The COVID-19 pandemic boosted the logistics sector, while retail and hotels are suffering. Residential is also developing quickly as a new asset class for institutional investors.

The top ten deals for 2020 are as follows, with estimated values:

- Finance Tower (EUR1.2 billion);
- Post X (EUR270 million);
- Silver Tower (EUR205 million);
- Euroclear (EUR173 million);
- Befimmo portfolio (EUR143 million);
- Platinum (EUR142 million);
- BelLogistics portfolio (EUR127 million);
- HQ Petrofina (EUR115 million);
- Blue Tower (EUR112 million); and
- Orelia care portfolio (EUR105 million).

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 following major reforms have already entered into force or will do so soon.

- The B2B Law entered into force on 1 December 2020, with the purpose of prohibiting "unfair clauses" in contracts between enterprises that, either separately or together with other clauses, create a significant imbalance

between the rights and obligations of the parties. It also includes a blacklist (four clauses that are deemed to be irrefutably unfair and are therefore prohibited) and a grey list (eight clauses that are presumed to be unfair, but the presumption can be rebutted), and applies to all contracts concluded, renewed or modified after that date.

- VAT and residential properties for the period 1 January 2021 until 31 December 2022 – to support the residential sector, the 6% VAT rate for demolition and reconstruction has been extended to the whole territory, and its benefit is, under certain conditions, also extended to developers and companies. In a nutshell, the demolition, construction and sale of residential properties to an individual who will use it as private dwelling, or to any party who will let such properties to or via a social real estate agency, should benefit from the 6% VAT rate.
- A reform of the property rights as of 1 September 2021 mainly follows case law and practice, and does the following:
  (a) provides for new definitions of long-term lease, right to build, usufruct and heavy repairs;
  (b) introduces the concept of "volume property" in Belgian law;
  (c) clarifies (and somewhat modifies) the rights and obligations of the parties; and
  (d) determines the consequences of any early termination of property rights.

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 (under the reform). 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 (under the reform) 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, under the reform), 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. The development of "title insurance" in the framework of real estate transactions is starting to occur, although it remains uncommon.

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

2.4 Real Estate Due Diligence

Read 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. It is therefore 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 he or she was aware.

These two obligations apply to both asset and share transactions.

The parties can contractually limit these guarantees, which is often the case 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 his consent has been vitiated, and 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.

2.6 Important Areas of Law for Investors

The investor must first have a complete view on the conditions that might affect the title, particularly pre-emption rights and specific conditions that might be imposed by the laws on economic expansion. 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 concerns 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, each regional legislation on this subject provides for a "waterfall" responsibility, the first in row being the polluter but, in the absence of identification or in the case of bankruptcy, there will be a recourse on the owner. It is therefore highly recommended to have appropriate verifications

carried out, from both an environmental and an insolvency standpoint.

The question on potential responsibility for soil contamination is answered differently depending on the structure of the acquisition, with legal protection being available only in asset transactions.

Share Transactions

In a share deal transaction, the risks and liabilities, if any, remain with the target company and are inherited by the investor, including for any historical environmental damages. 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 of the time qualify as a "transfer". The question of whether one can speak about a "risk land" shall depend on the activities effectively carried out (with or without environmental permit) in the premises. 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 a 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 provided that (i) the fair compensation includes a depreciation for the non-expropriated portion of the property and (ii) 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 grounds on which logistics buildings are currently located were 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 the obligation for the purchaser to construct certain industrial buildings and to request the prior written approval of the public authority if the purchaser intends "to alienate" the ground (and, as the case may be, the buildings constructed thereon), whereby the term "to alienate" is often broadly defined (eg, 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 10% 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 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 intra-group (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.

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

Security interests remain in principle valid in case of 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 afterwards 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 EURIBOR driven, 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 (eg, office, retail, etc) of a property. 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 of the facts (eg, the results of the public inquiry, environmental impact assessment, fire safety, etc).

4.3 Regulatory Authorities

The granting of 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, 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 type 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 this 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 a SA/NV or a SCS/CommV, the FIIS/GVBF, as an alternative investment fund, may also be obliged to appoint a licensed manager, unless an exemption applies.

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 – when the arrangement is limited to a certain use).

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 mech-

anism applies. No specific measure has been taken in response to the COVID-19 crisis.

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, provided 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;
- 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 of the sq m 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 Insuring the Real Estate That Is Subject to the Lease

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.

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 his 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, in principle, valid. This kind of clause must be distinguished from a mere termination clause, which does not provide for the automatic termination of the contract and lies 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 his 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 his 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 his 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 himself or his close relatives have their residence in the premises. The tenant must comply nevertheless 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 to 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 he gives notice by registered letter or by bailiff's writ, no later than one year prior to the end of the three-year period and he or a close relative intends 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. A specific moratorium applies in the case of residential leases (eg, a moratorium on eviction during the COVID-19 lockdown periods).

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 actors 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 a 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, on the contractor's side, by ad hoc force majeure clauses and, on the owner's side, by penalties.

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 (eg, 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.

- "New building" 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 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 are executed.
- 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 he is not a professional developer, the owner 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 10% 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 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 10% 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 that 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% in the capital of the Belgian subsidiary. Beside these formal conditions, specific attention is required for substance requirements and beneficial 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 gain 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, one counsel and nine 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.

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Trends and Developments

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Market Trends

Looking back at 2020, the main conclusion is that the real estate market performed extremely well and closed at a record high, with almost EUR6.2 billion investment volume. However, it is fair to say that the Finance Tower deal boosted the figures, and that the COVID-19 crisis did have an impact on the investment market. Indeed, quarterly figures show a collapse in Q2 and Q3, and a (slow) recovery in Q4.

In terms of asset classes, offices performed well, and logistics turned out to be the winner of the crisis, while the retail and leisure sectors suffered the most.

A clear trend in 2020 was the rise of the residential sector. Nursing homes remain the most important segment, but there was a sharp rise in institutional investment in rented residential properties. It must also be said that large-scale redevelopments have been announced, with the majority being multi-function properties including residential units.

Legal Developments around COVID-19

Although many initiatives have been taken to sustain the economy, no specific measures have been enacted to support or protect the real estate sector when it comes to the payment of rents and the payment of real estate-related taxes. Many tenants were faced with compulsory closure, which led to disputes regarding rent payments. The main pro and contra arguments are summarised below.

Force majeure

The Court of Cassation states that a circumstance that simply makes the performance of an obligation more onerous does not constitute an event of force majeure. An "act of God" or "act of government" is defined as any impediment that results from an order or prohibition emanating from a public authority and constitutes a foreign cause justifying non-performance of the obligations as provided for in the contract. In this regard, most of the legal community believe that the performance itself of the obligation to pay is in fact not affected by the act of government. Even if the lockdown imposed by the governmental orders reduced tenants' revenues, payment remains possible in theory during the obligatory closure, for instance with the tenant's available cash or through obtaining new external financing. This position is followed in most of the judgments published to date.

Failure by a landlord to guarantee peaceful enjoyment of the premises

In the case of (temporary) judicial or material loss of the leased premises, the landlord can no longer fulfil its guarantee obligation, and the tenant can request a reduction of the rent or the termination of the lease, without indemnity. This is the main argument for tenants requesting a full waiver of rent during the lockdown. However, it remains heavily debated and has been rejected in most of the judgments published, based on the following grounds.

- Lockdown and closure measures may result in the temporary loss of the tenant's use of the leased premises. However, the Civil Code presupposes that the impossibility of guar-

anteeing this peaceful enjoyment exists on the part of the landlord, who is bound by this obligation. In the present case, this impossibility is due to a measure taken by a third party (the public authority), for which the lessor is not answerable.
- The tenant's inability to carry on business in the leased premises is not the consequence of a failure by the landlord to fulfil his guarantee obligation to ensure peaceful enjoyment, but of a decision by the authorities that is binding on the tenant.
- The closure measure decided upon does not affect the leased premises but rather the business – ie, the tenant's business.
- The closure measure does not eliminate all possibilities of enjoyment: the storage function is maintained, the tenant can carry out an inventory or make improvements, and the tenant retains exclusive access to the premises.
- Online services and delivery services remained possible for certain shops.

Hardship

The hardship theory, which would recommend the renegotiation of commercial terms when an unforeseen circumstance creates an imbalance between the parties, is not recognised in Belgian law. This is acknowledged by several judgments published, although certain judges would – indirectly – apply this theory via the principle of prohibition of the abuse of right and the principle of the execution of contracts in good faith.

Abuse of right and execution of contracts in good faith

In all judgments published, and depending on the circumstances, this is the argument that supports a reduction of the rent due for the months of lockdown, but not a full waiver. However, it depends on the specific circumstances of the case: whether the tenant is an SME, a big local player with several shops or a multinational; whether the tenant has always fulfilled its own obligation; and whether the tenant has answered the landlord's call for a negotiation. In this respect, only a minority of the judgments recently published has granted a rent reduction on this basis.

Impact of the B2B Law on Real Estate Contracts

The Law of 4 April 2019 concerning the abuse of economic dependence, unfair clauses and unfair market practices in B2B relations (the B2B Law) introduces a prohibition on "unfair clauses" in contracts between enterprises. This B2B Law prohibits each clause that – separately or together with other clauses – creates a significant imbalance between the rights and obligations of the parties. Only the "core clauses" of a contract are not subject to this scrutiny, provided they are written in an intelligible and clear way (transparency test).

The B2B Law furthermore includes a blacklist of four clauses that are deemed to be irrefutably unfair and are therefore prohibited, and a grey list of eight clauses that are presumed to be unfair but the presumption can be refuted.

The B2B Law entered into force on 1 December 2020 and is applicable to contracts between enterprises concluded, renewed or modified after that date.

Application of the B2B Law to real estate contracts

All kinds of real estate agreements, such as purchase agreements, lease agreements and construction agreements regarding real estate assets, are subject to the provisions of the B2B Law if they are entered into between enterprises. The protection offered by the B2B Law is not limited to small and medium-sized companies, nor is a relationship of "dependency" required. Consequently, real estate companies that contract

with other real estate professionals will have to comply with the new law, regardless of the companies' size or the value of the transaction.

Impact of the B2B prohibition on "unfair clauses"

Not only the blacklist and the grey list apply: each provision in a real estate contract subject to the B2B Law can be challenged based on the general significant imbalance test (except for core provisions, provided they meet the transparency test).

Most significant blacklist clauses

- Unilateral interpretation – clauses giving a party the right to unilaterally interpret a contractual provision will be unlawful. Granting a party the right to unilaterally determine a right or obligation of the other party remains lawful. The precise scope of this prohibition is highly uncertain. All clauses with ambiguous or unclear wording that grant certain rights to a party to decide on a certain item without reference to objective criteria may fall under the scope of this prohibition – eg, the right for the principal not to grant the provisional acceptance relating to a building in the case of "material" snag items without defining the term "material".
- Irrefutable knowledge or acceptance – clauses that aim to irrefutably establish a party's knowledge or acceptance of terms of which that party did not have actual knowledge before the conclusion of the contract are prohibited. Consequently, clauses in a private sales agreement providing that the purchaser irrefutably accepts all special conditions encumbering the real estate asset without having provided these special conditions to the purchaser or without the purchaser having had the opportunity to take note of those special conditions before the conclusion of the agreement might be considered unlawful. Clauses containing refutable presumptions are allowed. Moreover, in Belgium, notaries have the legal obligation to verify the special conditions and other encumbrances regarding the real estate asset prior to the enactment of the notarial deed. In principle, they will be mentioned in the notarial deed itself.

Most significant grey list clauses

- Unilateral amendments – clauses that aim to give a party the right to modify the price, characteristics or terms of the contract, unilaterally and without a valid reason, are presumed to be unlawful. Some construction agreements grant the contractor the right to unilaterally modify the unit prices of certain materials. If the agreement does not provide objective criteria or "valid" reasons for the contractor to change the unit prices (eg, unexpected scarcity or an increase in the price of raw materials), such clauses will be presumed to be unlawful.
- Tacit extension or renewal without reasonable notice period – clauses that aim to tacitly extend or renew an agreement of definite term without providing a reasonable notice period to the counterparty are presumed to be abusive. If a lease agreement includes a tacit lease extension or renewal of the agreement, it is common practice in Belgium for such lease extension or renewal to take place, unless a party has given prior written notice – ie, opposed such renewal or extension.
- Reversal of economic risk without compensation – clauses that aim to place the economic risk on one party, without compensation, where such risk is normally borne by the other party or by another party to the contract are presumed to be abusive. The legal provision itself raises several questions, including how to distinguish between an economic risk and legal risks, how to determine which party should normally bear a certain risk, does any compensation suffice to justify a shift of risk

or should it be a reasonable compensation? All these questions are left to legal authors, practitioners and case law; neither the B2B Law nor its parliamentary preparatory works offer any useful guidance. For instance, asset purchase agreements often contain representations and warranties, specific indemnities and/or exoneration clauses related to the (characteristics and compliance of the) real estate asset. Lease agreements also often contain exoneration clauses. Are the risks covered by these clauses economic risks as they have a financial impact, or mere legal risks? Who should normally bear these risks: the seller or the purchaser? What type of compensation could justify a shift of these risks?

Reform of Property Law

General

The act of 4 February 2020 containing Book 3 "Goods" of the new Civil Code has been approved and shall enter into force on 1 September 2021 (with exceptions). It undoubtedly introduces the most far-reaching reform of Belgian property law since the Napoleonic Code of 1804. The new Book 3 repeals, inter alia, the acts of 10 January 1824 on long-term lease right and right to build.

With the new Book 3, the legislator wishes to better structure, modernise and integrate (the rules of) property law into a single code. In addition, the legislator wants to create a functional, useful and flexible set of rules with a new – sometimes delicate – balance between contractual freedom and legal certainty.

Real estate professionals

The new Book 3 contains many new legal provisions that are relevant to real estate professionals, particularly with respect to property rights (ownership, long-term lease right, right to build and usufruct right).

First, a new set of general provisions applies to all property rights, such as provisions on the creation and extinction of rights. In addition, each property right is defined, and these definitions cannot be deviated from. If an agreement grants a certain right in rem that would not fall under such definitions, there is a risk that said agreement will be re-qualified. This could have important tax consequences, as well as consequences in the field of responsibilities, compensations, etc.

Secondly, each property right is subject to a new set of rules. Although the definitions of the rights are fixed, these new rules are (mainly) not mandatory so the parties will retain their contractual freedom to deviate therefrom. The new rules are related to the rights and obligations of the parties, the maintenance and repair obligations of the parties, the indemnity to be paid upon expiry of the rights, etc.

The main changes with regard to usufruct rights, long-term lease rights and rights to build are summarised below.

Usufruct right (droit d'usufruit/ vruchtgebruikrecht)

A usufruct right is defined as "the temporary right to use and enjoy from a property held by the bare owner, as a prudent and reasonable person, in accordance with the destination of the property and under the obligation to return the property at the end of the usufruct right." In terms of duration, there is no minimum. For individuals, there is also no maximum provided by law, but the maximum duration of a usufruct granted to companies is 99 years. The usufruct right terminates on the date agreed by the parties, and in each case upon the death of the usufructuary, which includes bankruptcy or dissolution if the usufructuary is a company.

The new legislation calls for bare owners and usufructuaries to co-operate more closely, and recognises that bare owners also have rights during the period of usufruct – eg, bare owners get the right to visit the property given in usufruct every year.

As a fundamental modification, it must be noted that the bare owner shall still bear the responsibility and costs for major repairs but, unless otherwise contractually agreed, he now has the right to claim a proportional contribution in these costs relating to the major repairs carried out by him vis-à-vis their usufructuaries.

Long-term lease right (droit d'emphytéose/ erfpachtrecht)

A long-term lease right is defined as "a right in rem granting full use and enjoyment of another person's property that is immovable by nature or by incorporation. The long-term lessee may not do anything that would reduce the value of the immovable property, subject to normal wear and tear, age or force majeure. He may, unless otherwise stipulated, change the use of the immovable property." In general, the new Book 3 mainly repeats the current rules on long-term leases. The most important changes with regard to long-term leases are that the minimum duration is reduced to 15 years and that, from now on, it will be possible to establish a perpetual long-term lease right for public domain purposes.

It is confirmed that all repairs are to be carried out by the long-term lessee, who will also be able to modify the (use of the) property.

An important item to keep in mind in the drafting of long-term lease agreements is what is to be understood by "the value of the immovable property". The preservation of this value is an obligation of the long-term lessee, but the question must be raised of "which value" (at the time of the granting of the right, along the way, etc) and in which circumstances (eg, in case of demolition followed by reconstruction).

Right to build (droit de superficie/opstalrecht)

The new Book 3 defines a right to build as "a right in rem giving the right of ownership of volumes, whether built or not, in whole or in part, on, over or under someone else's land for the purpose of having buildings or plants therein." Consequently, rights to build are now expressed in terms of volume: the holder of a right to build is the owner of the volume to which his right relates. An important change with regard to building rights is that the maximum duration is extended to 99 years, and from now on the "property in volume" is recognised under Belgian law and can be created via a right to build. In this last case, the building right shall then be perpetual. Like for the long-term lease right, it will also be possible to establish a perpetual building right for public domain purposes.

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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, one counsel and nine 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.

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