THE REAL ESTATE LAW REVIEW

Twelfth Edition

Editor
John Nevin

THE LAWREVIEWS

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PREFACE

This time last year the world's focus was still on the covid-19 pandemic as the dominant issue affecting us all. Tragically, just as we were starting to see light at the end of the tunnel, the much-hoped-for fresh start was stopped in its tracks by the war in Ukraine. The past 12 months have been dominated by war in Eastern Europe and the ensuing global humanitarian, economic and political fallout. The stability and certainty craved by all currently remains a distant hope.

Following on from COP26 in Glasgow, this year the focus was on Sharm El Sheikh for COP27. Once again, some key world leaders were notable by their absence and there remains the sense that more could and should have been achieved. This year, a further focus was acknowledging the developed world's contribution to the climate problem, and a new loss and damage fund was agreed upon to help meet the climate change costs suffered by the world's poorer nations. It has been accepted that something needs to be done, and that includes in the property industry. The built environment accounts for at least 25 per cent of the UK's greenhouse gas emissions, and significant changes are necessary if net zero targets are to be met. To date, the focus has been on high-profile new developments with eye-catching environmental, social and governance credentials. How to deal with the much larger stock of older, lower-value and underperforming buildings remains a bigger challenge.

A great deal has happened since the first edition of *The Real Estate Law Review* appeared in 2012; Brexit seems but a distant memory, as a pandemic was swiftly followed by war in Europe and a cost of living crisis. These have truly been unprecedented times. This 12th edition of *The Real Estate Law Review* will, perhaps more than ever, continue to prove its worth by giving readers an invaluable overview of how key markets across the globe operate and how they react to major world events. The covid-19 pandemic and the war in Ukraine have both served as stark reminders that it is not possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of global events, and *The Real Estate Law Review* continues to help its readers to do just that.

This edition extends to 25 key jurisdictions around the world, and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effects on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of their client's own jurisdiction.

Covid-19 has not gone away but we have learned to live with it. The pandemic's legacy will be its lasting effect on how we live, work and play, and on each and every aspect of the global real estate market. More immediate headwinds include the very real risk of a long and deep recession, soaring inflation, rising interest rates, the withdrawal of government

lockdown support, failing consumer confidence, increasing costs, a critical shortage of labour and materials as well as ongoing supply chain problems. On a more positive note, the property industry has traditionally proved to be resilient, and covid-19 demonstrated its ability to adapt to difficult and challenging times. The United Kingdom will be anxious to maintain its position at the top of global shopping lists as investors look for relatively safe havens for their investment capital. London and the regions seem certain to remain attractive to overseas investors looking for investment opportunities, both in the traditional real estate investment markets and also the rapidly evolving alternative asset sectors. The next few years will undoubtedly be challenging as we continue on the journey to recovery, but opportunities will arise, and real estate will remain a key part of global investment strategies. Knowledge of the global real estate markets will prove key to identifying and making the most of buying opportunities.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this 12th edition of *The Real Estate Law Review*. I would also like to thank the members of *The Law Review* team for their sterling efforts in coordinating the contributions and compiling this edition. Finally, I wish everyone the very best of health for 2023 and beyond.

John Nevin
Slaughter and May
London
February 2023

Chapter 4

BELGIUM

Ariane Brohez and Christophe Laurent[1]

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

The property rights under Belgian law are as follows:

a ownership;
b right to build;
c long-term lease right;
d usufruct; and
e easements.

The mortgage, lien and pledge are secondary or accessory rights *in rem*, which do not have an independent existence and are attached to a receivable.

The parties cannot agree contractually to create, alter or otherwise extend the scope of property rights beyond what is legally provided or permitted by law.

Ownership is the most complete right of enjoyment of property, and it is a perpetual right. Ownership of land includes the ownership of all that is on and below the ground. Ownership can also take the form of an *indivision* – several owners jointly exercise the full ownership right over a property (e.g., two brothers who are transferred the family house by inheritance), or of a co-ownership – several owners enjoy the exclusive property right over private parts and shared rights over common parts (e.g., an apartment building where each apartment as such is subject to an exclusive ownership right while the ground, entrance and lifts are subject to a shared ownership right).

A right to build is the right to own a building or a construction, existing or to be built, on, above or below the ground of another person. During the term of the right to build, the holder of the right shall be the owner of the building erected by it. The right to build is limited in time, with a maximum duration of 99 years. Upon termination, the owner of the land becomes the owner of the constructions erected.[2] A right to build, as well as any constructions built pursuant to it, is a transferable asset that can be sold or mortgaged.

A long-term lease right grants its holder the right to use a building and collect the income as if it was the owner. A long-term lease right can be granted on ground or on existing building, or both; when granted on ground, the long-term lessee shall be the owner of the

1 Ariane Brohez and Christophe Laurent are partners at Loyens & Loeff.

2 For property in volume or for use for public interest purposes, a right to build can be perpetual.

constructions erected by it until expiry of the long-term lease right. The long-term lease right is a temporary right, with a minimum duration of 15 years and a maximum duration of 99 years.[3] The long-term lease right is a transferable asset that can be sold or mortgaged.

The usufruct is the right to enjoy a property, which is owned by another person. The usufruct is a temporary right, which terminates upon the beneficiary's death (in the case of an individual) or upon its dissolution (in the case of a corporation); when granted to a corporation, the usufruct has a maximum duration of 99 years. A usufruct can also be transferred or mortgaged.

An easement is a right *in rem* vested on a property to the benefit of another property; it therefore presupposes the existence of two properties with two different owners. An easement is in principle a perpetual right but might terminate through prescription (i.e., if not used for 30 years) or uselessness. It is an indivisible and accessory right that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property.

ii System of registration

To make the transfer of a property right enforceable against third parties, and more particularly against the creditors of the transferor, the title must be transcribed in the mortgage register of the judicial district where the asset is located. This transcription requires a Belgian notary since only authenticated deeds or acts can be transcribed. Before the transcription, the authenticated deed must be registered, which shall trigger the payment of transfer taxes. Consequently, there are two sources of information in Belgium: the land register, which provides a status of current ownership (including the registration number of the parcels) and the mortgage register, which keeps track of transfer of property rights over the past 30 years.

There is no state guarantee on the title, and the registers cannot be held liable for registering inaccurate information. Because of this absence of state guarantee, we are seeing the development of title insurance in the framework of real estate transactions.

iii Choice of law

Real estate transactions are, in principle, governed by the law of the location of the asset, here Belgian law. Note that share transactions and real estate finance transactions are sometimes governed by another law than Belgian law, such choice of law being valid. Note, however, that enforceability requirements are always governed by Belgian law.

II OVERVIEW OF REAL ESTATE ACTIVITY

Despite the crisis, the year 2022 has been announced as being the second best in terms of real estate investments in Belgium. The market activity includes the successful public bid over Befimmo, a Belgian REIT, which will result in a squeeze-out and delisting. Noteworthy transactions concern the Brussels office market, still supported by the presence of the European Union and Belgian public entities, and the logistics markets, where competition between local and international players remains high. However, a slow down in activity as from the fourth quarter 2022 and a pessimistic outlook for the first half of the year 2023 must be mentioned.

3 For public interest purposes, a long-term lease right can be perpetual.

The attention of real estate developers and investors is now focused on:

a forward transactions, which bring their own set of uncertainties and challenges due to the increase of construction prices;

b refinancing of existing assets that were purchased three to four years ago but for which the exit has been postponed due to market circumstances; and

c asset management.

Regarding asset management matters, investors will focus on items in line with environmental, social and governance (ESG), especially energy performances of buildings (e.g., refurbishments, solar panels or other alternative energies) and 'green leases', knowing that for this last subject no legal framework exists in Belgium.

In terms of asset classes, the retail sector is still suffering, while the hotel and leisure sector seems to be recovering more rapidly than initially expected after the covid-19 pandemic.

III FOREIGN INVESTMENT

Under Belgian law, there are no specific restrictions on foreign investment in real estate. No specific incentive for foreign investment applies either.

One should, however, pay attention to EU rules on money laundering and on sanctions, especially the ones following the invasion of Ukraine, since economic operators and services providers (e.g., lawyers and notaries) might be prevented from doing business with or rendering services to certain parties that are subject to restrictive measures or for which the know-your-customer and client due diligence is not conclusive. This is, however, not typical for real estate and applies to any type of business, but might have noteworthy application in real estate, especially on lease agreements. Indeed, the current EU sanctions against Russia prohibit, for example, making funds or economic resources available, directly or indirectly, to or for the benefit of listed natural or legal persons, entities and bodies. This means that the landlord of the property may no longer provide the enjoyment under the lease to a 'listed' tenant. Moreover, the landlord is not allowed to release funds or payments to the tenant (e.g., the repayment of deposits to the tenant). This is not only applicable to tenants actually listed but also to tenants who are, either directly or indirectly, owned or controlled by a listed person or entity.

IV STRUCTURING THE INVESTMENT

i Concept of real estate company

Belgian law does not know the concept of real estate company, being a company whose main assets consist in real estate and which would be treated, mainly for tax purposes, differently from an ordinary company. Consequently, the tax regime applicable to share transactions is not subject to deviating rules. Share transactions are not subject to transfer tax or value added tax (VAT) (unless the tax administration demonstrates a tax abuse), and capital gain realised on shares should benefit from participation exemption in the hands of the seller.

ii Structuring of the acquisition

Transactions are structured via the acquisition of shares, the acquisition of ownership or the acquisition of a 99-year long-term lease right.

In a share transaction, the purchaser shall acquire the shares of a special purpose vehicle (SPV) and at the same time inherit all assets and (hidden) liabilities of the company. Extensive due diligence is therefore required upon acquisition. A share transaction might, however, be detrimental to the purchaser: the leverage shall be limited to the existing debt at the level of the SPV, and the asset value shall correspond to historical value (i.e., construction or acquisition cost less the depreciation already taken) without step-up. This type of transaction sometimes proves to be difficult to finance, as the bank requires a mortgage on the asset, and the upstream security interest to guarantee a financing of shares is prohibited by financial assistance rules. Solutions can be found in the conversion of the SPV into an ordinary partnership or a specialised real estate investment fund. From a pricing and negotiation standpoint and since the seller should realise a tax-exempt capital gain, it is market practice to negotiate a discount for tax latency.

The sale of ownership shall allow, in the hands of the purchaser, the recording of a step-up on the asset value (i.e., the asset shall be recorded, and depreciated,[4] for its acquisition value by the purchaser) and to easily set up a full collateral package, without restrictions. It is, however, subject to 12 per cent[5] (in Flanders) or 12.5 per cent (in Brussels and Wallonia) transfer tax.

The granting, by the owner, of a 99-year long-term lease right over a property is common practice. In the hands of the purchaser, the advantages of this structuring are the same as for the acquisition of ownership,[6] and the tax cost is reduced since this transaction shall be subject to 2 per cent transfer tax. To guarantee the liquidity of the investment, parties can also agree that the transferee of the long-term lease right shall benefit from an option to acquire the residual property rights, such option being exercisable after the 15th anniversary of the entry into force of the long-term lease right to comply with the minimum 15-year duration of such right.

iii Investment vehicle

Foreign investors can acquire directly the ownership or the long-term lease right. In such a case, the revenues and capital gain shall be subject to corporate tax in Belgium, at the ordinary rate of 25 per cent. No profit branch tax applies. Such a structure allows a direct appropriation of all revenues and the absence of 'cash trapped' (i.e., the revenues corresponding to the depreciation taken on the asset) in Belgium.

The investor can also choose to structure its acquisition via a Belgian acquisition vehicle: a corporation (SPV), an ordinary partnership or a specialised real estate investment fund.

The SPV shall be subject to regular Belgian accounting and tax rules. The revenues and capital gain shall be subject to corporate tax in Belgium at the ordinary rate of 25 per cent. The disadvantage of an SPV lies with accounting treatment and capital protection rules. The building shall be automatically depreciated, and this depreciation shall reduce the accounting (and tax) result and, therefore, the profits available for distribution. It is common practice, but requires enough leverage capacity, to have an intragroup loan granted to the SPV to allow the upstream of this cash trapped. Specific attention must be paid to transfer pricing rules when fixing the conditions of this intragroup loan.

4 The acquisition value allocated to the land is not depreciable.

5 With reduced rates of 1 or 3 per cent applying to the purchase of only owner-occupied dwellings.

6 Part of the first instalment paid for the granting of the long-term lease right is to be allocated to the land, which is not depreciable.

To tackle this issue as well as to put a full collateral package in place, the SPV might be converted into an ordinary partnership. This type of company has legal personality under Belgian law and shall be subject to the same tax regime as the SPV. It is, however, not subject to capital protection rules, including the prohibition of financial assistance.

Investors might opt for a specialised real estate investment fund or FIIS[7] by either setting-up a FIIS as the acquisition vehicle (of the shares or the asset) or by converting a SPV into a FIIS. The main advantages of a FIIS reside in its accounting regime and its tax regime. The FIIS must draw up its financial statements in accordance with International Financial Report Standards, and the investment income (e.g., rental income and capital gain) is not subject to corporate tax. For certain investors, the FIIS also allows the qualification of the investment as real estate in accordance with the Solvency II Regulation. However a tax cost is associated with this structure:

a entering into this FIIS regime triggers the exit tax, being the taxation of the latent gain on the asset at a rate of 15 per cent; and

b the FIIS is subject to a yearly dividend distribution obligation, which will trigger withholding tax based on the applicable tax treaty.

In this respect, note that dividends distributed to foreign pension funds that are exempt from income tax should benefit from a withholding tax exemption based on Belgian tax law. From a regulatory standpoint, the FIIS is an alternative investment fund, either by option if it only has one investor (this investor not being an alternative investment fund) or is a joint venture, or by law in the case of multiple investors. The regulatory burden for a FIIS by option is limited to a yearly compliance questionnaire.

V REAL ESTATE OWNERSHIP

i Planning

Each region is competent regarding the general legal framework within its territory. Deriving from this general legal framework, zoning plans are the main source of planning rules and regulations and contain binding conditions on the nature of buildings and activities that can be authorised in the concerned area; these plans exist at the level of the municipality, the province and the region. In a nutshell, it can be said that construction, modification, renovation and extension require a building permit, as well as a change of the use of a property (e.g., from office to residential). The first condition to be granted a permit is that the contemplated development complies with the zoning plan. Other conditions apply as well depending on the facts (e.g., results of a public inquiry, environmental impact assessment and fire safety). The operation of certain installations, which may have an adverse impact on the environment or health, or both, also requires an environmental permit, or, when possible and relevant, a combined permit that merges the building and environmental prescriptions and authorisations.

7 *Fonds d'Investissements Immobiliers Spécialisé.*

ii Environment

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, a transfer or granting of property right and corporate restructuring shall most of the time qualify as a transfer. The activities effectively carried out (with or without an environmental permit) in the premises will determine the qualification of risk land; if an environmental permit has been delivered for a risk activity, it shall lead to the qualification of risk land, but the environmental permit is not the sole or determining criterion (e.g., if a tenant is operating a risk activity without a permit, the owner will nevertheless have to comply with soil formalities in the event of a transfer).

In terms of liability, two situations must be distinguished:

a the compliance with soil formalities lies with the transferor and can be shifted to the transferee where certain conditions are met; and

b the liability for soil pollution and sanitation measures lies with the operator.

Note that in each of the regions a waterfall system is in place, with the operator as first in line in terms of liability but also with a possible recourse against the owner. This is especially true in the event of bankruptcy of the operator. It is therefore highly recommended, for example, when letting a property, to have a clear view on the soil status, a monitoring of the tenant's activity and specific provisions with respect to soil in the lease agreement.

iii Tax

Share deals are not subject to transfer tax, stamp duty or VAT, unless the tax administration demonstrates an abuse.

Asset deals are either subject to transfer tax or VAT. When the real estate qualifies as new building for VAT purposes, the transfer of a property right may (when the owner is not a professional developer and opts for a VAT taxable transaction) or must (when the owner is a professional developer) be subject to 21 per cent VAT. 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 either when:

a a drastic modification of essential elements, being the nature, structure or destination, whatever the costs of the works might be, is executed; or

b modifications for which the cost of the works (excluding VAT) equals at least 60 per cent of the market value of the building (excluding ground) at the end of the works being executed.

When VAT does not apply, the purchase of an asset or the granting of a usufruct is subject to 12 per cent (in Flanders) or 12.5 per cent (in Brussels and Wallonia) transfer tax computed on the higher of the agreed price or the market value. Long-term lease rights and rights to build are subject to 2 per cent 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.

iv Finance and security

The collateral package includes mortgage, pledge of receivables (e.g., rent receivables and insurance receivables) and pledge of bank accounts. The parent company shall usually pledge the shares in the SPV and subordinate any intragroup loans. A few points must be kept in mind:

a a mortgage is subject to 1 per cent transfer tax and 0.3 per cent inscription duty computed on the amount for which it is inscribed. Considering this tax cost, the practice – mostly with Belgian banks but never with *Pfandbrief* banks – is to inscribe a mortgage for a limited amount and to grant a mortgage mandate for the remainder. A mortgage mandate is not a security but an irrevocable power of attorney to inscribe a mortgage;

b general banking terms and conditions usually include a right of pledge and set-off provisions in favour of the account bank, which could interfere with the pledge of bank accounts in favour of the lender. Therefore, it is common practice to require from the account bank a waiver of these rights and provisions. This should be disclosed and discussed with the account bank ahead of the closing; and

c subordination of intragroup loans is most of the time only partial in the sense that the SPV can still use excess cash to reimburse the intragroup loan.

VI LEASES OF BUSINESS PREMISES

Depending on the type of business, commercial premises can be rented via a common lease or a retail lease.

i Retail leases

Retail leases concern a specific group of professionals that are in direct contact with the public in the leased premises, the premises being primarily used for retail activities. These leases are governed by the Commercial Lease Act of 30 April 1951, which includes a wide raft of mandatory legal provisions, mostly for the benefit of the tenant:

a term: retail leases must be concluded for at least nine years, the tenant being entitled by law to request three renewals of nine years each. This right to request a renewal is, however, not absolute as it can be refused by the landlord, for cause or not. The justification of the refusal shall determine the indemnity to be paid to the tenant, as determined by law;

b break option: the tenant is entitled by law to terminate the retail lease every three years. An anticipated waiver of this termination right is not always valid;

c rent: 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 frequently apply variable rent based on turnover subject to a minimum guaranteed rent; and

d rent review: under a retail lease each party can, during a period of three months prior to the end of each three-year period, file a request to review the rent provided that the rent value of the leased premises has changed by at least 15 per cent due to new circumstances.

ii Common lease

Contrary to retail leases, the legal provisions applicable to common leases are not mandatory meaning that the parties can accommodate the different terms and conditions. Except for the prohibition of a perpetual lease (i.e., a lease exceeding 99 years), no restriction applies regarding the term of the lease.

iii 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. For traditional indexation, the formula is set out in Article 1728 bis of the old Civil Code. Where the formula chosen by the parties differs, the indexation amount can be reduced if the result of the contractual formula is higher than the result of the legal formula.

iv Maintenance, repairs and taxes

Concerning maintenance and repairs, the default rule is Article 1754 of the old Civil Code, a tenant-friendly provision where the tenant will only be liable for small maintenance and repair works, leaving all other maintenance works, including obsolescence, in the charge of the landlord. Parties, however, frequently derogate, providing that the rule of Article 3.154 of the Civil Code will apply, where the landlord shall not only support the structural repairs but also the repairs whose costs manifestly exceed the revenues of the asset. Considering this modification of the Civil Code, the parties would be well advised to detail their mutual obligations in the agreement. In sale and leaseback transactions, and retail and hotel transactions, we have seen lease agreements where all maintenance and repairs, including structural repairs, are met by the tenant.

It is common practice that the taxes linked to the property (e.g., the annual property tax) are recharged to the tenant.

v Rental guarantee

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

vi Registration, fixed date, transcription

Registration of the lease is a legal obligation, which usually lies with the tenant based on contractual provision. 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.

All leases exceeding nine years or including discharge of three-year rent must be recorded in the mortgage register and, therefore, executed before a notary. 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.

VII DEVELOPMENTS IN PRACTICE

i Indexation of residential rent prices

In Belgium, the regions are competent for residential leases, including with respect to the fixing of prices. Unless parties agree on a fixed rent price or an adjustment based on another metric than the cost of living, rent prices are indexed based on the health index. The health index is derived from the consumer price index, excluding alcohol, fuel and tobacco.

The index follows the indexation, which reached 12.27 per cent in October 2022, being the highest percentage since June 1975, when it stood at 12.50 per cent. The indexation based on the health index of October 2022 amounted to 12.27 per cent, and thus equals the indexation. The inflation rate has been greatly impacted by energy prices. Disregarding the energy prices, inflation would amount to 6.97 per cent as at October 2022.

Considering the impact of the current crisis on rental prices, as well as society's concern regarding sustainability and climate change, the three regions have decided to freeze or limit the indexation of residential rent prices depending on the energy performance level of the asset.

Brussels

In the Brussels capital region, indexation of residential rent is prohibited if the energy level of the dwelling carries an F or G label. If the label mentions E, the indexation is limited to 50 per cent of what is legally allowed. If the level is A, B, C or D, the indexation can be applied as foreseen by law or by contract. This regime is applicable as of 14 October 2022 and will last for 12 months.

Flanders

In the Flanders region, indexation of residential rent is prohibited when the residence's energy label is E or F. If the level is D, only half of the normal indexation is allowed. Full indexation is allowed for residences with energy levels A+, A, B or C. The entry into force date was 1 October 2022. The measure is applicable during 12 months but after this period, a correction mechanism becomes applicable preventing a normal indexation (or recapture) for the D, E and F labels afterwards.

Wallonia

In the Walloon region, an index-freeze regime similar to those in the two other regions has been put in place. As of 1 November 2022, there has been a complete index freeze in cases where the energy level is F or G. If the energy label is E, the indexation is limited to 75 per cent. For D energy labels, the indexation is limited to 50 per cent. Finally, there is no cap on the indexation of residential rent for premises with an energy level label of A, B or C. The index freeze will last for one year, after which a correction mechanism will become applicable for the contracts that fell under the index freeze preventing a normal indexation (or recapture).

ii Reform of contract law

As from 1 January 2023, all contracts are subject to a new legal framework. The most important aspects are summarised below.

Introduction of a hardship principle

Under current Belgian contract law, hardship is not acknowledged as a legal principle. A party will therefore 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 provision is indeed of suppletive law and the parties can exclude its application in their contract. This recognition of the hardship principle may be of particular importance for (the drafting and negotiation of) long-term agreements, for example, project development agreements, long-term lease agreements, building rights agreements and leases.

Abuse of circumstances

Under the new contract law, an 'abuse of circumstances' can be a ground for 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 of 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. One can expect quite some legal debate concerning this principle in 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 contract law confirms not only the freedom of contract as a guiding principle but also confirms the parties' freedom to negotiate and to end negotiations. In accordance with case law, The contract law confirms that the freedom to negotiate or end negotiations is only limited by the general principle 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 would not have 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 the case of breach of contract, is important to the real estate transactional practice as it clarifies the scope and limits of the freedom to negotiate.

Unilateral rights in the case of breach of contract

The new contract law explicitly confirms the right for a party suffering from a breach of contract by its counterparty to take unilateral (and sometimes even pre-emptive) action, without being required to go to court first. 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. These remedies include remedies that can be of particular importance for real estate contracts as they include:

a the possibility to unilaterally terminate a contract; and

b the possibility to unilaterally have work that was not performed or that was not properly performed by the counterparty, performed by a third party at the cost of the counterparty.

VIII OUTLOOK AND CONCLUSIONS

Between rising interest rates and inflation, and against the backdrop of the war in Ukraine, 2023 is likely to be a more difficult year for the real estate sector, with a few very quiet months awaiting a rebalancing of prices. During this period, investors are likely to focus on asset management and ESG priorities, driven also by local and European regulations. In this segment, we can also expect a new balance to emerge between landlord and tenant in terms of sharing the costs and benefits of energy saving investments.

In this uncertain environment, the application of the newly introduced hardship concept in Belgian contract law will have to be carefully monitored.

Appendix 1

ABOUT THE AUTHORS

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Ariane Brohez is a partner of the real estate practice group in Belgium. During the past 15 years, she has developed particular experience in structuring real estate funds, real estate investments (acquisitions and disposals) and real estate financing. Ariane assists clients in real estate transactions (portfolios, share deals, asset deals, sale and lease back and (re)financing), negotiating deals from initial offer or term sheet until closing and advising on all tax, regulatory and legal aspects. She has also specialised in Belgian corporate tax law and withholding taxes, including international tax developments and GAAR (general anti-avoidance rule), as well as in European law and constitutional law.

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

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