The Real Estate Law Review

Third Edition

Editor
David Waterfield

Law Business Research

The Real Estate Law Review

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David Waterfield

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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EDITOR'S PREFACE

Building on the success of the previous editions of *The Real Estate Law Review*, the third edition now extends to some 40 jurisdictions, and we are delighted to welcome new contributors from key countries around the world. *The Real Estate Law Review* seeks to enable practitioners and clients to meet the challenge of keeping abreast of the rapidly evolving global real estate market. Each chapter offers an up-to-date and accessible summary of the key legal and practical developments in the relevant jurisdiction, and a vital snapshot of the important market drivers, trends and opportunities. Together, the chapters provide an invaluable overview of international real estate.

It is no longer possible to look at domestic markets in isolation; real estate has become a global industry, and *The Real Estate Law Review* reflects that status. An awareness of the global real estate market and an understanding of the practices and requirements of overseas investors are vital if practitioners and their clients are to take advantage of investment trends and opportunities as they develop.

The Real Estate Law Review continues to provide an overview of the state of the international real estate market, including the types of investor, the sources of funding and those assets that are in demand. In general, the focus remains on prime properties in the world's leading global cities as investors continue to seek a safe haven for their capital. Although this remains the case with London, investors are starting to see opportunities in the wider UK market, and we are generally more optimistic than at this time last year. However, positive recent news, data and forecasts must still be considered in the light of continuing economic and political challenges, including the next US fiscal cliff, uncertainty in emerging markets and the stability of the eurozone.

Once again, I wish to express my gratitude to the distinguished practitioners from across the globe who have provided invaluable contributions to this edition. As ever, I would also like to thank Gideon Roberton and his team for their sterling efforts in compiling this third edition of *The Real Estate Law Review*.

David Waterfield
Slaughter and May
London
February 2014

Chapter 2

BELGIUM

Yves Delacroix[1]

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

Under Belgian law, two types of rights over real estate exist. The first are rights *in rem* relating to a certain direct control over real property:

a full ownership right, which is the most absolute right over an object and includes the rights of use, enjoyment and alienation (sale, granting other rights, destruction) within the limits of mandatory law, and which is unlimited in time;

b easement, which allows one property to be burdened to facilitate the use of another property;

c usufruct, which is a right to use a property owned by someone else, and to benefit from its profits or products, under the obligation of preserving its substance; a usufruct may last no longer than the life of the usufructuary and a maximum of 30 years if the beneficiary is a legal entity;

d *emphyteusis*, which is a special kind of long-term lease giving the right to use and build on real estate in return for the payment of an annual ground rent; a long lease is granted for a minimum of 27 years and a maximum of 99 years; and

e building right, which is a right to have ownership of buildings or structures on someone else's land; a building right is granted for a maximum of 50 years.

The second are rights *in personam*: claims allowing the request of a certain performance from another party (leases).

Apart from these, there are a number of accessory real rights such as mortgages and pledges. Ownership can also take the form of commonhold (condominium ownership).

1 Yves Delacroix is a partner at Liedekerke Wolters Waelbroeck Kirkpatrick.

The list of real rights is fixed by statute; it is not possible to create additional real rights by, say, contract. This is known as the *numerus clausus* principle.

ii System of registration

Ownership and property is evidenced in the Mortgage Register, in which all transfers of property – rights *in rem*, including mortgage deeds and easements (with the exception of the legal easements), as well as leasehold interest of a duration of more than nine years, must be described to be effective against third parties.

Land and buildings are also described in the Land Register, which also has other purposes (the Land Register sets out the categories to which each land parcel or building belongs and indicates the related estimated annual income, which is used for the calculation of the real estate withholding tax).

There is no state guarantee as such, and the Mortgage Register cannot be held liable for the registration of inaccurate information provided, it being understood that the Mortgage Register may only be held liable if the provided information is inaccurately processed.

Belgian notaries may be held liable for the validity and binding force of the deeds passed before them.

iii Choice of law

Belgian property law is essentially contained in the Belgian Civil Code, which contains the rules applicable to sales, leases, construction, etc. The Code also contains specific rules dealing with, *inter alia*, retail leases, residential leases and farm leases. Specific legislation exists for long leases, surface rights and mortgages.

Interpretation of the Civil Code by the courts – especially the Supreme Court – plays an important role.

Planning and environmental regulations are governed by Flemish, Walloon or Brussels regional legislation. Investors must obtain the necessary permits and permissions for each real estate project they set up in Belgium to ensure that they comply with these planning and environmental regulations.

II OVERVIEW OF REAL ESTATE ACTIVITY

The eurozone sovereign debt crisis has been a big threat to the Belgian real estate market in 2012. The impact on the economy has affected the demand for offices or logistic premises, as well as consumption in retail stores. The sovereign crisis has affected both investors and tenants with, for instance, sustained economic pressure on eurozone governments to keep expenditure, such as occupancy costs, under control; this has affected the Belgian real estate market, as the Belgian state and the European Union are two of the major occupiers of office premises in Brussels (Belgium's most important market). Investors became increasingly cautious and risk-averse, and the banks themselves also became extremely cautious in financing real estate transactions.

During 2013, the economic sentiment has, however, improved; the Belgian economy was no longer in recession at the end of 2013 with a 0.2 per cent GDP growth rate. According to a report drafted by DTZ, the total real estate investments for 2013

are expected to be above €2 billion for the first time since the crisis. According to DTZ, economic recovery is likely to start in 2014, and to accelerate from 2015.

It seems that offices are quickly coming back into favour for investors (the office segment in 2013 will represent 65 per cent of all investment, against 50 per cent in 2012). For the first time since the economic crisis, it appears that investors are willing to invest in offices again, although deals have become increasingly difficult and often take more time to complete. If the economic recovery continues, more transactions are certainly to be expected in 2014.

III FOREIGN INVESTMENT

Although tax consequences may be different for non-Belgian ownership, there are generally no restrictions on ownership or occupation by foreign entities. Neither are there any restrictions in principle on obtaining loans from either Belgian or foreign banks, it being understood that the source country of finance is important from a tax point of view (since the tax treaty, if any, may determine to what extent withholding tax is charged on interest payments).

As regards security rights, no restrictions exist except for the general pledge over the business (similar to the floating charge in the UK), which can only be in favour of an EU-licensed credit institution.

IV STRUCTURING THE INVESTMENT

A very common structure by which to invest in real property is a direct purchase (asset deal). Many transactions, however, especially large transactions, are done through company acquisition (share deal) because of tax considerations. Split sale was another commonly used structure in real estate transactions prior to the introduction of the anti-abuse tax provision introduced in Belgium by the law of 29 March 2012. A split-sale structure (see Section VII.iv, *infra*) was generally used for tax reasons and is no longer permitted under the terms of the new provision.

i Share deal (sale of shares of a company owning real estate)

A share deal (sale of shares of a company owning real estate) remains a common way to structure the investment. Transfer taxes (see Section V.iii, *infra*) are, in principle, not due in the case of a share deal. As a rule, except in cases of simulation (for instance, if the property is contributed to a new company after agreement has been reached on the object of the sale and the shares of the company are sold instead of the asset) no registration tax is due on the sale of shares. Even if the sole asset of the company is the real estate, in principle, no registration tax is due. Since, in practice, the transfer tax due in the case of an asset deal is usually borne by the purchaser, a share deal may produce a substantial saving on transfer tax for the purchaser.

From a direct tax viewpoint, in the case of a share deal, since the property does not change hands, the transferred company continues to depreciate the real estate during the remaining depreciation period and on the remaining depreciation basis. When the company later sells the real estate, a taxable capital gain is usually realised. The capital

gain is equal to the difference between the sale price and the tax value of the real estate in the company's books, meaning the historical cost less depreciation (the sale price is usually higher than the tax value of the real estate in the books); hence, at the time of the sale of the shares, the valuation of the shares should take into account the tax latency (i.e., the present value of the future potential tax burden in connection with the sale of the real estate by the company). The calculation of the tax latency should also take into account that the share price or goodwill cannot be depreciated under Belgian tax law. The burden of said tax latency is usually shared between seller and buyer.

Corporate income tax is levied in Belgium at a rate of 33.99 per cent. The tax on capital gains on fixed assets held for at least five years can be deferred subject to reinvestment of the full proceeds of the sale price in depreciable assets. The tax is then recaptured over the duration of the new depreciation.

Tax losses can be carried forward indefinitely; however, in the case of a change of control not justified by legitimate financial or economic needs, tax losses are barred. An advance ruling can be applied for with respect to the existence of legitimate financial or economic needs. The ruling commission, however, often considers that a change of control of a real estate company is not justified by legitimate financial or economic needs; hence, carried-forward tax losses are generally not taken into account for the calculation of the sale price of the shares.

V REAL ESTATE OWNERSHIP

i Planning

Each region has enacted its own town and country planning code. In the Flemish region, the Flemish Code of Planning and Zoning applies. This Code is a compilation and coordination of the Flemish Regional Acts of 22 October 1996 on planning and zoning and of 18 May 1999 on the organisation of planning and zoning. In the Walloon region, the Walloon Code of planning and zoning, urban development, heritage and energy applies. In the Brussels metropolitan region, the Brussels Code of planning and zoning applies.

In all three regions, every property falls within a particular zoning area, determined by the applicable zoning plans (the regional zoning plans and the municipal zoning plans). These plans must be taken into account whenever the competent authorities must deal with any application for a building permit, but also when delivering any other permit, such as environmental permits or the extension or renewal of any environmental permit.

Carrying out construction works also requires a building permit. Erecting a building without having previously obtained such building permit is a criminal offence, as is the maintaining of buildings erected without a permit. In the Walloon and Brussels regions, the building and environmental aspects are addressed in one single permit. This is as yet not the case in the Flemish region, where both permits must be obtained separately. This time-consuming requirement in the Flemish region is, however, due to be removed. On 19 April 2013, a draft of a new Flemish Regional Act was approved, providing that the building and environmental aspects shall be addressed in one single permit. The entry into force of this Act is expected during 2015.

Non-compliance with the applicable provisions of the zoning plan or building permit can trigger a variety of administrative, civil and criminal sanctions.

ii Environment

All three regions have adopted a comprehensive set of rules relating to soil and groundwater contamination. The three regional schemes on soil contamination present similarities but also notable differences. The following common principles can be mentioned for the three regions:

a Various events (e.g., accidental pollution or fortuitous discovery of pollution, the transfer of land where risk activities – activities considered as potentially causing soil pollution – were carried out, starting and ending a risk activity, etc.) will trigger the obligation to conduct a preliminary soil survey, performed by a licensed soil expert. Said preliminary soil survey must be filed with and approved by the regional public waste agency.

b The regional public waste agency can request that it file a descriptive soil survey if there are indications that the soil clean-up thresholds have been exceeded, or that the pollution is a serious threat for the environment and human health. The filing of said descriptive soil survey can give rise to the drafting of a soil clean-up project and, ultimately, to the cleanup of the land. Both the descriptive soil survey and soil cleanup project will require prior approval by the regional public waste agency.

c In principle, the author of the contamination will be held liable for the pollution.

Every regional soil contamination regulation provides for exonerations of the aforementioned obligations. Breaches of said regulations can also give rise to criminal sanctions.

iii Tax

Under Belgian law, the sale of real estate is subject to a registration tax of 12.5 per cent (if the property is located in the Walloon or Brussels region) or 10 per cent (if the property is located in the Flemish region). The registration tax is calculated on the purchase price, which may include the charges imposed on the purchaser. If the fair market value is higher than the purchase price, however, the registration tax is calculated on the fair market value. Seller and purchaser are jointly liable to pay the registration tax. In practice, however, registration tax is usually borne by the purchaser.

The sale of a new building may be subject to VAT at a rate of 21 per cent, in which case no proportional registration tax is due. If the seller is a professional builder, the transfer of a new building is automatically subject to VAT. Any other seller should opt to sell a new building with VAT; this tax is due on the purchase price of the new building. As previously mentioned, pursuant to a measure that entered into force on 1 January 2011, if a new building is transferred with VAT, the tax will also be due, under certain conditions, on the transfer of the land.

Transfer tax exemptions might be available if real estate is transferred in the framework of the transfer of an undertaking or in the framework of reorganisation.

iv Finance and security

The only form of security taken in relation to immoveable property is a mortgage. A standard security package required by third-party lenders generally consists of a mortgage or a mortgage mandate.

In large transactions, the lender would also take security over other assets, such as a pledge over the receivables (rental income), a pledge over the shares of the borrower if the parent company is involved in the loan, and a pledge over shares held by the borrower in other companies, or a business pledge (similar to a floating charge in the UK).

A mortgage deed must be signed before a notary public; substantial costs can be involved in the vesting of the mortgage, mostly in connection with registration duties and inscription duties at the Mortgage Registry (the cost amounts to approximately 1.4 per cent of the mortgage amount). As a result of this, borrowers will try to have the mortgage granted for an amount less than the value of the loan, and then grant a proxy to mortgage – by which the debtor irrevocably authorises the lender to establish a mortgage on the property – in addition to the mortgage (the borrower will then only pay duties on this second mortgage if and when it is actually established). Proxies to mortgage minimise costs but increase the risks for the lender. They are fairly common in real estate transactions; when used, the lender usually takes a first-ranked mortgage for a lower amount, coupled with a proxy for a more substantial amount. Proxies to mortgage must also be executed before a notary public. A proxy to mortgage does not grant any priority rights as such; it is only once the proxy has been exercised (and the mortgage subsequently registered) that the mortgage becomes effective and binding *erga omnes*. As such, a proxy to mortgage does not prevent third parties (acting in good faith) from obtaining rights *in rem* over the property, even if the proxy to mortgage is subject to a negative covenant (negative pledge).

In addition, certain lenders take *in rem* security rights over the entire business of the debtors by way of pledges. The creditors (lender or agent) and the beneficiaries of this security must be licensed credit institutions. A business pledge must be registered at the Land Registry and an amount of 0.5 per cent of the amount for which the inscription is taken is due.

VI LEASES OF BUSINESS PREMISES

Under Belgian law, four different types of lease agreements are to be distinguished:

a common lease agreements (concerning offices, parking spaces, warehouses, industrial buildings, etc.);
b residential lease agreements (the lease of the tenant's principal residence);
c commercial lease agreements (leases that are mainly utilised by the lessee or by a subtenant to carry out retail or craftsperson's activities in direct contact with the public); and
d agricultural lease agreements.

Common lease agreements are subject to the general provisions of the Civil Code.[2] Lease agreements of the other types are governed by specific legislation in the Civil Code. Commercial lease agreements (retail and artisanal activities) are, for instance, governed by the Commercial Lease Act of 30 April 1951. The general provisions of the Civil Code apply by default to this type of lease agreement insofar as those special rules do not deviate therefrom. Most provisions of the Commercial Lease Act are mandatory; and parties may not derogate from said provisions.

Most leases for commercial purposes (offices, warehouses, factories, etc.) are governed by the general provisions of the Civil Code, since they do not fall within the scope of a specific set of rules (except for the leases for retail trade); we will therefore briefly review some of the general rules of the Civil Code and, when useful, will make reference to or comparison with the Commercial Lease Act of 30 April 1951.

i Term

Parties are free to agree on the term of leases. Written lease contracts concluded for a fixed term end automatically when the lease periods have expired, without prior notice.[3] The contracts may, however, provide for notice at the end; they may also provide break options for one party or both.

In the framework of retail trade legislation,[4] the terms of each lease must be at least nine years; however, tenants may terminate leases at the end of each three-year period, provided they give notice at least six months before the relevant termination dates. The lease may grant the tenant more termination rights but may not restrict them. If lease agreements explicitly so allow, landlords may also terminate agreements at the end of each three-year period if they wish to carry on their own businesses in the leased premises, or they want to allow their spouse, certain relatives or a company owned by such person to carry on a business in the premises. Landlords' notices to quit must be served on tenants at least one year before the end of the relevant three-year period. Parties may also terminate leases at any time by mutual agreement, but the agreements must be set down in a notarial deed, or be declared before a justice of the peace.

ii Rent and rent increases

The amount of the rent is determined freely by the parties, by mutual agreement. If the rent does not provide an indexation clause, it will remain unchanged throughout the duration of the lease. Parties may, however, explicitly stipulate that the rent will be linked to the cost of living (which is most common) or that according to a certain number of elements, the rent will be revised upwards or downwards.

The Commercial Lease Act of 30 April 1951 on the retail leases stipulates the possibility for each party to request the revision of the rent at the end of each three year-period. Each party is entitled to apply to the justice of the peace for a rent review at the end of such period, provided the applicant can prove that the normal rental value

2 Sections 1714 to 1762-bis.

3 Section 1737 of the Civil Code.

4 Commercial Lease Act of 30 April 1951.

of the premises has become at least 15 per cent higher or lower than the then-applicable rent, and that such increase or decrease is due to new circumstances that will have an impact on the rental value of the premises for at least three years (the improvement of the district, etc.). If parties cannot reach agreement, a justice of the peace may fix the rent equitably by looking at market conditions and the features of the building.

iii Renewal

The legal rules governing ordinary leases are silent on a right of renewal, but the parties are free to provide such a right in favour of tenants. In the absence of such provision, there is no automatic right of renewal.

With regard to retail leases, tenants have the statutory right to demand three lease renewals, each for nine years (although the parties may agree to renew for other term lengths).[5] Tenants wishing to renew retail leases must apply to their landlords, between 18 and 15 months before the lease ends by recorded delivery letter or by bailiff, indicating the conditions under which they wish to renew their leases; landlords then have three months to give notice of their decisions. They may take any of the following actions:

a expressly agree to renew;

b refrain from replying to the tenant's offer, in which case they are deemed to have agreed;

c impose other renewal conditions – if tenants reject them, they must bring the matter before a justice of the peace within 30 days of receiving the offer, otherwise they lose their rights to renewal; or

d validly refuse to renew on one of the grounds listed in Section 16 of the Commercial Lease Act.[6]

Landlords may also claim higher rents offered by third parties; however, if current tenants match these offers, they are preferred. If renewal is refused as described in item (d), tenants can claim compensation for disruption of their business tenancies in some cases and under certain conditions. Landlords have an absolute right to refuse renewal without motive, but if they refuse to do so without invoking a motive provided for under the law, they are liable to tenants for damages in an amount of at least three years' rent.

VII DEVELOPMENTS IN PRACTICE

i Space ownership: the vertical dimension of real property

A hot topic in Belgian real estate law practice is the space ownership or vertical dimension of property issue, which deals with the question of whether it is possible to split horizontally the property of the soil from the property of the subsoil and the above ground in order to pile up property rights vertically.

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5 Section 13 of the Commercial Lease Act.

6 For example, personal occupation of the premises by the landlord, non-commercial use of the premises, required reconstruction works in an amount higher than three years' rent (with the main cause being attributable to the tenant).

This question cannot be answered without taking into account Section 553 of the Civil Code, which stipulates that all constructions, plantings and works on or within a piece of land are deemed made by the owner, at his or her expense and belonging to him or her, unless the contrary is proved. This is the right of accession, and it follows from this that the owner of a piece of land is deemed to be the owner of what is above and below it.

To realise the horizontal split, the owner of the ground must therefore renounce his or her right of accession. Such renouncement is, however, qualified by the Belgian Supreme Court as a building right regulated by the Belgian Act on Building Rights dated 10 January 1824. The major problem of the qualification as a building right lies in its mandatory temporal limitation to 50 years, meaning that no perpetual division of ownership can be realised above ground.

It has, however, long been admitted (since a decision rendered in 1969 by the Belgian Supreme Court) that such a split (without a time limitation) is possible between the soil and the subsoil. The reasoning is based on the literal interpretation of the concept of a building right as the right to have constructions, plantings and structures upon someone else's ground, which also means that nothing opposes a perpetual ownership under someone else's ground (i.e., the subsoil/the underground). It is debatable whether this possibility (perpetual division between the soil and the subsoil) will remain; indeed, the Parliament is due to modify the Act of 10 January 1824 to provide a wider definition of the building right as being also the right to have constructions under someone else's ground.

Some nuances are, however, conceivable in two situations in which a perpetual horizontal split of the ground (the above ground and the underground) seems to be possible.

The first situation is provided by Section 553 of the Civil Code, in which a third party acquires, by way of prescription, an underground space under a building of a third party, or of any other part of the building.

The second situation involves public state property, in which case, two hypotheses are conceivable. The most obvious hypothesis is that in which the soil belongs to a private entity and a construction above it (e.g., a viaduct) or beneath it (e.g., a pipeline) is public state property. Given the fact that, under Belgian law, no public state property can be acquired by prescription, the private owner will never be able to invoke his or her right of accession, thus creating in that respect a perpetual horizontal split of property rights. Another, more complex hypothesis is that in which a public body owns both the soil and the subsoil, with the soil being public state property (e.g., a public road) and the subsoil being private state property. In this hypothesis, it is conceivable that said public body sells its subsoil without being subject to the temporal limitation of building rights. This perpetual horizontal split is possible because of the preliminary split of the property regime of both the soil and the subsoil.

Further, it should be noted that on 13 September 2013, the Belgian Supreme Court decided that 'immovable ownership, independent from the ownership of the soil, can only be applied to constructions, structures and plantings'.[7] According to some

7 Cass. 13 September 2013, www.cass.be.

authors, this decision seems to be a confirmation by the Court that volume ownership is not possible. It is anticipated that this issue will continue to be heavily debated.

ii Proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property[8]

On 31 March 2011, a proposal for a directive on credit agreements relating to residential property was presented by the European Parliament and the Council.

The objectives of the proposal are twofold. First, it aims to create an efficient and competitive single market for consumers, creditors and credit intermediaries with a high level of protection by fostering consumer confidence, customer mobility, cross-border activity of creditors and credit intermediaries, and the submission of all creditors within the EU to the same rules. Second, it seeks to promote financial stability by ensuring that mortgage credit markets operate in a responsible manner.

The proposal was expected to be approved in the spring of 2012, but was in fact finally amended on 10 September 2013 and still has not been approved.

The main provisions of the proposal for the directive deal with:

a the financial education of consumers;
b conditions applicable to creditors, credit intermediaries and appointed representatives;
c the conduct of business obligations when providing credit to consumers;
d the obligation to provide information free of charge to consumers;
e the obligation of fair, clear, non-misleading and standardised advertising;
f the obligatory provision of pre-contractual information through the European Standardised Information Sheet (ESIS);
g the obligation to assesses the creditworthiness of the consumer and the disclosure and verification of consumer information;
h the possibility of early repayment; and
i prudential and supervisory requirements.

Its new Recital 7 and amended Article 2 provide that provisions laid down by the directive are subject to maximum harmonisation in relation to the provisions of pre-contractual information through ESIS. However, in those areas not clearly specified as being subject to maximum harmonisation, Member States should be allowed to maintain or introduce more stringent provisions than those laid down in the directive, provided that such provisions are consistent with their obligations under EU law. It is exactly in this regard – a lack of harmonisation – that Belgian doctrine criticises the proposal. There is too much leeway for the legislator, which unfortunately allows the maintenance of important differences within the consumer protection provisions in the different Member States.

8 COM(2011)0142-C7-0085/2011-2011/0062.

iii Rules on co-ownership

The Law of 2 June 2010 amended the Civil Code to improve and modernise the functioning of co-ownership and to resolve a number of difficulties that had previously occurred under the Law of 30 June 1994.

The most remarkable innovation is the provision for co-owner associations to create separate subgroups for separate buildings or for separate parts of a building; in other words, the ability to establish partial associations. Since co-ownership has become more complicated and more wide-ranging, the need for more efficient management of groups of buildings had arisen, and thus the need for a legal basis for such subgroups. Subgroups can now be formed provided that the main co-owner association consists of at least 20 individual parts. For a group of buildings, a subgroup can be created per separate building; for a building with physical divisions into distinct parts, a subgroup can be created for each part of the building. The partial associations need only be involved in respect of common areas intended to be used by some of the co-owners. The main association of co-ownership remains exclusively responsible for the general common areas and for the issues relating to the joint management of the co-ownership.

Partial associations can be established either with or without legal personality. To obtain legal personality, the basic deed and the regulation of co-ownership of the partial association must be registered at the Mortgage Registry Office.

iv Anti-abuse provision impact on split-sale transactions

Until recently (see Section IV, *supra*), the split-sale structure was a much used and very popular structure in Belgium for transferring control over immoveable property.

A split sale involves the vesting of a long-term lease right (against payment of a lump-sum price) to the benefit of one party and the transfer of the ownership encumbered with the long lease to another – possibly related – party. At the end of the long-term lease, the latter party obtains the full ownership of the real estate. If strict conditions are complied with, a split sale may involve a significant transfer tax saving. The transfer tax due in connection with the long-term lease was equal to 0.2 per cent of the amount paid under the long-term lease (by an Act of 28 June 2013, the transfer tax on long-term leases and on building rights has been increased to 2 per cent, with effect from 1 July 2013). The transfer tax due in connection with the transfer of the encumbered ownership is 10 per cent or 12.5 per cent (depending on the location of the property) of – as a consequence of the encumbrance – the reduced value of the property. Such structures were therefore very efficient from a transfer tax point of view, because the long-term lease right (previously taxed at a statutory rate of 0.2 per cent) represents the major part of the value of the property (70 per cent to 95 per cent), while the reversionary interest (taxed at a statutory rate of 10 per cent or 12.5 per cent) only represents the remainder. Legal certainty with respect to the transfer tax due in connection with the split sale could be obtained by way of an advance ruling of the Belgian ruling commission.

By the Law of 29 March 2012, Parliament introduced a new general anti-abuse provision to the Belgian tax law. The new anti-abuse rule provides that a legal deed (or series of legal deeds) is not binding on the tax authorities if they can demonstrate that tax abuse has been committed. For the purposes of the anti-abuse rule, tax abuse is defined as either a transaction the taxpayer enters, in violation of the purposes of a provision of

the Income Tax Code, outside the scope of this provision; or a transaction that gives rise to a tax advantage afforded by a provision of the Income Tax Code whereby securing this tax advantage would be in violation of the purposes of this provision, and whereby the primary purpose of the transaction is to obtain the tax advantage.

In the event that the tax authorities contend that a legal deed should be considered abusive, the taxpayer must demonstrate that the choice for the legal deed (or series of legal deeds) is motivated by purposes other than tax avoidance. When the taxpayer cannot demonstrate the existence of other, non-tax related, motives for the transaction, the transaction will be subject to taxation in line with the purposes of the Income Tax Code, as if the tax abuse had not taken place.

For registration duties, the new anti-abuse rule applies to all legal acts carried out as of 1 June 2012; transactions completed before that date cannot, in principle, be challenged on the basis of the new anti-abuse rule.

Although the split sale is not specifically mentioned in the law, it was generally considered that its use would no longer be permitted to structure real estate transactions, and this has been officially confirmed by the Belgian tax administration circular of 19 July 2012.[9] A split-sale transaction is now blacklisted to the extent that the entities involved on the buyer's side are affiliated, which means that such transaction will be considered abusive unless the parties are able to demonstrate that the transaction was justified for purposes other than tax avoidance. The above-mentioned circular was replaced by a new circular of 10 April 2013, which maintains the blacklist but also adds a white list of transactions that are considered to be not fiscally abusive.

v New circular on the VAT regime applicable to shopping centres

While leases in Belgium are not generally subject to VAT, the operating activities of a shopping centre are. A lease relating to a shopping centre unit is to be distinguished from an ordinary lease, given that other services are provided along with the private units and spaces put at disposal in a shopping centre. The operation of a shopping centre could thus be subject to mixed VAT taxation.

By a circular of 29 October 2012,[10] the VAT administration has clarified the VAT regime applicable to shopping centres.

While, previously, some aspects of the operation of a shopping centre could be subject to VAT (e.g, services with regard to utilities and services relating to the management of the common spaces of the shopping centre), there was a legal uncertainty regarding the costs to which the VAT deduction applied; the VAT regime that applied on a shopping centre was always subject to an individual decision of local administrations or the central VAT administration.

With the aim of bringing uniformity and legal certainty to this matter, the circular provides that a distinction must be made between three operation activities, and that a different VAT regime is applicable on each operation:

a the lease of private units and spaces, which is exempt from VAT;

9 No. 8/2012.

10 No. 34/2012.

b services associated with the lease of the private units or spaces (e.g., utility services such as water, heating and cleaning), which may be charged with VAT as long as they are charged separately; and

c general services with regard to the common spaces (e.g., publicity, organisation of events and animation, reception of clients, maintenance and cleaning of the common spaces, safety and waste management), which are subject to VAT.

We can therefore conclude that a shopping centre is subject to mixed VAT taxation; whether a cost is subject to VAT depends on the qualification of that specific activity.

The question arises, however, whether this circular is in accordance with the jurisprudence of the Court of Justice of the European Union, which recently ruled, by a judgment of 27 September 2012, on whether the leasing of immoveable property and the supplies of services linked to that leasing must be regarded as constituting a single supply, entirely exempt from VAT, or several independent supplies, assessed separately regarding VAT. The Court of Justice decided that although the services in question (e.g., cleaning services, etc.) would not normally be considered to be the leasing of immoveable property, they could, nonetheless, be regarded as ancillary to that leasing; charges for cleaning and maintenance in respect of a commercial property lease are to be treated as part of the rental of that property, and therefore exempt from VAT, since in the current case the two charges were closely linked.[11]

vi Extension of joint liability for the tax, social and salary debts of a joint contractor

By the Law of 29 March 2012, the Parliament adapted and extended the system of joint and several liability for the tax and social debts of a joint contractor or subcontractor that has existed within the construction sector for a considerable time.

Prior to the extension of the system, a contractor could be held liable by the social inspection authorities or the tax authorities (or both) for the social debts or tax debts (or both) of a joint contractor or subcontractor; however, the liability was, in principle, limited to the invoice amount of the services delivered. The contractor could, however, prevent this liability by correctly applying withholding duty when contracting with a joint contractor or subcontractor with social debts or tax debts (or both): the contractor should withhold an amount of 35 per cent in the case of social debts and an amount of 15 per cent in the case of tax debts of the joint contractor or subcontractor at the time of payment.

This system has been extended, with the Law of 29 March 2012 introducing a mechanism of ultimate responsibility to higher-ranked actors. Before the new Law, a principle (contractor) was only liable for the next contractor or subcontractor in the chain. However, following the introduction of this secondary liability, if a jointly liable contractor cannot settle the social or tax debts of the joint contractor or subcontractor, someone else in the chain shall subsequently be called upon and be held liable. As such, a contractor that has correctly withheld the 15 per cent or 35 per cent can still be held

11 *Field Fisher Waterhouse LLP v. Commissioners for Her Majesty's Revenue & Customs* (Case No. C-392/11).

subsidiarily jointly liable. Furthermore, the liability also applies to the salary debts of the contractor. This was implemented by the Royal Decree of 23 May 2013 in execution of the Law of 29 March 2013.

An Act of 11 February 2013, which entered into force on 4 March 2013, introduced a specific joint liability of employers of illegally staying third-country nationals (i.e., non-EU citizens). Three situations of joint liability are conceivable in this context:

a The first is the situation of the joint liability of the direct contractor, where the contractor or the next contractor is jointly liable for the salary debt resulting from the employment of illegally staying third-country nationals by his or her direct subcontractor.[12] However, joint liability does not apply if the contractor or next contractor is able to submit a written statement of his or her direct subcontractor in which the latter declares not to employ illegally staying third-country nationals.

b The second is the situation of the joint liability of the indirect contractor, meaning that the contractor and next contractor are jointly liable for the salary debt resulting from the employment of illegally staying third-country nationals by the subcontractor of their subcontractor (i.e., his or her indirect subcontractor), but only in cases where they were aware of it.[13]

c The third situation is the situation of the joint liability of the principal, meaning that the principal will be hold jointly liable in cases where he or she was aware of the employment of illegally staying third-country nationals by his or her direct or indirect contractor or subcontractor.

VIII OUTLOOK AND CONCLUSIONS

The eurozone sovereign debt crisis was identified as the biggest threat to the Belgian real estate market in 2012.

During 2013, however, economic sentiment improved, and risk aversion was no longer the main focus. The Belgian economy was no longer in recession at the end of 2013, showing a 0.2 per cent GDP growth rate.

As a result, it seems that offices are coming back into favour for investors; for the first time since the economic crisis, investors are willing to invest in offices again (the office segment in 2013 will represent 65 per cent of all investment, against 50 per cent in 2012).

Even though the general sentiment of 2013 is cautiously positive with regard to the Belgian real estate market, the governmental budget is still, as in many other countries, under pressure, and the government is in need of additional funding. During 2012–2013, the government implemented new laws that had an important impact on the real estate market (the anti-abuse provision's effect on the split-sale structure). We expect the government will be obliged to take further action in the course of the next year and will continue taking measures that, inevitably, have an impact on the real estate market.

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12 The chain of contractors is as follows: contractor – next contractor – subcontractor – indirect subcontractor.

13 Ibid.

Appendix 1

ABOUT THE AUTHORS

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Yves Delacroix ranks among the leading real estate lawyers in Belgium. He has extensive experience in handling large real estate transactions, and has particular expertise in sale, sale and leaseback, and lease (and other occupational or financial contracts, such as long-term leases, building rights, usufruct, financial or VAT leasing), and in related commercial contracts and construction law issues. Mr Delacroix acts for investors, developers, corporate users and retailers. He handles both real estate asset and corporate real estate transactions.

He is the author of several publications and teaches real estate law at the University of Louvain (executive master of real estate programme at the Louvain School of Management).

Mr Delacroix joined Liedekerke Wolters Waelbroeck Kirkpatrick in 1990, where he became a partner in 2000. He has a law degree from the Université Catholique de Louvain (1986), a degree in international law from the University of Leiden in the Netherlands (1987) and a degree in business administration from the Louvain School of Management (1988).

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