

Reform of the Belgian Civil Code

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News Flash – The new Belgian Civil Code (the Book on Goods) has just been approved by parliament, which will affect the Real Estate sector.

On 30 January 2020, the Belgian parliament adopted an important piece of legislation that will significantly affect the Real Estate sector. The reform represents a comprehensive overhaul of the provisions of the Belgian Civil Code governing goods and is particularly relevant to real estate transactions. It should enter into force and apply (subject to publication) to new transactions as from July 2021, but in many cases, parties can already decide to apply the new regime.

For real estate professionals, the main impact will relate to *in rem* rights structures, ie structures involving an assignment of part of the ownership of a property to a third party in the form of an *in rem* right (leasehold, usufruct, building right or easement). Other related real estate aspects will also be impacted, including the ownership regime, rules governing simple co-ownerships and relationships between neighbours.

This News Flash does not purport to provide an overview of all relevant changes, but highlights a couple of important changes.

New rules applicable to *in rem* right agreements

In rem rights will now be subject to a new and harmonised set of regulations, deviating in many instances from the current regime. The changes include amongst others the following:

- Duration: the maximum term for usufruct and building rights is increased to 99 years (it was already the case for leasehold rights), while the minimum term applicable to leasehold rights is reduced from 27 years to 15 years.
- Repair obligations: the 'default' liability regime that specifies that usufruct holders and leaseholders are responsible for repairs to a building is extended; in particular, the usufruct holder will now have to bear a portion of the costs for structural repairs (*pro*

rata to the remaining value of its right), and the leaseholder will be responsible for all repairs, including structural repairs.

- Indemnity on the expiry of an *in rem* right: the bare owner will now be liable to indemnify the leaseholder for any new construction/refurbishment performed on the property; conversely, the bare owner will only bear such obligation to the usufruct holder if the bare owner has consented to such construction/refurbishment.
- Price/consideration for an *in rem* right: the obligation to provide for annual consideration to be paid by the leaseholder is removed; if such annual consideration is contractually agreed, the assignor of an *in rem* right (eg leasehold) will remain jointly liable, together with the assignee, for the payment of such amounts in the case of an assignment.

Most of the provisions of the Belgian Civil Code are of a facultative nature, meaning that parties may provide for alternative arrangements in their agreements. However, the new provisions will apply in absence of such alternative arrangements and will often form the basis of the negotiating position for each party. Also, a number of these new provisions are mandatory and parties cannot derogate from these provisions, in particular, definitions and the provisions relating to the duration of *in rem* rights.

New opportunities and risks in structuring transactions

The reform will also have a major impact on the structuring of real estate transactions. While it will open up new possibilities, it will also create some risks (non-exhaustive):

- Definitions of *in rem* rights are codified for the first time and are mandatory, meaning that non-compliance with such definitions may lead to a re-characterisation of several real estate transactions; this could have significant consequences both from a civil and tax perspective; in particular, the new definitions may raise doubts as to the validity of certain structures commonly used, such as for instance leasehold rights with far-reaching contractual restrictions to modify the building (eg hotel contract) and building rights created on existing buildings; careful structuring and drafting will be required to mitigate those risks.
- A new feature of the building-rights regime will now authorise the setting up of volume ownerships, enabling owners to structure real estate projects outside of the burdensome framework of organised co-ownerships; this will provide additional flexibility on the market in various contexts, but the conditions of such regime are strict and should be carefully reviewed.
- Several provisions clarify and confirm that it is possible to put in place sub-leaseholds, sub-usufructs and other similar structures, facilitating several common transactions (including sale and lease back operations).

It is anticipated that these changes will only impact new structures as from July 2021. However, in practice, parties may already adapt their arrangements to benefit from the new available possibilities, but will need to consider the risks. The set of structures currently used in the Real Estate sector will have to be amended to reflect these changes.

Further impacts

Many other new features are implemented by the reform. Some features are a codification of existing practice, providing additional legal certainty. Other features are however new, and include new actions to protect the owner or *in rem* right holder in several instances (non-performance of repair works, anticipated harmful action by a neighbour, recognition of existing rights, etc), a new regime for the assignment of *in rem* rights, and protections for third parties (mortgage creditor, tenant, etc) upon expiry of *in rem* rights.

The reform will also indirectly impact the tax treatment of several real estate operations. At this stage, no guidance has been provided by the legislator or the tax administration in connection with these changes. When selecting transactional structures, establishing the rights and obligations of each party, choosing the terms of the agreements, their potential consequences must be carefully considered.

We remain at your disposal to answer any question that you may have and/or to discuss how these changes will impact your business position.

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