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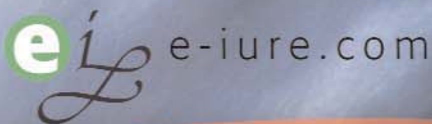

The Netherlands

KAISER ADVOCATEN & BELASTINGADVISEURS

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Kaiser Advocaten & Belastingadviseurs is a law and tax firm based in the centre of the Netherlands. Our practice is characterized by its rapid and straight forward approach, founded on the extensive experience of our lawyers and tax advisors. We consider our clients' interest our number one priority, without hesitating to advise our clients what we believe is in their best interest. Consequently, this means that we may pursue a settlement in some cases, and in other cases, for instance, we initiate summary proceedings to protect our clients' interests. Also, our clients may be better off with a concise but complete contract than with an exhaustive version. We want to know what is of importance to our clients and we take this into account in our advice and in all our activities.

Our lawyers and tax advisors possess extensive experience, particularly in the following areas of expertise:

Company law:

- Corporate restructuring, mergers & acquisitions, joint ventures, management buy-outs and buy-ins;
- Commercial business contracts, distributor agreements, franchise, agency;
- Formation of new companies and other legal persons
- Intellectual property.

Tax:

- Corporate and individual tax;
- VAT;
- Estate planning.

Employment law:

- Individual employment agreements, dismissal, reorganizations;
- Employee representation;
- Collective employment agreements.

Property and Real Estate:

- Building contracts;
- Real estate development and acquisition;
- Securities;
- Lease, rights of superficies.

Insolvency law:

- Bankruptcy, moratorium, (financial) restructuring;
- Sureties, liens, bank guarantees, personal securities;
- Directors' liability.

Litigation:

- Representation in civil proceedings on the merits and summary proceedings
- Seizure of assets;
- Tax proceedings;
- Arbitration.

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Regulations and rules

The Dutch law applicable to legal persons and, more specifically, to corporations can be found in the second book of the Dutch Civil Code. Apart from this general legal framework, a number of specific statutes and regulations exist.

Types of companies

The organizational forms of doing business in the Netherlands can be divided in those with legal personality and those without legal personality. This distinction is of importance for the way in which the business is treated by the law: as far as patrimonial law is concerned (i.e. the laws of succession, property, contract and tort), legal persons are in principle treated in the same way as natural persons.

Organizational forms of business with legal personality are, amongst others, both types of corporations: the public limited liability corporation (naamloze vennootschap, hereinafter: "NV") and the private limited liability corporation (besloten vennootschap , hereinafter: "BV"). Organizational forms lacking legal personality are the sole proprietorship (eenmanszaak), the general partnership (vennootschap onder firma) the private partnership (maatschap), and the limited partnership (commanditaire vennootschap). Due to the limited scope of this article only the NV and BV are dealt with in more detail.

The NV and BV are both legal persons that have an authorized capital divided in shares. The shares of an NV can (in principle) be transferred freely, whereas the shares of a BV cannot. Incorporation of a BV or an NV takes place on initiative of the founders by a notarial deed containing the articles of association (By-laws do not exist under Dutch corporate law). Prior to incorporation, a so-called declaration of no objection has to be obtained from the Ministry of Justice.

The liability of shareholders

The shareholders of an NV or a BV are in principle only liable for the unpaid balance on their shares. This liability is limited to the nominal value of the shares plus the subscription price for as far as it exceeds the nominal value. Only under exceptional circumstances can a shareholder in his capacity as shareholder be held liable based on the law of tort.

1. Share capital

Minimum capital

The authorized capital and the nominal value of shares have to be stated in the articles of association. At least one fifth of the authorized capital stated in the articles of association of an NV or a BV has to be issued in shares. Furthermore, for an NV the capital to be issued in shares should be at least 45.000€, whereas for a BV 18.000€ suffices. These amounts have to be actually paid in. Provided that the aforementioned minimum requirements are met, a corporation and its shareholder can agree that (up to a maximum of) three quarters of the nominal value of a registered share has to be paid-in when the corporation requests this.

Classes of shares

Shares can be subdivided in two main classes: registered shares and bearer shares. An NV may issue both, whereas a BV is only allowed to issue registered shares. The shareholders' register is kept by the management board of the corporation.

Both registered shares and bearer shares can be issued as, amongst others, ordinary shares, preference shares and priority shares. Ordinary shares are shares to which no special provisions apply. Preference shares provide the holder with a preference over other shareholders in respect of dividend payments. Priority shares provide the holder with certain powers attributed by the articles of association (e.g. certain veto and nomination rights).

Categories of shares can be provided for in the articles of association, which is usually done by giving them a letter (e.g. priority shares A and B). The articles of association can attribute different rights to each category.

Furthermore, in the Netherlands it is possible to separate the voting rights of a share from the rights to dividend. This so-called 'certificering van aandelen' is done by issuing shares to a (corporation founded) foundation, which exercises the voting rights. The capital required to subscribe to these shares is provided by investors, who in return have a claim against that foundation for their share of the dividend received.

2. Corporate governance

Introduction: two-tier system

Dutch corporate law is based on a two-tier system. This system provides for a management board, responsible for the management of the corporation and a supervisory board, which advises and supervises the management board. Having a supervisory board is only mandatory for 'large' corporations (i.e. an NV or a BV with an issued share capital of 16,000,000€ or more, a works council and one hundred or more employees). The mandatory supervisory board of a 'large' corporation has more powers than the supervisory board voluntarily installed by the articles of association of a 'small' corporation.

For the remainder of this article, the term corporation comprises both the NV and BV, unless stated otherwise.

Shareholders' meeting

At least once a year, within six months after the end of the financial year or at such shorter notice as the articles of association prescribe, a shareholders' meeting has to be convened. This meeting is sometimes called the ordinary shareholders' meeting, in contrast to other (extraordinary) shareholders' meetings, which are optional.

In principle, the shareholders' meeting has, within the boundaries of the law and the articles of association, all powers that are not attributed to the management board or organs of the corporation. In principle, unless stipulated otherwise in the articles of association, the shareholders' meeting has the following basic powers to:

- **a.** Appoint, suspend and dismiss members of the management and supervisory board;
- **b.** Amend the articles of association;
- **c.** Adopt the annual accounts;
- **d.** Decide on the dissolution, change of legal form, merger and split-up of the -corporation.

In case of a corporation with a mandatory supervisory board, the powers under a. and c. are attributed to that board.

Increasing the share capital to an amount exceeding the authorized capital, or reducing it by lowering the nominal value of shares, or changing the corporate purpose requires amendment of the articles of association, and therefore approval of the shareholders' meeting, as well as a declaration of no objection by the Ministry of Justice. Also redemption and repurchase of shares, although no amendment of the articles of association is needed, requires approval by the shareholders' meeting.

Management board

To a certain extent, the articles of association may limit the powers of the management board. However, this may not go as far as to attribute powers that belong to the management board to either the shareholders' meeting or the supervisory board. Although prior approval for certain decisions may be required, the management board has its own responsibility and may ignore certain instructions by the shareholders' meeting if they are, in the opinion of the management board, contrary to the corporation's interests. For corporations that are part of an international network (concern) this may differ however.

The members of the management board are appointed by the shareholders' meeting for 'small' corporations and by the mandatory supervisory board for 'large' corporations. In principle there are no restrictions as to who can be appointed as a board member (e.g. legal persons and shareholders can also be board members). Membership of the management

board and the supervisory board cannot be combined however. Board members can be appointed for a limited or an indefinite period of time.

Liability of the management board may arise under certain circumstances. In case of 'mismanagement' for instance, the management board is liable towards the corporation. Individual board members may avoid this liability if they can prove that they are personally not to blame for this and have taken reasonable measures to prevent this. Usually, the management board will be discharged from their responsibility for leading the corporation after closure of each financial year on adoption of the annual accounts. Liability towards third parties can arise in case of bankruptcy of the corporation (if it is caused by the board not taking proper care of its management tasks), non-payment of taxes and social security premiums, presenting wrong or misleading information in the annual or interim accounts on the state of affairs of the corporation, and in cases of tortuous behaviour.

Supervisory board

In advising and supervising the management board the supervisory board has to represent the interests of the corporation. The articles of association can contain supplementary provisions on the powers of the supervisory board. In case of a 'large' corporation the supervisory board has special powers, including amongst others the power to appoint, suspend and dismiss members of the management board, adopt the annual accounts, and prevent certain management board decisions.

At least two thirds of the members of the supervisory board are to be appointed, suspended and dismissed by the shareholders' meeting. In case of a 'large' corporation all board members are nominated by that board and appointed (for a maximum term of four years) by the shareholders' meeting.

(Disclosure of) remuneration

The remuneration of management board members as well as supervisory board members is without limit and has to approved by the shareholders' meeting. Disclosure of the remuneration is mandatory as part of the annual accounts.

Works council

If a corporation has fifty employees or more, according to the Works councils act (Wet op de ondernemingsraden), employee representation by a works council is mandatory. The management board is obliged to consult with the works council at its request. Furthermore the advice of the council has to be obtained prior to taking decisions concerning, amongst others, mergers, (partial) termination of the activities of a company run by the corporation, and important changes in that company's organization.

Annual accounts and the annual report

Every year, within five months after the financial year has ended the management board of a corporation has to draw up the annual accounts. Under special circumstances, this period can be extended to eleven months by the shareholders' meeting. Eventually adoption of the annual accounts and report takes place by the shareholders' meeting or, in case of a 'large company' by the supervisory board, after which approval of the shareholders' meeting is required.

Next to the annual accounts, which should contain a profit and loss account and a balance (both with explanatory notes) of the company, the management board has to draw up an annual report. This annual report should contain an accurate description of the state of affairs of the corporation on the balance date, and of the ongoing and expected future state of affairs. 'Small' corporations without a mandatory works council are exempt from the obligation to draw up an annual report.

An audit of the books and accounts is mandatory, except for 'small' corporations. This audit has to be performed by a registered auditor which is appointed by the shareholders' meeting. The auditor examines whether the annual accounts provide the required insights in the financial state of affairs of the corporation and whether they are drawn up according to the relevant statutory provisions. Furthermore, the auditor assesses the compliance of the annual report with the annual accounts. The findings of the auditor have to be presented to the shareholders' meeting / the supervisory board before adoption of the annual accounts can take place.

In principle, all corporations have to file their annual accounts, together with –if available– the annual report and the findings of the auditor. These documents have to filed (by the management board) at the Trade Register, kept at the Chambers of Commerce, within eight days after adoption or approval by the shareholders' meeting. If adoption or approval has not taken place (in time) the should be filed at least within thirteen months after the financial year has ended. Late filing can result in liability of the management board in case of bankruptcy and criminal liability of the corporation itself.

Quoted companies

On 9 December 2003 the Corporate Governance Committee published the Dutch Corporate Governance Code (the "Code"). The Code contains principles and best practice provisions on, amongst others, remuneration of the management board, remuneration of the supervisory board, disclosure of remuneration, independency of members of the supervisory board, and conflicts of interests. Although the Code is in itself not legally binding, quoted companies must state with reasons in the annual report how far the code has been observed. Companies that do not have a quotation but nevertheless choose to act in accordance with the Code, cannot at will decide to uphold certain principles of the Code and ignore those that do not suit them.

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1. Registration with Government, authorities and permits

Foreign investment in The Netherlands by incorporating (subsidiary) companies, opening branch offices, taking shares in Dutch corporations or granting loans, is subject to the same requirements as investment by Dutch (legal) persons. In principle, no special registration or permit is required for foreigners or foreign companies that wish to undertake activities in The Netherlands.

General requirements for investment are amongst others, in case of incorporation of a new corporation, a declaration of no objection from the Ministry of Justice, and in case of holding more than 5% of the shares in a quoted company notification of this interest and its mutations with the Netherlands Authority for the Financial Markets. Furthermore, certain permits may be required to run a specific type of company (e.g. a bank or an insurance company).

2. Transfer of dividends, interest and royalties abroad

The transfer of dividends, interest and royalties abroad is not restricted by Dutch law. There is no Dutch withholding tax on paid royalties and interest. Dividends may be subject to withholding tax, depending on the applicable tax treaty and EC-law.

3. Repatriation procedures and restrictions

Corporations incorporated under Dutch law remain subject to it until liquidation. Change of 'nationality'/applicable law is only possible under specific circumstances prescribed by law, such as (threat of) war and revolt. Furthermore, the official seat -to be stated in the articles of association- of a corporation must be in The Netherlands.

'Transfer' of a corporation by transferring its place of effective management is possible, but is in principle subject to exit taxation unless the participation exemption applies.

4. Foreign personnel (permits, etc)

In order for a foreigner to work in The Netherlands he or she must have a valid title to stay in the Netherlands (i.e. visa and/or residence permit) and in most cases also a working permit. In general, in case of a stay of three months or less a visa is required, whereas in case of a stay of more than three months a residence permit and a prior special visa (i.e. authorisa-

tion for temporary stay) is required. Visa's and authorisations for temporary stay can be applied for at Dutch embassies or consulates worldwide. Application for a residence permit has to take place at a Dutch municipality.

EU/EEA and Swiss nationals are exempt from the visa and residence permit requirement provided that they reside in The Netherlands on basis of Community law (e.g. for work or performing services). They may -but are not obliged to- apply for a so-called 'proof of lawful residence', confirming the lawful basis of their stay. Furthermore, they can apply for a residence permit, which may be necessary for practical reasons (e.g. the opening of a bank account).

In order to be eligible for an authorisation for temporary stay or a residence permit, certain requirements have to be met. In principle, a person can obtain these authorisations if he or she has a valid passport, has no criminal record, does not constitute a risk to the public order, national peace or national security, has sufficient means of support or a sponsor with sufficient means of support, is prepared to cooperate on a tuberculosis test, has a health insurance that will cover him or her in The Netherlands, and furthermore, meets the specific requirements associated with his purpose of stay. For working as an employee in The Netherlands these specific requirements are an employment contract that guarantees an independent sustainable income, a work permit (not always necessary, as seen below), and sufficient sustainable means of support.

As mentioned above, in order to actually work in The Netherlands a work permit may also be required. This permit is required for all non-EU/EEA nationals (again with the exception of Swiss nationals) and for nationals of the certain recently joined EU member states. The employer has to apply for a working permit. This permit will in principle only be granted if the employer has investigated thoroughly enough that no employee for which no permit is required was available to him. No work permit is required for so-called 'knowledge workers', which are amongst others workers below the age of thirty with an annual salary of at least 35,130€ and workers thirty years of age or above with an annual salary of at least 46,541€ (but not professional soccer players). Knowledge workers do have to possess a valid title to stay in the Netherlands.

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Introduction

Two notable features of Dutch labour law are:

The great influence –elected– works councils can have on company policy.

In certain cases the works council has to be consulted before the employer can take a decision. Sometimes even approval of the works council is required.

The duty of the employer to pay his employee during the first two years of his disablement due to illness. Only after this period the employee is entitled to benefits.

1. Employment Contracts

a. Types of contracts

In general, employment contracts in The Netherlands can be subdivided into two main groups. Contracts concluded for a definite period of time and contracts concluded for an indefinite period of time. This subdivision is mainly of relevance to the conditions under which the contract can be terminated.

Instead of actually concluding employment contracts with workers it is also possible to hire temporary workforce from an employment agency or to make use of freelance workers. These working-relations are not fully subject to Dutch labour law and, more in particular, to the provisions on termination.

b. Dismissal

Employment contracts can be terminated by mutual consent, by giving notice of termination and by rescission by the court. Furthermore, an employment contract for a definite period of time ends ipso jure when that time-period has expired.

Termination by mutual consent

The termination of an employment contract by mutual consent is usually arranged for in a settlement agreement. In return for the consent of the employee with the termination of his employment contract, the settlement agreement usually contains a provision that stipulates that the employment contract is terminated on the initiative of the employer and that there is no urgent cause for dismissal 'on the spot'. This is of importance for the employee's right to employee benefits.

Termination by giving notice

Termination of an employment contract by giving notice cannot take place without a dismissal permit, which is to be obtained from the Central organization for Work and Income (CWI). Without this permit, notice is null and void. The permit will be issued because of business-economic reasons (e.g. reorganization), when an employee is not competent for the job and when the working relationship between the employee and the employer is severely disturbed.

As an exception to the general rule, the dismissal permit is not required for giving notice of termination during the probationary period, for giving notice of termination when there is urgent cause for dismissal "on the spot" (e.g. theft and refusal to carry out work) and for giving notice to managing directors of corporations.

Once a permit is issued a (statutory) minimum notice period must be observed, the length of which depends on the duration of the contract. Furthermore, notice may not be given under certain circumstances. Giving notice of termination is prohibited, amongst others, in case of inability to work due to illness, during pregnancy, during membership of the works council and because of marriage or trade union membership.

The termination of a contract by giving notice can be "apparently unreasonable", even when CWI has issued a permit. Termination will be deemed apparently unreasonable if either no reason or a false reason is given, or if the hardship endured by the employee is disproportionate to the employer's interests. In such an event the employee may claim reinstatement or compensation.

Termination by rescission by the court

The subdistrict sector of the district court can on request rescind an employment contract on grounds of serious cause. A change of circumstances of such a nature that the contract should in all reasonableness be terminated instantly or on short notice (e.g. an irresolvable dispute) is considered to constitute serious cause, as well as circumstances that would have justified dismissal "on the spot".

If the court decides to rescind the contract on grounds of serious cause constituted by a change of circumstances, compensation may be awarded to one of the parties. In practice however, compensation is awarded most often to the employee. The amount of compensation is calculated by multiplying the number of years of service, the monthly remuneration and a correction factor with each other. Years served by an employee when he or she was between the ages of forty and fifty count each as one and a half year, whereas the years served above the age of fifty count each as two years. The correction factor is used to compensate for blame regarding the dismissal and will be 'one' if neither employer nor employee is to blame.

The procedure has both a written and an oral phase. However, instead of a procedure with

full argument on both sides, employer and employee can also agree in advance on the termination of the contract and –optional– on a compensation. In such cases, only a shortened pro forma procedure is required, which is sometimes used to try not to loose entitlement to unemployment benefits for the employee.

Collective dismissal

Dismissal of twenty employees or more within a time period of three months or less has to be notified by the employer to CWI and the relevant trade unions. If the company has a works council the employer furthermore must ask the council for advice concerning the dismissal. The notification should at least contain the reason(s) for dismissal, criteria for the selection of the employees involved, whether or not the works council has been or will be consulted, and how severance payments –if any– are calculated. Without notification and –in order to leave room for consultation– within one month after notification, CWI will not issue any permits.

In practice, the employer often draws up a so-called "social plan". This plan describes the consequences of the collective dismissal and contains measures for compensation. A 'good' social plan will positively influence the position that the trade unions and CWI will take on the proposed collective dismissal.

Dismissal of managing directors

Both company law and labour law govern the relationship between a corporation and its managing directors. The removal of a director from the board usually also implicates the termination of his or her employment contract. Termination of the employment contract has to take place according to the 'ordinary' labour law rules, with the above-mentioned exception that no permit is needed in case of notice of termination.

2. Employee Representatives And Union Representation

Works councils

Within a company employees are represented by the works council, an elected body within consisting of employees of that company. A works council is compulsory for companies with fifty employees ore more. The employer is obliged to regular consult with the council and to keep it informed. Furthermore the advice of the council has to be obtained prior to taking decisions concerning amongst others merger, (partial) termination of the activities of the company and important changes in the company's organization. Decisions concerning amongst others pension plans, working hours, bonuses and policies on illness, even require prior consent of the council.

Trade Unions

Another form of employee representation takes place through the trade unions. Apart from negotiations with the government and federations of employers on government policy, trade unions conclude collective labour agreements with (federations of) employers.

Collective Bargaining Agreements. Other Agreements

Labour contracts are often heavily influenced by collective labour agreements. These collective agreements are concluded per sector of industry or trade between trade unions and federations of employers or individual employers. Their scope is, depending on the contracting parties, either nationwide or restricted to one company. Their content often comprises wages and other labour conditions.

Employers who are a member of a contracting federation of employers are bound by the collective labour agreement. Furthermore, the government can on request declare a collective labour agreement binding for a complete sector.

Wages And Other Types Of Compensation

Remuneration for work can roughly be subdivided into three classes: salary, holiday allowance, and other (e.g. bonus, company car, stock options etc.). The first two classes form a mandatory part of every employee's remuneration. The holiday allowance is fixed at a minimum of 8% of the overall salary.

The amount of the remuneration is –apart form certain minimum standards– freely negotiable, at least in principle. In practice however, it is often prescribed by collective labour agreements. The overall minimum salary per 1 January 2008 is 1,335€ per month.

Apart from the abovementioned classes of remuneration an employee is entitled to a minimum number of holidays with pay. This minimum is fixed at four times the weekly working hours, i.e. twenty holidays per year in case of a full time contract.

Overtime hours have to be paid if and to the extent agreed upon in the employment contract or prescribed by the applicable collective labour agreement. In absence thereof it depends on the individual circumstances.

Employment Regulations

Employment regulations are often incorporated in a so-called "personnel guide". Regulations of a general order (i.e. working hours, breaks, rules of conduct etc.) can be imposed unilaterally, although in certain cases approval of the works council is required. Other regulations, as far as they concern the labor conditions, in principle require approval from the individual employee. Employment contracts usually contain a provision stating that the employee approves of the contents of the personnel guide.

Social Security

The social security system in The Netherlands is based on social assistance (i.e. benefits available to all citizens, such as welfare and old age pensions) and social insurance (i.e. benefits available to those insured, such as unemployment benefits). For labour relationships the social insurance is of particular relevance.

All employees fall under the compulsory insurance against unemployment and disability. Both employer and employee pay premiums for unemployment insurance. The premium for the disability insurance is fully paid by the employer and is partly dependent on the number of (ex-) employees that receive benefits in respect of a disability incurred during their work for the employer.

Entitlement to benefits under unemployment insurance exists if an employee becomes unemployed after he has worked during at least twenty six out of the last thirty six weeks. If an employee furthermore has worked during at least four out of the last five years the duration and amount of the entitlement will be increased. In order to actually receive benefits however, the unemployment must be involuntary and the employee must actively seek for a new job.

Entitlement to benefits under the disability insurance exists if an employee is after a so-called "waiting-time" of two years still unable to go back to his work. During the waiting-time the employer has to pay the employee, even though the latter is not productive.

Health and Safety

A number of statutes require the employer to take action in the field of health and safety. As a general requirement the employer should have an active policy on labor conditions, encompassing care for security and protection of health and welfare of the employees. More specific requirements are derived from this general requirement, such as the duty to have policies on absence due to disability and on the prevention of sexual harassment and violence. A government body, able to impose fines, is charged with the inspection on compliance with the mentioned requirements.

In the case of disability of an employee due to illness, the employer has some special duties. These duties encompass payment during the first two years of disability and an active policy on reintegration (i.e. offering adapted or other suitable work and regular consultation). The two-year period is prolonged if the employer does not put enough effort into the reintegration of the disabled employee.

Contracting And Outsourcing Of Work Or Services

Based on a contract of assignment, work and services can be outsourced to third parties. Although the contract of assignment is not subject to Dutch labor law, assigning work to an individual, such as a freelance worker, is not without risk. If in practice a contract bears too much resemblance to an employment contract, the provisions of labour law are applicable to it.

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Scope

The term 'real estate' covers many different area's of law that have a relationship with assets. To many of those area's of law specific statutes and regulations apply. Our real estate practice covers, among others, construction law, real estate development and acquisition, securities, lease and rights of superficies.

Types of ownership

Under Dutch law, ownership is the most comprehensive right a (legal) person can possess in respect of a good. Dutch law only knows one type of ownership. Limitation of this right of ownership is possible by dismembered rights (i.e. rights in rem a third party has in respect of a good and that can be invoked against everyone, such as a mortgage or a right of pledge), and by personal rights (i.e. rights a third party has and that can in principle only be invoked against the owner, such as lease). Furthermore, an owner can be restricted in the exercise of his right of ownership by the legitimate legal interests of third parties and by regulations of public law.

The right of ownership can be held by one person or by more persons collectively (gemeenschap). A special form of collectively held ownership is the right of apartment (appartementsrecht), which is used to divide flats and other buildings into units that can be sold separately. For collective interests such as (maintenance of) the roof and shared spaces, an association of owners (vereniging van eigenaren) is founded, of which all holders of a right of apartment in a building are a member by law.

Due to its limited scope, this article only deals with (the ownership of) so-called registered goods (registergoederen). Registered goods are immovable goods (i.e. land and buildings) and other goods that require a registration (i.e. ships and aircrafts).

(Land) registry

The land registry (Kadaster) keeps the public records that contain the notarial deeds of transfer and proof of ownership of registered goods.

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