

The protection of land rights in the Netherlands

1. Introduction

Given below is an explanation of the Dutch system for registering land rights and the protection that the title holders can derive from that system. In response to increasing automation, a number of amendments will shortly be introduced. Those amendments will also be explained.

2. The system for registering rights

In the Netherlands, land rights are registered in two phases. In the first phase, the parties enter into a contract of sale, which means that they agree on the obligation to transfer a piece of land. That obligation is laid down in a contract of sale, but at this stage ownership has not yet been transferred. That happens in the second phase, in which the intervention of a civil-law notary is mandatory. The civil-law notary draws up a deed of conveyance, which has to be listed in the public registers kept by the registrar. Once he has received the deed, the registrar verifies within a maximum of 4 days whether the registration requirements have been met. If he decides to register the deed, he adds a registration report to the deed, which is then returned to the party offering the land. His decision to register the deed has retrospective effect to the time at which the land was offered. From that time onwards, the deed of conveyance is registered and the ownership is transferred. The registrar does not issue a title certificate setting out the rights of the new owner. Members of the public are themselves responsible for consulting the deeds in the public registers in order to establish who the owner is and can in principle rely on the details laid down in the deed. The Dutch system should therefore be formally considered to be what is known as a system of deeds. In the event of people suffering losses because the deed contains inaccurate information or because the registrar has erroneously registered it, those people can recoup their losses from the civil-law notary or from the Dutch Land Registry Office. In the Netherlands, that is a self-administering state body which is liable for errors made by the registrar. Apart from the public registers, the registrar is also charged with keeping what is known as the cadastral register. This is a parcel based property register which – in addition to references to the public registers – also lists the names of rights and title holders. In formal terms, this register serves only for levying tax and no rights can be derived from registration as an owner. In practice, however, registration as a title holder in the cadastral register plays an important role. Before drawing up a deed of conveyance in the cadastral register, the civil-law notary looks into the question of whether the selling party is listed as the owner. Should that not be the case, the civil-law notary is not in principle permitted to draw up the deed. This is stipulated by the governing board of the Order of Civil-Law Notaries following consultation with the insurance company of those civil-law notaries. The insurer wants to limit the risk that he will have to pay out damages because the civil-law notary helped to transfer the property of an unauthorised person or co-operated with someone other than the actual owner in establishing a mortgage right. This forces civil-law notaries to resolve differences of opinion with the registrar concerning the implications of a registered deed in advance of a new transfer. They can do this by eliciting a court ruling using a specific procedure.

In practice, this system adequately serves both the economic interest of smooth legal transactions and the interest of legal certainty. Because the registrar quickly updates his registration, civil-law notaries, who are also responsible for transferring purchase amounts, are able to transfer the purchase amount previously received from the buyer or his mortgage bank to the vendor on the day on which their deed is presented. Proceedings relating to the legal status virtually never arise. This is because the civil-law notary of the parties to the deed investigates in advance the identity, the legal capacity in general and the authority to perform this specific legal transaction. The civil-law notary verifies the selling party's previous acquisition in ownership by making a comparison with the registrar's registration.

3. The system for registering boundaries

The legal boundary of a transferred piece of land is determined in the Netherlands by the intention of the parties, as specified in the deed. It is possible to have the intended boundary measured in advance by a land surveyor of the Land Registry Office, but this is not usually done. If part of an existing parcel is transferred, a land surveyor of the Land Registry Office visits the site after a number of months. He makes a request to the adjacent owners to adjust the boundary at the site. Provided that the boundary does not differ from the description in the deed, the designated boundary is created up to the boundary of a new cadastral parcel. If the parties are unable to agree on the course of the boundary, the Land Registry Office does not create a new cadastral parcel. The cadastral boundaries are not made visible at the site. They are however laid down in a digital cadastral map. This map is based on individual boundary sketches made by the land surveyor, who in rare cases of boundary disputes plays an important role. Agreements have been made with the notarial profession about the registration of drawings in which the boundaries have already been described in outline form.

It is theoretically possible that a boundary other than that originally intended by the parties is designated. In that case, the cadastral boundary is different from the legal boundary. In practice, however, this is never the court's ruling. In the absence of evidence to the contrary, the court assumes that the cadastral boundary coincides with the original intention of the parties, and is therefore the legal boundary. It is for this reason that in the event of a boundary dispute the parties usually accept the cadastral boundary as indicated in the Land Registry. The advantage of this system is that the transfer can take place in advance, without the formality of a survey. Here too, the Dutch system is based on part on the economic interest of smooth transaction legal transactions.

4. Digitalisation of the public registers

Up until now, only the register of names and rights and title holders (the cadastral registration) was automated and available for consultation via the Internet. However, it will shortly also be possible to store deeds in the public registers in digital form so that they can be consulted via the Internet too. This is done by scanning the paper deeds as soon as they arrive. This means that the registrar no longer has to make copies of deeds and send them by mail in response to requests to inspect them. Electronic copies can be called up online by clients. When the request is made, an automated process is triggered which results in the copy being sent over the Internet in the form of an e-mail. One of the risks of

digitalizing documents that were originally laid down on paper is that the digital files regularly have to be transferred to other tapes or magnetic disks. This is necessary because of the limited life-span of information carriers of this nature, but also because certain formats fall into disuse. If a digital file has been stored in an obsolete format, it will have to be converted to a more up-to-date one. However, deeds or details from those deeds can be lost during the transfer or conversion process. On the request of the civil-law notaries, it has therefore been decided to lay down backups of digital files as copies on microfilm for the time being.

In the future, we want to register the deeds in digital form in the public registers. Current legislation does not yet permit deeds to be presented electronically, but a draft bill that allows this has been submitted to the Dutch parliament. It is important for legal certainty that exclusivity and integrity are monitored. Monitoring exclusivity relates primarily to the signature. Third party acquirers can rely on a registered deed in the Netherlands. If there are errors in a deed, the loss can be recouped from the civil-law notary who signed the deed. An alternative to the written signature will therefore have to be found for the electronic presentation of deeds. For this purpose, a link to the European directive is being sought. We will require the electronic signatures that the directive places on par with a written signature. This authentication is also known as the advanced electronic signature. It will probably be possible in due course to create that signature using various technologies (such as biometrics). In the situation as it stands, this can only be done with what is known as asymmetric encryption. This technology involves the use of private and public keys, which are inextricably bound. The databases being authenticated are encrypted with the private key into what is called a digital signature. The accompanying public key is registered in a digital identity document, the certificate, that can be sent to the registrar with the digital signature. This certificate is issued by a certificate service provider, and also shows the name for the key holder in the certificate. To avoid having to keep cumbersome administrative records and all possible identity verifications, the Land Registry Office has decided not to issue keys and certificates itself. The registrar accepts all certificates that meet the requirements of the European directive for what is known as a qualified certificate. Theoretically, this could imply that certificates must be accepted from various certificate service providers, but because all deeds in the Netherlands are drawn up by civil-law notaries and the Order of Civil-Law Notaries has its own certificate service provider, it is probably that only the certificates of a single certificate service provider will be used. To secure the integrity of the electronically-transmitted deeds, we will be using unique verification numbers, known as hash values. The civil-law notary's automated system calculates the hash value of a deed prior to transmission and sends it as part of the digital signature to the registrar. Upon receipt, the registrar's system also calculates the hash value and compares it with that of the digital signature. If the two hash values are not the same, the electronic presentation is rejected because the deed has apparently been altered by unauthorized persons since being signed.

Those wishing to present deeds electronically must first report to the registrar. They are then required to stipulate the certificate service providers whose certificates they will be using. The registrar will then ensure that they are given the technical means to verify the authenticity of certificates from that certificate service provider.

5. Automated processing of electronically presented documents

Presenting documents electronically also makes it possible to automate the verification of registration requirements and to automate the updating of the registers. Methods that can be used for this are currently being looked into. The study is focusing on the use of electronic forms that civil-law notaries can call up via the Internet. If the form is filled in correctly, the civil-law notary can download it and print it out at the office on sealed paper and turn it into the original of a written deed. For registration in the public register, the digital file that the civil-law notary has downloaded and given his digital signature is presented as a copy of this paper document. Because it is only possible to download a form that meets all registration requirements, it is possible that registration in the public registers will take place in automated form. The details entered into the free fields would then have to be suitable as XML files for the automated updating of the cadastral registration. Apart from the efficiency gains that can probably be thus achieved, another advantage is that legal transactions concerning registered properties are further speeded up. There is a new risk that relates to the question of how the registrar can ascertain whether the file being presented is the same as the completed electronic form that he knows meets the registration requirements. We are still looking into the answer to that question. Here too, it is possible that the solution will be found in calculating and comparing reference numbers, the hash values.

6. Conclusion

The system of deeds that was originally introduced by Napoleon still formally exists in the Netherlands, but has in practice developed in the direction of a system in which the registrar and civil-law notary actually decide who is accepted as a title holder in social and economic life. Because civil-law notaries have a monopoly on the transfer of ownership of land, it was possible to bring this about by means of agreements between registrars/civil-law notaries and the insurance company of those civil-law notaries. This is a variant of what is known in Dutch politics as the polder model. Both the economic interest of smooth legal transactions and the interest of legal certainty are adequately served by that system. When it comes to the extensive automation of registration, which is currently something on which we are strongly focusing, the ability to collaborate with a large suppliers' organization is a significant advantage. This accelerates the introduction of automated systems. None the less, the Dutch system is also open to criticism. This criticism comes mainly from consumer organisations, which take the view that civil-law notaries charge excessively high rates for work that could easily be done by others. Prompted by this criticism, a decision has now been made to liberalise the rates and the number of places for civil-law notary offices. It does however remain the case that only civil-law notaries can draw up deeds of conveyance, and for that reason there is still criticism of a system that effectively meets the requirements from the viewpoint of protecting persons with land rights.

W. Louwman