Financial Leasing and Its Unification by Unidroit

D. Faber & B. Schuijling

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1. The Netherlands and International Work on Leasing and Secured Transactions

1.1. Unidroit Work on Leasing

The Netherlands has been a member state of Unidroit since 11 April 1940 and has contributed to various Unidroit work on leasing. The Netherlands has participated in the Unidroit diplomatic conferences and has signed the final acts of the 1988 Ottawa Convention on International Financial Leasing; the 2001 Cape Town Convention on International Interests in Mobile Equipment and the Protocol and Matter Specific to Aircraft Equipment; and the 2007 Luxemburg Protocol on Matters Specific to Railway Rolling Stock to the Cape Town Convention. Furthermore the Netherlands (including Dutch industry representatives) is involved in the preparation of the Preliminary Draft Protocol on Matters Specific to Space Assets to the Cape Town Convention. Despite its participation in the preparation of Unidroit instruments, the Netherlands has not signed or ratified any of the Unidroit conventions on leasing, nor has it adopted or implemented the 2008 Unidroit Model Law on Leasing.

The European Union, of which the Netherlands is a member state, acceded to the Cape Town Convention and the Aircraft Protocol on 28 April 2009, in force as of 1 August 2009. Furthermore, the European Union has signed the Luxemburg Protocol on 10 December 2009.

1.2. Work of other International Organisations

Other work on leasing and secured transactions by international organisations include the UNCITRAL Legislative Guide on Secured Credit Transactions and the 1994 Model Law on Secured Transactions prepared by the European Bank for Reconstruction and Development. The Netherlands currently does not intend to adopt or implement these instruments. The reason for this could be the relatively recent reform of the Dutch Civil Code (Burgerlijk Wetboek). After more than forty years of preparations, a completely reformed Civil Code entered into force in 1992, thereby replacing the Civil Code dating from 1838. In addition to this, a modernised set of provisions on ‘hire’ (huur) entered into force on 1 August 2003. However, the general provisions on ‘hire purchase’ (huurkoop) date from 1936.
2. An Introduction to Leasing in the Netherlands

2.1. Leasing as an Economic Term

In the Netherlands the use of the English terms ‘lease’ or ‘leasing’ is not confined to a specific legal meaning. Rather, it is an economic term used to describe financing arrangements which share certain characteristics. In general, leases involve one party (the lessor) granting the use of a certain capital good to another (the lessee) in return for certain (periodic) payments. However, in practice the term ‘lease’ is sometimes used to describe a loan secured by a non-possessory right of pledge. The Netherlands has not enacted any legislation specifically targeted at lease transactions, nor are there any plans to do so.

2.2. Operational and Financial Lease

A distinction is made between operational and financial leases, both in practice and in legal literature. In the case of a financial lease the purpose of the transaction is, foremost, the financing of the leased asset. The aggregate of payments made by the lessee serves as a full compensation for the costs of investment made by the lessor. Furthermore the duration of the contract is linked to the economic lifespan of the leased asset. In general the leased asset is accounted for on the balance sheet of the lessee. This is not the case with an operational lease. The payments made by the lessee then serve as a compensation for the use of the leased asset. Here, the lease object is generally accounted for on the balance sheet of the lessor. Despite this usage, the terms ‘operational lease’ and ‘financial lease’ were never introduced as such in legislation. Nevertheless, the categories of operational and financial lease roughly correspond with two types of contract provided for by law: ‘hire’ (huur) and ‘hire purchase’ (huurkoop). Operational and financial leases are also treated differently for tax purposes.

2.3. Leasing Industry

The leasing industry in the Netherlands has a substantial economic value. According to the Association of Car Lease Companies, their members leased out nearly 700,000 cars in 2008, thereby realising a turnover of € 7.8 billion. However, the share of financial leases is relatively small. Only about 54,000 cars were leased financially. Statistics of the Dutch Association of Lease Companies show that their members had an aggregate turnover on leasing transactions of € 6.1 billion, mainly divided between the leasing of machines (€ 1.7 billion), computers (€ 1.2 billion) and transport equipment including aircraft (€ 3 billion). Leasing of immovable property only contributed € 119 million to the turnover. The share of financial leases is unknown.

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1 Cf. the definition of ‘lease’ in Art. 2 Unidroit Model Law on Leasing.
2 Art. 3, section 3 Wet conflictenrecht goederenrecht serves as an exception to this. See subparagraph 3.2.
3 Cf. the definitions of ‘financial lease’ in Art. 2 Unidroit Model Law on Leasing; and Art. 1 Convention on International Financial Leasing.
4 See paragraph 4.
5 See paragraph 12.
6 The 2008 annual report of the Vereniging van Nederlandse Autoleasemaatschappijen is accessible through <www.vna-lease.nl>.
7 Statistics of the Nederlandse Vereniging van Leasemaatschappijen are accessible through <www.nvl-lease.nl>.
The Dutch leasing industry is largely made up of independent leasing companies, leasing companies that are subsidiary companies of major banks and leasing companies closely related to a supplier of capital goods (so-called ‘captive leasing companies’).

Leasing companies and their asset acquisitions are financed and refinanced in numerous ways. The shareholding structure of a lease company may influence the financing techniques used. For example, where a lease company is a subsidiary of a bank or a supplier this will affect the financing structure. In general, leasing companies employ a variety of modern financing techniques, including receivables financing, such as factoring and securitization, and the issuance of shares or bonds.

3. International Leasing and Private International Law

The leasing industry has internationalized to a great extent. Leasing can, for example, be used to finance the export of capital goods. Furthermore, the large amount of capital involved in certain lease transactions, for example the leasing of aircraft or immovable property, or the utilisation of differences in tax laws may result in the calling in of foreign parties.8 Leases with an international character lead to questions regarding the applicable law.

3.1. Law Applicable to Contractual Aspects

Under Dutch private international law, the law governing the contractual aspects of a leasing transaction must be determined in accordance with the conflict-of-law rules of the Rome I Regulation.9 Parties are free to choose the law governing the lease contract. They can select the law applicable to the lease as a whole or to parts of it.10 In the absence of a choice of law, which rarely occurs, the lease of movable property would be governed by the law of the country where the lessor has its habitual residence; the lease of immovable property would be governed by the law of the country where the asset is situated.11 Notwithstanding a choice-of-law, there are special regimes for, inter alia, consumer contracts, and mandatory provisions of the law of another country or European Union law may apply.12

3.2. Law Applicable to Proprietary Aspects

The proprietary aspects of a leasing transaction must, under Dutch private international law, be determined in accordance with the conflict-of-law rules of the Property Law (Conflict of Laws) Act (Wet conflictenrecht goederenrecht). The main rule is that the proprietary aspects are governed by the law of the country where the asset is located at the time.13 The proprietary regime in respect of registered ships and aircraft is governed by the law of the country where the ship or aircraft is registered.14 The proprietary consequences of a retention of title of ownership (eigendomsvoorbehoud), which may be relevant for certain financial

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8 See subparagraph 12.2 for the tax aspects of cross-border leasing.
10 Art. 3(1) Rome I Regulation.
11 Art. 4(2) respectively 4(1)(c) Rome I Regulation.
12 Art. 6 respectively Art. 3(3) and 3(4) Rome I Regulation. In addition, overriding mandatory provisions may be applied (Art. 9 Rome I Regulation).
14 Art. 2, sections 2 and 3 Property Law (Conflict of Laws) Act.
leases, are governed by the law of the country where the asset is located at the time of delivery. However, where an asset is destined for export, parties can choose the law of the country of destination as the law governing the proprietary aspects of the retention of title. Parties to an international leasing transaction regarding movable assets created in one country, but destined for use in another country, are in a similar manner allowed to choose the law of the country of destination to govern the proprietary aspects of the lease.15

3.3. Recognition of (Foreign) Rights in rem

Dutch private international law recognises rights in rem validly created or transferred under the law of another country. Furthermore, where an asset is moved to another country (conflit mobile), the proprietary rights in the asset will remain as such. These rights will therefore not be automatically transformed into a local proprietary interest. However, rights in rem cannot be exercised in a manner incompatible with the law of the country where the asset is located at the time of the exercise.16

4. The Lease Agreement

4.1. Rights and Duties under a Lease Agreement

The legal consequences of a lease contract are, under Dutch law, primarily determined by the contents of the agreement and the rules of contract law. Within the boundaries set by good morals, public policy and mandatory law, lessor and lessee are free to agree upon the exact stipulations of the lease.17 As mentioned above, there is no legislation specifically targeted at lease agreements as such. However, various provisions of both general and specific contract law may apply to a lease contract. In particular, two types of contract provided for by law can play an important role in the characterization and the legal effects of a lease contract: ‘hire’ (huur) and ‘hire purchase’ (huurkoop).

4.2. Hire

The contract of hire under Dutch law corresponds with the legal notion of ‘lease’, as in civil law systems often derived from the Roman law concept of locatio-conductio, denoting a transaction under which the owner of property, the lessor, contractually grants possession of the property to another person, a lessee, for a specified or unspecified period of time (the lease term) in return for periodic payment of money (the lease payments). At the end of the term, the property is returned to the lessor. Under Dutch law the transaction so defined is characterized as ‘hire’ (huur).18 Hire must be distinguished from sale (koop): the former agreement intends to grant a right of use of property to another person, whereas the latter is aimed at a transfer of the property. Furthermore hire is distinguished from loan for use (bruikleen): a hire agreement requires the lessee to give something in return for the use of the asset, whereas a loan for use does not. A hire agreement will in economic terms often correspond with an operational lease. The characterization of a lease contract as a hire agreement is hardly problematic, as nearly all provisions on hire, in particular in relation to

15 Art. 3 Property Law (Conflict of Laws) Act.
16 Art. 5 Property Law (Conflict of Laws) Act.
18 Arts. 7:201 to 7:310 Dutch Civil Code.
movable property, have a directory nature. The parties are free to deviate from the provisions on hire provided for in the Dutch Civil Code.

4.3. **Hire Purchase**

Dutch law has special legislation on ‘hire purchase’ (*huurkoop*). There is a set of general provisions dating from 1936. However, these provisions do not apply to immovable property, registered aircraft and most seagoing and inland waterway vessels. The hire purchase of inland waterway vessels and of immovable property are regulated separately.

Hire purchase is defined as an instalment sale in which title in the supplied goods is retained until the purchaser has fulfilled all its obligations under the contract of sale. Under Dutch law, retention of title is construed as a transfer under the suspensive condition of payment of the relevant obligations. The opening of a bankruptcy proceeding in respect of the lessor does not obstruct the fulfilment of the suspensive condition. The lessee acquires the leased asset if the remaining obligations under the lease are paid to the lessor's administrator.

The legislator at the time believed that the purchaser was in need of special protection against entering into a hire purchase agreement hastily and against an overly strong position of the seller. The legislation therefore regulates in detail the formation of hire purchase agreements and the rights of the hire purchaser. For example, a hire purchase agreement must be concluded in writing in order to be valid. Furthermore, the purchaser has a right of early redemption, and if the termination of a hire purchase (as a result of nonperformance of the purchaser) puts the seller in a more favorable position than would have been the case if the contract was properly executed, the seller has the obligation to hand over the surplus to the purchaser.

The provisions on hire purchase are for the greater part mandatory. The characterization of a lease contract as a hire purchase can therefore have a serious impact on the parties' mutual rights and obligations.

To prevent circumvention of the protective mandatory rules on hire purchase, the legislator has extended their scope to transactions with similar purpose, including transactions involving a third-party financier who acquires ownership of the asset while granting credit to the purchaser. This means that for the characterization of an agreement as a hire purchase, it is decisive whether the agreement intends to ultimately transfer ownership. This raises the question of whether lease agreements not intending an automatic transfer of ownership, but containing an option to buy the leased asset, can be characterized as a hire purchase. If the proportion between the amount of money involved with the exercise of the option and the

19 Arts. 7A:1576h to 7A:1576x Dutch Civil Code.
20 Art. 7A:1576, section 4 Dutch Civil Code.
21 Arts. 8:800-812 Dutch Civil Code (inland waterway vessels); and the 1973 Temporary Act on the Hire Purchase of Immovable Property (*Tijdelijke wet huurkoop onroerende zaken*).
value of the leased asset at that moment would strongly urge the lessee to exercise its option
to buy, this forms a strong indication that the lease intends to transfer ownership to the lessee.
In our opinion the provisions on hire purchase apply in such cases. Although contrary views
have been expressed in legal literature, we believe that there are no good grounds to limit the
application of these provisions solely to hire purchases concluded with consumers and other
weak parties.

Despite some criticism in legal literature, there are currently no plans to amend or delete
the general provisions on hire purchase. A legislative proposal, submitted in 1995, to replace
the Temporary Act on the Hire Purchase of Immovable Property, has been withdrawn in
2005. In practice, the hire purchase of immovable property has fallen out of use due to the
extensive and mandatory protection of hire purchasers against sellers (and due to tax
legislation).

4.4. **Various other Rights and Duties**

The rights and duties of lessor and lessee are furthermore determined by various statutory
provisions of contract law. Dutch contract law however, is for the far greater part directory in
nature. In practice, parties often derogate from these provisions in lease contracts. Some rules
of directory law and the most customary derogations to these rules are mentioned below.

4.4.1. **Quiet Enjoyment of the Leased Asset**

The right to a quiet enjoyment of the leased asset can be considered an essential element of
the lease to the lessee. The rules on hire agreements and hire purchases contain directory
provisions ensuring the lessee's enjoyment of the leased asset. In practice, the lessor
generally warrants that the leased asset is free from attachments and security interests other
than permitted. However, the lessee carries the risk of disturbances of its enjoyment
attributable to an external cause.

4.4.2. **Risk of Loss**

An important aspect of a financial lease concerns the allocation of the risk of loss or
depreciation of the leased asset and the point in time the risk passes from one party to the
other. If a financial lease is characterized as a hire purchase, the risk of loss or depreciation is
in principle transferred from the lessor to the lessee at the time of actual delivery of the leased
asset. In practice, lessor and lessee generally stipulate the allocation of these risks. For
example, parties may agree that the risk of loss and depreciation is carried by the lessee as of
the conclusion of the lease agreement.

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28 Arts. 7:203 and 7A:1576m, section 1 Dutch Civil Code.
29 Cf. Art. 16 Unidroit Model Law on Leasing; and Art. 8(2), 8(3) and 8(4) Convention on International
Financial Leasing on warranties of quiet possession.
30 Art. 7:10 Dutch Civil Code.
31 Cf. Art. 11 Unidroit Model Law on Leasing on risk of loss.
4.4.3. **Maintenance and Insurance**

The maintenance and insurance of the leased asset form other important aspects of the lease agreement. In practice, lessor and lessee agree on each party’s duties regarding maintenance and insurance of the leased asset in a detailed manner. Under a financial lease the maintenance and insurance will generally be the lessee's responsibility.32

5. **Consumer Leases**

5.1. **Protection of Consumers in General**

In general, Dutch legislation does not distinguish between consumer leases and other leases.33 Nevertheless, consumers are protected in various ways against professional parties throughout the Civil Code and in other statutes. An important example is the protection of consumers against unreasonable standard contract terms.34 Additionally, many provisions regarding specific contract law, such as various provisions on hire and sale, are mandatory in case of a consumer transaction.

5.2. **Protection under the Consumer Credit Act**

Consumer lessees may be protected particularly under the Consumer Credit Act (*Wet op het consumentenkrediet*), as certain financial leases may qualify as a credit transaction within the meaning of this act.35 A credit transaction in the sense of the Consumer Credit Act generally includes agreements that intend (or several agreements together intending) granting the use of movable property in exchange for one or more payments, or agreements that intend a financier paying the supplier of movable property in connection with granting the use of that movable property to another party in exchange for one or more payments. However, the Consumer Credit Act only regulates credit agreements between a professional financier (or supplier) and an individual. Furthermore, the scope of the act is limited greatly by excluding short-term credit agreements, transactions involving more than € 40,000 of credit, hire agreements and transactions connected with the business of the borrower.36

Nearly all provisions of the Consumer Credit Act are mandatory and can have a serious impact on the parties' mutual rights and obligations. The protective rules include maximum costs of credit, a right of early redemption for the consumer, and an obligation to hand over any surplus if the termination of a credit agreement puts one party in a more favorable position than would have been the case if the contract was properly executed.37 Furthermore, the act limits the permissibility of security through a right of pledge or retention of title, and

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32 Cf. Art. 18(1) Unidroit Model Law on Leasing; and Art. 9(1) Convention on International Financial Leasing on duties to maintain the asset.

33 The special provisions regarding the hire of housing accommodation (Arts. 7:230-282 Dutch Civil Code) could be considered as an exception to this.

34 Arts. 6:231 to 6:247 Dutch Civil Code.

35 The Consumer Credit Act was adopted in 1990, partly to comply with the European Directive 87/102/EEC. As of 12 May 2010 a new Directive on credit agreements for consumers (Directive 2008/48/EC) must have been implemented.

36 Arts. 1, 2, 3 and 4 Consumer Credit Act.

37 Arts. 34, 35, 37 and 44, section 2 Consumer Credit Act.
excludes the surrender of the security asset to the lessor after three-quarters of the credit sum has been paid off.38

6. Tripartite Leasing

Leasing often occurs in the form of a tripartite arrangement between lessee, lessor and supplier. Basically, three types of tripartite leasing arrangements can be distinguished in Dutch leasing practice. Firstly, an arrangement in which the lessor acquires the asset from the supplier and then leases it out to the lessee. Secondly, an arrangement in which the supplier leases the asset out to the lessee, and the lessor then acquires ownership of the leased asset and the leasing receivables from the supplier. The third type of arrangement is a so-called sale-and-lease-back in which the lessee acquires the asset from the supplier, and sells it to the lessor, who immediately leases the asset back to the lessee. In all these arrangements ownership of the leased asset is transferred to (or remains with) the lessor.

Such tripartite leasing arrangements, comprising elements of both a supply contract and a lease, can either be in the form of several separate agreements or in the form of one multiparty agreement. Dutch law does not require parties to strictly keep the supply contract and the lease separated. More than that, the use of separate contracts does not exclude the possibility that the contracts share certain legal consequences by operation of law.39 The Dutch Supreme Court (Hoge Raad) has ruled that separate contracts can be so closely connected that the termination or avoidance of one of the contracts results in the termination or avoidance of the other, or that a right to suspend performance of the lessee in one of the contractual relationships can also be exercised in the other. This close connection of contracts is particular likely in the case of tripartite leasing arrangements with separate supply and financing contracts that fall within the scope of the hire purchase provisions. Whether such a connection exists in a specific case must be determined by way of interpretation of the legal relationship between the parties.40 In addition, several agreements together may qualify as one credit transaction under the Consumer Credit Act, giving the consumer under certain circumstances the right to suspend its payments to the financier in case the supplier fails to fulfil its obligations to the consumer.41

7. Security Interests and Leasing

7.1. Approach to Security Interests in General

The Dutch Civil Code contains comprehensive provisions on secured transactions. In particular security can be provided in the form of a right of mortgage (hypotheekrecht) on property subject to registration (registergoederen), such as immovable property, or a right of pledge (pandrecht) on all other property, such as movable property and receivables. The Dutch Civil Code provides for both disclosed and undisclosed, and possessory and non-possessory rights of pledge. Rights of mortgage and rights of pledge provide the secured creditor with a proprietary interest in the security asset, entitling it to take recourse against the

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38 Arts. 40 and 41 Consumer Credit Act.
39 Cf. Art. 7 Unidroit Model Law on Leasing; and Arts. 10, 11 and 12 Convention on International Financial Leasing on legal consequences of tripartite financial leasing.
41 Art. 45, section 1 Consumer Credit Act.
security asset for its secured claim, with preference over other creditors. In addition, a supplier can ‘secure’ its claim by way of retention of title of ownership (eigendomsvoorbehoud) in the supplied assets.

7.2. **Public Registration of Security Interests**

Mortgages are the only security interests to be disclosed in a public registry. Registration of the notarial mortgage deed is a requirement for the creation of the security interest. After filing, the registrar enters the deed in the public registry after having verified the fulfilment of certain formal requirements. However, the registrar does not verify the validity of the mortgage as such.

Although the creation of a right of pledge may require some kind of registration, pledges are not disclosed in a public registry. For example, an undisclosed or non-possessory pledge can be created through a private deed provided that the deed is registered with the tax authorities.42 This registration is primarily intended to prevent antedating of the private deed as the tax authorities mark the deed with the date of registration.

7.3. **Prohibition of Fiduciary Transfers**

A typical feature of Dutch legislation on security interests is the so-called prohibition of fiduciary transfers. A juridical act intended to transfer ownership for purposes of security (fiducia cum creditore) or which does not have the purpose of vesting title in the acquirer (fiducia cum amico), cannot constitute a valid legal (basis for a) transfer of ownership.43 This prohibition is closely linked to the introduction in the Dutch Civil Code of the aforementioned undisclosed and non-possessory rights of pledge.

In practically all leasing arrangements, ownership of the leased asset remains with or is transferred to the lessor and is used to secure the lease payments by recovering the asset in case the lessee fails to pay. The prohibition of fiducia has therefore raised questions on the validity of transfers of ownership as part of a financial leasing arrangement, especially for the sale in a sale-and-lease-back transaction. However, a restrictive interpretation of the aforementioned prohibition by the Dutch Supreme Court has removed most questions.44 According to the Supreme Court the prohibition of fiducia does not affect every transfer of ownership which is connected with credit granted to the transferor. The prohibition only affects transfers for purposes of security in the sense that they intend to provide the acquirer a security right similar to that of a right of pledge or mortgage, meaning a right to take recourse against the transferred asset with preference over other creditors. By contrast, a juridical act intending an actual transfer of ownership forms a valid legal basis for the transfer of ownership. The ownership of the lessor resulting from a retention of title is clearly valid as it is a form of security explicitly permitted by statute.45 Whether parties to a sale-and-lease-back have intended an actual transfer, is a matter of interpretation of the lease agreement.46 Besides the restrictive interpretation of the Supreme Court, the significance of the prohibition of

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43 Art. 3:84, section 3 Dutch Civil Code. Under the former Civil Code the Dutch Supreme Court had recognised these forms of fiduciary transfer.
45 Arts. 3:92 and 3:91 Dutch Civil Code.
46 Hoge Raad 18 November 2005, JOR 2006/60 (BTL Lease/Van Summeren c.s.).
fiducia has been reduced through the implementation of the Financial Collateral Directive.\textsuperscript{47} A transfer on the basis of a financial collateral arrangement (financiëlezekerheidsovereenkomst tot overdracht) is explicitly considered not to be in violation of the prohibition of fiducia.\textsuperscript{48} However, financial collateral can only consist of money of account, financial instruments and, after implementation of the latest amendments to the Financial Collateral Directive, credit claims.

7.4. Position of the Tax Authorities

Another aspect of Dutch legislation regarding security interests in leasing transactions is the position of the tax authorities. As a starting point, tax claims are privileged on all of the debtor’s assets. This is hardly problematic as rights of mortgage and pledge rank before this privilege. However, the tax authorities have an even stronger right to take recourse for certain tax claims against so-called bodemzaken. Bodemzaken are movable assets located at the debtor’s premises which serve a permanent use of the premises in accordance with its purpose. Provided that they are independent movable property, fixtures and fittings, production machinery and equipment all fit this definition. Stock and transporting equipment are not considered to be bodemzaken.

The tax authorities’ right of recourse in respect of bodemzaken is twofold.\textsuperscript{49} Firstly, the tax privilege ranks before non-possessory rights of pledge on the debtor’s bodemzaken. Secondly, the tax authorities have a right of recourse against bodemzaken, irrespective of the ownership of these assets. The tax authorities’ rights in relation to bodemzaken are limited to the collection of certain taxes, in particular sales tax (omzetbelasting) and tax on wages (loonbelasting).\textsuperscript{50} Income tax (inkomstenbelasting) and company tax (vennootschapsbelasting) fall outside the scope of these rights.

It’s important to note that the tax authorities will refrain from taking recourse against assets that are the actual property of a third party, meaning that the asset belongs to the third party in both a legal and an economical sense. Generally, financial leases largely allocate the economic risk of depreciation of the leased asset with the lessee, and therefore do not constitute actual property of the lessor.\textsuperscript{51} The State Secretary of Finance has issued a regulation in which the conditions are specified under which the lessor is considered to be the owner of the leased asset for this purpose, the Lease Regulation (Besluit Leaseregeling). This regulation is further discussed under paragraph 12.

The tax authorities’ rights in relation to bodemzaken are controversial legal instruments. For years the abolition of these instruments has been strongly advocated in legal literature. The Insolvency Law Committee, appointed by the Minister of Justice, presented recommendations to this effect in 2007, in the form of a preliminary legislative proposal for a new insolvency act.

\textsuperscript{48} Art. 7:55 Dutch Civil Code.
\textsuperscript{49} Arts. 21 and 22 Invorderingswet 1990.
\textsuperscript{50} Art. 22, section 3 Invorderingswet 1990.
\textsuperscript{51} Leidraad Invordering, § 22.8.10.
8. **Transfer of Rights and Duties under the Lease Agreement**

During a lease, a party to the contract may want to transfer one or more of its rights or duties under the lease agreement, or transfer the contractual relationship as a whole.

8.1. **Transfer of the Lease as a Whole**

Under Dutch law, a party to a contract, e.g. a lease or sub-lease, may transfer its contractual relationship to a third party by way of a takeover of contract (contractsoverneming).\(^{52}\) A takeover of contract results in the replacement of one of the parties to the contract and the transfer of generally all existing rights and duties to a third party. Furthermore, all ancillary rights (nevenrechten) to these rights, such as a right of pledge or rights under a contract of suretyship, automatically pass to the third party.\(^{53}\) A takeover of contract requires a tripartite agreement. Besides an agreement between the transferring party to the contract and the third party, the consent of the other party to the contract is necessary. However, the other party to the contract can give its consent in advance, resulting in a takeover as soon as the transferring party and the third party have agreed on the takeover and have notified the other party of this fact in writing.\(^{54}\) In practice, lease agreements often contain the lessee's consent in advance to a takeover. However, if such a consent forms a standard contract term in a consumer lease, it is considered unreasonably onerous and therefore voidable.\(^{55}\)

8.2. **Transfer of Duties under the Lease**

Individual duties can be transferred to a third party by means of a takeover of debt (schuldoverneming).\(^{56}\) A takeover of debt requires an agreement to that effect between the debtor and the third party. However, the takeover has effect vis-à-vis the creditor only after its consent thereto. The creditor's consent can be given in advance, resulting in a takeover as soon as the debtor and the third party have agreed on the takeover and have notified the creditor of this fact in writing.\(^{57}\)

8.3. **Transfer of Rights under the Lease**

Individual rights arising from the lease agreement are in principle transferable. Nevertheless, personal claims arising from the lease may be rendered non-transferable by an agreement to that effect between lessor and lessee.\(^{58}\) The lessor's right of payment of the lease receivables can be transferred in accordance with the provisions on the assignment of personal claims (rechten op naam). Subject to a valid legal basis and the lessor's power of disposition of these assets, the lease receivables can be assigned either in a disclosed or an undisclosed manner. Disclosed assignment requires an authentic or private deed to that effect between the creditor

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\(^{52}\) Art. 6:159 Dutch Civil Code.

\(^{53}\) Art. 6:142 Dutch Civil Code.

\(^{54}\) Art. 6:159, section 3 in conjunction with Art. 6:156 Dutch Civil Code. Cf. Art. 15(2) and 15(3) Unidroit Model Law on Leasing on the transfer of rights and duties under a lease and consent in advance.

\(^{55}\) Art. 6:233 in conjunction with Art. 6:236 under e Dutch Civil Code.

\(^{56}\) Arts. 6:155 to 6:158 Dutch Civil Code.

\(^{57}\) Art. 6:156, section 1 Dutch Civil Code. Cf. Arts. 15(1) 15(b) and 15(3) Unidroit Model Law on Leasing on the transfer of duties under a lease and consent in advance.

\(^{58}\) Art. 3:83, section 2 Dutch Civil Code.
and third party and notification to the debtor of the assigned claim. Undisclosed assignment solely requires an authentic deed or a registered private deed.59

Future claims can be assigned in advance, meaning the formalities required for an assignment are already fulfilled and will result in a transfer of the claim at the time of its inception.60 However, the undisclosed assignment of future claims is limited to claims that will arise directly from a pre-existing legal relationship, such as a contract.61 Furthermore, the opening of bankruptcy proceedings in respect of the assignor before the inception of the assigned claim, will prevent the transfer to the assignee.62 Whether lease receivables that are not yet due and payable are to be considered as existing or future claims is somewhat uncertain as Dutch law does not provide general rules distinguishing future claims from existing claims (in particular existing claims under a suspensive condition or time period). However, there is certainty regarding lease receivables under leases that can be characterized as hire agreements. The Dutch Supreme Court has ruled in respect of hire agreements that the receivables corresponding with future periods in time, are considered future claims.63

Unless agreed otherwise by contract, the transfer of lease receivables does not affect the lessee's defences nor does it fully prevent a right of set-off for the lessee.64

9. Transfer and Loss of Ownership of the Leased Asset

9.1. Transfer by the Lessor

Besides the transfer of the rights and duties under a lease, the lessor may want to dispose of the ownership of the leased asset. Under a typical lease agreement the lessor has the ownership of the leased asset and can dispose thereof. Under Dutch law, the transferability of ownership of movable and immovable property cannot be limited by agreement.65

To what extent the lessee's rights are protected against the acquirer of the asset primarily depends on the – contractual or proprietary – character of these rights under the lease. If a lease is characterized as a hire agreement, the rights of the lessee are generally of a contractual nature and can only be exercised against the lessor. The lessee does not have a proprietary interest in the asset. However, a transfer of the leased asset results in the transfer by operation of law of the hire agreement to the acquirer of the asset. This provision is only mandatory for hire agreements regarding immovable property.66 If a lease is characterized as a hire purchase agreement, the lessee’s right to acquire the leased asset is protected against a transfer of the asset by the lessor.67 Furthermore, if the lease involves a transfer under retention of title, the lessee has a proprietary interest in the leased asset resulting in the acquisition of ownership of the leased asset after fulfilment of its obligations under the lease. A transfer of the leased asset by the lessor cannot affect this position.

60 Again subject to a valid legal basis and the lessor's power of disposition over these assets at that time. Art. 3:97 in conjunction with Arts. 3:84 and 3:94 Dutch Civil Code.
61 Art. 3:94, section 3 Dutch Civil Code.
62 Arts. 20, 23 and 35, section 2 Dutch Bankruptcy Act (Faillissementswet).
63 Hoge Raad 30 January 1987, NJ 1987, 530 (WUH/Emmerig q.q.).
65 Art. 3:83, section 1 Dutch Civil Code.
66 Art. 7:226 Dutch Civil Code.
9.2. **Transfer by the Lessee**

In general, it cannot be said that, in a financial lease, the lessee acquires a proprietary interest in the leased asset which to some extent commensurates with the payments made. A distinction should be made between financial leases that provide for an automatic transfer of ownership of the leased asset to the lessee and other leases.

The automatic transfer of ownership of the leased asset to the lessee after fulfilment of its obligations under the financial lease agreement is, under Dutch law, construed as a retention of title. The proprietary interest of the transferee under retention of title is a much debated subject of Dutch property law. Legal literature is basically divided into two views. The first view is that until fulfilment of the relevant obligations the transferee merely has an expectation of acquiring ownership. The lessee can only transfer the lease object as a future asset. The second view, somewhat inspired by the German legal concept of the *Anwartschaftsrecht*, holds that already before fulfilment of the relevant obligations, the lessee has an existing proprietary interest in the leased asset which can be transferred. This proprietary interest is generally characterized as conditional ownership (*voorwaardelijke eigendom*) or ownership under suspensive condition (*eigendom onder opschortende voorwaarde*). The second view has been adhered to by a great majority in recent legal literature.68

Other leases do not provide the lessee with a proprietary interest in the leased asset.

9.3. **Loss of Ownership through Accession**

Proprietary interests in the leased asset, most notably the lessor's ownership, may be lost as a result of the affixation of the asset to another object. Affixation may lead to accession (*natrekking*) of the asset by another movable or immovable property, resulting in the loss of existing proprietary interests in the leased asset.69

Accession occurs when the leased asset becomes a component part of another property (the principal property). As ownership of a property comprises all component parts, the ownership of the principal property will include the leased asset.70 Whether a leased asset has become a component part, is determined by common opinion or follows from such a physical connection that the asset cannot be separated from the principal property without causing considerable damage to one of them.71 More specifically, the leased asset becomes a component part according to common opinion if either (a) the principal property is considered incomplete without it or (b) the asset and principal property are specifically geared to one another in a constructional sense. The question of which of the relevant assets should be considered the principal property is generally determined by common opinion.72

Additionally, accession by immovable property will occur when the leased asset, either directly or indirectly, forms a permanent part of the land.73 The leased asset does not need to be physically connected to the land for this. An asset has become a permanent part of the land when it is intended to permanently remain at the location. This follows from the nature of the asset, the construction and the intention of the constructor to the extent ascertainable for third

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68 See Faber 2007, p. 33-58, with further references.
69 Cf. the definition of ‘asset’ in Art. 2 Unidroit Model Law on Leasing; and Art. 4 Convention on International Financial Leasing on affixation of the asset.
70 Arts. 5:3 and 5:14, section 1 Dutch Civil Code.
71 Art. 3:4 Dutch Civil Code.
72 Arts. 3:4 and 5:14, section 3 Dutch Civil Code.
73 Arts. 3:3 and 5:20, section 1, sub e Dutch Civil Code.
parties. However, accession of the leased asset by the land may be interrupted by creating a right of superficies ("opstalrecht").

10. Failure of Performance

10.1. Failure of Performance and Remedies

In the event of the other party failing to fulfil its contractual obligations under the lease, the remedies of a party are primarily governed by rules of general contract law. A party can demand specific performance of the obligation at law or be entitled to rely on a right to suspend performance of its own obligations. Furthermore, a party can demand additional and reliance damages in case of an attributable failure to perform. A failure to perform may also form a reason to rescind the lease agreement. In both operational and financial leases, the termination of the lease ends the lessee's right of use, allowing the lessor to claim the return of the leased asset.

10.2. Contractual Remedies

The remedies mentioned above are in principle rules of directory law, allowing parties to contractually deviate therefrom. For example, parties may agree to the events that constitute an attributable failure to perform or the events that give the right to early termination of the lease. Parties may also determine whether an aggrieved party is required to give the other party a notice of default and a reasonable opportunity to cure. Other examples are the extension, restriction or exclusion of rights of suspension or termination.

Customary events of default in a financial lease are (a) the lessee failing to pay the lease receivables; (b) the opening of insolvency proceedings against the lessee and (c) the lessee failing to properly maintain or insure the leased asset. The lessee is generally granted a right to suspend payment of the lease receivables in case its quiet enjoyment of the leased asset is disturbed, but only if the cause of the disturbance is attributable to the lessor. Customary events that give right to termination of the lease are often linked to the complete economical loss of the leased asset. Parties may agree on early termination charges, penalties or payoffs.
10.3. **Damages**

As mentioned above, a party can demand additional and reliance damages in case of an attributable failure to perform. However, the parties can exclude or restrict their liability. The parties may also agree on penalty clauses, although mandatory provisions entitle the debtor to request in court the moderation of evidently unfair penalties.85

11. **Insolvency Aspects**

11.1. **Bankruptcy in General**86

The opening of bankruptcy proceedings essentially results in a general attachment on the debtor's assets, including assets acquired after opening of the proceedings, for the benefit of its joint creditors. The debtor loses the right to manage and dispose of its assets and creditors can only enforce their pre-bankruptcy claims against the debtor through submission of their claims to the administrator. However, creditors of claims against the insolvent estate can demand immediate payment from the administrator and can take recourse against the debtor's assets included in the bankruptcy. Secured creditors can enforce their rights as if bankruptcy proceedings had not been opened. Revindacatory creditors, such as the legal owner of the leased asset, can demand from the administrator the surrender of their assets.87

11.2. **Effect on Leases**

As a starting point, the opening of bankruptcy proceedings in respect of one of the parties to a contract has no influence on the existence of that contract. However, the Dutch Bankruptcy Act contains special provisions for certain types of contracts, which can be of particular importance for leasing contracts. One provision deals with reciprocal contracts in general that are not or not fully performed by both the bankrupt debtor and the other party at the time of the opening of the bankruptcy proceedings,88 which will often be the case with existing leases. The other party can request the administrator to declare within a reasonable period of time whether he intends to perform the contract. If the administrator fails to do so or declares that he will not perform the contract, he loses the right to demand performance from the other party. If the administrator declares that he intends to perform the contract, he is obliged to give security for the proper performance. As a result the other party's claims under the lease contract are claims against the estate.

Furthermore, there are special provisions for the termination of hire purchase and hire agreements.89 If the bankrupt is a lessee under a hire purchase agreement, both the administrator and the lessor can terminate the contract. The lessor's claim against the lessee is an ordinary bankruptcy claim.90 If the bankrupt is a lessee under a hire agreement, both the

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86 The Dutch Bankruptcy Act (Faillissementswet) contains three types of insolvency proceedings: (i) bankruptcy (faillissement), (ii) suspension of payments (sursèance van betaling) and (iii) debt reorganisation for natural persons (schuldsaneringsregeling natuurlijke personen). The main text only refers to bankruptcy proceedings.
87 Cf. Art. 7 Convention on International Financial Leasing on the lessor’s real rights in the equipment.
88 Art. 37 Dutch Bankruptcy Act.
89 Approximately the same rules apply to hire and hire purchase contracts in suspension of payments or debt reorganisation for natural persons proceedings.
90 Art. 38a Dutch Bankruptcy Act.
administrator and the lessor are entitled to early termination of the contract with a maximum notice period of three months. Where lease receivables are paid in advance, the lease cannot be terminated before the end of the period that has been prepaid. The lease receivables due from the date of bankruptcy are claims against the estate. The Dutch Bankruptcy Act does not contain specific rules for the case the bankrupt is lessor under a hire purchase or hire agreement.

11.3. Moratorium

In bankruptcy, the court may order a moratorium (afkoelingsperiode) for a maximum period of two months, which can be extended once with a maximum of two months. The moratorium blocks the enforcement of rights of recourse in respect of assets included in the bankruptcy (in particular the enforcement of a right of pledge or mortgage) or the surrender of assets under the control of the debtor or the administrator. The moratorium does not prevent creditors with claims against the estate from taking recourse against the debtor's assets. In the event of a bankrupt lessee, the moratorium prevents the lessor (under either a financial or operational lease) from taking control over the leased asset.

12. Tax Aspects

12.1. Tax Benefits

The characterization of a lease as either operational or financial is of importance for the levying of various types of tax, in particular income, company and sales tax. The Minister of Finance and the State Secretary of Finance have issued regulations on the characterization of leases for tax purposes.

For income tax and company tax purposes the character of a lease determines whether the lessor or lessee must be regarded as the owner of the leased asset. The fiscal owner enjoys certain tax benefits, such as investment allowances and early depreciation of the costs of acquisition. The Lease Regulation (Besluit Leaseregeling) specifies the conditions under which the lessor is considered to be the owner of the leased asset for tax purposes and the application of the tax authorities' right of recourse against bodemzaken, described in subparagraph 7.4. The lessor will be regarded as the owner of the leased asset if it (a) behaves as such; (b) has legal ownership of the leased asset; and (c) carries the positive and/or negative residual value risk in respect of the leased asset. The regulation gives further economic criteria to determine whether the lessor carries the residual value risk, thereby taking into account end-of-term options. The Lease Regulation provides a safe harbour, meaning that, through fulfilment of the requirements, parties can obtain certainty on the characterization of a lease as an operational lease for certain tax purposes.

For sales tax purposes financial and operational lease are treated differently. A financial lease constitutes a delivery, whereas an operational lease constitutes a service. This distinction is of importance for the manner of taxation, the tariff and the application of tax exemptions. The VAT Regulation specifies the criteria to distinguish leases for this purpose.

91 Art. 39 Dutch Bankruptcy Act.
92 Arts. 63a to 63e Dutch Bankruptcy Act. A moratorium may also be applied in suspension of payments or debt reorganisation for natural persons proceedings.
12.2. **Cross-border Leasing**

Leasing arrangements where the lessor and lessee are situated in different countries may provide parties with substantial tax benefits. Recent years show examples of cross-border lease-back arrangements between Dutch lessees and American lessors to finance, for instance, power stations. A cross-border lease can be used in particular to utilize differences in national tax laws in respect of leases. Important tax benefits can be differences in tariffs and tax sparing credit opportunities. Dutch companies are often used in international leasing transactions to avoid or decrease foreign tax claims. Depending on the tax regimes of the countries involved and tax treaties, a lease arrangement may even result in an absence of taxation or the collection of tax benefits, such as investment allowances, in both jurisdictions, commonly called a ‘double dip’. Double investment allowances can be the result of differences in determining ownership for tax purposes of a leased asset.

The Dutch legislator has not considered it necessary to intervene with this practice. However, the United States (a jurisdiction that was often involved in cross-border leasing arrangements) has taken measures to render this kind of transactions unattractive as far as taxes are concerned.

There is no Dutch legislation specifically addressing the involvement of governmental entities and local authorities entering into cross-border leasing transactions. However, the Minister of the Interior and Kingdom Relations and the State Secretary of Finance are of the opinion that local authorities should refrain from entering into these arrangements and other transactions that aim at obtaining financial benefits at the cost of another (foreign or internal) authority. Furthermore, the Minister expressed the intention to prevent or reverse such transactions.94

13. **Accounting Aspects**

According to the Dutch Civil Code any enterprise is obliged to keep books showing the state of their assets and liabilities and everything concerning their business, in accordance with the requirements for that business, and to keep all records in respect thereof, so that its rights and obligations may be ascertained at any time.95 Moreover, legal persons are obliged to draw up annual accounts. For most legal persons, the drawing up and publication of the annual accounts is extensively regulated. The annual accounts comprise both a balance sheet and a profit-and-loss-account and must, according to acceptable standards in society, offer such an insight that a sound judgment can be made into the legal person's assets and liabilities, its results, and (to the extent possible) its solvency and liquidity. Furthermore, European Union legislation obliges publicly traded companies to draw up their consolidated accounts in compliance with certain IAS/IFRS accounting standards adopted by the European Union for this purpose.96

A commonly used set of accounting standards in the Netherlands are the *Richtlijnen voor de Jaarverslaggeving* (Guidelines on Annual Reporting). Although commonly used, it should be noted that these guidelines are a private initiative. The guidelines are highly influenced by the IAS/IFRS accounting standards.

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95 Arts. 3:15i and 2:10 Dutch Civil Code.
96 Regulation (EC) 1606/2002 on the application of international accounting standards.
14. Supervision Aspects

14.1. Licensing Requirements

The commercial activity of leasing is not subject to a licensing requirement under Dutch law as such. However, if a leasing company is financed by raising or having repayable funds from the general public, e.g. loans or deposits, the lessor may qualify as a credit institution within the meaning of the Financial Supervision Act (Wet op het financieel toezicht) and as such be in need of a banking licence issued by the Dutch Central Bank.97

Furthermore, if the lessor enters into certain consumer leases it may require a consumer credit licence issued by the Authority for the Financial Markets.98

14.2. Integrity Legislation

Financial leasing companies in the Netherlands may be subject to obligations and supervision under the Prevention of Money-Laundering and Terrorist Financing Act (Wet ter voorkoming van witwassen en financiering van terrorisme). The act requires certain financial institutions to conduct customer due diligence when establishing new business relationships, carrying out certain transactions or if there are indications that a customer is involved in money laundering or terrorist financing. Additionally, these institutions have to report so-called ‘effected or intended unusual transactions’, such as cash transactions over € 15,000 and transactions with persons established in designated countries or territories. Compliance of financial leasing companies with the act is supervised by the Dutch Central Bank.

98 Art. 2:60 Financial Supervision Act.
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