



A Dutch *notaris*, a legal professional

*Which legal services
does a notaris provide?
Specialisations
List of terms*



When visiting a notaris please remember to bring the valid and appropriate proof of identification: such as a passport, a driving licence, a European identity card, a municipal identity card or a tourist card.

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List of terms

Introduction

This brochure, by the Koninklijke Notariële Beroepsorganisatie¹⁾ (or KNB), hopes to provide an introduction to a Dutch “*notaris*”. A *notaris* or civil law notary has a special place in the world of legal professionals in the Netherlands: attorneys-at-law, bailiffs and tax consultants. This is in the first place apparent from the way a *notaris* is appointed and the way he performs his duties. Like an attorney, a *notaris* is a professional legal adviser with clients who pay for his advice, but like a judge, a *notaris* is appointed by the Crown, and for ‘life’, in the sense that he is granted an honourable discharge at the age of 65. The permanence of his appointment is designed to safeguard the independence a *notaris* needs to perform his duties.

This brings us to the second important feature: a *notaris*’s independence and more importantly, his impartiality. Unlike a legal advisor or an attorney-at-law (in Dutch *advocaat*), a *notaris* does not act for just one party. Instead, in the Dutch legal system, he is required to weigh up and balance the interests of all the parties in a certain legal matter. A *notaris* is, as it were, above the parties. When real property is conveyed, a *notaris* for instance acts for both the vendor and the purchaser. He is required to observe professional confidentiality and has the right to withhold information in court, in the same way as an attorney-at-law or a doctor.

A *notaris*, who is always academically-trained, is not only a legal expert on family law, the law of succession, business law and property law, but must also stay abreast of fiscal legislation and case law insofar as they relate to these fields. If necessary, he may co-ordinate the activities of other legal experts. A *notaris* does not appear in court.

Apart from providing legal advice, a *notaris* also records agreements, either because the law requires it or at the parties’ request. The formal document drawn up by a *notaris*, a ‘notarial deed’, provides definitive

¹⁾*The Koninklijke Notariële Beroepsorganisatie is the Dutch professional association for notarissen.*

proof that the date and the parties' signature are correct. A *notaris* is required to retain the original deed and to issue the parties with certified copies. A specially-endorsed copy, the "grosse", provides conclusive evidence of title in the same way as a court judgement. The holder of a notarial deed subsequently does not need to conduct any legal proceedings.

The new Act, the "Wet op het Notarisambt" which became effective on 1st October 1999, 156 years after the original act, on the one hand reinforces a *notaris*'s official position, but also permits a freer market for the services he provides. The consolidation of the *notaris*'s official position is for example reflected in the way the requirements of impartiality and independence have been enshrined in law, the many regulations a *notaris* and a "kandidaat-*notaris*" (junior notary) are required to observe, and furthermore the fact that a *notaris* is not also permitted to act as an attorney at law. The introduction of market forces is reflected in the greater scope for junior notaries to become a *notaris* and the greater scope for competition.

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The new Act generates more opportunities for junior notaries wishing to set up a practice and more freedom in the fees a *notaris* is permitted to charge. The Act has provided for an external committee of experts and if junior notaries can submit a sound business plan to this committee, they have more opportunity than before to set up their own practice. The greater freedom in the fees a *notaris* is permitted to charge implies that the KNB no longer gives rules for fees or lays down recommended rates; any limitations are laid down by the Ministry of Justice. During the transitional period from 1st October 1999 until 1st October 2002, real property transactions are subject to the minimum and maximum rates laid down by the Minister of Justice, and a *notaris* must fix his fee within these margins, although certain family law cases are still bound by a maximum. The KNB regulations are designed to safeguard the integrity and professionalism of individual *notarissen*, but the KNB disciplinary procedures are a further safeguard to ensure that these are indeed properly observed.

Which legal services does a notaris provide?

The law requires a notarial deed for a number of agreements and legal transactions. The most important are:

1. conveying real property in The Netherlands;
2. creating or cancelling mortgages;
3. incorporating public limited or private limited liability companies (N.V.s and B.V.s) or amending their Articles of Association;
4. incorporating foundations or associations and amending their Articles of Association;
5. drawing up or altering Wills;
6. drawing up or amending pre-nuptial settlements and registered partnership agreements;
7. transferring shares;
8. legalising signatures;
9. providing for gifts and donations in a notarial deed.

For practical reasons a *notaris* often also performs certain legal transactions and drafts agreements other than the above, for example agreements between co-habitees and provisions to protect private limited liability companies against third parties.

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Conveying real property in The Netherlands

The conveyance of real property can be broken down into two stages:

a. Contracts of sale

In a contract of sale, the vendor and the purchaser agree that the purchaser shall acquire the title to a piece of real property under certain conditions, at a certain price and on an agreed date. This contract becomes effective when they have agreed on all the conditions of the sale.

The parties are bound by such a contract, even if it is not recorded in a written document, although a written contract of sale is customary. A contract of sale does not need to be drawn up by a *notaris*, but as the parties are bound by it, it is wise to

arrange for a *notaris* to be called in at an early stage, to provide the necessary expert guidance and advice on legal details. Aside from describing the property and recording the price, the contract of sale records the parties' other agreements. The intervention of a *notaris* will therefore ensure, to the extent possible, that neither of the parties finds himself saddled with obligations he cannot reasonably fulfil. For that reason, a contract of sale includes resolatory conditions, so that the sale will not go ahead, for example if the purchaser fails to obtain a residence permit or a mortgage. The contract often also includes a penalty clause for the event that either of the parties fail to comply with their obligations. The *notaris* will moreover inform the parties of their obligations and explain how to comply with them.

The contract of sale often stipulates that the purchaser pays a *notaris*, as an independent third party, a deposit, which is subsequently deducted from the purchase price. Because of the *notaris*'s impartiality, it is in the purchaser's interests to pay the deposit to a *notaris* rather than the vendor. Instead of a deposit, the purchaser can also provide the *notaris* with a bank guarantee.

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b. Conveyance

The property is conveyed, or the title is transferred, by registering the deed of conveyance in the Land and Public Registry Agency. The deed of conveyance must be drawn up by a *notaris* and must be signed by the latter and both parties. Before signing, a *notaris* is required to investigate the title to the property and the vendor's power to dispose of it in the public registers.

Unless agreed otherwise, the costs connected with buying real property are for account of the purchaser. These include:

- transfer tax, 6% of the purchase price of the property, which is paid via the *notaris*;
- the *notaris*'s fees;
- the costs of registering the deed of conveyance at the Land and Public Registry Agency.

Other costs the purchaser may be required to pay include the agent's commission, if an estate agent was involved in the sale, as

well as a proportion of the property tax which the vendor is required to pay in the calendar year in which he sells the property. A *notaris* generally arranges the financial settlement of the property transaction. The purchaser does not become legal owner of the property until the deed of conveyance has been signed and the *notaris* has ensured that it has been entered in the public registers. The purchase price is not transferred to the vendor until the *notaris* has confirmed that the property is charged with no mortgages or attachments other than those which were taken into account when the deed of conveyance was signed. The purchaser is responsible for insuring the property as of the signature date of the deed of conveyance.

Creating or cancelling mortgages

If the purchaser borrows money in order to purchase a property, the lender will often demand security in the form of a mortgage. That is to say, the house becomes collateral for the borrower's repayment obligations. The mortgage deed necessary for this must also be drawn up by a *notaris* and the latter must arrange for an extract of that deed to be registered in the public registers. After the loan has been repaid in full, the mortgage registration is struck out by means of a notarial deed of mortgage cancellation.

Incorporating public and private limited liability companies (N.V.s and B.V.s) or amending their Articles of Association

Business enterprises can be set up under different legal forms, i.e. with and without legal personality. In the case of enterprises without legal personality it is impossible to distinguish between the enterprise's capital and the entrepreneur's, so that the entrepreneur will remain personally liable for the company's debts. This is not the case for legal entities, as they are deemed to be separate and independent. If a legal entity has legal personality, the entrepreneur cannot be held liable for more than the sum he contributed into the company's capital (barring exceptions). Sole traders, partnerships and limited partnerships are examples of business enterprises which are not separate and independent legal entities.

The absence of legal personality does not necessarily entail that it is not a good form for an enterprise. A *notaris* can advise entrepreneurs and explain the legal and fiscal consequences of the various legal forms.

N.V.s and B.V.s are examples of limited liability companies with legal personality. Most legal entities are B.V.s, while N.V.s are usually large companies with a stock exchange listing. The law requires a notarial deed of incorporation in order to incorporate a N.V. or a B.V., and this must contain the Articles of Association. The incorporators of a B.V. must pay up a minimum of EURO 18,000 of the share capital, whereas the incorporators of an N.V. must pay up EURO 45,000. The incorporators must be able to demonstrate that they have this sum at their disposal. Under the new system, the *notaris* is completely responsible for ensuring that Articles are legally correct, and the Ministry of Justice's preventative supervision is restricted to inspecting the financial and criminal records of the company's policy-makers.

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After the deed of incorporation has been executed, a copy must be filed in the Commercial Register of the local Chamber of Commerce. This is done to give any interested party the opportunity to examine the company's Articles of Association and to establish which executive and non-executive directors have which powers to represent the company. The law stipulates that the company's directors are jointly and severally liable for the transactions undertaken before the company's particulars were registered in the Commercial Register. In practice, however, as a *notaris* arranges the first registration, the directors' liability is restricted to a minimum. The particulars in the Commercial Register must always reflect the current situation. This entails that any amendments or any change of directors or powers of the persons authorised to represent the company must be filed with the Commercial Register.

In principle, the law restricts a legal entity's liability to its paid up capital. For this reason, any person doing business with that

company must be able to establish whether it is a legal entity, and the compulsory filing of information at the Commercial Register is one of the ways of establishing this. But there is another statutory provision intended to prevent third parties from being misled: any documents, printed matter or notices originating from a company – barring telegrams and advertising material – must clearly state the company's full name according to the Articles of Association, as well as its address and the location of the registered office. Letters and orders must moreover quote the Commercial Register where the company is registered, and the registration number.

Incorporating foundations or associations and amending their Articles of Association

A foundation is an independent legal entity, like a B.V. The law lays down a number of requirements for foundations:

- a foundation may have no members;
- a foundation may not pay its founders, members of its executive or any third persons – barring payments made to third parties for charitable or non-profit purposes.

This means that foundations are not the ideal legal form for a commercial enterprise, which is why they are usually set up to pursue social or humanitarian objects. Foundations are nevertheless also set up for commercial purposes, for instance in order to execute a trust. A foundation is incorporated by a notarial deed and must be registered in the Foundations Register kept by the local Chamber of Commerce.

The Articles of Association of an association with full legal personality must be recorded in a notarial deed, as it would otherwise have no more than limited legal powers, which means that it would be unable to own real property or be an heir, and that its executive would be personally liable if acting on its behalf vis-à-vis third parties and when binding the association.

Associations with full legal personality must be registered in the Associations Register kept by the local Chamber of Commerce, something which is usually arranged by the *notaris* who executes

the deed containing its Articles of Association.

Drawing up or altering Wills

A *notaris* plays an important role in drafting and executing wills. If a testator wishes to derogate from the statutory provisions on succession, it is necessary to draw up a will. According to the Dutch law of succession, children and grandchildren are entitled to a certain statutory portion of the estate, the “legitimate”. A testator can never disinherit children or grandchildren from this “legitimate” and they can invoke this portion without taking recourse to the courts.

A will must be drawn up by a *notaris*, who is required to inform the Central Register of Wills of the name of any person who instructs him to draw up a will, but not of its contents. In that way, after a death, it is possible to establish whether the deceased made a will with a Dutch *notaris*, and if so, with which *notaris*.

A non-Dutch national who wishes to draw up a will in The Netherlands – for instance because he lives and/ or has capital or assets there – is also well-advised to call in a *notaris*. As problems of private international law often occur in such cases, a *notaris* is in the best position to establish how to best protect his client’s interests.

Probate proceedings are unknown in The Netherlands. After a death, a *notaris* issues a ‘certificate of succession’, recording the names of the heirs, and they can only access the deceased’s bank and/ or giro accounts if they have this certificate. Neither is a personal representative possible in the Dutch law of succession. From the moment of death onwards, the estate passes to the heirs directly and immediately: the principle of “saisine”. One of the heirs is then usually authorised to wind up the estate on behalf of the other heirs. He can, but is not required, to seek the assistance of a *notaris*, but a *notaris* must be called in in order to settle and distribute the real property in the estate. A *notaris* can also assist in completing the inheritance tax return.

Drawing up or amending pre-nuptial settlements and registered partnership agreements

Under Dutch law, spouses have an automatic and general community of property. This means that, as of the day of the marriage, both spouses' possessions and debts - not only the possessions which are acquired or debts entered into in the course of the marriage, but also those which the spouses already had before the marriage - automatically become one whole.

It is possible to derogate from this statutory general community of property by entering into a matrimonial property contract, a pre-nuptial settlement. This kind of settlement is executed before a *notaris* in a notarial deed. There are many kinds of pre-nuptial settlements, and a *notaris* has an important advisory task in this respect.

After the pre-nuptial settlement has been drawn up, the *notaris* arranges for it to be registered in the matrimonial property register kept by the court. It is public, so that anybody may inspect its contents. It is wise - and cheaper - to enter into a pre-nuptial settlement before a marriage is solemnised, but it may also be drawn up or amended in the course of the marriage. It is also wise for foreigners who move or who have capital or assets in The Netherlands to seek the assistance of a *notaris*, because the Dutch concept of a general community of property can also apply to them under certain circumstances.

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Dutch law also allows two persons of the same or a different sex to have their relationship registered in the civil registers.

Matrimonial property law also applies to such "registered partnerships", so that it is also possible for registered partners to derogate from the general community of property by notarial deed. These are then called "registered partnership agreements".

Transferring shares

Shares must be issued in order to incorporate a company, and a notarial deed is necessary in order to issue shares in a B.V. When a B.V. is incorporated, its shares are issued in the deed of

incorporation, which does not need to be executed by a *notaris*, but if the company already exists, the issue or transfer of shares requires a separate notarial deed. This also applies to the transfer of restricted rights to a share, such as usufruct or pledge. The fact that a *notaris* is required to intervene in the issue and transfer of shares, gives both parties greater legal safeguards, as a *notaris* ensures that the deed of issue includes all the information required in law, and investigates the title. It is not until the company has acknowledged the transfer of shares or until the transfer has been served on the company that the new shareholder or the holder of a title can exercise the rights attached to the share, such as voting rights, the right to attend meetings and the entitlement to dividend.

The legalisation of signatures

Sometimes it is necessary to obtain a legalised signature on an official document, such as a power of attorney necessary in connection with an international transaction. When a signature is legalised, the official (the *notaris* for example) endorses the document with a signed statement to the effect that he has satisfied himself of the identity of the person who signed the document. It should be pointed out that the legalisation of a signature provides no guarantee whatsoever of the authenticity of the document itself.

In order to establish whether the *notaris* who legalises a signature is authorised to do so, it is also possible to request that the *notaris's* signature, in its turn, be legalised. Sometimes this is done by a consulate and sometimes by the Clerk of a District Court (*arrondissementsrechtbank*) in The Netherlands. This kind of legalisation is called an apostille and gives a better guarantee than a legalisation, as it not only confirms the authenticity of the signature, but also the capacity of the official who provided the legalisation and, if applicable, the authenticity of the stamps or seals.

Providing for gifts and donations in a notarial deed

In our affluent society we make gifts almost daily, usually things which are handed over in person, such as money or material

objects. Such gifts require no notarial deed. However, a notarial deed is compulsory as soon as a gift or donation concerns other objects, such as a house. This also applies if a person generously undertakes to make periodic donations to a charity, for instance a fixed annual sum. A notarial deed provides proof vis-à-vis the tax authorities or third parties that this donation has indeed been made.

Specialisations

Electronic transactions

Dutch notaries are showing an increasing interest in developments in information technology (IT), and a special association was set up to cater to this need in the Spring of 1999. This association is designed to offer KNB members the opportunity to specialise in notarial IT services, to develop new products and to explore new markets. The association offers two kinds of services, namely 'trusted third party services' (such as arranging the kind of legalisation necessary for electronic legal transactions) and depositing source codes for software programs (escrow).

Mediation

Legal conflicts often arise on a personal level, within families - for instance on the distribution of an estate, or when arranging access to children after a divorce - or between business partners who must continue doing business together even if tensions have escalated to such an extent that this has virtually become impossible. There are however *notarissen* trained especially to lead and mentor mediation processes. If mediation is successful, the parties sign a legally-binding document recording their agreements. In view of the fact that it requires both impartiality and the ability to head off legal disputes, mediation is a service pre-eminently suitable for a *notaris*.

Estate planning

Estate planning, which has blown over from the United States, is designed to provide legal and fiscal assistance upon the transition and preservation of assets, and to ensure that assets, such as family estates, are not broken up. The object of estate planning is to ensure that once accrued, an estate is transferred as advantageously as possible. Its primary object is to make the future estate as small as possible and thus restrict the total amount of inheritance tax. When doing so, the parties can encounter problems relating to donations, the law of succession, matrimonial property law and tax law. These are all fields in which a *notaris*, being an all-round legal adviser, is an

expert. A *notaris*'s ability to combine both legal and tax advice can be an invaluable contribution.

List of terms

Association (*'vereniging'*)

This is a legal entity (see: Legal Entity) consisting of a collaboration between two or more persons who strive for a certain common objective, for example, to play a sport together. Associations may not be set up in order to distribute profits amongst the members. Dutch law distinguishes between associations with and associations without legal powers, which may be full or partial. An association with full legal powers can enter into the same rights and obligations as any adult citizen. In order to have full legal powers, an association's Articles of Association must be recorded in a notarial deed. An association without full legal powers has limited rights, which means that it can for example not acquire real property (see: Real Property) and that, in addition to the association itself, the members of its executive are personally liable for its debts.

Authentic deed (*'Authentieke akte'*)

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This is a signed and dated document drawn up by a publicly-recognised official, usually a *notaris*, recording facts, acts, events and/or statements. Such a deed serves as evidence of the matters it describes and has the same legal effect as a judgement rendered in a court of law.

the Central Register for Wills and Testaments (*'Centraal Testamenten Register'*)

This is the register recording all the wills drawn up in The Netherlands. It does not record the contents of the will itself, merely the fact that a person has drawn up a will. In this way, it is possible to establish whether a deceased had a will and which *notaris* keeps it.

the Commercial Register (*'Handelsregister'*)

This is the public register kept by the Chamber of Commerce, in which companies are entered and which must provide evidence of the person or persons authorised to sign on the company's behalf.

a Deed of cancellation ('*royementsakte*')

A mortgage (see: Mortgage Deed) is cancelled after the mortgage has been paid off entirely, after which the *notaris* deletes or cancels the registration in the public registers (see: Land and Public Registry Agency). This is done by means of a notarial deed (a deed of cancellation). The mortgage lender must give its permission for this.

a Deed of conveyance ('*Leveringsakte*')

The title to real property (see: Real Property) is transferred from the vendor to the purchaser when an - authenticated - copy of the notarial deed of conveyance is registered at the land and public registry agency (see: Land and Public Registry Agency). The deed of conveyance must be drafted by a *notaris* and must be signed by the latter, the vendor and the purchaser. The contents of the deed of conveyance must correspond with the contract of sale which the parties had already entered into.

General partnership ('*vennootschap onder firma*')

A general partnership is a form of collaboration between two or more persons, partners, jointly operating a business and acting as an organisation. In other words, they do business under a joint name. This type of collaboration is entered into in a partnership contract between the incorporators.

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Inheritance tax ('*successierechten*')

This is a tax which is levied over the assets which a beneficiary obtains from an estate after the testator's death. The percentage of tax payable depends on the degree of kinship and the value of the property inherited from the deceased's estate.

Investigation of title ('*titelrecherche*')

The *notaris* checks the records of a real property in the public registers (see: Public Registers) to establish how and when the vendor acquired its title (see: Real Property).

Junior notary (*'kandidaat-notaris'*)

This is a law graduate specialising in notarial law who provides notarial services under the responsibility of a *notaris*. Once a junior has complied with a number of conditions, including practical experience at a *notaris's* office as notarial graduate, a junior notary may be appointed as *notaris*.

the Land and Public Registers Agency (*'Kadaster'*)

This is the public register kept by a government agency, the Land and Public Registers Agency, recording all real property (see: Real Property), and all property transactions, for example the owner of the property and the mortgages with which it is charged.

Legal entity (*'rechtspersoon'*)

Like a human being, a legal entity can have independent rights and obligations, which for example means that if a person does business via a legal entity, only that entity can be held liable for debts arising from that enterprise.

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Limited partnership (*'commanditaire vennootschap'*)

A limited partnership is a special kind of general partnership (see: General Partnerships), with the most important difference being the fact that a limited partnership has two kinds of partners: managing partners and dormant partners. The managing partner is personally and severally liable for the firm's debts, in the same way as a partner in a general partnership, but this does not apply to dormant partners.

Matrimonial property law (*'Huwelijksvermogensrecht'*)

These are the statutory provisions providing for the financial consequences of a marriage. In Dutch law, if the spouses-to-be make no arrangements to that effect before their marriage, i.e. if they do not enter into a pre-nuptial settlement, their marriage will create a general community of property, so that their respective assets will form one joint community of property.

Mortgage deed ('Hypotheekakte')

The purchase of real property (see: Real Property) usually depends on whether the purchase can be financed, and, in general, prospective buyers turn to a bank, insurance company or pension fund for this. A loan for real property is usually secured by a mortgage, which means that the property is given to the lender as collateral to ensure that it will recover the sum it has loaned. A mortgage is created in a notarial deed: a mortgage deed.

Notaris ('Civil law notary')

A *notaris* or civil law notary is a publicly-appointed official charged with drawing up authentic deeds (see: Authentic Deed) and other duties with which he is charged in law, such as winding up estates, presiding over auctions and legalising documents (in fact giving a seal of authenticity).

Partnership ('Maatschap')

This is a form of collaboration between two or more persons, partners, who each contribute their labour, assets and/or property and who strive for a certain common objective. The individual partners are not required to contribute equally to the partnership. Partnerships are often set up by professionals: doctors, attorneys etc.

Preventative supervision ('preventief toezicht')

These are the 'policing' duties of the Ministry of Justice undertaken before public or private limited liability companies (see: Public Limited Liability Companies and Private Limited Liability Companies) are incorporated to establish whether any of the company's policy-makers have a financially dubious past or a criminal record.

Private limited liability company ('besloten vennootschap' - B.V.)

A private limited liability company is a legal entity (see: 'Legal Entity') with a capital divided into shares which has been incorporated to achieve a certain object. Those providing the company with capital are referred to as shareholders, and every shareholder participates in the company for a certain proportion of the shares.

Colophon

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