1 Introduction

1.1 Research question

This report addresses the evaluation of the Sale of Immovable Property Act, which came into force on 1 September 2003. The reason for conducting the evaluation was the promise by the Minister of Justice to the Members of Parliament that the Act would be evaluated 5 years after its entry into force. The key question of this research is the following:

To what extent does the Sale of Immovable Property Act in practice satisfy the goals of the Act, considering the difficulties that have been observed in the literature, case law and practice and what adjustments are advisable?

The evaluation has been conducted on the basis of the following sub-questions:

1. Is there any reason to extend the requirement of written form to sales regarding commercial property and buyers that operate for professional purposes?
2. Has the protection offered to the non-professional buyer of a house by article 7:2 of the Civil Code by means of a three-day cooling-off period and the possibility to register the sales agreement in the public registers proved sufficient?
3. Has the 5% rule of article 7:768 of the Civil Code achieved the intended enforcement of the position of the non-professional buyer of newly-built houses?
4. Is there any reason or necessity to replace or extend the cooling-off period with obligatory intervention by a notary when the parties enter into the sales agreement?

At the time that the research was conducted, fraud in real estate was a point of (political) concern. In addition to the key question, it was investigated in how far this research contains points of departure for the prevention of fraud in real estate. In relation to this, in particular the role of the notary was taken into consideration as well as other actors, such as estate agents.

1.2 Research plan

In order to answer the above questions, the parliamentary history, the doctrine and the case law regarding the Sale of Immovable Property Act were studied. Empirical data was gathered by means of interviews with representatives of interest groups representing various actors on the market. Additional data was gathered by means of electronic questionnaires sent to buyers, sellers, notaries and estate agents.

1.3 Results

The research shows that several problems which require attention have indeed arisen. Several suggestions for improvement have been made.

The point of departure for the Sale of Immovable Property Act was the desire to improve the protection of a consumer in the process of buying a home. As a result, the key question that lies at the heart of the law is how this protection should be achieved. At the time, a three-day cooling-off period was decided upon, thereby allowing the consumer to consult experts. The literature, as well as interviews and the results of questionnaires, show that this goal has not been achieved with the cooling-off period. With a view to protecting the consumer against uninformed decisions of which they cannot oversee the consequences, the obligatory intervention of a notary during the phase when the parties enter into the sales agreement offers better protection. This mainly follows from the literature. The cooling-off period does offer some relief for impulsive buyers. On the other hand, the cooling-off period results in a great
deal of anxiety and uncertainty on the part of the seller. Moreover, protection against impulsive decisions is already realised by the written form requirement.

1.4 Answers to the sub-questions

1. There is a sufficient reason to extend the application of the requirement of a written form. First, the written form requirement should be applicable as soon as a person not acting for professional persons is involved (regardless of whether this is the buyer or the seller, and regardless of the nature of the object). Secondly, there is also a sufficient reason to extend the requirement of written form to all sales agreements regarding immovable property, including business property and professional buyers. This would prevent problems relating to delimiting the scope of the Act and would also prevent an unequal position between the professional and the non-professional buyer; it also serves the legal certainty of the parties involved as well as legal certainty in general.

2. With a view to the goal of allowing a non-professional buyer to consult experts after the conclusion of the sales agreement, the protection offered by the cooling-off period is not sufficient. The cooling-off period does grant some protection against impulsive decisions by buyers, but considering the protection already offered by the requirement of a written form with regard to this point, the cooling-off period has little to add.

The Vormerkung in principle reinforces the right of the buyer to actual performance; however, the rule raises a number of questions and several side-effects, such as an (overly) far-reaching breach of the principle of paritas creditorum.

3. The 5% rule offers a good basis for the protection of a non-professional client, but its application raises a significant number of questions.

4. There is a sufficient reason to replace the cooling-off period with obligatory intervention by a notary during the phase when the parties enter into the agreement.

5. Points of departure for the prevention of fraud can be found concerning the various actors who are involved in the sale of a home: inter alia estate agents, assessors, mortgagees and notaries. All actors involved in the process should have the necessary instruments to allow them to fulfil their responsibility in this area. Adding to this, the auction procedure can be revised.

In the following, the main results regarding each investigated topic are presented: the requirement of a written form, the Vormerkung, the 5% rule, the position of the notary and fraud in the sale of real estate.

2 The requirement of a written form

2.1 General findings

Interviews and questionnaires show that the introduction of the requirement of a written form in article 7:2 of the Civil Code has been well received by all the parties involved. Doctrine has also approved of this requirement.

Buying a home is a complex and far-reaching agreement. It is difficult to oversee the obligations that one assumes. Laying down the agreement in writing means security with regard to the content and (when applying a strict approach) certainty with regard to the moment when the contract is concluded. Not merely the parties involved, but also society in general benefits from clarity with regard to the legal status of immovable property, which is served by the requirement for a sales contract to be in a written form.

From a practical point of view, as a result of this written form requirement, both the buyer and the seller have more time to consider the transaction before it is put down in written form. The written form also
means that the parties have a better insight into all of the relevant aspects of a sale, especially if model contracts are used as they specifically contain all the relevant clauses. On the other hand, it means that the parties can withdraw from oral agreements as long as these have not been laid down in writing.

The written form requirement has proved to be effective. However, several questions have arisen in its application:

- What is the status of oral agreements if the agreement is not laid down in writing?
- What are the consequences of changes or additions to the contract after it was laid down in writing?
- How can the quality of the written agreement be safeguarded?
- Should electronic contracting be possible?
- How should the scope of application be determined, with a view to the unclear terminology in article 7:2 of the Civil Code?
- How should the inconsistencies in the terminology be dealt with?

2.2 The status of oral agreements

With regard to the status of oral agreements, the nullity of the contract has attracted the most support, which can be found in the parliamentary history, the literature, and most recent in the highest case law. The strict approach: that is no contract based on oral agreements and no possibility to oblige the other party to cooperate in laying down the agreement in a written form, mainly serves the purpose of legal certainty. A disadvantage of this approach is that parties can withdraw from oral agreements.

According to the non-strict approach, it should be possible to hold parties to oral agreements by means of obliging the seller to cooperate in the establishment of the written agreement. A disadvantage of this approach is that it leaves uncertainty as to the moment when the agreement is reached, as well as the contents thereof. The legal basis for obliging the seller to cooperate would be the doctrine of pre-contractual liability. However, this doctrine does not lend itself to establishing legally binding agreements in this context.

If it is thought desirable to be able to hold the seller to oral agreements, it should be laid down in the law that if the agreement is not laid down in a written form, the sanction is that the buyer can annul the (oral) agreement. It should be noted that this solution is not favoured by the research team.

If oral agreements do not lead to legally binding contracts, the doctrine of pre-contractual liability can be applied if the parties act in contradiction with fairness and reasonableness before the contract is laid down in a written form. The application of this norm as formulated in the case law can lead to damages being awarded, or if necessary, to the obligation to continue negotiations. If there is proof of an oral agreement, this can be a factor to be taken into consideration when deciding the case. Considering the strict and restrained application of this, it does not seem to allow claims obliging a party to cooperate in the written agreement. This might be different under extraordinary circumstances such as a deliberate misrepresentation or an abuse of circumstances, but even in these circumstances the solution can be sought in awarding damages.

2.3 Alterations, additions and the quality of the written agreement

Laying down minimum requirements in the law concerning the content of the written agreement can contribute to solving problems with regard to the status of additional agreements and alterations to the original contract. Additionally, it contributes to safeguarding the quality of the written agreement. The consequences of additions and alterations to the original contract are not always obvious. This also raises the question whether the additions and alterations should be agreed upon in written form and if this triggers the renewal of the cooling-off period. Additions and changes that concern the minimum requirements affect the core of the agreement and therefore the validity of the original contract. Such
changes should be laid down in writing and should replace the original contract clauses. The research team does not think that it is advisable to allow more than one cooling-off period with regard to the same object and the same buyer.

2.4 Electronic contracting

The possibility of electronic contracting need not necessarily be excluded. The objections to electronic contracting with regard to a home do not so much concern the electronic version of the written form or the lack of extra safeguards which are additional to the current level of protection offered by the Sale of Immovable Property Act: the written form requirement, the cooling-off period and the possibility to enter the agreement in the public registers.

In the light of the present level of protection provided by the law, electronic contracting is suitable. If properly regulated and supported by legal measures, this does not devalue the contract.

2.5 Scope of application and inconsistent terminology

It is advisable to resolve the observed non-clarities and inconsistencies concerning the terminology and the scope of application by means of amending the text of article 7:2 of the Civil Code. More in particular, the legislator can choose to explicitly include houseboats and mobile homes within the scope of application. Furthermore, for delimiting the scope of this provision it can be decided to abandon the current approach to limit the scope by referring to both the status of the buyer and the status of the object. Applying the written form requirement as soon as a non-professional party is involved (irrespective of whether this is the buyer or the seller) results in a more balanced provision. The protection that is granted by the written form requirement in combination with a strict approach is more balanced as it protects the weaker party regardless of whether this is the buyer or the seller. As a result, the Act would be less sensitive to economic fluctuations.

There is also a sufficient reason to extend the written form requirement to all agreements concerning immovable property (including business objects and professional buyers). This would resolve the observed problems in delimiting the scope of application. Additionally, this prevents a non-professional buyer vis-à-vis a professional buyer from being at a disadvantage with regard to the moment when the contract is concluded, thereby resolving the (unintended) inequality as a result of article 3:298 of the Civil Code. Professional parties also profit from clarity regarding the moment when the contract is concluded and the contents thereof. Finally, society in general benefits from certainty with regard to the legal status of immovable property.

3 The cooling-off period

3.1 General findings

Considering the objective of the cooling-off period, it can be concluded that the cooling-off period is not appropriate. The main reason as to why the legislator introduced the cooling-off period was to ensure the possibility of consulting experts (compare Kamerstukken II, 1995/96, 23 095, no. 5, p. 4). Both the literature and the results of the questionnaires note that the cooling-off period is too short for an expert to be consulted, a report to be drawn up and, finally, a (preferably written) note of withdrawal to be sent to the seller. The questionnaires show that respondents feel that the length of the cooling-off period is sufficient if one consults experts well before the conclusion of the contract. It was also noted that the written form requirement already offers an opportunity to do this and, in that respect, the length of the cooling-off period is sufficient.

The cooling-off period does offer relief against hasty decisions. The danger of hasty decisions, however, has to a large extent been eliminated by the written form requirement. The fact that the buyer has to wait until the agreement is laid down in written form in practice means that there are several days to consider
the decision before the actual conclusion of the contract. In this respect, a properly drawn up model contract, with a minimum content, allowing the buyer to reflect upon the content before signing the contract, offers a certain safeguard to which the cooling-off period has little to add. This also serves multiple purposes: it serves as a warning, it prevents the exclusion of essential clauses and results in more balanced relations between the buyer and the seller. A modification is in order here: in cases where the buyer is confronted with a standard contract with the request to sign immediately and on the spot, the cooling-off period can offer some additional protection.

The cooling-off period is very sensitive to economic fluctuations. It offers one-sided protection by solely protecting the buyer. This does not do justice to the (very likely) situation where the seller is the weaker party. If there is a strong sellers’ market, the weak position of the buyer justifies the protection offered by the cooling-off period. In a buyers’ market, this justification dissolves, while the unease and the uncertainty for the seller will remain.

3.2 Experiences in practice

Not many problems have arisen with the application of the cooling-off period. The interviews and the questionnaires did not show any abuse or frivolous use by buyers. Case law concerning the cooling-off period is scarce and mainly concerns the moment when the written contract is handed over (signalling the beginning of the cooling-off period). The results from the questionnaires show that the problems that have arisen mainly lie on an emotional level. The image that arises from the empirical data is that there are no major problems, but there is no positive response to the cooling-off period either. The advantages that have been reported in interviews relate to the written form requirement rather than the cooling-off period (certainty concerning the moment when the contract is concluded, improvements to the quality of the contract, clarity as to the consequences of the sale and heightened consciousness among buyers as a result of which there is no need to use the cooling-off period).

3.3 Recommendations

The introduction of the cooling-off period has not led to a complete realisation of the objectives that were envisaged. As these objectives can be achieved through other means, the legislator can consider dispensing with the cooling-off period.

If the cooling-off period is retained, the research team advises that the exceptions in article 7:2 section 5 of the Civil Code should also be retained, inter alia the exception concerning the public auction. The application of the cooling-off period to a public auction entails significant practical problems, while it does not achieve the intended objective. The research team advises that an additional exception be added for a sale by private treaty as meant in article 3:268 of the Civil Code. The process of a sale by private treaty is closely related to that of a public auction, therefore the reasons for excluding the public auction from the application of the cooling-off period also apply here.

With regard to the unjustified long period of uncertainty that this would entail for the seller, it is not advisable to extend the length of the cooling-off period. Furthermore, the indented objectives can be attained by making use of conditions in the sales contract relating to the outcome of expert advice. The research team does not find it advisable to grant the same buyer more than one cooling-off period with regard to the same object, for example as a result of changes or additions to the written contract. Renouncing the right to withdraw from the contract should be possible if delivery takes place within the three-day period. The required protection is then ascertained by the involvement of a notary.

It is the responsibility of the seller (or his estate agent) to inform the buyer of the existence of the cooling-off period and to establish the handing over of the written contract in order to mark the start of the three-day cooling-off period.
4 Article 7:3 of the Civil Code, the Vormerkung

4.1 General findings

The rules concerning the Vormerkung are of a technical nature and have given rise to many questions. These questions have mainly arisen in the literature and concern legal-technical matters. The Vormerkung has far-reaching effects, especially with regard to the breach of the principle of paritas creditorum.

4.2 Experiences in practice

Practice has not reported many problems. The questionnaires show that buyers make use of the possibility to enter their contract of sale in the public registers, but there are no reports of the protection actually being used. The questionnaires also show that the existence of the rule is not widely known amongst buyers and sellers.

4.3 Questions

The questions that have arisen in relation to the Vormerkung are the following:

- What must be registered in the public register?
- Can the registration of the contract be delayed until certain conditions have been met?
- Is registration possible if the right to the delivery of the property follows from a source other than a sales contract?
- Can the sale of a still to be formed joined ownership be registered?
- Can a sale via an executionary auction be registered?
- Which facts or legal acts cannot be held against the buyer and by whom?
- How does the protection relate to a bridging mortgage loan?
- Does the registration protect against a later split in joint ownership?
- Is the assignment of a registered right to delivery possible?
- What if, in the case of a double sale, the second sale is registered while the older right to delivery should prevail?
- Does the registration protect against the seizure of (future) rental income?
- Who must deliver in the case of the moratorium or bankruptcy of the seller?
- Does the trustee in bankruptcy have to cooperate with the delivery if the purchase price does not cover the mortgage loan?
- What if, as a result of certain procedures, the six-month period of protection threatens to expire?
- Does the cooling-off period under article 63a Bankruptcy Act also apply to the buyer who had his right to delivery registered?
- What role is left for the notary, as the sales contract has already been concluded when the buyer wants to register the contract?

The most important questions concern seizure; case law shows that this has led to problems in practice:

- Is the inequality between seizures before and after the registration justified?
- Should it be possible to convert the seizure of the home with the seizure of the purchase price?
- Is seizure of the purchase price under the buyer possible?

4.4 Recommendations

The research team feels that in answering the questions summed up above, the rationale of the rule, that is securing the right to the actual delivery of the home, must be the point of departure. Although the legislator acknowledged that with the Vormerkung the principle of paritas creditorum is to a certain extent breached, the research team feels that this should not lead to differences in the position of seizures that took place before and after the registration of the sales contract or to the seller profiting from the Vormerkung.
The terminology of article 7:3 of the Civil Code, as well as the situations in which the buyer is protected, share many common features with the Bankruptcy Act (Faillissementswet). Therefore, in the proposed Insolvency Act (Voorontwerp Insolventiewet) explicit attention should be paid to the delivery of property in combination with the Vormerkung.

It should also be noted that the Vormerkung potentially serves other objectives than the protection of the buyer’s right to actual delivery, for example market transparency, the prevention of fraud and quicker payment after delivery. It is recommended that the legislator should take these aspects into account.

The introduction of the Vormerkung has achieved its goal to reinforce the buyer’s right to the actual delivery of the home. However, the rule has several (unintended) side-effects, such as an (overly) far-reaching breach of the principle of paritas creditorum and possible ways of benefiting parties that were not envisaged. Realising the full potential of the rule entails that each question or side-effect must be addressed and determined if the law needs to be amended or to discern which approach should be adopted.

5 The 5% rule

5.1 General findings

The intention of article 7:768 of the Civil Code is to reinforce the position of the non-professional client. As a result of this rule, the client has a means of putting pressure on the building contractor with regard to rectifying certain shortcomings. Interviews with building contractors revealed that the availability of this means of pressure has not led to a quicker rectification of constructional or technical shortcomings. What has become clear is that building contractors wait until the three-month period has elapsed before commencing repairs. A second element of the protection granted by this rule lies in the possibility that the client can obtain the funds that were held on deposit if a repair is impossible.

Interviews and a large number of arbitration cases concerning this rule demonstrate that the rule has encountered several implementation problems in practice. As a result of this, the objective of the rule - reinforcing the position of the non-professional client - has not been fully realised. Due to these implementation problems, legal uncertainty remains for the client, which does not enhance his position.

The objective of the 5% rule is not undermined by the use of bank guarantees. Bank guarantees also mean restrictions for the constructor and are therefore a means of pressure. Additionally, the client has something on which he can fall back if a repair by the constructor proves to be impossible.

The amount of 5% of the total sum to be paid by the client seems sufficiently high to be able to enforce repairs by the constructor. A higher percentage would probably lead to higher sums to be paid by the client. The money kept on deposit does not lead to a quicker repair by the constructor. This is mainly attributable to the fact that during the three-month period more shortcomings can emerge.

5.2 Problems in practice

As follows from the large number of arbitration cases and the interviews the following problems have occurred:
- uncertainty as to what is a shortcoming in the performance;
- uncertainty with regard to the procedure for releasing the money held on deposit and the role of the notary in this;
- uncertainty and inefficiency if various procedures are commenced concerning different shortcomings;
- clients withhold disproportionally large amounts of money on deposit compared to the shortcomings involved;
- the application of the rule in relation to shortcomings to communal parts of apartment buildings;
uncertainty with regard to the question for which party the notary holds the money on deposit (which is relevant to the interest and in the case of the bankruptcy of the constructor).

5.3 Recommendation

The 5% rule offers a good basis for the protection of the non-professional client. The application of the rule in practice has demonstrated various inadequacies. The research team advises that the application of the 5% rule should be thoroughly reviewed and optimised.

6 The position of the notary

6.1 General findings

In response to the question whether there is a reason or a necessity to have an obligatory intervention by a notary at the moment of the conclusion of the contract, it can be concluded that there is at least a reason to opt for this. Firstly, concerning legal impartiality and independence. Secondly, concerning the specific legal knowledge that is required in sales agreements. And lastly, concerning the fact that the notary is in any event involved in the registration of the delivery of the property. His involvement at the moment of concluding the contract means that the investigation carried out at the moment of delivery can take place at an earlier stage. Anything that arises from this investigation can then be included in the contract. The notary can advise the parties on how to draw up their agreement, thereby preventing the need for 'rectifications' at the moment of delivery.

6.2 Practical experiences

Experiences with the Amsterdam model, where the notary is involved at the moment when the contract is concluded, are positive as is shown by the results of the questionnaires. Policy makers have also spoken in positive terms concerning the Amsterdam model. Respondents report that the involvement of the notary at the moment of concluding the contract prevents important matters from being overlooked and incomplete and incorrect information from being included in the contract. Also mentioned are the independent position of the notary and the use of his expertise at a stage where this is still of use, that is, at the time when the parties determine their mutual obligations. The involvement of the notary also entails that the whole process of the conclusion of the contract takes longer. It takes more communication and more parties must be brought together.

The two-way option, allowing for a choice between the cooling-off period or intervention by a notary, does not seem to meet with much approval, and does not appear to be a viable option.

6.3 Findings with regard to the tariffs

Based on the questionnaires and a number of requests for quotations, no unambiguous conclusions can be drawn with regard to the question whether tariffs will increase. Within Amsterdam a practice has evolved in which an increase in the tariffs will not be likely. Outside Amsterdam this is different. Tariffs have decreased since their release in 1999. It is unlikely that the granting of extra work for notaries will take place without an increase in the tariffs. However, in light of the decrease in tariffs over the last few years, and the extra safeguards that are granted by the notary, it is questionable whether this can be seen as a problem.
7 Fraud in real estate transactions

7.1 General findings

From the consideration of the various forms of fraud that occur in real estate transactions, and the initiatives that have been deployed to date in reaction to this, it can be concluded that the various actors involved are increasingly taking responsibility. However, in some instances instruments are lacking. For example, with regard to estate agents and surveyors an instrument to sanction misbehaviour is no longer available now that estate agents and surveyors are no longer sworn in. It is important to record who takes which responsibility and who should verify what.

7.2 Recommendations

According to the research team it is advisable to reinstate the swearing-in procedure in combination with an independent disciplinary tribunal. Estate agents and surveyors who are found guilty of transgressions should not be able – as opposed to the current situation – to continue in their profession. Additionally, a surveyor should also be included within the scope of the Wwft.

Mortgagers could perform more verifications, such as employers’ declarations or a search of public registers. It could be made possible to compare information with information retained by the tax authorities, the municipal personal records database, the National Mortgage Guarantee Scheme, the Employee Insurance Schemes Implementing Body and information concerning the value of homes for the purposes of the Valuation of Immovable Property Act. Fraud could possibly be uncovered at an earlier stage, and the mortgage loan should then be refused. If it is thought that mortgagees should take more responsibility, it is advisable to look into the possibilities for allowing these actors to access these data.

In relation to fraud it is imminent to address public auctions. A property is generally sold for a much lower price at auction. A reason for this is that non-professional buyers are not drawn to auctions, while these buyers are often inclined to pay a higher price for property than a professional estate trader. If more non-professional buyers are to become involved in this market, serious measures should be taken. The buyer should be able to view the property before the auction and the problem of illegal renting should be addressed.

7.3 The role of the notary in real estate fraud

The notary can undertake several forms of action to limit fraud in real estate. He should, for example, always verify the identity papers with the verification of information system and check the authenticity of the documents. Additionally, the notary should always check the name in the land register. If these checks are carried out at an early stage (at the time of the conclusion of the contract) fraud might be discovered sooner. If a notary detects fraud, he should refuse to proceed.