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Regulating Airbnb in the Netherlands

Rosalie Koolhoven*

Even though Airbnb enables everyone to list a home on her online marketplace, the short stay tenancy resulting from her successful intermediation can be unlawful under private law. The Airbnb host who is the owner of an apartment might enter into a conflict with other apartment owners in the same building, if use of the apartments as a short stay location is prohibited. The tenant of a home acting as an Airbnb host could be in breach of contract with his own landlord, when offering it on the for-profit accommodation market is contractually forbidden. The growing number of conflicts with a legal basis in private law, has led to a quite nuanced portrait of circumstances in which hosts, engaged in unlawful tenancy, are either excused, forced to stop their activities or forced to leave their home after an eviction procedure. This country reports describes three civil law relations in Dutch law – apartment rights, social tenancy and private tenancy contracts – that restrict the use of Airbnb and alike platforms within the accommodation sector. These restrictions exist along (local) public law restrictions that Airbnb has led to in cities with a tense housing market such as Amsterdam. Interestingly, the recent civil law judgements do not leave these general tensions unmentioned.

I. Apartments rights

A building can be divided by its owner into 'apartment rights' (art. 5:106 Dutch Civil Code). The notarial deed of division (*splitsingsakte*) by which the apartment rights are established, comprises a division arrangement (*splitsingsreglement*) and is published in the public registers for consultation, by which it enhances legal certainty for owners vis-à-vis each other and third parties such as future buyers. The deed defines the purpose of use of each apartment. To support liveability and quality of life, owners of an apartment right can be obliged to use their apartment as a home. They can at the same time be denied the use of the apartment as a pension or office. To maintain a shopping mall with a certain standard, for example, owners might be obliged to keep a shop offering services at least five days a week. In short: a certain use can be obligatory or explicitly forbidden.

Compliance with these obligations and prohibitions by each individual owner is an entitlement of the other owners, represented by the Assembly of Owners. The Assembly can initiate a lawsuit for compliance or request the injunction of unlawful use. This is justified by the proprietary principle of 'publicity': the fact that the purpose of use is registered, published (article 5:111 Dutch CC) and known to each apartment right owner beforehand, goes hand in hand with the *erga omnes* effect.¹

The Assembly of Owners can initiate court proceedings against one of the individual apartment owners to address the use of an apartment as a 'short stay location', as a result of booking via Airbnb or an alike platform. The point of law is the definition and interpretation of the term 'residential purpose' (*woonbestemming*) as laid down in the deed of division. In most division arrangements that are part of the deed, it is stipulated that each owner has the obligation to comply with the defined purpose. This obligation can be complemented by a 'pension prohibition' or 'short stay prohibition'. Court proceedings are thus based on either 1) the definition and interpretation of 'residential purpose' or 2) on the obligation to comply with the stipulated purpose,

or 3) on an injunction to abstain from prohibited use. If clarity about prohibitions is lacking – in for example summarily composed division deeds² – conflicts can be resolved by an

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equitable claim (*redelijkheid en billijkheid*), weighing all interests at stake in the particular building.³

1. The purpose of use

The meaning of 'residential purpose' given to apartments used as a home, requires legal interpretation.⁴ Residential use is to be perceived as 'permanent residence'.⁵ Permanent residence contradicts 'commercial exploitation'. The Amsterdam Court of Appeal explained that commercial exploitation is exploitation for *short term use*, by *unknown third parties* (tourists), against *remuneration*. In the cited case, the owner earned an average of € 1.200 to € 1.445 per week with short term rentals, which constituted a use in breach of the registered purpose of use.^{6/7} This definition of 'commercial exploitation', was gradually developed in case law from 2012 onwards, in which the owner used her apartment as a 'pied-à-terre' and let friends and family use the apartment, *not for profit*. The court decided this type of use did not constitute a breach of the residential purpose. The *ratio decidendi* was that the owner did not ask remuneration.⁸

Where the 'sharing economy' was long perceived as a bundling of 'unofficial' activities 'outside the market' or 'outside the system'⁹, one judgement shows that the qualification of the (contested) type of use, is of a factual nature rather than one of legal definition. The question whether a person exploits an apartment as a short stay accommodation is not answered by an official business registration of a 'pension' or alike.

In 2016, the Court of First instance in Amsterdam clarified that the prohibition to exploit a pension, is to be interpreted as prohibiting not only professional, permanent exploitation, but as prohibiting *such activities*. If an owner receives guests via Airbnb, at that moment, the apartment is factually exploited as a pension. A defendant claiming he is not commercially exploiting his apartment, in support of which he shows there is no official registration, will not be excused.¹⁰

The most recent case shows that factual commercial exploitation contrary to the deed of division cannot be neutralised by maintaining the residential purpose at the same time. In this situation, the owner used one guestroom for Airbnb and was present himself when receiving guests. Nonetheless, whilst maintaining the residential purpose, the owner also exploited the apartment commercially. This was forbidden, the reason being that other owners in the building did not expect, nor had to expect the commercial use of neighbouring apartments.¹¹ They are entitled to the compliance with the residential use *only*.

2. Equity

Besides the 'Airbnb cases' being solved through the interpretation of the purpose of use and the obligation to comply with that, one also finds that the Assembly of Owners applies for an injunction against continuous commercial use in equity (*redelijkheid en billijkheid*).¹² Interestingly, these cases point out the internal justification for a short stay prohibition, based on the social consequences of short stay use. It is – in the end – the structure of apartment building that is

decisive: each apartment building legally consists of individual apartment rights giving access to a private area and one or more communal areas, ranging from a central hallway to a shared garage or maker space. In some buildings, the communal areas are accessible with one key. If this key is passed on to unknown third parties, it will make other private areas –shops or homes – easily accessible.

Injunctions are admitted when other private areas become vulnerable for vandalism or when the safety of inhabitants is at stake.¹³ This is not any different if the owner of the apartment uses one guestroom for Airbnb and stays present himself: 'other inhabitants are confronted with unknown people which could cause them to feel unsafe'.¹⁴

In addition, most neighbours experience some degree of nuisance caused by tourists. Each arrival or departure is accompanied by noise of quests and suitcases.¹⁵

Lastly, an unprecedented *ratio decidendi* found in a court order of August 8th 2018, to forbid short stay in equity, is 'liveability'. The judges gave the following reasoning to admit the injunction: 'Those who do not live in an area generally feel less obliged to comply with social norms than one feels vis-à-vis neighbours'. With this, the judge acknowledges the voice of the Amsterdam city centre inhabitants, that do not feel 'at home' anymore in their city, which has allegedly been 'taken over' by tourists or apartment owners with commercial intentions.¹⁶ This sentiment predominated last years' newspaper reports about Airbnb and the cities' Airbnb policy.¹⁷

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II. Tenancy contracts

More and more tenants of privately owned houses and subsidised housing are being sued by their landlords – private owners or housing corporations – when they engage in unlawful short term subtenancy as mesne tenants. A landlord has many remedies to address the problem: remittance of the enjoyed profit (art. 6:104 Dutch CC)¹⁸ or collect a contractual fine.^{19/20} The severest remedies are termination of the (main) tenancy contract and forced eviction of the tenant.²¹ Two preliminary questions need to be answered for each of the remedies to be admitted. When is subtenancy unlawful? Which circumstances justify termination of the tenancy contract and eviction of the mesne tenant?²²

1. Unlawful subtenancy

The landlord and tenant are in a tenancy contract governed by the general rules on tenancy (article 7:201 a. f. Dutch CC) and the specific rules for dwellings (article 7:232 Dutch CC a. f.).²³ Our civil code's tenancy law knows many mandatory rules, yet leaves room for contractual deviation in some matters.²⁴ Article 7:221 Dutch CC on general subletting writes that a tenant is allowed to sublet a leased property wholly or partially to another, unless she/he had to assume that the landlord has reasonable objections.²⁵ Article 7:244 Dutch CC, specific for housing, writes: 'Notwithstanding article 7:221, the tenant is not allowed to sublet the home fully or partially to another person. The tenant of an independent home, that has her/his principal residence in that home is, however, authorized to sublet a part'.²⁶ Subtenancy of the entire home is only allowed with permission of the landlord. Subletting a room as part of a home is allowed.

However, these CC articles are not mandatory and a landlord may stipulate in the tenancy contract that all kinds of subtenancy are forbidden.

2. Justification of termination and eviction?

In the majority of tenancy contracts, subtenancy is forbidden. In such case, both subtenancy of the home and a part/a room constitute a breach of contract, giving access to termination and eviction.²⁷ However, case law shows that this is not current practice. The breach of contract should justify the termination and to assess whether the breach is 'severe enough', the distinctions in articles 7:221 and 7:244 Dutch CC are used, along other circumstances, that are the subject of this paragraph.

a) Profits and warning

In a case in which the lessor of a house was explicitly obliged to use the house himself and forbidden to sublet it or offer 'pension services', the Court awarded the landlords claim to termination of the contract and eviction of the mesne tenant. What justified this was that it concerned short stay subtenancy to tourist against an average of € 135 per night, whereas the tenant himself paid ten times that amount for the entire month to the landlord.²⁸

b) Warning and awareness

In a comparable case, it was not only the profit that justified the eviction, but also the fact that the landlord found out about the short term sublet, warned the mesne tenant and then noticed the tenant used Airbnb again. The landlord was granted the immediate eviction: having been warned, yet structurally continuing the unlawful subtenancy justified that.²⁹

Whereas more and more becomes known about Airbnb and the legal qualification, this was not the case a few years ago. In one judgement, the profit and the awareness of the legal consequences of Airbnb were the *rationes decidendi*.³⁰

This unawareness was a reason to excuse tenants in previous cases. In an older tenancy contracts, a landlord had stipulated that subtenancy was forbidden. However, the tenant used Airbnb successfully a few times, for which the landlord requested termination of the contract and eviction. The breach of contract did not justify termination nor eviction for several reasons. First, in the eight years of tenancy prior to the breach, never any problem occurred. Secondly, the interpretation of the subtenancy prohibition differed between the two contracting parties: the landlord meant 'every case of subtenancy', whereas the tenant thought subtenancy for a few days was accepted, but subletting the home permanently was forbidden. The judge took into account that at that time of the breach, beginning of 2014, not much was known about the legal qualification of the contract between the mesne tenant and the subtenant.³¹ Whilst excusing the tenant for the mistake in law, the judge emphasised that this will change in the future, as more becomes known about the legal implications of Airbnb and alike platforms, and the rights and obligations of 'sharing contracts', through the media.

c). The landlord's interest

A mother of two sublet a room in her apartment for € 600 per week.³² After having had four subtenants, the landlord invited her to his office and terminated the tenancy contract using a 'termination document', which she had to sign. She felt under pressure to do so and asked the landlord to rethink the situation a week later, effortlessly. In court, the judge reasoned in her favour: Amsterdam's communal short stay policy suggests subtenancy of a room is a way to help out

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tenants in financial distress. On the grounds, the judge puts the severity of the breach in perspective analogously to article 7:244 Dutch CC: she sublet a room without having left the home herself. As a mesne tenant, responsible for safeguarding the landlords' interests in the proper use of the home, she was there during the subtenancy to fulfil that duty of care. The landlords claim was denied.³³

3. Social tenancy

The fewer cases of subsidised housing show the same *rationes decidendi*, even though the public disapproval – less of an issue in the private sector – is big in cities as Amsterdam, where subsidised housing is scarce.

In a case pending in 2016, the social housing corporation filed for eviction of a tenant for 42 breaches of the subtenancy prohibition. The judge denied because the tenant, first of all, only subletted a room. Secondly, she was a good tenant for 21 years prior to that. Thirdly, at that time, it was impossible to 'anticipate on the use of Airbnb, because that did not exist at the time of the conclusion of the tenancy contract'. Lastly, the public law justification for eviction, found in depriving the housing market from scarce social housing, was denied too: tenants on a waiting list for social housing were not disadvantaged, because the tenant never left her home.³⁴

III. Conclusion

The growing number of conflicts in apartment buildings has led to a revised article 27 of the 'model division arrangement' in 2017, which is an adaptable basis for notaries establishing apartment rights. This will hopefully lead to more clarity in the future.

In both the private and social housing sector, the distinction in articles 7:221 and 244 Dutch CC is used to nuance the severity of the breach that should justify termination and eviction. More recent cases show that 'unaware' tenants will not be excused in the future, since the public debate on liveability has become widespread in the media and entered the Dutch courts.

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¹ In some divisions, next to the division arrangement (*splitsingsreglement*) also an internal arrangement (*huishoudelijk reglement*) made by all apartment owners jointly or the Assembly of Owners (*Vereniging van Eigenaars*), might deny an apartment owner the possibility to use his apartment in a specific way. Literature and case law enrich the ongoing debate about the correct, formal, binding way (or ways) to restrict apartment owners in their use. E. g. (concerning the at

first allowed short stay exploitation which some owners want to prohibit later on) Court of First Instance Noord-Holland 4 February 2016, ECLI:NL:RBNHO:2016:863. That legal question – whether or not to use the deed of division or the internal arrangement – will be left aside in this country report. See A. A. van Velten & F. J. Vonck, *Appartementsrecht en aanverwante rechtsfiguren voor de privaatrechtelijke vormgeving van bouwwerken*, Preadviezen voor de Vereniging voor Bouwrecht; No. 44, The Hague: Stichting Instituut voor Bouwrecht, 2016.

² Division arrangements vary: the model arrangements that are used date from either 1973, 1983, 1992, 2006 or 2017 and are adapted to the wishes of the owner of the building establishing the division. They can be very summarily, not mentioning anything on short stay. N. L. J. M. Rijssenbeek, *De model-splitsingsreglementen toegelicht*, 2nd ed. 2018, The Hague: Instituut voor Bouwrecht, p. 1-2.

³ In my summary, I will not mention the procedural grounds of each case, but focus on the material outcome instead.

⁴ Decisive for the interpretation is the expressed intention of the initial owner, as can be objectively deduced from the deed of division, Supreme Court 1 November 2013, ECLI:NL:HR:2013:1078 and Supreme Court 14 February 2014, ECLI:NL:HR:2014:337.

⁵ Court of First Instance Noord-Holland 31 January 2013, ECLI:NL:RBNHO:2013:BZ3659.

⁶ The appeal case against the judgement of 31 January 2013: Court of Appeal Amsterdam 10 September 2013, ECLI:NL:GHAMS:2013:2857.

⁷ Similarly: Court of First Instance Amsterdam 29 October 2015, ECLI:NL:RBAMS:2015:9967, AR 2016/1134; N. L. J. M. Rijssenbeek, *De model-splitsingsreglementen toegelicht*, 2nd ed. 2018, The Hague: Instituut voor Bouwrecht, p. 224.

⁸ Court of Appeal Amsterdam 25 September 2012, ECLI:NL:GHAMS:2012:BY2628. Cited in Court of Appeal Amsterdam 9 August 2016, ECLI:NL:GHAMS:2016:3245.

⁹ Eds., 'Airbnb is een logische stap', *De Gelderlander* 15 March 2016.

¹⁰ Court of First Instance Amsterdam 14 January 2016 (ECLI:NL:RBAMS:2016:2120). See also in Court of First Instance Amsterdam 20 November 2017, ECLI:NL:RBAMS:2017:8455.

¹¹ Court of First Instance Amsterdam 8 August 2018, ECLI:NL:RBAMS:2018:5751; N. L. J. M. Rijssenbeek, 'Verhuur voor een korte periode (short stay, Airbnb en B&B) in het appartementsrecht', *Tijdschrift Bouwrecht* 2016/67.

¹² Asser/Bartels & Van Velten, *5 Zakenrecht. Eigendom en beperkte rechten*, Deventer: Wolters Kluwer 2017, nr. 351; N. L. J. M. Rijssenbeek, *De model-splitsingsreglementen toegelicht*, 2nd ed. 2018, The Hague: Instituut voor Bouwrecht, p. 7-14.

¹³ Court of First Instance Rotterdam 10 August 2016, ECLI:NL:RBROT:2016:6236 (confirmed in appeal Court of Appeal Den Haag 18 July 2017; ECLI:NL:GHDHA:2017:4250).

¹⁴ Court of First Instance Amsterdam 8 August 2018, ECLI:NL:RBAMS:2018:5751.

¹⁵ Court of First Instance Noord-Holland 31 January 2013, ECLI:NL:RBNHO:2013:BZ3659 and Court of Appeal Amsterdam 10 September 2013, ECLI:NL:GHAMS:2013:2857. See also, taking into account the acoustics of the building Court of First Instance 4 October 2010, ECLI:NL:RBAMS:2010:BO8425.

¹⁶ Court of First Instance Amsterdam 8 August 2018, ECLI:NL:RBAMS:2018:5751.

¹⁷ J. Witteman, 'Airbnb: de yuppen de lusten, de rest van de stad de lasten', *Volkskrant* 30 July 2016, p. 32-33; W. van Noort, 'Hoe Airbnb voor problemen zorgt', *Nrc.next* 6 November 2015; Red., 'Kotsen of kassa – hoe Airbnb de stad verdeelt', *Nederlands Dagblad* 29 July 2017, p. 8-9;

Red., 'New York vs Airbnb: strijd om toekomst van verhuursite', *NRC Handelsblad* 20 October 2016, p. 6; M. Remie, 'Airbnb weet dat het moet meebuigen', *NRC Handelsblad* 4 January 2017, p. 4; E. van Zwam, 'Namen en rugnummers, dat werkt het beste tegen Airbnb', *Trouw* 31 August 2018, p. 15; M. Couzy, 'Ooit blije binnenstad geeft buurt dikke min', *Het Parool* 16 February 2018. Amsterdam's website offers an overview of regulation in English online via amsterdam.nl/bestuur-organisatie/organisatie/ruimte-economie/wonen/regels-verordeningen/reg-vakantieverhuur/.

¹⁸ Court of Appeal The Hague 15 August 2017, ECLI:NL:GHDHA:2017:2197; Court of Appeal Amsterdam 6 February 2018, ECLI:NL:GHAMS:2018:407.

¹⁹ Court of First Instance Amsterdam 30 May 2015, ECLI:NL:RBAMS:2016:3568; Court of Appeal Amsterdam 6 February 2018, ECLI:NL:GHAMS:2018:407.

²⁰ M. van Kogelenberg, 'Onderverhuren via Airbnb? Een riskante bijverdienste voor de onderverhuurder', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2016/4, p. 156-158.

²¹ See article 6:265 sub 1 jo. 7:213 jo. 7:231 Dutch CC.

²² There is a property owner, who is the landlord in relation to the tenant. This tenant is called the mesne tenant, meaning 'intermediate' tenant as soon as he sublets his home to a subtenant.

²³ Decisive is the definition of dwelling (*woonruimte*) in article 7:233: A dwelling is a built immovable which is used as either an independent or dependent home, or a caravan or trailer stand (...).

²⁴ R. Koolhoven, 'Kwalificatie en rechtspluralisme in 'de deeleconomie'', *Maandblad voor Vermogensrecht* 2015/06, p. 186-193.

²⁵ In Dutch: 'De huurder is bevoegd het gehuurde geheel of gedeeltelijk aan een ander in gebruik te geven, tenzij hij moest aannemen dat de verhuurder tegen het in gebruik geven aan die ander redelijke bezwaren zal hebben.'

²⁶ In Dutch: 'In afwijking van artikel 221 is de huurder van woonruimte niet bevoegd het gehuurde geheel of gedeeltelijk aan een ander in gebruik te geven. De huurder van een zelfstandige woning die in die woning zijn hoofdverblijf heeft, is echter bevoegd een deel daarvan aan een ander in gebruik te geven.'

²⁷ Such as in Court of First Instance Amsterdam 1 November 2018, ECLI:NL:RBAMS:2018:7690.

²⁸ Court of First Instance Amsterdam 22 October 2014, ECLI:NL:RBAMS:2014:7231.

²⁹ Court of First Instance Amsterdam 7 July 2015, ECLI:NL:RBAMS:2015:4335.

³⁰ Court of First Instance Amsterdam 4 March 2016, ECLI:NL:RBAMS:2016:1041.

³¹ The same reasoning is found in Court of First Instance Amsterdam 30 May 2015, ECLI:NL:RBAMS:2016:3568.

³² Court of First instance Amsterdam 26 May 2015, ECLI:NL:RBAMS:2015:3903.

³³ See M. van Kogelenberg, 'Onderverhuren via Airbnb? Een riskante bijverdienste voor de onderverhuurder', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2016/4, p. 153.

³⁴ Court of Appeal The Hague 9 May 2017, ECLI:NL:GHDHA:2017:1361 and Court of First Instance Rotterdam 6 November 2015, ECLI:NL:RBROT:2015:7899. Eviction admitted in a case in which the mesne tenant had left the dwelling: Court of First Instance Noord Holland 29 May 2018, ECLI:NL:RBNHO:2018:4584.