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# INTERNATIONAL LAWYERS NETWORK



**BUYING AND SELLING REAL ESTATE: AN  
INTERNATIONAL GUIDE**



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## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ARGENTINIAN LAW

### I. INTRODUCTION.

Below you will find a brief outline of the legal regulation of the acquisition of real estate property in Argentina, which is mainly governed by the Argentine Civil and Commercial Code (“CCC”).

### II. FORMS OF REAL ESTATE OWNERSHIP.

Argentine law regulates different forms of real estate ownership. A brief summary is provided below:

#### a) Sole Ownership.

Sole Ownership confers all the powers to legally use and materially and legally dispose of a real estate property. All of the existing constructions belong to the owner, which are presumed to be built by said owner, except evidence to the contrary. This kind of ownership extends to the subsoil and airspace, with the exception of specific cases determined by law. The owner is also legally entitled to exclude third parties from said real estate property.

#### b) Joint Ownership.

Joint Ownership is the right over a real estate property that belongs to more than one person, where each person owns an undivided share of said property. Each co-owner can, solely or jointly, use the common property without altering its destiny, and also, they can agree either the use of the common property at alternate times or the exclusive use over determined parts of the property.

Additionally, each co-owner can sell or encumber his or her undivided share without the assent of the other co-owners, while the sale of the whole

property requires the consent of all the co-owners. Each co-owner is responsible for paying the expenses corresponding to his/her share, as well as of refunding other co-owners the expenses in which they may have exceedingly incurred in relation to their shares. Unless otherwise agreed, every co-owner may require the legal partition of the ownership and the division of the property.

#### c) Condominiums.

Condominium (*propiedad horizontal*) confers rights of use and disposal of an independent and undivided share of a building (called a functional unit) and the proportional part of said building’s common areas. The building’s different parts, as well as the rights arising from them, are interdependent. This type of property exercised over the *functional unit*, which may consist in a flat, a commercial property or other space with functional independence and direct or indirect access to a street. The condominium is governed by internal regulations which are incorporated to the title deed.

#### d) Residential Developments.

This category comprises country clubs, gated communities, industrial, commercial, or nautical parks or any other type of residential developments regardless of their destiny (temporal or permanent homestead or commercial), also including those with mixed uses, in accordance with local administrative regulations. The residential developments are considered a type of condominium.



The main characteristics of these developments are enclosure of the development, existence of common and individual areas and the existence of internal regulations. All of the common and exclusive parts and areas are interdependent, as well as the rights over them, conforming a non-divisible whole.

Aspects in connection with authorized areas, dimensions, uses and other urbanistic elements of residential developments are governed by local administrative regulations of each jurisdiction.

**e) Surface rights.**

Surface right is a temporary right over a third party's real estate property, which confers to its holder the power to use and dispose the legal right to plant, forest or construct in said property (or a right over existing plantations, forestations, or constructions), comprehending property's terrain, soil and/or subsoil, in accordance with the terms and conditions set forth in the deed title. The third party remains owner of the real estate property.

The term of the surface right cannot exceed seventy years for constructions, or fifty years for plantations and forestations, both terms considered as from the date of acquisition of the surface right. The term can be renewed as long as it does not exceed said maximum terms.

The owner of the property keeps his right to sell and dispose of the property as long as it does not interfere with the existing surface right. During the agreed term, the surface right holder may transfer and encumber the

constructions without the prior consent of the owner.

**f) Usufruct.**

Usufruct confers the right to use a third party's real estate property. This right can apply over a whole property or just a share of said property. This right can only be granted by the owner of the property.

Usufruct can be granted for life if the holder of the right is an individual or for a maximum of 50 years if the holder is a corporation.

**I. LEGAL FORMALITIES IN RELATION TO REAL ESTATE OWNERSHIP ACQUISITION.**

**a) Preliminary Purchase Agreement.**

Under Argentine law, all transfers or creation of rights over real estate properties must be granted as a public deed before a notary. The notary must conduct due diligence to verify the soundness of the title of the seller over the relevant property, obtain certificates attesting the ownership and the inexistence of injunctions preventing the transfer. The notary also acts as a withholding agent of the taxes connected with the transfer.

Although it is not mandatory, usually seller and buyer execute a preliminary purchase agreement (*boleto de compraventa*) of the real estate property, in order to agree on the terms of the transaction while all the required formalities for executing the transfer deed are complied with.

In order to enter into the preliminary purchase agreement each of the parties must: (i) have general capacity in terms of the CCC as for the performance of legal acts; (ii) have an Argentine tax ID



number; and (iii) in the case of individuals married under community property regimes, obtain their spouse's assent to the sale.

Preliminary purchase agreements usually include: (i) the identification of the parties; (ii) the price and payment terms;

(iii) a detailed description of the property to be acquired; (iv) the current condition of the property to be acquired; (v) time of conveyance of the possession over the property; (vi) tax treatment of the transaction; (vii) general obligations of the parties; (viii) appointment of a notary public for the granting of the transfer deed; and (ix) provisions in connection with parties' failure to compliance with their respective obligations.

#### **b) Transfer Deed.**

Once the due diligence of the title has been completed and the certificates have been obtained, which usually takes about

30 days, the parties shall grant the transfer deed which has substantially the same content as the preliminary purchase agreement.

Parties may directly sign the transfer deed and not sign a preliminary purchase agreement.

The notary public is usually chosen by the buyer. The fees of the notary usually range from 1 % to 1.5 % of the purchase price. The fees and expenses relating to the due diligence over the title to the property are usually paid by the seller, while the remaining fees are paid by the buyer.

#### **c) Registration with the Real Estate Registry.**

The final stage for acquiring property is the registration of the transfer deed with the Real Estate Registry of the jurisdiction where the property is located. Once registered, the buyer's ownership over the property is enforceable before third parties. Such registration entails certain fees which are usually comprised in the notarial fees and are also assumed by the buyer.

The times involved in the registration of the deed will depend on the relevant jurisdiction, but in average this should take between 1 and 2 months.

### **IV. TAXES.**

Please find below an outline of the main taxes involved in the sale of real estate property according to the latest tax reform.

#### **a) Real Estate Transfer Tax.**

If the real estate property was acquired before January 1, 2018 ("the date"), individual tax residents ("individuals") selling real estate property are taxed at 1.5% tax rate over the price of the sale. This tax is withheld by the notary public.

If the real estate property was acquired after the date, individuals are taxed at a 15% tax rate over net income (sale price minus acquisition cost).

The transference of any rights over real estate property are also taxed at a 15% tax rate (net income) if such rights were also acquired after the date (this includes the transfer of participations in real estate trusts).

#### **b) Corporate Income Tax (CIT).**

Local companies selling real estate must pay CIT over the sale of real estate



property at a progressive tax rate over the net income. The current law has changed the fixed tax rate (30%) applicable until fiscal year 2020 for a progressive one, according to the following criteria:

a) if the net income of the company does not exceed ARS 7.604.948 million (approximately USD 28,000) in the fiscal year, a 25% tax rate applies;

b) if the net income range exceeds ARS 7.604.948 million but is less than ARS 76.049.485 million (approximately USD 280,000), a tax rate of 30% applies to the income exceeding ARS 7.604.948 million; and

c) if the net income exceeds ARS 76.049.485 million, a tax rate of 35% applies to the income exceeding ARS 76.049.485 million.

**c) Stamp Tax.**

This is a tax levied by each of the provinces in Argentina and the City of Buenos Aires which in broad terms applies over the purchase price or the registered value of the property, whichever is higher. The tax rate varies in each local jurisdiction. Usually, this tax is borne in equal parts by the seller and the buyer.

**V. AGENTS.**

Real Estate agents may be used by either buyer or seller of real estate property, but their participation in real estate transactions is not mandatory. The agent fees are not determined by law and may differ from one jurisdiction to another. Usual fees range from 3 % to 4 % of the purchase price.

**VI. SPECIAL CASES.**

**a) Frontier Securities Zone Act (Decree 15,385/44 as Amended) ("FSZA").**

The FSZA regulates the acquisition by foreign individuals or foreign companies of rural real estate assets and certain urban real estate assets located in frontier zones. It also regulates the acquisition of shares in companies which own said real estate assets, as well as corporate restructuring operations of said companies.

The regulation of the FSZA considers the following to be foreign companies: (i) companies incorporated abroad from Argentina, (ii) companies incorporated in Argentina, in which foreign companies or individuals hold the majority stake or have sufficient votes to make decisions in shareholders' meeting; and (iii) companies in which foreign shareholders own more than 25% of the corporate capital.

Under the FSZA, all acquisitions of real estate assets located in frontier zones or shares of companies which own said assets require clearance from governmental authorities, with the exception of assets located in certain cities or urban assets which have a surface of less than 5,000 square meters, must be previously approved by the Internal Affairs Secretary.

In order to obtain said approval, foreign companies must make a filing with the Internal Affairs Secretary, including certain forms provided by said governmental entity, certain corporate information (e.g., corporate bylaws, appointment of board members, latest financial statements, identification of shareholders), certificates of criminal



record of the board members and an investment project to be conducted in the real estate property to be acquired. The filing should be made by the investor.

The authorization is granted by way of exception and depends on showing that the investor (or its shareholders and officers) has not been convicted of crimes affecting national security and proposing an investment project for the development of the acquired real estate asset. The investment project is analyzed in the light of the following criteria: (i) that the project is declared of national, provincial, or municipal interest by the competent authority; (ii) purports to the social and economic development of the region where it is located; (iii) it will be implemented in underdeveloped zones; and (iv) it mainly employs Argentine workers.

**b) Protection of Rural Lands Ownership Act (Act 26,737) (“PRLO”).**

The PRLO limits the ownership or possession of rural land by foreign individuals or companies (which are referred to as Foreign Owners). Rural Land is defined as any real estate asset located outside the limits of cities. It provides that all Foreign Owners cannot own or possess more than 15% of the total rural land of Argentina. Likewise, Foreign Owners cannot own or possess more than 15% of the total rural land in each Province or Administrative Department. Additionally, Foreign Owners of the same nationality cannot own or possess more than 30% of the rural land owned by Foreign Owners. Moreover, a single Foreign Owner cannot own more than 1,000 hectares in the core area or an equivalent surface

in other locations to be determined by the governmental authority. Finally, Foreign Owners cannot hold an interest on rural land adjacent to bodies of water of certain importance. Moreover, any change in the composition of the corporate capital of local companies’ owners of rural land should be informed to the authorities to verify compliance with the PRLO.

The PRLO considers the following to be Foreign Owners: a) Individuals of foreign nationality (although there are some exceptions for foreign nationals who have resided in Argentina for more than 10 years, or have Argentine children, or have been married to an Argentine national for more than 5 years); b) Companies, incorporated in Argentina or abroad, whose capital is owned in more than 51% (or a sufficient percentage to adopt decisions in shareholders’ meetings) by foreign individuals or companies.

The regulations of the PRLO provide that in the case of usufruct and surface rights, it will only control the owner of the property and not the holders of said rights.

The PRLO has created a National Registry of Rural Land which oversees compliance with the PRLO.

The application of the PRLO is triggered when dealing with the acquisition of real estate assets or participation in companies which own of real estate assets which qualify as rural land. As noted before, the PRLO bans the acquisition of rural exceeding 1,000 hectares in the core area, or adjacent to bodies of water of certain importance, or in excess of the 15% maximum of the



rural land allotted to Foreign Owners at national, provincial, and municipal level.

Before the granting of the deed of acquisition of the rural real estate asset the intervening notary must procure with the National Registry of Rural Land a certificate of clearance, confirming that the above limits are not breached by the intended transaction. If the certificate of clearance is not obtained the transaction cannot be implemented.

**c) “UVA” mortgage loans.**

UVA mortgage loans are a new form of mortgage loans aimed at the purchase, repair, or expansion of real estate property. They are granted by both public and private banks and represent a comparative advantage over other forms of mortgage loans, since they offer a more convenient interest rate.

These loans are expressed in Purchasing Value Units (“UVAs”), which reflect the average construction cost of one square meter and are updated based on the Consumer Price Index. This is an exception to the general prohibition of making adjustments based on inflation.



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# INTERNATIONAL LAWYERS NETWORK



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## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER AUSTRALIAN LAW

### INTRODUCTION

The majority of land in Australia consists of freehold title. Registration of ownership of freehold title is recorded using the Torrens system. The Torrens system is a system of title by registration. This means that an interest will only be a legal interest if it is registered on title. Once the interest is registered, that interest is indefeasible and takes priority over all other interests. Both the vendor selling the land and the purchaser purchasing the land execute a legal document transferring ownership. Once settlement of the property has occurred, the transfer document is registered. Each State and Territory in Australia has its own register. The purchaser becomes the registered proprietor of the land, which is recorded on the Torrens title register. The registered proprietor is issued with a specific certificate of title for the property which contains a unique volume and folio number and a plan identifying the land, details of any restrictions (e.g., a covenant) affecting the land and details of any encumbrances (e.g., mortgage). Titles may comprise of land or spaces defined by a plan.

In recent years, property settlements and registration of interests on the Torrens system have been effected electronically through the Property Exchange Australia platform (“PEXA”). One of the key benefits of using PEXA is that registration of interests is effected immediately. Certificates of title were previously issued only in paper, but now titles can be issued electronically.

### COMMON TYPES OF PROPERTY TRANSACTIONS

#### Land

In Australia you can sell or buy a vacant block of land. Developers commonly subdivide large blocks of vacant land into smaller blocks, which

are then on-sold to purchasers. It is often a condition of the land contract that purchasers must commence and complete the construction of a dwelling on the land within a certain timeframe. The type of dwelling may be controlled by restrictions imposed by the vendor, or the planning authority (e.g., local council) such as a covenant, building envelope and/or design guidelines.

### Residential Dwellings (Existing and Proposed)

#### Existing Dwellings

The purchase or sale of an existing residential dwelling is a common transaction. This involves the transfer of ownership of the land, including any fixed dwelling, improvements, and other permanent fixtures on the property. The property is usually sold to a purchaser in its current condition and subject to all defects. It is important for purchasers to undertake their own due diligence enquiries concerning the property and to be satisfied with its state and condition. These enquiries should be conducted before a contract is signed. The contract of sale is prepared by the vendor. Purchasers are entitled to attempt to negotiate contracts in order to make them more even handed.

#### Proposed Dwellings

Purchasing “off-the-plan” involves purchasing a dwelling that is yet to be built on a lot which is yet to be created. Settlement occurs once the subdivision has been registered (which creates a title for the lot), and construction of the dwelling has been completed. Off-the-plan contracts are complex, but commonplace. Both the land and what is being constructed on the land may be subject to changes by the vendor. Depending on the State and Territory, there can be stamp duty savings when purchasing off-the-plan. Settlement under an off-the-plan





contract may take several years to settle, as the vendor has a specified timeframe in which to register the plan and construct the dwelling. These types of contracts are typically drafted on a vendor favourable basis, with the vendor having flexibility regarding construction and broad termination rights, especially if the development does not proceed. A purchaser's right to terminate the contract is usually limited. Residential, commercial, and vacant land can be purchased and sold "off-the-plan". Selling "off the plan", is possible because of a legislative regime which allows this.

### **Commercial Properties**

Commercial properties include retail, industrial and office spaces. The purchase or sale of a commercial property may be with vacant possession or subject to a lease (i.e., tenanted). A property may comprise both commercial and residential spaces (e.g., commercial space at ground level, with adjoining residential space upstairs). If the property is leased and is sold to a purchaser subject to the terms of the lease, it is important for the purchaser to review the terms of the lease, especially if the purchaser is relying on the rent for income. The sale of commercial properties are usually a taxable supply and subject to the payment of a Federal Goods and Services Tax ("GST"). However, the sale of leased property can be GST free if the parties agree that it is the supply of a "going concern". To satisfy the going concern exemption, certain requirements must be met.

### **Retail Properties**

When buying or selling a retail property in Australia, each state and territory has its own specific retail legislation, which governs retail premises, the lease provisions and disclosure documentation. If purchasing a leased property, it is important for a purchaser to review the lease documentation. A failure to do so could adversely affect the purchaser's rights as the

future landlord to enforce the terms of the lease. Some leases have termination rights, or rights under the retail lease legislation for longer terms, and certain rent review methodology. The applicable retail lease legislation has a big impact on leases, so leases are not always what they seem to be.

## **DIFFERENT METHODS OF SALE**

### **Private Sale vs Auction**

#### Private Sale

A property can be sold privately through a sales agent or by private sale directly between a vendor and a purchaser. In most cases, a vendor will engage a real estate agent to sell the property, as this can be more efficient, and the vendor has the benefit of the real estate agent's brand, reputation, and database of potential purchasers. In these situations, contracts may be negotiated and re-drafted to suit both parties and may include agreed conditions.

#### Auction

A property can also be sold at a public auction. This involves the engagement of a real estate agent, who is also an auctioneer. An auction date is set by the vendor and interested buyers can attend the property and submit their offers by placing a public bid. Each State and Territory has its own legislation which governs auctions. Sales of property by auction are unconditional. The contract is signed, and the deposit is paid after the auction has concluded. Generally, the vendor controls the bidding by setting a reserve price, which is the minimum price a vendor will accept for the property. Sometimes, the bidding at a public auction does not reach the vendor's reserve price. When this occurs, the property is "passed in" and the highest bidder has first right to negotiate with the vendor at the reserve price. Generally, at auctions it is



more difficult for a purchaser to renegotiate the contract.

### **Expression of Interest vs Tender**

There are methods of gauging interest in a property without a public auction or directly negotiating with a purchaser straight away. Such methods may involve an expression of interest or a tender.

#### Expression of Interest

The vendor of the property invites potential purchasers to submit an expression of interest (“EOI”). This is a common method of sale for high end or more bespoke properties. The EOI form may be prepared by the real estate agent or by the vendor’s solicitor. It contains details of the purchaser, price, and terms such as the deposit, settlement period and special conditions. The terms of the EOI make it clear that the submission of an EOI does not create a contract for the sale of the property. It is not binding. Therefore, no legal rights or obligations except those contained in the EOI document are deemed to arise until a contract of sale is executed and exchanged and the full deposit is paid. The vendor may accept or reject any EOI in its absolute discretion without giving reasons and the vendor is not bound to accept the EOI with the highest price or any EOI received.

EOIs can be complying or non-complying and a vendor is free to accept either. Once parties are close to agreement on commercial terms, a contract of sale must be entered into to effect a binding transaction. With an EOI, purchasers can be more casual with their proposal.

#### Tender

The vendor invites offers from tenderers for the purchase of the property. The tender document, which is usually prepared by the vendor’s solicitor, sets out the terms of the tender and attaches a copy of the contract of

sale. The tenderer must deliver the tender to the tender box in a sealed envelope. The tender documents include the signed tender form, signed contract documentation, including guarantee and a cheque for the deposit.

The key difference between a tender and an EOI is that each tenderer who lodges a tender is deemed to have made an irrevocable offer to purchase the property for the tender price and on the terms and conditions of the tender and the contract of sale. The offer made by the tenderer remains open for acceptance by the vendor for a certain period and it cannot be revoked before that time by the tenderer. Tenders can be complying or non-complying and a vendor is free to accept either. The vendor is under no obligation to accept any tender, which is not lodged in accordance with the terms of the tender and is not bound to accept the highest tender.

This method of selling is usually undertaken for large residential and commercial properties, like shopping centres, where the vendor prefers to keep the sale as private as possible. If a tender is accepted, there will be a binding contract between the parties.

### **DOCUMENTATION**

#### **Sale Documents to be in Writing**

Each State and Territory has its own specific legislation, which requires that a contract for the sale or disposition of an interest in land must be in writing and signed by the person to be charged. Contracts of Sale are typically signed electronically.

#### **Contract of Sale**

Each State and Territory has available its own standard contract of sale which is in a form approved by the relevant peak body for lawyers (e.g., applicable Law Society or Law Institute) or real estate agents (i.e., the Real Estate Institute for the State or Territory) or both. The contract



of sale includes among other things the parties' details, the property (and any inclusions) to be purchased, the price and the settlement date. It is important for purchasers to obtain legal advice before entering into a contract of sale and for vendors when having a contract prepared.

### **Prescribed Conditions**

Generally, a contract of sale will contain standard or general conditions of sale, with the ability for the parties to include additional conditions as "special conditions" or to amend the standard or prescribed conditions. In terms of priority, the special conditions of a contract will usually prevail over any standard or general conditions. When preparing a contract of sale for an off-the-plan purchase, conditions imposed by statute must be included. The requirements for each State and Territory vary.

### **Disclosure Requirements**

The vendor disclosure requirements vary for each State and Territory. In some States, a vendor is required to disclose certain information about the property in the form of a vendor's statement or disclosure statement or by providing copies of certain prescribed documents (e.g., title search, plan, drainage diagrams, registered dealings on title and council certificates). In other parts of Australia, the disclosure regime does not exist or is very limited, with a requirement for the vendor to provide some statutory warranties about the property. It is important that a purchaser obtains legal advice and conducts its own due diligence enquiries and is satisfied in relation to all aspects of the property.

Statutory disclosure obligations provide some protection to purchasers. Non-compliance by a vendor with statutory disclosure obligations may give a purchaser the right to terminate a contract.

### **Negotiated Amendments**

If a purchaser or vendor has concerns or issues regarding the property, then the parties can negotiate any required amendments to the proposed contract before it is signed and exchanged. For example, does the contract need to be conditional on the purchaser undertaking due diligence enquiries or certain works or obtaining reports which must be satisfactory to the purchaser? Is there a particular issue concerning the property (e.g., contamination) which needs to be in a special condition? Is the vendor obliged to carry out works before settlement?

### **Conditional Contracts**

It is not uncommon for the contract of sale to be subject to certain conditions. An off-the-plan contract is one example of a conditional contract, as it is subject to the registration of a plan of subdivision. A contract could also be conditional on finance, the purchaser's due diligence enquiries (e.g., title and property searches, building and pest reports), either the purchaser or the vendor procuring a permit for the property or the vendor agreeing to complete certain works before settlement. It is important that the condition is included in the contract and drafted carefully to ensure that the party relying on the condition can terminate the contract without penalty if the condition is not satisfied and is refunded any deposit monies paid.

### **Terms Contracts**

A terms contract is a special type of contract. Except for Victoria and Western Australia, these types of contracts are referred to as instalment contracts. What constitutes a terms contract, or an instalment contract will vary depending on the applicable legislation of the State or Territory. Terms contracts can be created inadvertently. Care must be taken. Generally, a terms contract can arise when a purchaser is



obliged to make multiple instalments of the price under a contract, or the purchaser is entitled to possession or occupation of the property before settlement. In some States, the title to the property may be transferred before the purchaser has paid the full price. While in other States the use of these types of contracts is either prohibited or their use is severely restricted. Where terms contracts or instalment contracts are permitted, the relevant statutory requirements must be strictly complied with to avoid creating a contract which is voidable by the purchaser. Terms contracts can impose restrictions on the vendor's ability to mortgage the property once sold. Depending on the State or Territory, the consent of the purchaser is required to any mortgage of the property. Terms contracts are not common but were used for the sale and acquisition of rural properties (e.g., farms). Legal advice should be obtained when you are dealing with a terms contract or instalment contract.

## **DIFFERENT TYPES OF OWNERSHIP**

In Australia there are several distinct ways that property can be owned.

### **Sole Proprietor**

If a property is acquired by an individual or by a single corporate entity, that individual or single corporate entity will be recorded on the certificate of title as the sole registered proprietor.

### **Co-ownership**

If two or more parties purchase property together in Australia, those owners are co-owners. The two types of co-ownership are joint tenancy and tenancy in common. Careful consideration as to how property is owned is important as this can have implications for stamp duty, estate planning, finance, and tax implications. The co-ownership of a property

can be registered as joint tenants or as tenants in common or a combination of both.

### **Joint Tenancy**

A joint tenancy means that all co-owners own the property jointly and equally and each co-owner is entitled to the whole of the property. This means that upon the death of any of the joint tenants, the ownership share of the deceased person automatically passes to the surviving joint tenant/s equally. It is the right of survivorship, which is the principal difference between a joint tenancy and a tenancy in common. It is important that legal advice be obtained when determining whether a property should be owned as a joint tenancy or as tenants in common. A joint tenancy form of ownership is commonly used by spouses/domestic partners. In certain circumstances, a joint tenancy can be severed and converted into a tenancy in common.

### **Tenants in Common**

A tenancy in common allows two or more parties to record and specify the percentage in which they will own a share in the property. This form of ownership is used when the contribution to acquire the property is unequal or where the 'partners' are not spouses. For example, the transfer of land would refer to shares as proportions. This type of ownership allows each owner to separately deal with their respective share of the property as they require. This also includes transferring their share to a third party or bequeathing their share in the property under their will. This form of ownership is commonly used in business acquisitions.

## **DUE DILIGENCE CONSIDERATIONS**

### **Vendor disclosure requirements**

A purchaser should be satisfied in relation to all aspects of the property being purchased as most contracts will be vendor-biased and once



signed a purchaser will have little in the way of rights unless those rights are specifically negotiated. It is important that purchasers conduct their own due diligence as the disclosure requirements imposed on vendors in Australia varies from each State and Territory. It is important that legal advice is obtained as early as possible in the process. It is important that a vendor obtains legal advice to ensure they comply with any disclosure requirements which are imposed by the applicable State or Territory legislation. Otherwise, a failure to comply may give a purchaser rights to terminate a contract before settlement.

### **Caveat Emptor**

The doctrine of caveat emptor or “let the buyer beware” means that purchasers looking to buy property in Australia should undertake their own due diligence enquiries. Due diligence enquiries can be conducted before a contract is signed or the contract can be signed subject to the purchaser undertaking its due diligence enquiries and being satisfied with them within a specified timeframe. The extent of those enquiries will depend on the value of the property.

### **Title Search**

Conducting a title search of the property is the first step. It is important to check that the vendor who is selling the property is actually the registered owner on title and to see a plan of the land being purchased. In Victoria, a person can sell land before that person has become the registered proprietor of the property. This can be achieved by providing a purchaser with evidence of the right to sell, such as the lodgement of a purchaser’s caveat.

### **Restrictions /Encumbrances**

A search of the title and plan will reveal information which is relevant for a purchaser. Such information will show if a property is

mortgaged or if there are restrictions, easements, or encumbrances (any registered interests or third-party agreements which affect or limit ownership or use of the land), which burden the property and potentially limit what a purchaser can do with the property. A title search will also reveal if any third parties have registered their interests, by a caveat or a mortgage. When a vendor sells and settles the property, the vendor must provide clear title at settlement to the purchaser. All mortgages and caveats must be removed by settlement. A vendor warranty to provide clear title is common in a contract.

### **Planning Checks**

Purchasers should check the local planning scheme or planning restrictions for the property being purchased. This is important if a purchaser has a particular use for the property. In Australia such controls are achieved through legislation and planning policies and instruments. Each State and Territory has its own regulatory framework. Responsibility for implementing those requirements is usually with the State Government and the local councils. Contracts of sale often contain conditions, which provide that a purchaser buys the property subject to all restrictions, including those under the relevant planning scheme. It is important that a purchaser is satisfied that they can use the property for the desired purpose. For example, is a permit required for the proposed use? In certain States, disclosure obligations will reveal the relevant zoning of a property, but full enquiries may be warranted.

### **Property Inspections**

A physical inspection of the property by the purchaser is important. They may include expert building inspections and pest and termite inspections. A purchaser should check that the improvements on the property are



sound and compliant with the applicable building legislation. A contract of sale will often include an acknowledgement that the purchaser accepts the condition of the property as at the day of sale. It is equally common that the vendor need only deliver the property at settlement in the condition it was in on the day of sale. A contract can be conditional on the purchaser obtaining a satisfactory pest/termite inspection and if not satisfactory, then the purchaser can terminate the contract.

### **Survey**

Purchasers should check the title boundaries of the property. Are all fences and improvements erected within the title boundaries of the property? If not, there could be issues in the future if the owner of a neighbouring property seeks to enforce its rights. The principle of adverse possession means that a person may claim land by long usage. The requirements for adverse possession claims vary from State to State. However, adverse possession claims are not part of the land law in the Northern Territory or the Australian Capital Territory.

### **Services**

As the vendor disclosure regimes vary from each State and Territory, it is important that a purchaser is satisfied with the level and quality of the services (i.e., water, sewerage, electricity, and gas) at the property. Do they exist? What is the state and condition of the services at the property? A failure to check for services could result in a purchaser incurring substantial cost if they need to be installed to the property and connected.

### **Environmental Checks**

Each State and Territory has its own regime for dealing with contaminated land. Generally, the person who causes the contamination is responsible. However, if that person no longer owns the land, or cannot be found, then the

relevant authorities may require the owner of the land to deal with any contamination issues. It is important for purchasers to check the environmental condition of the property, especially if they have a particular use in mind or the property may be contaminated. Although this is less of an issue for existing residential land, it is a relevant consideration for industrial or commercial sites. If the land is contaminated, certain uses may be prohibited by the relevant planning regime, unless certain requirements are met (e.g., remediation of the land). If a purchaser is looking to use the property sensitively (e.g., residential or childcare), it is essential that the purchaser is satisfied with the environmental condition of the property. It is common in contracts of sale for a vendor to sell a property in its current condition and subject to any contamination. A vendor will seek a release and indemnity from a purchaser in respect of any claims, which may arise from contamination. If a vendor has a contamination report, the report will often be disclosed to the purchaser and the purchaser will be expected to purchase the property subject to that report.

### **Finance**

If a purchaser requires finance to purchase the property, then the contract can be made conditional on finance being obtained.

### **Land Tax**

When purchasing a property, it is important to understand what annual outgoings are payable such as council rates, water rates and land tax. Land tax is calculated as a percentage based on the value of land and is an annual charge. The purpose of land tax is to assess an owner of land on the aggregate value of all taxable land they hold in a particular State or Territory. Land tax is payable in each State and Territory in Australia except for the Northern Territory.



The thresholds for when land tax is payable vary for each State and Territory.

If the property being purchased is held on trust, a trustee surcharge may apply. New South Wales, Queensland, Victoria, and South Australia have a trustee surcharge regime. Depending on the State, different tax-free thresholds apply for property held on trust. Land tax is not payable by an owner who uses the property as their principal place of residence. Foreign owners are obliged to pay additional absentee duty.

### Leases

If the property is leased, then the sale of the property will be subject to the lease, unless the lease expires before settlement occurs. In some States and Territories, leases of a certain duration must be registered on title. If a property is leased, this means that vacant possession of the property will not be provided to the purchaser at settlement. The type of property (e.g., residential, commercial, or retail) will determine the type of lease. For example, if the property is used for retail purposes (e.g., a shop), then the lease will likely be a retail lease and will be subject to the relevant retail tenancy legislation. Each State and Territory has its own retail tenancy legislation, which is very prescriptive. It is important for a purchaser to review the terms of the lease to ensure it is enforceable, the vendor has been complying with the retail tenancy legislative requirements and there are no tenant rights in addition to those contained in the lease.

### GOODS AND SERVICES TAX

GST is a Federal tax of 10% introduced in Australia on 1 July 2000 under *A New Tax System (Goods and Services Tax) Act 1999* (Cth). It is similar to a value added tax, whilst the primary liability for GST is on the vendor, or supplier, a contract may transfer responsibility

to the purchaser. GST is imposed on the supplier in respect of taxable supplies. Whether GST applies to a particular property transaction will depend on whether the supply is taxable.

### Threshold Requirements

Whether a supply is taxable will depend on four threshold requirements:

Consideration (monetary or otherwise, but not a gift);

Australia (transaction must occur in Australia);

Registered entity (supply must be made by an entity registered for GST); and

Enterprise (supply must be made in the course of an enterprise).

Just because a vendor is not registered for GST, does not mean that GST is not payable on the transaction. GST can still be payable if the vendor is required to be registered for GST.

### Whether Price Inclusive or Exclusive of GST

In property transactions, it is the vendor as the supplier of the property who is primarily liable to remit the GST to the Australian Taxation Office (“ATO”). If GST is payable, then purchasers should pay attention as to whether the price for the property is inclusive or exclusive of GST or GST free. If the purchase price is exclusive of GST, the additional cost of GST can be significant, depending on the price for the property.

If GST is payable on a property transaction (i.e., the four threshold requirements have been satisfied), then the supplier (i.e., vendor) must provide the purchaser with a tax invoice for the GST. A contract of sale is not usually a valid tax invoice. Stamp Duty is payable on the higher of market value and the purchase price for the property plus GST.



### **GST Free Supplies**

Not all supplies of property will attract GST. Some supplies are treated as being GST free (i.e., no GST is payable). The following are examples of GST free supplies:

#### Sale of a farm

In order for the sale of a farm to be GST free, the property must have been used as a farm for 5 years before the sale.

#### Going Concern

The sale of leased commercial/retail or industrial property can be GST free. This is referred to as the “going concern” exemption. In order for the exemption to apply, certain criteria must be satisfied:

- The purchaser is registered for GST;
- The vendor and purchaser agree in writing that the supply of the property is that of a going concern;
- The vendor must supply everything necessary for the continued operation of the enterprise (i.e., the enterprise of leasing); and
- The vendor must carry on the business until settlement.

If the going concern exemption is not satisfied, it is critical that the contract contains a claw back provision for GST. The claw back provision will enable the vendor to recover the amount of GST from the purchaser. It is important for the claw back provision to remain enforceable after settlement has occurred for a certain period of time in case there is an issue. It is not uncommon for a claw back provision to remain enforceable for a number of years after settlement.

### **Input Taxed Supplies**

The sale of existing residential property (i.e., not new residential property) is input taxed. This means that no GST is payable. Even if the property is owned by a company, provided the property has been used as residential premises, it will be input taxed. New residential premises, the sale of new residential or commercial residential property will attract GST if sold in the course of an enterprise.

### **Mixed Supplies**

Certain supplies of property are considered to be a “mixed supply”. That is, both taxable and nontaxable (i.e., input taxed) for GST purposes. An example of a mixed supply is the sale of commercial or retail property, which also has existing residential premises. It is important that the contract deals with the mixed supply issue. It will be necessary to apportion the price and determine what portion of the property constitutes the taxable supply and the nontaxable supply.

### **Margin Scheme**

If GST is payable on a property transaction, the amount of GST payable can be reduced if the vendor can adopt the margin scheme. Developers prefer to apply the margin scheme (if it is available) to the calculation of GST. It is important to understand that the margin scheme is not automatically available. Certain criteria have to be satisfied before it can be applied. Generally, a vendor can only sell property using the margin scheme if they purchased the property using the margin scheme, or no GST was payable.

The application of the margin scheme will differ depending on when the property was acquired:

- If the property was owned by the vendor as of 1 July 2000 (i.e., was acquired before 1 July 2000 when GST was introduced); or





- If the property was acquired by the vendor after 1 July 2000 (i.e., after GST was introduced).

If the property was owned by the vendor as of 1 July 2000, then GST is calculated on the margin or difference between the valuation of the property as of 1 July 2000 and the sale price. If the property was acquired by the vendor after 1 July 2000, then GST is calculated on the margin or the difference between the acquisition cost (i.e., what the vendor paid for the property) and the sale price (i.e., what the vendor is now selling the property for).

Assuming the margin scheme is available, the parties must agree in writing that it applies. Such agreement is usually contained in the contract, but it can sit outside of the contract.

### **GST Withholding Regime**

Since 1 July 2018, purchasers of certain types of residential premises and potential residential land which are subject to GST are required to withhold GST from the settlement proceeds payable to the vendor and pay it to the ATO.

## **OTHER IMPORTANT CONSIDERATIONS**

### **Cooling off**

Generally, once a contract of sale for property has been properly entered into, it is binding on the parties. However, in Australia, certain States and Territories have legislation which provides a purchaser of residential property with a statutory right to “cool off” under a contract. The cooling off right means that subject to certain conditions being met, a purchaser may bring the contract to an end by notice in writing to the vendor. The cooling off right has to be exercised within a specified period of time from when the contract of sale was signed (usually 3-5 business days).

Each State and Territory has their own statutory requirements, including the

timeframe, the percentage of money to be forfeited and the notice requirements, except for Tasmania and Western Australia. Depending on the State or Territory, there may be some exceptions to the cooling off rights. Exceptions may include if the property is purchased at a public auction or within three days of auction or is over a specified size. It is important that legal advice is obtained if there is a statutory right to cool off and a purchaser wishes to exercise that right. If the cooling off right is not exercised in strict compliance with the relevant legislation, then a purchaser will be legally bound under the contract.

### **Stamp duty payable on acquisition of land (or an interest in land)**

If you acquire property in Australia, each State and Territory requires ‘stamp duty’ to be paid on the acquisition. Stamp duty is charged at a flat rate or an ad valorem rate (based on the value of the transaction). The rate of duty payable on a property acquisition varies between each State and Territory. It can also depend on whether or not you are an ‘owner-occupier’ or an investor. In some cases, the location and nature of the property (whether rural or suburban) can affect the rate of duty payable. The timeframe for paying stamp duty varies for each State and Territory and there are various stamp duty concessions and exemptions available. Generally, stamp duty is payable by the purchaser. It is important to understand how much stamp duty is payable in any property transaction and to obtain legal advice.

Depending on the State or Territory, you may be able to apply for a stamp duty exemption or reduction. This is generally where there is no change in the underlying ownership. In Australia, first home buyers can apply for a stamp duty concession and in some States, pensioners can also apply for a concession.



Higher rates of duty are payable on property acquisitions if you are a foreign purchaser. A higher rate of duty is also imposed on trusts with foreign beneficiaries who purchase property.

### **Landholder duty**

Each State and Territory has its own landholder duty regime, which imposes duty on certain acquisitions of interests in companies and unit trusts that own land.

### **Economic entitlements**

A person who acquires an economic entitlement (defined broadly to include the entitlement to participate in the income, rent or profit of the land, proceeds of sale or capital growth) in relation to land is taken to have acquired a beneficial ownership of the land. If the arrangement does not specify the percentage of economic entitlement, it is deemed that the person has acquired a 100% interest in the relevant land and duty will be payable on the full value of the interest.

### **Verification of identity**

It is a requirement of the land titles office in each State and Territory that the identification of the parties in a property transaction be verified (“**VOI**”). VOI checks are intended to protect against identity theft and fraudulent land title transactions. This VOI requirement applies to individuals as well as corporate entities. The existence of the company must be confirmed and the identity of the persons signing on behalf of the company must be verified. If an attorney has been appointed under a power of attorney, the attorney’s identity must also be verified.

Solicitors are required to certify to the relevant land titles office that the VOI checks have been completed. This verification process is particularly important due to property transactions in Australia now being settled

online using PEXA. Verification checks are usually completed by a solicitor for the party or Australia Post. “Reasonable steps” are required to verify the identity of a party. The Australian Registrars National Electronic Conveyancing Council has issued a “verification of identity standard” (“**Standard**”). If the Standard is followed, then that person is deemed to have taken reasonable steps. If a person resides overseas, the VOI check can be undertaken by a notary public who certifies that they have verified the identity of the party and provide certified copies of the identity documentation (e.g., passport and driver’s licence). The VOI documentation is considered valid for 24 months and can be relied upon across multiple conveyancing transactions.

### **Adjustments at settlement**

In addition to the payment of the price and GST (if applicable) by the purchaser to the vendor at settlement, there is an adjustment of certain annually payable outgoings. Subject to the terms of the contract, certain outgoings are apportioned between the vendor and purchaser. The vendor is usually responsible for all outgoings up to and including the day of settlement and the purchaser is responsible for all outgoings from settlement. The outgoings which are commonly adjusted are council rates, water rates, land tax, owner’s corporation fees/levies and rental income (as applicable).

### **Settlement – using PEXA**

PEXA is an electronic lodgement platform that enables legal practitioners, conveyancers, and financial institutions to prepare, lodge and register land registry documents and effect property settlements online in real time. Using PEXA has led to a significant reduction in the manual processing of paperwork by allowing land registry documents to be lodged electronically. PEXA also facilitates the transfer of funds in real time.



## Agents

It is common to engage a real estate agent when selling property in Australia. Real estate agents must be licensed and will require the vendor to execute a sales authority or agreement. Each State and Territory has its own legislation which governs the real estate industry. If a real estate agent is engaged, the vendor will be required to pay the agent a commission as agreed in the sales authority or agreement. A common structure can be negotiated. The trigger for payment of the commission is usually when the contract becomes unconditional. The vendor will also be required to pay advertising and marketing costs associated with the sale of the property.

## Consultants frequently engaged

The types of consultants commonly engaged in property transactions from time to time include builders, building surveyors, land surveyors, environmental and geotechnical consultants, town planners, valuers, feasibility analysts, architects, and engineers. In addition to these consultants, it is also important to obtain legal and accounting advice.

## Capital Gains Tax

Generally, tax is payable on the capital gains made from selling property. However, this does not apply to gains made from the sale of a principal place of residence.

## Death duties

Australia does not have a death duties regime.

## Windfall Gains Tax

From 1 July 2023, a windfall gains tax (WGT) will apply to land that is rezoned resulting in a value uplift of more than \$100,000. The WGT is 50% or 62.5% depending on the value of the uplift.

## IMPORTANT FOREIGN INVESTMENT CONSIDERATIONS

### Foreign resident capital gains withholding

Foreign resident capital gains withholding applies to vendors who sell certain taxable property under contracts entered into from 1 July 2016. It applies to sales of property where the contract price is \$750,000 or more. The tax rate is 12.5%. It imposes an obligation on purchasers to withhold 12.5% of the price at settlement and to remit it to the ATO if the vendor is a foreign resident.

### Foreign Investment Review Board – foreign purchasers

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) (“FATA”), *Foreign Acquisitions and Takeovers Regulations 2015* (Cth) and the Australian Federal Government’s specified Foreign Investment Policy provide the framework for dealing with a “foreign person” or a “foreign government investor” who propose to purchase property in Australia. Depending on the type of property being purchased, if you are a “foreign person” for the purposes of FATA, you must apply for foreign investment review board (“FIRB”) approval prior to the property being transferred. This means that contracts of sale for property by a “foreign person” are typically conditional on the purchaser obtaining FIRB approval within a specified time. If FIRB approval is not obtained, then the contract can be terminated.

A “foreign person” not only includes an individual who is not ordinarily resident in Australia, but it also includes:

- a corporation or the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; and



- a corporation or the trustee of a trust in which 2 or more persons, who together hold an aggregate *substantial interest*, are:
  - a) not ordinarily resident in Australia;
  - b) a foreign corporation; or
  - c) a foreign government entity.

A “substantial interest” for the purposes of the above means an interest of 20% or more in the relevant company or trust.

There are certain restrictions imposed when dealing with the purchase of residential and commercial property by “foreign persons”. Generally, foreign persons are unable to purchase existing residential dwellings unless they are a temporary resident (at a minimum). Foreign non-residents have the ability to purchase ‘new dwellings’ within Australia. A new dwelling is defined as being a dwelling that has not been previously occupied or a dwelling within a development that has not been occupied for more than a total of 12 months. These parameters aim to encourage the creation of jobs within Australia and also increase the number of new residences being developed.

There is no monetary threshold for the purchase of residential property, but there is a threshold for the purchase of developed commercial property.

If you are a permanent resident in Australia or if you are from New Zealand, exemptions apply and FIRB approval is not required prior to acquiring an interest in Australian property. If you are a temporary resident, it is likely that you will be granted FIRB approval to purchase vacant land or a residential dwelling off-the-plan, however, the approval is likely to be subject to conditions.

The overarching policy objective behind the FIRB’s regulation of foreign investment into Australian companies and businesses is to ensure that any proposed foreign acquisitions are not contrary to Australia’s national interest.

### **OWNERSHIP STRUCTURE**

When looking to acquire property in Australia, it is important to consider the most appropriate legal structure in which to own the property. The key issues will be asset protection, taxation issues, stamp duty, land tax, estate planning, complexity, and cost. It is important that specific legal and accounting advice is obtained before deciding upon what is the most appropriate structure for ownership of the property. The most common structures are individual, company, trust, partnership, and joint venture. It is also possible to buy an interest in a property by buying shares or units in the ownership structure.

#### **Individual**

Ownership by an individual is the simplest option. It means that all debts and liabilities attached to the property will be the responsibility of the individual. The individual will have sole control of the property. An advantage of an individual is that if the property is held as an investment and it is subsequently sold and a capital gain is made, the individual will be able to take advantage of the 50% capital gains discount. The capital gains tax is a Federal tax imposed on the capital gains realised from the sale of assets. To take advantage of the capital gains discount, the property must be held by the individual for 12 months or more. If the property is held by a foreign resident individual, the 50% discount is removed or reduced on capital gains made after May 2012. The main disadvantage with individual ownership is that it does not offer any asset protection. The individual’s creditors



will have the right to claim against the personal assets of the owner, including the property.

### **Company**

A company is a legal entity and has the same rights and obligations as an individual person but is subject to regulation by the *Corporations Act 2001* (Cth). This means that a company can incur debt, can sue, and be sued and it is taxed as a separate legal entity. One of the advantages of using a company to own the property is that the liability of the owners of the company (i.e., shareholders) to third parties is generally limited to the amount (if any) which is unpaid on their shares. There are public companies and proprietary companies (i.e., private). A proprietary company is simpler and less expensive to administer than a public company. The process for incorporating a proprietary company in Australia is a relatively straightforward process and inexpensive. A company can be registered within a couple of days. One disadvantage with using a company structure is that if the property is sold and a capital gain is made, the company cannot claim the 50% capital gains discount on any resulting capital gain.

### **Trust**

Under a trust structure, the trustee (who may be an individual or company) holds all income and capital (e.g., the property) on trust for the beneficiaries. The beneficiaries can be individuals, trusts or companies. The trust is created by a document called a trust deed. The trust is governed by the terms of the trust deed, State or Territory legislation and the common law.

Whilst the trustee must be a legal entity, the trust is not a legal entity. It is merely a body of rules around ownership, management, and control. The Torrens system of recording ownership of land in Australia struggles to recognize the existence of a trust as only the

trustee is registered on title. No particulars of any trust are recorded in the register which provides anonymity, and also some flexibility.

There are three main types of trusts.

#### Discretionary Trust

A discretionary trust means that the trustee has the discretion to distribute the income and capital of the trust to a range of beneficiaries. Discretionary trusts (also known as a family trust) commonly have specified beneficiaries, as well as classes of general beneficiaries (which may include the family members of a named beneficiary and associated companies and trusts). Under a discretionary trust, the trustee can but is not obliged to make distributions, which consider the beneficiaries individual tax circumstances. A discretionary trust may also provide a reasonable level of asset protection as the beneficiaries of the trust are generally not entitled to income or capital until the trustee decides to make the distribution. Another benefit with using a trust is that a trust can take advantage of the 50% capital gains tax discount if the trust held the property for at least 12 months before it is sold, and the capital gain is distributed to an individual or another trust.

#### Unit Trust

Under a unit trust, the beneficiaries (which are referred to as unit holders) subscribe for units in the trust. Each unitholder has a fixed interest in the capital and income of the trust that corresponds with the proportion of units they hold. Units can be bought and sold. Unit trusts have the benefit of conferring a clearly defined entitlement and are considered to be more appropriate than a discretionary trust for non-family ventures.



### Fixed Trust

Unlike a discretionary trust, a fixed trust is a trust where beneficiaries have a fixed entitlement. The trust deed fixes the proportion of income and capital that each beneficiary is entitled to throughout the income year. With a fixed trust, the trust can take advantage of the 50% capital gains discount if there is a sale of the property where a capital gain has been derived and the property has been held for 12 months or more.

### **Joint Venture (with or without nominee)**

A joint venture is another example of a structure, which may be considered when dealing with property. A joint venture is when two or more parties come together in order to undertake a specific project. For example, the acquisition and development of a property.

The parties usually enter into a joint venture agreement which contains the rights and obligations of each joint venture party. Each party is treated individually or separately for tax purposes, so each party can use their own preferred tax structure. In this type of joint venture, a nominee is often used to hold the joint venture property as bare trustee. The nominee can provide a corporate identity for the joint venture and also act as the operator of the joint venture.

### **Partnership (with or without nominee)**

Another alternative structure to consider when dealing with property is a partnership. Unlike a joint venture, a partnership is an arrangement between two or more entities to carry on a business together with a view to a profit. Except for certain professional partnerships, business partnerships cannot have more than 20 partners. A partnership is created by an agreement among the partners, which is usually documented in writing. The partnership is regulated by the terms of the partnership

agreement (if there is one), the common law and the relevant partnership legislation, which applies to the applicable State and Territory.

A partnership is not a separate legal entity, and each partner is jointly and severally liable for the debts of the partnership. Partners also share in the profits of the partnership. Limited partnerships can also be established in some states under specific state legislation. Limited partnerships allow some partners to limit their liability for debts. Limited partnerships are generally taxed as companies.

It is common for a partnership to operate through a nominee company. The nominee's role is usually very limited with no control or decision-making powers in relation to how the partnership should be conducted. It is the partnership rather than the nominee which actually carries on the business. The nominee provides a corporate identity for the partnership.



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# INTERNATIONAL LAWYERS NETWORK



**BRAUNEIS KLAUSER PRÄNDL RECHTSANWÄLTE  
BUYING AND SELLING REAL ESTATE IN AUSTRIA**

**ILN REAL ESTATE GROUP**

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER AUSTRIAN LAW

### I. Introduction

There are many considerations that a buyer/seller of real estates should make before buying or selling a property. The following article is intended to give a brief overview of the most important "Must-Knows" when selling or buying real estate in Austria.

### II. Preliminary clarifications for the buying or sale of real estate

- What type of property should be bought or sold and what special features need to be considered?
- Who draws up the sales agreement?
- How is the purchase financed? Must banks or third parties be involved?
- Do I need official approvals?
- What are the risks and who has to take them?
- What do I have to pay special attention to when buying / selling the selected property?
- How can I protect myself best?

### III. Most important types of property acquisition

In the Austrian market, following typical types of real estate transactions may be described:

- **Purchase of an undeveloped plot of land**  
Plots of land are often bought for the purposes of construction. In this regard, first and foremost the relevant Austrian zoning and construction rules should be checked, to ensure that the desired building may indeed be developed on the given land.
- **Purchase of a developed plot of land:**  
As a rule, buildings located on a plot of land are considered part of the land and

treated as part of the land plot. This means that, in general, with the purchase of the land, the purchaser automatically acquires the building(s) as well (so-called "superficies solo credit").

- **Purchase of a condominium property:**

Condominium ownership is the right granted to the owner or an ownership partnership to exclusively use and dispose of an independent apartment, other independent premises, or a parking space.

The transfer of ownership of real estate may also be administered in the form of a donation (see below), an exchange agreement or in the course of an inheritance.

### IV. Formal Requirements

It is necessary to conclude a valid contract of sale (purchase), i.e., an agreement between the contracting parties on the object of purchase and the purchase price.

However, for the necessary execution of the agreement in the land register a written contract is required; the signatures on this agreement have to be certified by a notary public or a court.

### V. Central issues in a purchase agreements

The following points should in any case be part of a property purchase agreement:

- a. The contracting parties;
- b. the purchase price and the payment terms;
- c. accurate description of the property, i.e., the plot of land (including registration details in the land register), any inventory, fixtures and fittings and equipment of the



- building or apartment as well as existing easements, mortgages etc;
- d. date of the handover to the buyer;
  - e. real estate tax + court registration fee;
  - f. warranties on the object of purchase;
  - g. declaration of citizenship and/or conditions for the granting of a land transfer licence;
  - h. confirmation of the owner/seller that the transfer of ownership may be registered in the land register („Aufsandungserklärung“);
  - i. Handover and takeover of the object of purchase, including the date for the transfer of risks and recklessness, benefits, burdens, and advantages to the buyer;
  - j. Energy certificate: When selling buildings or objects for use (i.e., houses, flats, or business premises), an energy certificate must be presented and issued. The obligation lies with the seller.

## VI. Austrian Land Register

The Austrian Land Register (Grundbuch) is a public registry administered by the Austrian Courts where all land plots and existing rights in rem are recorded. The person who is registered in the land register is legally considered as its owner. The entry in the land register is the mode of acquiring ownership of real estate and rights similar to real estate in Austria. The entry in the land register thus assumes the function of ownership in the context of immovable property.

Since the land register is public extracts can be requested by all citizens for a small fee.

The land register consists of three main parts:

### - A Sheet

This section lists general data, and, for example, easements connected with the property.

### - B Sheet

This section provides information about the ownership of the property.

### - C Sheet

In the C sheet of the land register, all encumbrances (e.g., liens) of the individual property objects are listed.

## VII. Transfer of Ownership

The purchase contract contains a so-called “Aufsandungserklärung” (declaration of transfer of ownership) by the seller, with which the change of ownership may be carried out in the land register.

To ensure that the purchase price is transferred to the seller after the registration of the ownership in favour of the buyer, the contracting parties mostly agree on a fiduciary deposit of the purchase price with a trustee (attorney-at-law or a notary public). The contracting parties therefore conclude a trust agreement with the trustee according to which the trustee is obliged to transfer the purchase price after the fulfilment of all conditions stated in the purchase contract / trust agreement, which usually include the encumbrance-free recording of the buyer's title in the land register as well as the payment of any taxes and court fees.

**Note a special rule in Vienna:** Since July 1, 2000, Viennese attorneys-at-law are obliged to process the trust funds entrusted to them exclusively via electronically specially secured escrow accounts. These accounts may only be used after the Vienna Bar Association has given its (electronic) "seal of approval". Other

dispositions (especially cash withdrawals) are excluded and technically not possible.

### VIII. Financing

The usual way of financing real estate in Austria is through a bank loan/mortgage for at least part of the purchase price. In this case, the bank usually insists on a lien as collateral which is to be entered in the land register at the same time as the registration of ownership of the purchaser.

### IX. Condominium ownership („Wohnungseigentum“)

A special rule applies to condominium ownership. Here, the owners of a property or owner partnerships (each consisting of two natural persons) acquire the right to exclusively use and solely dispose of independent apartments or other independent premises or parking spaces for vehicles in an apartment building or other building complex.

The basic law on condominium ownership is called the „Wohnungseigentumsgesetz - WEG“. The WEG contains detailed regulations on the establishment and administration of condominium ownership. For its establishment, a written agreement of all co-owners of a building complex is required. The exclusive right of use (condominium ownership) of the co-owners comes into existence upon registration in the land register.

As far as the management of the general parts of the property is concerned (e.g., staircase, garden), the condominium owners together form the community of owners („Wohnungseigentümergeinschaft“). This community of owners is a separate legal entity under private law that can act on behalf of the individual owners of one apartment building.

### X. Setting a right to build („Baurecht“)

A building right („Baurecht“) is the right to establish a building on another person's property. The purpose of the building right is the utilisation of the property without the owner having to relinquish his ownership rights. The owner of the building right has to pay an agreed monthly or yearly fee for the use of the property („Bauzins“) to the property owner.

The so called „Baurecht“ is created by registration in the land register of the property and may be granted for a term of not less than 10, but not more than 100 years. If the building right expires, the building reverts to the owner of the real estate and any lien on it (the building) is transferred to the property.

### XI. Buildings on third-party land („Superädifikate“)

Buildings erected on land owned by others („Superädifikate“) are structures (buildings) placed on another person's land with the intention that they should not remain on said land indefinitely. This lack of intention to firmly attach the building to the ground and leave it there indefinitely allows a building to belong to the builder and not to the landowner (this is a similar situation as the before mentioned „Baurecht“).

Example: Someone rents/leases a plot of land on a lake and builds his own bathing hut on it. This so-called „Superädifikat“ is one of the exceptions to the principle that the landowner automatically also owns everything that is built on his land plot. In this case, therefore, ownership of the land and ownership of the building are separate.

### XII. Tax Effects

The purchase of real estate is subject to Austrian Real Estate Transfer Tax („Grunderwerbsteuer“) at a tax rate of generally 3.5% of the purchase price.

Furthermore, a court registration fee of 1.1% of the purchase price is charged for the registration of new ownership rights in the land register.

The prerequisite for the registration of the ownership right in the land register is, in addition to the already mentioned documents, the proof that the real estate transfer tax has been paid to the responsible tax office (so-called clearance certificate). The processing with the financial authorities is regularly carried out by the trustee (attorney at law or notary public) who draws up the purchase contract.

Since April 1, 2012, earnings from the sale of private real estate are subject to the Austrian Real Estate Income Tax ("Immobilienvertragssteuer" - ImmoEST). The taxation is not based on the regular income tax rate, but on a special 30% tax rate (there are exceptions to this taxation, for example if the own residence is sold). For the purposes of real estate income tax, the term "property" refers to land and buildings, condominiums, and rights equivalent to real estate property, such as building rights.

### **XIII. Additional Costs**

In event of broker's commission;

Attorney or notary fees; the purchase contract is usually drawn up by a lawyer or a notary who normally also apply for the registration in the land register.

In most cases the attorney / notary also acts as trustee. The amount of the lawyer's or notary's fees is approximately 1-3% of the purchase price. In addition, it is possible to agree a lump sum.

Costs for authentication of signatures: In order to register the new ownership in the land register, it is necessary that the signatures on the purchase contract and (if applicable) on the

mortgage deed for the mortgage loan are certified by a court or notary public.

### **XIV. EU and other countries**

In general, EU/EEA citizens and entities are allowed to freely purchase and sale real estate in Austria, while non-EU/EEA citizens and entities may only purchase Austrian real estate with the permission of the competent Government Office. In this case, a corresponding application must be made to the authority that approves the acquisition.

In tourist zones there may be further restrictions for the purchase of real estate property.

### **XV. Donation**

The donation of a property (land, apartment, etc.) constitutes a contract that the donor and the donee (recipient) conclude with each other. The donation must be accepted by the donee. Thereby, certain formal requirements must be observed: The gift without immediate transfer requires according to Austrian Law a written contract in form of a notarial deed. If the property is handed over to the donee immediately, the signatures of all parties must be certified by a notary public for the transfer of ownership to be recorded in the land register.

From a tax point of view a donation and the purchase of real estate are quite comparable, but since the gratuitous transfer does not result in a capital gain of the seller, the donation generally does not incur Real Estate Income Tax. However, caution is required in the case of a so-called "mixed gift", i.e., if an - even if symbolic - consideration is paid for the property.

On the other hand, the donation of real estate is subject to Real Estate Transfer Tax as well as to a court registration fee. The basis of assessment for the Real Estate Transfer Tax in the case of donations is the property value which is generally determined by an expert or

through a government approved real estate price index. The tax rate is then graduated according to the value of the gift.

#### **XVI. Our Law Firm**

This Memorandum is for information purposes only and reflects Austrian law in January 2021.

This Memorandum does not constitute legal advice and cannot replace personal consultation on a case-by-case basis. If you have any further questions about real estate in Austria or need general legal advice, please contact Dr. Andreas Bauer, a.bauer@bkp.at, +43 1 532 12 10.

**XVII.** bkp Rechtsanwälte is one of the leading business law firms in Austria. We are specialized in consulting in all areas of business law with a distinctly international orientation. We assist our clients in the long term and find sustainable ways to achieve their desired objective.



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# INTERNATIONAL LAWYERS NETWORK



**KLA ADVOGADOS**

**Buying and Selling Real Estate in Brazil**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER BRAZILIAN LAW

### 1. OVERVIEW OF BRAZILIAN HISTORY

Brazil is a federative republic and the largest country in both South and Latin America. It is also the world's fifth-largest country by area and sixth by population. In the Americas, it is the only country where Portuguese is the official language.

Bordered by the Atlantic Ocean on the east, Brazil has a coastline of 7,491 kilometers (4,655 mi). It borders all other South American countries except Ecuador and Chile and covers 47.3% of the continent's land area. The Amazon is a world-renowned vast tropical forest, home to diverse wildlife, a variety of ecological systems, and extensive natural resources spanning numerous protected habitats. This unique environmental heritage makes Brazil focal point of significant global interest and debate regarding foreign ownership of rural land, deforestation, and environmental protection.

Explorer Pedro Álvares Cabral claimed the area for the Portuguese Empire in 1500. Brazil remained a Portuguese colony until 1808, when the capital of the empire was transferred from Lisbon to Rio de Janeiro. In 1815, the colony was elevated to the status of kingdom upon the formation of the United Kingdom of Portugal, Brazil and the Algarves. Independence was conferred in 1822 with the creation of the Empire of Brazil, a unitary state governed by a constitutional monarchy and a parliamentary system. The ratification of the first constitution in 1824 led to the formation of a bicameral legislature, now called the National Congress and also marked the introduction of the real property registry system. The country became a presidential republic in 1889 following a military coup. A military junta came to power in 1964 and held power until 1985, after which civilian rule was reinstated. Brazil's

current constitution, formulated in 1988, defines it as a democratic federal republic.

The federation comprises the union of the Federal District of Brasília, 26 States, and 5,570 Municipalities. The legal system of all States and the Federal District is governed by the Civil Law system, derived from the French Napoleonic Code, as reflected primarily in the Civil Code.

In practice, this means that just Brazilian State regulations on notarial and conveyancing matters, together with the municipal ordinances on urban property taxation bring over 5,597 different enacted provisions into consideration when acquiring real estate in Brazil!

### 2. DIFFERENT TYPES OF REAL PROPERTY

The classification of a property depends on its use, and it is, therefore, irrelevant where the property is located (i.e., property located in an urban area with municipal zoning regulations will be considered rural property if used for rural purposes). There are two main types of property:

- a) Rural property.
- b) Urban property.

Urban properties can be classified as residential, commercial, and industrial. The ownership of urban property may be classified as fractional ownership, joint ownership in a condominium building or a co-ownership in an ordinary condominium.

All the regulations applicable to property cadastre, rules, restrictions, and other requirements depend on the classification of the property.



### 3. TYPES OF REAL ESTATE DEVELOPMENTS

Brazil law basically recognizes the following types of land development:

**a) Urban properties:**

- a.1) Allotment** - the division of a plot of land into lots with the installation of the necessary infra-structure, i.e., serviced lots (e.g., streets, water, sewage, electricity for transfer to public agencies upon conclusion) prepared and ready for sale. There has been a notable impact on this type of development following the enactment of new Federal Law no. 13,465/17 that now permits a local municipality to control access to allotments, which has resulted in a fierce debate about the legality of access control to such allotments which, as a result, ended;
- a.2) Land division** - the division of a plot of land into lots without the installation of infrastructure (because the plot already has access to the necessary infrastructure);
- a.3) Real Estate Development** - real estate developments are regulated by Law 4,591/64, thus created by dividing a piece/portion of real estate into several individual/separate and private constructed units, whereby an undivided interest in the real estate is established/registered in each unit. For the development and sale of hotel units with the hotel and lease administrations included the Securities Commission's Normative Ruling nº 602/18 must be also observed;
- a.4) Plots under the condominium regime** - brand new type of real estate development also regulated by new

Federal Law no 13,465/17, this type of condominium entails division of plots into lots, without improvements, created/developed as individual units with the remaining areas registered as communal property.

**b) Rural properties:**

- b.1) Allotment** - same concept as above;
- b.2) Land division** - same concept as above.

The development of urban real estate projects in Brazil typically occurs through a sales process that begins prior to construction of the project where buyers purchase units 'off-plan', i.e., based on architectural plans and models.

A typical urban real estate project would comprise the following stages:

- a) Land Analysis**. Mainly involves the calculation of the:
  - a.1)** Maximum amount of built area that could be constructed on the land, as prescribed by local zoning, and use category legislation;
  - a.2)** Unit sale price, which varies according to project and the property location, its distinctiveness, as well as the characteristics of the units on which the analysis is based;
  - a.3)** The cost of the project, which primarily comprises construction costs, marketing costs, brokerage expenses and taxes; and
  - a.4)** Environmental and zoning requirements pursuant to local regulations (Federal and State regulations) might be also applicable.
- b) Project approval**. Any real estate project must be approved by the relevant Municipality prior to the commencement of the project.



- c) Project development. A property developer is permitted to start selling the units of a real estate project only after obtaining regulatory approval and the relevant permits referred to above and after the project development has been registered with the relevant Real Estate Register Office.
- d) Due-Diligence.
- e) Project Launch. Essentially the start of the units' sale. The sale of units may only take place after a project has been approved and the development has been duly registered before the relevant Real Estate Registry Office.
- f) Construction.

#### 4. TYPES OF *IM REM* RIGHTS IN BRAZIL

- a) ownership;
- b) surface;
- c) use;
- d) right-of-way;
- e) enjoyment;
- f) habitation;
- g) right to acquire;
- h) pledge;
- i) right of floor slab ("Direito de Laje", which roughly translates to the Right of the Floor Slab, allows to obtain a distinct title to construction on top of or under another building even though it sits on the same land) - regulated by the new Federal Law no 13,465/17;
- j) right to guaranty:
  - j.1) mortgage;
  - j.2) fiduciary lien;
  - j.3) antichresis;

- j.4) seizure.

#### 5. GUIDELINES AND MAIN STEPS IN THE PROCESS OF REAL PROPERTY ACQUISITION

Acquisition of a real estate property in Brazil, whether urban or rural, essentially involves the following steps:

- ✓ Finding a property for sale, possibly with the assistance of a real estate broker/realtor, whose assistance is not mandatory. The broker's fee and payment thereof, which is negotiable between the parties and broker, and may be up to 6% of the purchase price.
- ✓ The purchaser, whether an individual or company, must have a Brazilian Tax Registration Number issued by the Federal Revenue authority. The registration procedure is straightforward and can be carried out by a third party (attorney-in-fact).
- ✓ Execution of a private sale and purchase agreement. This is not a mandatory step but is recommended given that such an instrument entitles the parties concerned to not only establish all the conditions to be met to conclude the real property acquisition, but also to outline all the obligations with respect to the formalities to be complied with prior to the acquisition, among which, notably, due diligence.
- ✓ Property legal due diligence. It is highly recommended that a legal due diligence on the property is conducted by a lawyer appointed by the purchaser, which would include a detailed audit of the rights of the seller and his/her predecessors, as well as a research on any encumbrances that may be registered over the property (mortgages, claims, etc.). The property due diligence is a very important step,





given that Brazilian Notaries are not obliged to (and hence will not) perform such due diligence, moreover, given that it is possible to waive in the deed of purchase the right to certain information and to obtain the basic clearance certificates. It is important to note that recent changes in Brazilian Law could facilitate the legal due diligence measures given that, among other provisions, the law now states that any claims, encumbrances or liens (with some exceptions) will affect the sale of a real property only if such encumbrances or liens were duly registered and therefore appear in the property ownership record file, with the relevant Real Estate Registry Office (the ownership record file is a mandatory certificate for the execution of the real property sale deed).

- ✓ Technical (e.g., engineering, geological or archeological) and environmental due diligence would also be recommended, depending on the status of the property, its historical data or the prior (or future) use of the property.
- ✓ Execution of the purchase deed before a Notary Public. In Brazil, the acquisition of any real property occurs solely by virtue of a notarial deed (save for certain exemptions, as in the event of the permission obtained for the acquisition of a property for a price lower than the official minimum wage, or in case of participation of a financial institution by means of a private instrument). The Notary Public is usually chosen by the purchaser, who also pays the notary fees. Both the seller and the purchaser may (i) appear in person before the notary to execute the deed; (ii) appoint attorneys-in-fact to do so in their name and on their behalf by virtue

of a notarized Power of Attorney; or (iii) choose for the digital signing, which will be done by a videoconference held by the Notary Public. The deed must be drawn in the Portuguese language only. The Notary Public will read the deed aloud to the parties. Therefore, a non-Portuguese-speaking party (if attending the execution of the deed in person) will need to appoint and have a translator present. Regarding the digital signing, it is important to mention that electronic signatures in Brazil are regulated through Provisional Measure No. 2200-2 / 2001 ("MP 2200-2"), which created the Brazilian Public Key Infrastructure ("ICP-Brasil"), the national system of digital certification. Therefore, to properly execute a digital deed, the parties must have an ICP-Brasil digital certificate. The issuance of an ICP-Brasil digital certificate requires: (i) a taxpayer registration in Brazil ("CPF"); (ii) a face-to-face meeting before a Certification Authority to collect biometric (fingerprint and face).

- ✓ Payment of the property ownership transfer tax. In general, the property ownership transfer tax (a Municipal tax) must be paid upon the execution of the deed, but the rules on the payment of this tax and its rates vary in accordance with the applicable rules imposed by the municipal authority where the property is located.
- ✓ Registration of the deed of sale with the relevant Real Estate Registry Office (in contrast with the choice of Notary Officer, who may be chosen by one of the parties, the Real Estate Registry Office's jurisdiction is defined by State Law and, therefore, cannot be selected by either party). Under Brazilian law, a purchaser of



real property only becomes the property's rightful owner after the notarial purchase deed is duly registered with the competent Real Estate Registry Office, as indicated in the real property ownership certificate.

## 6. FEES AND EXPENSES RELATED TO THE ACQUISITION OF REAL PROPERTY

Notarial and Real Estate Registry Office fees vary from State to State and are regulated by State law. In each State, the same fees will be charged by every Real Estate Registry Office and Notary Public practicing in that State.

Lawyer's fees can be negotiated and are established by the Brazilian Bar Association in its main fee guidelines. Under the law, a lawyer does not need to be present at the execution of the deed of sale; however, to ensure the validity of negotiations and compliance with the relevant legal formalities, it is advisable to have a lawyer present. Furthermore, the presence of a lawyer also serves to ensure the accuracy of the deed's content in relation to the description of the property, the description of the succession of rights of the seller and his/her predecessors, in addition to other legal requirements.

Depending on circumstances, other costs might be applicable, such as the *laudemium*, applied to marine land (properties located on islands or properties that fall under an occupancy regime or a permit issued by the Federal Government).

## 7. FINANCING

The most common way to finance the purchase of a real estate property is through a bank loan. To grant a loan, Brazilian banks examine the purchaser's credit history and financial situation in addition to having the current commercial value of the property appraised by a civil engineer.

Upon payment of the purchase price - loaned amount - directly to the seller, the bank secures its interest over the property by registering a guarantee with the Relevant Real Estate Office to guarantee the loan (commonly a mortgage or a fiduciary lien).

## 8. SPECIFICITIES WITH RESPECT TO RURAL LAND - PROPERTY BOUNDARIES DESCRIPTION AND ITS ENVIRONMENTAL DATA

Brazilian Law prescribes particular provisions in relation to rural land, and anyone with the intention of acquiring rural land must be aware of (i) specific rules/regulations with respect to the description of the boundaries of rural land that detail satellite geo-referenced coordinates in accordance with the proper topographical rules established by the National Institute of Colonization and Agrarian Reform ("INCRA"), and (ii) specific rules/regulations with respect to demarcated preservation areas on such properties and cadastre thereof with the State and the federal environmental agencies.

It is important to note that the description of rural properties by way of satellite geo-referenced coordinates must be certified by INCRA and may lead to other legal measures/requirements with respect to the property regularization, given that the description must be recorded in the property ownership record file. In addition to certification by INCRA as a requirement for the valid execution of a deed of sale of rural land, registration with the relevant Real Estate Registry Office is also required if the property in question comprises an area of more than 100 hectares in extent.

It is also important to note that the registration of rural property data with the State and the Federal environmental agencies is a further requirement for the execution of deed of sale for the acquisition of rural land, coupled with



its registration with the relevant Real Estate Registry Office.

In addition, the rural property must be registered with the Federal Revenue, since the property must have an identification number (“NIRF”).

### 9. RESTRICTIONS ON REAL PROPERTY ACQUISITION BY FOREIGNERS

Brazilian law does not impose restrictions on urban real property ownership by foreign entities or persons.

However, foreign entities or persons are currently not permitted to own rural real properties without governmental authorization.

It is worth noting that over the course of the last two decades fierce debate has been ongoing in on the issue of property ownership by foreign entities. Up until the end of 2016, in São Paulo State the mere fact that an entity was duly registered with the São Paulo Board of Commerce, with no consideration given to the nationality of its shareholders, was sufficient for such an entity to be treated as a Brazilian entity, hence making it possible for the entity to own rural property in São Paulo State.

However, the Supreme Court suspended this practice. Presently, the position is that a foreign entity is the one under direct or indirect foreign control.

With the edition of the INCRA’s Normative Ruling nº 88/2017, the exigence of INCRA’s pre-approval on rural real properties acquisition by foreigners was pacified, however, changes on this issue are still expected, considering there is no clear period for implementation. of a final ruling by the Supreme Court, or from the several bills put forward for consideration by the National Congress.

### 10. IMPORTANT PROVISIONS TO BE CONSIDERED AT TIME OF PURCHASE/ACQUISITION OF A REAL PROPERTY

Right of first refusal: A provision stipulating that in the event of a sale, sale commitment, assignment, or commitment to the assignment of rights in connection with a leased real property, the tenant has the right of first refusal to acquire the leased real property, and that the landlord must bring the transaction to tenant’s knowledge. Further, in case of joint ownership, members of the condominium also have the right of first refusal.

Validity Clause: A type of clause, which if included in a lease agreement and registered at the Real Estate Registry Record, grants the right to a tenant to see out the lease for the entire term should ownership be transferred to a third party.

Restraint of mortgage/Non-encumbrance clause: This type of clause prohibits the encumbering of a property with a mortgage; only applied on specific circumstances.

Non-communio bonorum clause: This type of provision prevents the property from becoming part of a joint estate due to marriage or union, regardless of the regime governing the union or marriage.

Inalienability clause: This clause restricts the owner’s faculty/ability/capacity to dispose of the property.

### 11. NOTES/OBSERVATIONS ON TAXATION

Real property transfer tax varies between municipalities and, therefore, depends on where the property is located. It is important to note that in case of donation of real property, Municipal transfer tax shall not be levied, but State Donation and *causa mortis* shall be the payable tax instead.



Urban Real Estate Property Tax (“IPTU”). All urban real estate property in Brazil owned by individuals or legal entities as of January 1st of each year, is subject to Urban Real Estate Property Tax payable to the municipality within whose jurisdiction the property is located. IPTU is the main annual tax imposed on urban real estate properties, and the surface area of the real estate property, its location, the value of its constructions etc. are used to calculate such tax.

Rural Real Estate Property Tax (“ITR”). All rural real estate property in Brazil owned by individuals or legal entities as of January 1st of each year, is subject to Rural Real Estate Property Tax, payable to the Federal Government. Calculation of ITR is based on information provided by the property owner to the Federal Revenue (information includes the surface area, the purpose of its use, extent of preserved native forest, agricultural production, among several other considerations).

Tax on income from property rental, or the sale of property (capital gain tax), pursuant to federal tax provisions, apply on real property leases or sales. Given the frequent amendments to tax legislation, it is highly advisable that all property related taxes are revisited and re-calculated as necessary.

## **12. NOTES ON THE REAL ESTATE REALTOR ACTIVITIES**

Under Brazilian law, a Real Estate Realtor must be registered with the relevant agency (“CRECI”). A broker’s participation in a transaction is not mandatory but if a broker has been hired, even if the broker is not responsible for the effective conclusion of the transaction, regardless of whether the transaction is duly concluded, the realtor’s fees would still be due. The parties may (and should) agree to incorporate a provision in the deed of sale stipulating effective conclusion of the

transaction as a prerequisite to the payment of realtor’s commission.

Realtor’s commission may vary in accordance with the arrangement between the party and the broker, with an upper limit of 6% per cent of the purchase price, established by law in general/standard/conventional cases.



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# INTERNATIONAL LAWYERS NETWORK



**FOGLER RUBINOFF LLP**

**BUYING AND SELLING REAL ESTATE IN CANADA - ONTARIO**

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CANADIAN (ONTARIO) LAW

### INTRODUCTION

Canada, a bijural country, utilizes both common and civil law. Except for Québec, a civil law jurisdiction, the common law operates in all remaining provinces and territories. Real estate transactions conducted in Ontario are governed by laws and rules that are specific to the province. This requires buyers and sellers to remain considerate of the Province's particularities when transacting. This guide will provide a brief overview of important considerations when buying or selling property in Ontario.

### I. PURCHASE AND SALE AGREEMENT

All real estate sales in Ontario require a formal written contract between the buyer and seller in order to comply with the *Statute of Frauds* and must contain the elements of a binding contract including offer, acceptance, consideration, and the meeting of the minds. The purchase agreement outlines all the obligations, responsibilities, and procedures in accordance with contract law. It also must accurately identify and describe the real property being purchased and usually includes both the municipal address and the legal description.

Buyers and sellers are typically bound to certain terms and conditions upon agreeing to make the purchase. For instance, a buyer who makes an offer cannot then revoke it until a specified period of time has elapsed. Within that time period the seller can accept, reject, or make a counteroffer. If no counteroffer is made, and the seller accepts the buyer's offer, the offer becomes a legally binding agreement. A deposit is security for the performance of the buyer's obligations and is usually held in the seller's brokerage's or lawyer's trust account. It is not a limitation on damages in the case of a

default by the buyer unless expressly stated as so in the purchase agreement. On closing, the deposit is credited to the buyer as partial payment of the purchase price.

The agreement of purchase and sale may contain conditions in favour of the buyer and/or seller. For example, a buyer may have a defined period of time in which to arrange suitable financing, conduct due diligence of the property and to be satisfied with their investigations of the property. If so satisfied, the buyer may waive their conditions and the agreement would then be legally binding. If the conditions are not waived, the agreement may terminate, and any deposits paid returned to the buyer in accordance with the terms of the agreement.

The agreement of purchase and sale may contain a clause on the right to assign the contract to a third party. If the agreement is silent on the right to assign, then under contract law, either party's "benefits" can be assigned without the other party's consent, but not their "burdens." The buyer may need flexibility for tax planning, liability reasons or compliance with the *Planning Act* and so if the need to assign the agreement is important, it should be included as a term to the purchase agreement.

The Ontario Real Estate Association ("**OREA**") is most commonly known for providing the standard forms for the purchase, sale, and leasing of residential and commercial properties. Each local real estate board within Ontario has adopted the standard OREA forms which may be used for residential and commercial real estate transactions. While these forms may be typically used, especially in a residential transaction, they are not mandatory and other forms of agreements and sales may be drafted. The standard forms may



also be easily amended by adding a schedule with further clauses that are tailored to the particular transaction. The type of property being purchased also needs consideration such as freehold, leasehold or condominium. Great care must be undertaken when drafting the purchase agreement to accommodate local requirements in addition to the needs of the party the lawyer is representing.

### **Commercial**

Many similar principles apply to a commercial real estate transaction as to a residential real estate transaction, although the dollar figures are usually larger. Additional considerations are required by the nature of the property, such as tenants and their leases, service contracts and employment contracts of salaried workers, future revenues from the property and future development plans for the property.

The commercial buyer normally requests in the purchase agreement that pertinent due diligence materials be provided by the seller such as realty tax records and appeals, environmental reports, surveys, building engineering reports, copies of all tenant files including leases, maintenance contracts, development files, etc. so that it can evaluate the property, its financial feasibility and intended use. The commercial buyer may need to evaluate cost sharing arrangements, easements, zoning, and environmental issues. The due diligence conditions and other conditions, if any, and timing of same are negotiated with the seller and must be detailed in the purchase agreement. The buyer's lender may also have due diligence requirements, such as an appraisal and satisfactory environment reports. The buyer should ensure these are met prior to any waiver of conditions. Closing documents that will be required and if the seller or buyer are responsible for drafting same are also listed in the purchase agreement.

Since commercial properties come in a variety of forms such as vacant land, commercial, retail, industrial, mineral, and agricultural property, tailoring the transaction to satisfy the buyer and seller, based on the type of business that was being conducted on the property or the buyer's intended use of the property, is an integral part of the purchase agreement.

### **II. BROKERS AND AGENTS**

Real estate agents and real estate brokers are governed by the *Real Estate and Business Brokers Act, 2002* (Ontario) and its regulations. In Ontario, a real estate agent will have obtained the minimum mandated education, have passed a set of tests required by OREA, and be registered with RECO. To become a broker, in addition to the requirements to become an agent, an individual will have completed the Real Estate Broker Program and have been registered as a salesperson for at least 24 months. It is not mandatory to use a real estate agent or broker on a transaction.

Listing a property in Ontario is making it known to potential buyers that the seller is looking for offers. The listing agreement is a contract between a seller and a real estate agent or brokerage. The agreement will specify a time period in which the brokerage will have exclusive access to list the property - usually 90 days. The price, while being stated on the agreement, will only be an estimate. The commission, often a percentage of the sale price to be given to the brokerage for its services, is also listed in the agreement and is often paid by the seller. If the buyer and seller have separate agents, the commission is typically split between the agents as may be set out in the agreement of purchase and sale or the listing agreement. Additionally, if the brokerage intends on collecting a flat fee or a finder's fee, this must be stated in the listing agreement. A *holdover clause* is a clause that sometimes allows a brokerage to collect its



commission after the expiry of its listing period if the brokerage introduced a buyer to a seller and such a clause can be stipulated in a listing agreement.

### III. BUYER'S INSPECTION

#### **Residential**

When purchasing a home or commercial property the seller is required to disclose some, but not all, physical defects. Patent defects are defects that can be easily detected through reasonable inspection and ordinary vigilance. If a buyer fails to detect a patent defect, '*caveat emptor*' - buyer beware prevails. Conversely, latent defects are defects that are not detectable through reasonable investigation. In Ontario, sellers are only liable for not disclosing latent defect if the property they sold is later found to make (1), the property unfit for habitation or poses future danger and (2) if the repair would be so expensive that it would severely reduce the property value. Failure by the seller to disclose latent defects when the aforementioned criteria are met may constitute fraud.

The buyer's lawyer will examine title to the property for items such as mortgages (which are to be paid out by the seller or assumed by the buyer if agreed-upon in the purchase agreement), restrictive covenants and easements. The buyer's lawyer may also determine whether there are government work orders or deficiency notices against the property, confirm if the present use as specified may be lawfully continued and if there are any arrears of realty tax or utilities that may form a lien. The buyer will also confirm if fire insurance can be obtained for the property. Any issues arising from title and off-title searches are called requisitions and are submitted to the seller's lawyer in a requisition letter by the requisition date as stipulated in the purchase agreement.

Most acquisition transactions are financed with a lender. The buyer will typically obtain a loan from a bank or other lender and agree to register a charge or mortgage in favour of the lender against the property on closing. If the purchase agreement contains a condition for the buyer to arrange financing during the due diligence condition period, the buyer will be responsible to ensure all terms of the lender's conditions, such as an adequate appraisal, are met prior to the waiver date.

In a heated real estate market, a buyer may submit an unconditional offer to the seller to gain an advantage over other prospective buyers. However, the buyer should be aware of the risks, including potential damages if the buyer cannot complete the transaction on closing, of such an offer as the offer becomes a binding contract if accepted by the seller.

#### **Commercial**

A buyer of a commercial property will conduct searches regarding the physical integrity of the building and soil, legal searches relating to title, executions, zoning and work orders, property tax and utility arrears, reviews of surveys (if available), similar to residential transactions. The buyer will evaluate the pertinent due diligence materials provided by the seller as aforementioned. The commercial buyer should assess all leases and related tenant files, and do off-title searches which may comprise of assessing zoning and work orders, development and cost sharing agreements, Phase 1 and 2 environmental reports, and fire and health department documents, etc. In other words, a buyer has the additional responsibility of ensuring the commercial feasibility of the property.

For a leased property, a tenant acknowledgment, also known as an estoppel certificate, is routinely obtained from the commercial tenants prior to closing. These are





not usually obtained for an apartment building as the rental income is usually less significant and parties do not want to disturb the residential tenants. The tenant acknowledgement confirms the material facts about the lease, including, but not limited to, any outstanding landlord work, arrears of rent, rent amounts (including additional rent), square footage, the existence of any amendments to the lease, the lease term, expiry date, renewal rights, escalations in rent, deposits, prepaid amounts and that there are no disputes or rights of set off, or if there are, details of such claims. The tenant acknowledgement is important as it confirms the lease information but may limit the potential for disputes post-closing with the buyer as the tenant will be estopped from later asserting a different interpretation of the lease terms. It is important for the buyer and seller to assess and determine what the consequence will be if the seller is unable to provide the estoppel certificates, or if the certificates materially differ from the leases and disclosures made by the seller. Examples may include termination of the transaction without either party being liable for damages, an abatement of the purchase price or a temporary hold-back.

Since commercial properties come in a variety of forms, it is prudent to hire professionals such as engineers, planners, appraisers, and surveyors to assist in the transaction who have expertise in the type of property being sold or purchased, and to determine if the intended future use of the property is allowed. In some instances, the professional may have to contact various third parties, such as utility providers, conservation authority, fire department, building department, and municipal zoning departments to determine if encumbrances that are not registered on title exist or if historical environmental violations exist. The carriage of business on the property warrants a

higher level of scrutiny for commercial real estate transactions than for residential transaction.

#### IV. HOLDING TITLE

There are several ways in which title to a property can be held. Consideration should be given to the *Planning Act*, liability, and tax planning. A buyer should consult with its counsel and tax advisors prior to determining how title will be held.

When multiple parties are registered owners on title, the ownership can be as "joint tenants" or "tenants in common." Joint tenancy is used when the owners want that if one of them dies, the survivor(s) become the owner(s) by right of survivorship. Joint tenancy is frequently used by spouses for their matrimonial home. Tenancy in common means each owner owns a percentage of the registered title. If one owner dies, that owner's share is then an asset of the deceased owner's estate and may eventually be transferred to the heirs of the estate in accordance with the deceased's will or intestate laws of their jurisdiction.

Individuals contracting regarding property must be 18 years old, not be incapable, and not be an undischarged bankrupt. If the party does not have such capacity, legal representatives such as estate trustees, attorneys under power of attorney, the Public Guardian and Trustee, the Office of the Children's Lawyer and others may be required to be a part of the transaction.

Corporations must be authorized by resolution of its directors and, if required, shareholders. The purchase agreement and closing documents must accurately set out the names of offices of the signing officers.

Real property in Ontario must be held by a legal person or corporation. Partnerships are not a legal person and therefore cannot hold registered title. Limited liability partnerships



are formed under the *Limited Partnerships Act*. In limited partnerships, the only entity legally capable of holding title to the real property is the general partner. Alternatively, partnerships can use a nominee, as discussed below.

A nominee or trustee, usually a corporation, may hold registered title to a property on behalf of a beneficial owner. A nominee agreement or declaration of trust would stipulate the terms on which the nominee or trustee holds the property. Nominee companies offer flexibility when there are multiple beneficial owners of real estate as it allows for a single legal title holder and, for example, new joint venturers can acquire an interest in the nominee without having to register changes at the land registry office. This is also sometimes used for privacy reasons.

Starting from May 6, 2017, it has been mandatory for most buyers to fill out an information form disclosing beneficial owners and certain other information in connection with the purchase of residential and agricultural properties. The completed form is submitted electronically to the Minister of Finance and is not made public.

In both residential and commercial transactions, title insurance is a contract with a title insurer that may protect the buyer and mortgagee from possible financial losses such as:

- title to the estate or interest insured being held other than as shown in the policy;
- any title defect and charge, lien, or encumbrance on the title, including defects that may have been disclosed by an up-to-date survey;
- unmarketability of title;
- certain types of fraud; and

- lack of a right of access to and from the land.

Separate owner and lender policies are available. Owner policies are generally a one-time purchase and protects a buyer for as long as they, or their heirs, hold title to the property. Similarly, a lender policy is usually a one-time purchase and effective while the mortgage loan is outstanding. An owner is not covered by a lender's policy as only the mortgagee's interest is insured. Title insurance can be beneficial in that it allows buyers and lenders to "insurer over" selected problems and may reduce legal fees as certain searches may be waived by the title insurer.

It is imperative that the buyer's lawyer discuss the benefits and limitations of a title insurance policy with their client, including, but not limited to, whether the buyer has an knowledge of a title defect, their intended future use of the property and the usefulness of a current survey of the property.

## **V. RECORDING REAL ESTATE DOCUMENTS**

In Ontario, the Land Titles system has replaced the old Registry System, although approximately 30,000 properties have not yet been converted to Land Titles. The Land Title system is an electronic registry housing all private property ownership information in Ontario. It contain official records of title, deed, mortgage, and other land documents. Under the Land Titles system, search results are certified by the government, with no requirement to look any further into prior registrations of the property, with certain exceptions. The Land Titles system provides a statement of title. Each separately owned piece of land is called a "parcel" and each parcel has an assigned number or a "PIN".

On closing, the transfer of the property is usually registered electronically by the buyer's



lawyer, along with any related instruments such as a mortgage.

## **VI. THE PLANNING ACT**

The purpose of the *Planning Act* is to regulate how land can be developed and used. Subdivisions are used to divide one large parcel of land into two or more smaller parcels for further development. Careful consideration must be given to the *Planning Act* in any conveyance as a violation can be fatal in that that no interest in land is created or passed. S. 50 of the *Planning Act* pertains to the subdivision of land and prohibits an owner from the sale, transfer, or mortgage of a property if they also retain an interest in the abutting lands, unless certain exemptions to the basic prohibition are met. A buyer's lawyer must search the chain of title and adjoining properties to ensure the owner does not own abutting lands unless an exemption under the *Planning Act* applies.

An important amendment was introduced with S.50(22) of the *Planning Act* in that there was an inclusion in the transfer document of optional statements by the seller and their solicitor and by the buyer's solicitor regarding compliance with the *Planning Act*. If these statements are completed on the transfer, any prior contraventions of the subdivision control provisions of the *Planning Act*, which otherwise would have voided the interest in land, are deemed to be no longer and never to have had this effect; in essence the violation is "cured." The requirement for *Planning Act* statements ought to be included as a required term in the agreement of purchase and sale as otherwise the statements are not compulsory.

## **VII. CONSTRUCTION LIENS AND WRITS**

Construction Liens are governed by the *Construction Act*. When work is performed or materials are supplied to the property, the party doing so, which can include contractors

and sub-contractors can place a construction lien on title against the property if they are not paid. A construction lien acts as an encumbrance to the title, giving aggrieved parties a right to be paid and a right to sue under the *Construction Act*. The buyer of the property may be liable to pay if the lien is not removed from title upon transfer.

## **VIII. WRITS OF EXECUTION**

An execution search is automatically conducted against the vendor by the electronic registration system prior to the registration of a transfer. In a lawsuit, the successful party is awarded a judgement in its favour against the other party. The successful party can then obtain a writ to be filed against the unsuccessful party in any district in which the other party owns property pursuant to the Execution Act. The writ of execution allows for the seizure and sale of real property, amongst other rights. Buyers should not close the purchase of lands if the registered owner is subject to a writ of execution, as the property will be noted as being subject to the writ of execution.

## **IX. THE ONTARIO NEW HOME WARRANTIES PLAN (ONHW) ACT**

Defects in newly build homes are subject to the *Ontario New Home Warranties Plan Act*. The *Act* was implemented to protect new home buyers from defective and faulty construction by the builder. All builders and all new homes have to be registered under the *Act*. Tarion, a crown corporation, is responsible for implementing the *Act* and indemnifying new buyers in case of loss.



## X. HST

The Harmonized Sales Tax ("**HST**") is a 13% tax on the sale of all goods and services across Ontario, with certain exemptions. HST does not apply to used housing (i.e., any residential home where the buyer is not purchasing a new build.) However, HST is payable for the purchase of new homes and substantially renovated homes, where 90% or more of the interior has been renovated and was inhabited for less than one year. Since May 7, 2022, HST is also applicable to all assignments of agreements of purchase and sale for new houses and condominium units and is chargeable by the assignor and payable by an assignee on the portion of the assignment purchase price representing the assignor's profit, over and above what the assignor agreed to pay the vendor but excluding the reimbursement of deposits by the assignee to the assignor.

HST applies to most commercial transactions, subject to some exceptions. The purchase agreement stipulates whether HST is included in the purchase price or not. If the buyer is an HST registrant, the buyer may self-assess, claim input tax credits, and remit any HST owing to the Canada Revenue Agency ("**CRA**") directly. The seller will require an indemnity from the buyer on closing to protect the seller from the buyer's failure to remit the tax. The seller should confirm the buyer's HST registration number with CRA prior to closing.

## XI. RESIDENCY STATUS OF THE SELLER

Residential property that is designated as a primary residence of seller who is not a non-resident of Canada is usually exempt from income taxes with CRA.

Section 116 of the *Income Tax Act* imposes liability on both the seller and buyer during the property transaction. The seller is responsible for potential tax liability for profits earned from

selling the property. This section imposes the same liability on the buyer if a non-resident, as defined in the *Income Tax Act*, fails to remit the tax to CRA.

The buyer is obligated under the *Income Tax Act* to make reasonable inquiry as to the residency of the seller. A statutory declaration from the seller confirming the seller is not a non-resident is obtained on closing and delivered to the buyer. This is usually sufficient to protect the buyer from the tax liability. However, if the seller has signed the documents outside of Canada or provides an address outside of Canada for service, further inquiries must be made, or the buyer may become liable for the tax amount owing. If the buyer has actual notice that the seller is a non-resident, the buyer cannot rely on the statutory declaration.

If the seller is a non-resident, the seller must provide a "certificate of compliance" (CRA form T2062, often referred to as a "compliance certificate" or "s. 116 certificate") on closing certifying that all tax has been paid to CRA or security has been given for payment. If the certificate of compliance is not available on the closing date, the buyer's lawyer must withhold in trust from the sale price the maximum amount of the tax liability for which the buyer could be responsible for if the seller failed to pay the tax (currently 25% of the sale price) until receipt of the certificate of compliance is received. In practice, if a large tax amount is owing, the seller may need to use the holdback to pay the tax liability and will apply to CRA for a certificate of compliance. When CRA sends a tax statement/letter to the seller's lawyer or accounting stating that upon its receipt of the unpaid tax it will issue a certificate of compliance, the buyer's lawyer will issue payment to CRA of the unpaid tax from the holdback. The seller's lawyer usually



undertakes to deliver the certificate of compliance upon its receipt of same.

## **XII. CLOSING COSTS**

In addition to legal fees and disbursements and title insurance policy premiums paid by the buyer, purchase transactions in Ontario are subject to land transfer taxes as set out below. The seller is typically responsible for their own legal fees and the agent/brokerage commission, if applicable.

### **Land Transfer Tax**

A buyer in Ontario is required to pay a land transfer tax on the registration of any transfer/deed. For commercial properties, the tax is currently calculated at the following rates:

- one-half of 1% on the first \$55,000 of the purchase price;
- 1% on the balance of the purchase price up to and including \$250,000;
- 1.5% on the balance of the purchase price up to and including \$400,000; and
- 2% on the balance of the purchase price at \$400,001 and above.

For residential properties, the tax is calculated at the same rates as for commercial properties, except where the land contains one or two single-family dwellings, and the property is valued at more than \$2,000,000. For such transactions, the 2% tax rate only applies from \$400,001 up to and including \$2,000,000, and a 2.5% tax rate applies to the balance of the purchase price for the property.

In the City of Toronto, a municipal land transfer tax is also due on the registration of a transfer/deed in addition to the provincial land transfer tax. This municipal land transfer tax is calculated as follows:

- for properties containing at least one but no more than two single-family residences, one-half of 1% on the first \$55,000 of the purchase price, 1% on the balance of the purchase price up to and including \$250,000, 1.5% on the balance of the purchase price up to and including \$400,000, 2% on the balance of the purchase price up to and including \$2,000,000, and 2.5% on the balance of the purchase price at \$2,000,001 and above; and
- for all other properties, one-half of 1% on the first \$55,000 of the purchase price, 1% of the balance of the purchase price up to and including \$250,000, 1.5% of the purchase price up to and including \$400,000, and 2% on the balance of the purchase price at \$400,001 and above.

First-time homebuyers (buyers that have not owned real estate anywhere else in the world) may be eligible for a refund of all or part of the tax, up to a limit. Certain transfers, such as between spouses for no consideration, may be exempt from the tax.

### **Non-Resident Speculation Tax**

Effective April 21, 2017, and recently changed on October 25, 2022, a non-resident speculation tax (NRST) of 25% has been imposed on the purchase or acquisition of an interest in a residential property located in the Province of Ontario by an individual or corporation controlled by a person who is not a citizen or permanent resident of Canada or by foreign corporations and taxable trustees. The NRST is owed in addition to the land transfer tax in Ontario and Toronto, if applicable, and applies to the value of the consideration for a transfer of residential property. The transfer contains statements identifying whether the transfer is subject to the NRST and applicable



explanations.

### **XIII. CLOSING DOCUMENTS**

Some examples of commonly used documents on the closing of the residential transaction are:

#### **1. Transfer/deed of land**

This document transfers ownership of the real property to the buyer, lists the consideration paid and contains the land transfer tax affidavit completed by the buyer. If the seller is an individual, the transfer must contain *Family Law Act* statements, which are designed to protect spousal rights of the matrimonial home. If a party is selling the matrimonial home and the spouse is not listed on title, the non-titled spouse must give consent to the transaction. *Planning Act* optional statements may also be included in the transfer. The buyer will advise the seller how it is taking title.

#### **2. Statement of adjustments**

The statement of adjustment is prepared by the seller for the buyer and calculates the amount of money the buyer owes the seller on the closing date and will show the purchase price due to the seller and credits for any deposits already paid by the buyer. It should include an adjustment all ongoing expenses and revenues, such as property taxes, rents and damage deposits from tenants, condominium strata fees, etc., that are due or paid by the seller prior to closing. It includes all costs up to the day before closing for the seller, and the day of closing for the buyer. An undertaking from the buyer and seller to readjust the statement of adjustments after closing for any errors discovered post-closing or for a

recalculation of realty taxes once the final tax bill is issued post-closing is commonly included in the closing documents.

- 3.** Document Registration Agreement ("DRA") – To accommodate electronic registration, the DRA outlines the terms of escrow under which the transaction is completed, including the transfer of funds and registration of documents.
- 4.** bill of sale – to be delivered when chattels are being transferred to the buyer along with buildings and land;
- 5.** vendor take-back mortgage, if applicable;
- 6.** vendor direction as to funds;
- 7.** vendor declaration of possession;
- 8.** buyer's direction re: title;
- 9.** vendor's certificate or statutory declaration pursuant to s. 116 of the *Income Tax Act*;

Commercial transactions would also use the above-noted documents, but may also require the following documents, and other documents specific to the terms of the transaction:

- 10.** assignment and assumption of leases;
- 11.** notice and direction to tenants;
- 12.** assignment and assumption of warranties and guarantees;
- 13.** assignment and assumption of contracts;
- 14.** mortgage assumption agreement, if applicable;
- 15.** tenant estoppel certificates (pre-closing), if applicable;
- 16.** general conveyance;



17. purchaser's covenant to self-assess, pay HST and indemnify vendor.

**XIV. ANNUAL PROPERTY COSTS**

Property owners in Ontario can expect to incur the following annual costs:

1. Realty taxes – Each property's value is assessed for municipal tax purposes under the *Assessment Act* and the local municipality determines the tax rates to be paid based on the assessed value. Realty taxes can be comprised of local and regional amounts, school amounts, and special assessments.
2. Insurance - Not mandatory but is typically obtained to cover property damage and liability. If the property has a mortgage, the lender will require insurance as an ongoing condition of the loan.
3. Strata fees if a condominium; and

4. Operating expenses, such as utilities, maintenance, and repairs.

**XV. PROHIBITION ON THE PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS ACT**

Introduced in the 2022 federal budget, this Act was passed by the Parliament of Canada on June 23, 2022 and will come into effect on January 1, 2023. This Act prohibits non-Canadians (including individuals and individuals using corporations) from purchasing residential property anywhere in Canada, for a period of 2 years, with certain exceptions for persons who enjoy protected status or are married to a Canadian. Contraventions of this Act may result in the residential property being sold by court order, and/or imposing a fine of up to \$10,000 on offenders and those that counsel, induce, aid or abets in the contravention of this Act. At this point, the government is still finalizing the details of this legislation and it is expected that there will be additional regulations under this Act to provide further details of this legislation.



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# INTERNATIONAL LAWYERS NETWORK



**ROBINSON SHEPPARD SHAPIRO LLP**

**BUYING AND SELLING REAL ESTATE IN CANADA - QUÉBEC**

**ILN REAL ESTATE GROUP**





## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CANADIAN (QUÉBEC) LAW

Unlike the other Canadian provinces and territories, which are all common law jurisdictions, Québec is a civil law jurisdiction. It is governed by the *Civil Code of Québec*, originally inspired by the French Napoleonic Code, and therefore quite distinct from other Canadian legal systems. In Québec, real estate is categorized as being immovable (real) property, as opposed to movable (personal) property. Both lawyers and notaries handle Québec real estate transactions, but only notaries may receive deeds creating encumbrances (hypothecs, known as liens or mortgages in other jurisdictions). Québec notaries are not analogous to notaries public in other jurisdictions; they receive the same legal training as lawyers but are members of the Chamber of Notaries and graduate from its distinct post-university program, specializing in real estate matters.

### I. STANDARD FORMS OF AGREEMENTS

#### Residential Transactions – Pre-Sale Documents

All Québec licensed real estate brokers governed by the *Real Estate Brokerage Act* (Québec) and its Regulations are required to use the following forms provided by the *Organisme d'autorégulation du courtage immobilier du Québec* (OACIQ) when preparing brokerage contracts as well as the following agreements for the purchase, sale, and lease of immovables:

- Exclusive brokerage contracts for the sale or purchase of:
  - (i) Chiefly residential immovables containing fewer than 5 dwellings excluding co-ownership
  - (ii) Divided co-ownership – Fraction of a chiefly residential

- immovable held in divided co-ownership
- (iii) Undivided co-ownership – Share of a chiefly residential immovable held in undivided co-ownership
- (iv) Residential lease
- (v) Sale of a mobile home located on leased land
- Lease documents:
  - (i) Promise to lease
  - (ii) Counterproposal
  - (iii) Lease amendments
- Sale / Purchase documents
  - (i) Promise to purchase
  - (ii) Counterproposal to a promise to purchase
  - (iii) Amendments
  - (iv) Waiver of conditions (*e.g.*, financing, inspection)
  - (v) Annex F – Financing
  - (vi) Annex R– Residential Immovable
  - (vii) Annex RC – Remuneration and Costs
  - (viii) Declarations by the seller of the immovable (land and buildings, appurtenances, dependencies)
  - (ix) Declarations by the seller of the immovable - Divided co-ownership
  - (x) Enhancements prior to acceptance



### Commercial Transactions – Pre-Sale Documents

In commercial purchases and sales, either party may prepare the offer to purchase or sell (as the case may be). These are often highly negotiated and tailored documents. They generally set out the legal description of the immovable property, the sale terms including price, deposit, conditions to be met to the satisfaction of the purchaser (such as financing, title search, environmental and other due diligence inspections), representations and warranties of the vendor, the outside closing date and the date and time by which the offer must be accepted, failing which it will be null and void.

### Purchase and Sale Agreement

In both residential and commercial sales, the purchase and sale agreement takes the form of a deed of sale, signed by both parties, which sets out all of the terms and conditions of the transaction, including the date of occupancy, the warranties provided by the seller (*e.g.*, title, condition of the property, seller's matrimonial regime in the case of individuals, seller's tax residency), the purchase price and payment terms, as well as the 5% federal goods and services tax ("GST"), 9.975% Québec sales tax ("QST") and mutation taxes due on the transaction. The deed must be signed before a Québec notary if there is a balance of price or if the buyer is assuming an existing encumbrance; otherwise, it may be signed either in notarial form (which is the general practice) or under private signature before two witnesses, who must also sign.

### II. BROKERS AND AGENTS

Real estate brokers and agents are governed by the *Real Estate Brokerage Act* (Québec) and its Regulations. All brokers are licensed real estate agents, but not all agents are licensed brokers. Real estate agents work for a broker or brokerage firm, either as salaried employees,

on commission or both, and the broker is legally responsible for its agents. Agents or brokers in Québec may act for the seller or the purchaser (although the latter is less common). As noted above, the brokerage contract is a prescribed form in residential, but not commercial, land sales. Under Québec case law, even if the seller retains the broker or agent, they are still obligated to deal honestly with both parties and may not mislead the buyer. Where the broker or agent acts only for the seller, the seller pays the commission; where both parties are represented by brokers or agents, the two brokers or agents typically share the commission. The obligation to pay the commission is governed by the brokerage contract, but generally in order to trigger the obligation to pay a commission, the broker or agent must have introduced the buyer and seller. There is usually a clause in exclusive brokerage contracts protecting the rights of the agent(s) to collect a commission if the property is sold within a specified period (generally 90-180 days) after its expiration to a party introduced to the property while it was in effect.

### III. BUYER'S INSPECTIONS

#### Residential:

Most offers are made conditional upon inspection and/or financing, although in a heated real estate market, a buyer who is prepared to make an offer without conditions may have an advantage if there are competing bids. The buyer will typically engage a licensed building inspector, who will visit the property and check for interior and exterior structural issues, verify the heating, ventilation, plumbing and electrical systems and the type and state of the roof, underground storage tanks, etc. and generally identify any issues which should be rectified, and which could influence the value of the property (and therefore potentially reduce the price).



The buyer's notary will conduct a formal title search on the property to establish the chain of title and to identify any hypothecs, prior claims, other encumbrances, servitudes (easements), concurrent or priority rights of ownership, and any other right or charge reducing the value of ownership of the property. The notary will also obtain and verify an up to date (not more than 10 years old) certificate of location (survey) to be provided by the seller (and which will be required by the buyer's lender if the purchase is being financed). Finally, the notary will verify the zoning and any permits for renovations to the property, as well as payment of the property taxes (municipal, school, water, etc.), any right of tax authorities to claim arrears of property taxes, any prior claim in their favour, any registration of a notice of sale of the property for non-payment of the property taxes, any consequential sale of the property, and the registration of a notice of legal hypothec by the tax authorities or by any contractor who has worked on the property. The notary will, in preparing the deed of sale, also prepare any adjustment of taxes, charges, utilities, etc. and confirm that the buyer has insurance coverage for the property in place as of the date of transfer of ownership.

#### Commercial

In addition to the inspections performed by residential buyers, commercial buyers also generally obtain at least a Phase 1 environmental review (with a Phase 2 follow-up where the Phase 1 report raises concerns), and a use and zoning/permitting analysis, particularly if the buyer is planning any renovations to, or a particular usage of, the property.

If the property is leased, the buyer's due diligence should include a thorough review of all leases and related documents, including the term, any options to renew, an assessment of the rentals stipulated compared to current

market conditions, as well as all maintenance and other contracts relating to the operation of the property.

#### Title Insurance

In both residential and commercial sales, any title issues which cannot easily be resolved prior to the sale may be covered by the issuance of a title insurance policy, generally applied for by the buyer as beneficiary, but at the seller's expense.

#### IV. FORMS OF OWNERSHIP

Residential property is commonly held in an individual's personal name (or both spouses' names in the case of a couple) but may also be held in a family trust or by a holding corporation. A family trust is created by signature of a notarial trust deed naming three trustees, at least one of whom must be independent (*i.e.*, neither the settlor nor a beneficiary), which identifies the beneficiaries and defines the trustees' powers.

Commercial property may be held in a variety of ways, including directly in the name of the owner, or through a corporation, partnership, limited partnership, unlimited liability company or trust. It may also be held in emphyteusis for up to 99 years, in which case the beneficial and legal (or "bare") ownership, which would otherwise be united in a single owner, are divided among one or more individuals or entities.

#### V. REGULATION AND DISTINGUISHING FEATURES OF EACH TYPE OF OWNERSHIP

##### Corporations

Canadian corporations may be incorporated federally, under the *Canada Business Corporations Act* (the "CBCA"), or under the corporate statute of a particular province or territory (in Québec, the *Business Corporations Act* or "QBCA"). A federal corporation "carrying



on business in Québec”, which definition includes owning immovable property, must register with the Québec Register of Enterprises (the “REQ”), and update that information at least annually, as well as within 15 days of any change. One disadvantage to incorporating federally is therefore the requirement to file two annual returns and pay two annual filing fees, whereas only one return and one annual filing fee are required for a Québec corporation. Additionally, 25% of a CBCA’s corporation’s directors must be Canadian residents; there is no residency requirement for Ontario or QBCA directors.

Another potential disadvantage of incorporation under the CBCA is that all corporations which are not publicly traded are required to maintain “a register of individuals with significant control over the corporation” (an “ISC”). This is defined as any individual who, as registered holder or beneficial owner, controls any number of shares carrying 25% or more of the voting rights attached to all of the corporation’s outstanding voting shares or equal to 25% or more of all of the corporation’s outstanding shares measured by fair market value. Two or more individuals can each be considered an ISC if they have joint ownership or control of 25% or more of the shares in votes or value. The CBCA corporation must maintain a register containing each ISC’s name, date of birth and address, jurisdiction of residence for tax purposes, the day they became or ceased to be an ISC, and a description of why they qualify as an ISC. This information must be confirmed, and updated if necessary, at least annually and may be maintained at the corporation’s registered office or at any other place in Canada designated by the corporation’s directors (such as the law firm where the minute books are maintained). The information is accessible to shareholders and creditors of the corporation or their personal

representatives upon request during the corporation’s usual business hours, and they may obtain an extract from the register on payment of a reasonable fee. The information may not be used by any person except in connection with (i) an effort to influence the voting of shareholders of the corporation (e.g., a proxy solicitation); (ii) an offer to acquire securities of the corporation; or (iii) any other matter relating to the affairs of the corporation. Failure by the corporation as well as its directors and officers to establish or maintain the register without reasonable cause, the recording or provision by a director or officer of false information, and the failure by a shareholder to reply accurately and completely to a corporation’s request for information, are all punishable by fines and a maximum of 6 months’ imprisonment. Similar requirements are at various legislative stages in each province and territory, so this requirement will eventually become universal throughout Canada, regardless of the jurisdiction of incorporation.

#### Unlimited Liability Company (“ULC”)

ULCs, which are similar to American limited liability companies (LLCs), can currently be formed only under the laws of the Provinces of Nova Scotia, British Columbia, and Alberta; however, they can hold property in Québec if they register with the REQ. These entities permit flow-through treatment for profits and losses to their shareholders, although tax treaties may impact the ability to use this. However, Canadian ULCs do not provide limited liability protection, and it is therefore common practice to interpose a single purpose holding corporation between the ULC and its shareholder(s).

#### Partnerships / Limited Partnerships

These are formed under provincial/territorial law by the agreement of the partners in the



case of a general partnership, or the general and limited partners in the case of a limited partnership.

General partnerships do not usually require any other formality in order to be created, whereas a limited partnership generally exists only from its registration date. The partnership agreement or limited partnership agreement, as the case may be, takes the place of the certificate and articles of incorporation and by-laws, and will govern the issuance of partnership units and the operations of the entity.

Typically, in a limited partnership, the general partner (which is often a shell corporation) is responsible for all the obligations and liabilities of the limited partnership. The liability of the limited partners is restricted to the amount of their respective contributions, provided that they do not become involved in the management of the limited partnership. To retain limited liability protection, the limited partner must remain a passive investor rather than an active participant in the operation of the limited partnership.

Both general and limited partnerships formed under Québec law or carrying on business in Québec must register with the REQ and provide information analogous to that required of a corporation.

### Trusts

A trust carrying on a commercial enterprise, such as a business, investment, or real estate trust (whether or not profitable), which is not managed by a registered trustee (such as a trust company) must also register with REQ in the same manner as a sole proprietorship, partnership, or legal person (corporation) within 60 days of beginning operations.

Under draft Canadian legislation expected to come into force in 2023, trusts will be required

to disclose information on each trustee, beneficiary, settlor, and protector of the trust. This includes trusts which own residential properties both within and outside Canada, and those which own shares of private companies that are not currently paying dividends (both of which were previously exempt from the trust filing requirements).

Bare trusts employed to hold registered title to real estate or other assets belonging to third parties, which may not be reflected by a formal trust deed, and which previously did not have to file tax returns, will be required to do so once the new rules come into effect.

As a result of this change, more trusts will have to file an annual Canadian income tax return. The failure to do so could result in penalties for each missing year of up to 5% of the fair market value of the trust's assets, plus interest.

### Nominee or prête-nom agreements

Nominee or "prête-nom" agreements are commonly used in real estate transactions to register property in the name of a nominee corporation, which holds legal title only, with the beneficial ownership retained by the true owner(s). Nominee corporations are often used to collect rent and pay expenses, or to acquire family assets such as a residence. Even if already disclosed in the taxpayer's tax return, all Québec taxpayers must file prescribed form TP-1079.PN disclosing all nominee agreements:

- Signed on or after May 17, 2019, on the later of (i) 90 days following the date of signature and (ii) December 23, 2020; or
- Signed before May 17, 2019 but having income tax consequences continuing on or after May 17, 2019 (e.g., deduction of expenses, attribution of rental income, imposition of a capital gain, principal residence exemption claims, creation of tax attributes such as adjusted cost



base, etc.) by or before December 23, 2020.

Nominee agreements signed before May 17, 2019, but not having income tax consequences on or after that date need not be disclosed.

The information to be disclosed includes the date and a copy (if in writing) of the nominee agreement or other document evidencing same, the identity of the parties, a full description of the transaction (or the series of transactions) covered by the nominee arrangement and the identity of any person or entity for which there are resulting tax consequences. Disclosure by one party to the nominee agreement is deemed to be disclosure by all parties.

Failure to disclose a nominee arrangement can result in an initial penalty of \$1,000 plus an additional daily penalty of \$100 (up to a maximum total penalty of \$5,000). As well, Revenu Québec can suspend the taxpayer's tax assessment period, such that prescription (limitation period) does not begin to run on any tax claims for that period.

## VII. CLOSING COSTS / ADJUSTMENTS

### Mutation ("welcome") tax

The buyer must pay the mutation or transfer tax (colloquially referred to as the "welcome tax") to the Québec Minister of Revenue under the *Mutation Tax Act* (Québec) within 31 days of issuance of the first tax bill, subject to certain exceptions for transfers between related parties (e.g., two spouses, a parent and child, or a corporation and its shareholder, provided the shareholder holds at least 90% of the shares and the buyer does not re-sell or "flip" the property within 24 months of the initial exempt sale).

Mutation tax rates are calculated on the higher of the purchase price and municipal evaluation of the property (both of which are identified in the deed, as is the amount payable, even where

an exemption applies). The 2022 rates are as follows: (i) 0.5% of the first portion of the taxable amount up to \$52,800; plus (ii) 1% of the portion of the taxable amount between \$52,800 and \$264,000; plus (iii) 1.5% of the portion of the taxable amount between \$264,000 and \$500,000; plus (iv) 2% of the taxable amount between \$500,000 and \$1,000,000; plus (v) 2.5% of the taxable amount in excess of \$1,000,000. Québec municipalities are entitled to impose a surcharge of up to 3% for properties having a purchase price or municipal evaluation over \$500,000. This is the case in many cities including Montreal, its suburbs, and surrounding areas. For example, Montreal charges (i) 0.5% on the portion of the purchase price up to \$53,200; plus (ii) 1.0% of the portion of the purchase price between \$53,200 to \$266,200; plus (iii) 1.5% of the portion of the purchase price between \$266,200 and \$532,300; plus (iv) 2.0% on the portion of the purchase price between \$532,300 and \$1,064,600; plus (v) 2.5% on the portion of the purchase price between \$1,064,600 and \$2,059,000; plus (vi) 3.5% of the portion of the purchase price between \$2,059,000 and \$3,000,000; plus (vii) 4% on the portion of the purchase price in excess of \$3,000,000.

Even where an exemption applies, the city has the right to charge a supplemental tax as follows: none if the taxable value is less than \$5000, 0.5% of the taxable value between \$5000 and \$40,000, plus a fixed amount of \$200 if the taxable value exceeds \$40,000.

### Non-residents

As of January 1, 2023, non-Canadian residents will be barred from directly or indirectly purchasing a Canadian residential property for a period of 2 years. These properties will include (i) a detached house or similar building containing up to 3 dwelling units; (ii) a part of a building that is a semi-detached house, row



house unit, residential condominium unit, or similar premises that is intended to be owned apart from any other unit in the building; and (iii) vacant land zoned for residential or mixed uses in a Census Metropolitan Area or Census Agglomeration, but excludes recreational properties outside of Census Metropolitan Areas or Census Agglomeration.

Prohibited purchasers include individuals who are not Canadian citizens or permanent residents of Canada, corporations that are not incorporated in Canada, and corporations controlled by foreign corporations or individuals who are not Canadian citizens or permanent residents of Canada. While the Regulations are not yet finalized, the threshold will probably be either direct or indirect ownership of 3% or more of the value of equity or voting rights of a corporation, or control in fact.

It is anticipated that this prohibition will not apply to (i) binding contracts signed by December 31, 2022; (ii) a non-resident spouse or common-law partner of a Canadian resident where they buy the property together; (iii) refugees; and (iv) temporary residents who meet certain criteria to be set out in the forthcoming Regulations (which may include students and certain foreign workers).

#### Adjustments

The buyer and seller generally adjust for taxes, utilities, and other prepaid expenses as at the date of transfer of ownership. In addition, in the case of commercial property, adjustments are also made for rents, third party operating expenses and common area maintenance expenses.

Typically, the offer and deed will provide that the buyer chooses the notary and pays the notarial fees, including the cost of publication and the provision of notarial copies to both parties. If the purchase is financed, the lender

will choose the notary to receive the deed of hypothec (mortgage), who will ideally also handle the sale, and the buyer will assume those costs. If there are existing encumbrances on the property (*e.g.*, the balance of a hypothecary loan) to be paid out at closing, the notary will obtain a payout letter from the lender, arrange for payment from the sale proceeds and have the prior lender's security radiated, all at the seller's expense.

#### Sales Tax

The sale of a new residential property, or of an existing property that has undergone major renovations, from the builder / developer is subject to the GST and QST, with a partial rebate available for individuals only. If the purchase price is between \$350,000 and \$450,000, then up to 36% of the amount of GST not exceeding \$6300 is refundable. If the purchase price is between \$200,000 and \$300,000, then 50% of the amount of QST not exceeding \$19,950 is refundable.

The sale of an existing residential property which is occupied by its owner and not rented property is not subject to GST or QST; however, if the owner of the property resides in part of it and rents part (*e.g.*, a duplex or triplex), the portion not used by the owner as a residence, determined on a prorated basis, will be taxed in the same manner as the sale of a commercial property.

The sale of a commercial property is subject to both GST and QST, unless both parties declare in the deed that they are registered for both taxes, provide their respective tax numbers, and file an election to have the transaction be treated as non-taxable.

It is the buyer's obligation to collect and remit the GST and QST, so the seller's tax numbers should be verified; if they are invalid, the buyer will be liable to pay these amounts to the tax authorities.



If the seller is not a Canadian resident, the buyer must withhold 25% of the gross proceeds in trust (typically with the officiating notary) until the Canada Revenue Agency confirms the amount to be paid and issues a certificate of compliance (“tax clearance certificate”) when the tax has been fully paid, at which time any excess funds may be released to the seller. A buyer who fails to withhold and remit the required tax could be held liable for the entire amount, plus penalties and interest.

#### VII. RECORDING REAL ESTATE DOCUMENTS

The Québec land register traces all real estate transactions carried out in Québec since its creation in 1830. The overall system is known as the Cadastre du Québec, and the province is divided into various registration divisions, each one of which has its own registry office.

Title can be searched electronically via the Index of Immovables, using the lot number. The municipal evaluation is also generally accessible on-line, depending on the municipality, using the civic address, which will also yield the lot number(s). Copies of the registered deeds may also be ordered on-line.

Leases under Québec law are a personal, rather than a real, right. However, notice of the lease may be published against title. This protects the tenant by ensuring that if the property is sold, the new owner must respect the balance of the term of the lease, including any renewal options. If the lease was not published before the sale, the new owner is only obliged to continue it for the shorter of the balance of the term (not including renewals) and 12 months from the date of the sale. This puts the tenant in a very precarious position, particularly if the premises are desirable and the rental is below market, if the tenant cannot easily find replacement premises, or if the tenant has made significant improvements and cannot recoup their cost.

Since November 8, 2021, all documents to be published at the Land Registry may only be submitted electronically. Land surveyors and bailiffs may submit a digital inscription, in addition to lawyers and notaries, even if they did not prepare the underlying document.

#### VIII. CHARTER OF THE FRENCH LANGUAGE

The *Charter of the French Language* (Québec), as amended by Bill 96 (*An Act respecting French, the official and common language of Québec*) adopted on June 1, 2022, makes French the exclusive official language in the Province of Québec, although other languages (such as English) may be used in certain circumstances and under certain conditions. Several provisions came into effect as of September 1, 2022, with others to follow over the next three years.

Since September 1, 2022, regardless of the date of their signature, all deeds and other documents (example, a notice of lease) submitted for publication at the Québec land registry office must be filed exclusively in French; if filed in a language other than French, they must be accompanied by a certified French translation, failing which they will be rejected.

A contract for the sale or exchange of part or all of a chiefly residential immovable of fewer than five dwellings, or of a fraction of a chiefly residential immovable that is the subject of an agreement or declaration of co-ownership must be drawn up in French but may be prepared exclusively in another language if all parties expressly so agree.

However, the promise to enter into such a contract, as well as the preliminary contract required to be entered into between a builder or developer and an individual purchaser of an existing or planned residential immovable, and the memorandum required to accompany it if the immovable is to be held in co-ownership





(i.e., a condominium), must be prepared exclusively in French.

Furthermore, all supporting documents accompanying a registration request (for example, proof of service of a notice or judgment, a certificate of death, etc.) must be in the French language, or if drafted in another language, must be accompanied by a French version certified by a licensed translator.

IX. ANNUAL COSTS FOR PROPERTY OWNERSHIP

In addition to the purchase price, a buyer must typically budget for the following annual expenses of property ownership:

- A. Property Insurance (including boiler and machinery, fire, damage, and liability).
- B. Property Taxes (municipal, school, water, special assessments); if all or part of the property is rented out, the rental income will be subject to income tax in the hands of the landlord.
- C. Operating expenses (e.g., utilities, maintenance, repairs).

CONCLUSION

Real estate is an area of interest for most people, regardless of their profile and focus, whether as an owner, tenant, landlord, or merely someone who keeps an eye on the economy, as fluctuations in the real estate market are often seen as a reliable barometer of its state and condition.

In addition to demanding a deep understanding of the ever-changing real estate market and conditions, the field covers a vast landscape of legal issues, such as leasing, commercial and corporate law, litigation (including arbitration, mediation, and other forms of dispute resolution), financing, construction, tax, co-ownership and condominium law, municipal law, bankruptcy and insolvency and

environmental law, many of which come into play in any real estate transaction.



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# INTERNATIONAL LAWYERS NETWORK



**PAGBAM | SCHWENCKE**  
Buying and Selling Real Estate in Chile

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CHILEAN LAW

### I. STANDARD FORMS OF AGREEMENTS

1. Offer to Purchase: Offer to Purchase sets forth Buyer's offer of price, date for closing, contingencies for inspections, financing, etc., and date for entering into a formal purchase and sale agreement. Seller may accept, reject, or counteroffer, based on the original offer.

2. Promise to Purchase: The most usual form of agreement to sell and purchase real estate, is through a Promise to Purchase. The Promise to Purchase must detail the terms and conditions of a Definite purchase as thoroughly as possible, and, consequently, the Definite Purchase and Sale Agreement shall contain the same terms set forth in the Promise to Purchase. The key condition contained in the Promise to Purchase to enter into the Definite Purchase and Sale Agreement is that the titles of the property must comply and be according to law.

3. If no Promise to Purchase is entered into and/or or the titles of the property were not properly reviewed, the Buyer may agree to accept the property's titles without actually reviewing them. In this case, the parties often agree on a clause having the Buyer acknowledging this situation and waiving its action to rescind the sale.

4. The most used terms of the Promise to Purchase are:

A. Description of the property: It includes the address / location, boundaries, land tax identification number, and registration number under the competent Real Estate Register.

B. Price and payment form: Buyer and Seller would declare that payment is done in full by the Seller, declaring that the

Seller's obligation to pay is entirely fulfilled at the moment of the deed signing.

Occasionally, the Buyer will pay a portion of the price with a loan granted by a bank or financial institution. The Seller will usually state that the Buyer's failure to obtain credit will not be considered a condition for declaring the agreement void and/or a breach of the Promise to Purchase.

The parties will often agree that the purchase price will be paid through one or more bank instruments left in escrow before the notary public that authorizes the deed of sale, with instructions to deliver said documents to the Seller once the property is registered under the Buyer's name in the competent Real Estate Registrar, with no encumbrances (except known previous encumbrances, such as Co-ownership Regulations or easements) and those warranties granted by the Buyer to guarantee payment of credits taken for the purchase (i.e., mortgages and prohibitions to sell).

If the parties agree that the purchase price will be paid in installments, the Seller will usually not waive its action to terminate the contract and will not grant the Buyer settlement. Once payment is done in full, Seller will often be obliged to both waive its action to terminate and grant settlement to the Buyer's obligation to pay.

C. Form of sale and delivery: This is usually done *ad corpus*, which means, "in its current state". The Buyer declares to acknowledge this situation, and that the property is free of any encumbrances and, in general, any limitation to ownership. However, for large plots, mainly rural real estate, the parties usually agree to review the property's exact surface through a



topographical survey, setting a unitary price per square meter sold, which may eventually result in an adjustment in the price. For example, if the topographical survey reveals that the property's actual surface is less than 2% of the property's surface in its titles, that difference is accepted by the Buyer. If the difference is higher, the Buyer will be entitled to request a proportional price reduction.

Other commonly used conditions include:

- For condominium properties, Buyer will have to submit to the relevant Co-ownership Regulation.
- The property must be delivered empty, with no debts of any kind, i.e., land tax, utilities, common expenses, etc.
- In the case of rural property, it must be delivered without workers of any kind. The Seller guarantees that the labor contracts of any workers of the property have been terminated.

D. Titles: the sale is usually subject to the condition of having the Buyer's attorneys review the legal titles of the property. If the titles do not conform to the Law, said condition fails, and the Promise to Purchase turns void with no party liability.

A review of the property's legal titles seeks to verify, at least, that:

- The Seller, either directly or by adding the possession of the property by prior owners, has owned the property for at least ten consecutive years (being this term the statute of limitations for acquiring real estate).
- The Seller (and prior owners), especially in the case of corporations, were legally entitled to acquire, maintain, and sell the property (i.e.,

corporations are mandated by Law to count with the authorization given by an extraordinary shareholders meeting, of the sale of real estate that represents 50% or more of the company's assets).

- The property is not subject to encumbrances and limitations that may hinder its transfer or its full exploitation and use by the Buyer, due to, for example, leases, seizures, mortgages, prohibitions, mining permits, easements, expropriations, usufructs, environmental conservation rights, co-ownership regulation, etc.
  - Technical and environmental conditions that may affect the transfer or full exploitation and use of the property by the Buyer: For example, farming and forestry subsidies, debts owed to public institutions for land taxes, subsidies, declarations of public utility (which means part, or all of the property may be subject to future expropriation due to eminent domain), or the approval of the exploitation of the property by Environmental Impact Evaluation System (SEIA).
  - In the case of urban real estate purchased for the construction of any building, both the city and the district's land-use master plans must be reviewed to verify if the construction in the property is authorized based on the use of land designated in the master plan.
5. Term and place of execution: the parties will often agree on a term to enter into the Purchase Agreement, usually based on the time necessary for the Buyer's counsel to review the property's legal titles and, when applicable, to obtain financing for the purchase. The parties will also agree on the



notary public's office where the deed will be entered into. In case the property's price is paid partially or entirely with a bank loan, the relevant notary public is usually appointed by the financial institution granting said loan.

6. Guarantees: The usual security to ensure compliance of obligations set forth in the Promise to Purchase (for the Seller, providing the legal titles of the property and signing the deed on the agreed date; for the Buyer, signing the deed on the agreed date and paying the purchase price), the parties provide cross-guarantees in the form of banking instruments with a sum usually equivalent to 10-20% of the sale price, which may only be collected if the other party breaches its contractual obligations.

7. Conflict resolution: Any disagreements between the parties, including any differences regarding the legality or completeness of the property's titles, are usually settled by the ordinary courts of justice or an arbitrator.

8. Formalities: Promises to Purchase may be executed as private documents, or as public deeds. In the case of a public deed, if authorized by the Seller, the Buyer may register the Promise to Purchase under the competent Real Estate Registrar, for publicity matters.

9. Prohibitions: The Seller may also accept, at Buyer's request, to abstain from offering the property to third parties or encumbering it during the term of the Promise to Purchase. If authorized by the Seller, this prohibition may be registered in the competent Real Estate Registrar.

## II. BROKERS

1. Real estate brokerage is an unregulated activity in Chile. No special

qualifications or permits are required to operate as a broker.

2. The common broker's commission rate is 1-2% of the sale price, payable by both the Seller and the Buyer, unless negotiated otherwise.

3. Brokerage is not mandatory. It is usually employed in the sale of used real estate. Sellers of new residential/commercial/industrial/forestry /agro projects hire established brokerage firms to look for potential buyers, and to prepare bidding processes, usually for large properties with commercial/industrial/forestry/agro potential.

## III. BUYER'S INSPECTIONS

1. Inspections are not mandatory, although the Buyer usually performs a visual inspection of the property, to verify its state. Technical checks are not customary but are generally requested for old properties. The Seller usually imposes a sale "as is" of the property, meaning the Buyer accepts to purchase the property in the state verified during visual inspection. Buyer reviews technical information as part of the legal review necessary to confirm the Seller has owned the property, either by her directly or by adding possessions of prior owners, for at least ten years.

2. When buying new property, the Buyer usually inspects the property with an architect to verify any flaws or construction defects, which must be repaired before receiving the property. Additionally, the sale of new property, especially for residential purposes, is subject to Chile's Consumer Protection Act in all aspects unrelated to construction quality. Therefore, the inspection may reveal differences between the conditions offered



by the Seller versus the actual needs of the property, which may configure deceptive advertising and leave the Seller liable for infringing Chile's Consumer Protection Act.

#### IV. FORMS OF OWNERSHIP

1. Residential property is usually held to an individual's name, or the name of a company controlled by the Buyer. Joint ownership is allowed in the percentage determined by the joint purchasers, even if it is not a 50-50% assignment.

2. Commercial property is usually held to a commercial real estate ("*inmobiliaria*") company's name.

3. Rural property is usually held either to an individual's name (especially in case of small plots of at least half a hectare) or to a rural real estate ("*agrícola*") company's name.

#### V. FORMALITIES

1. The purchase of real estate in Chile is categorized in Chilean law as a formal agreement. This means that the transfer of ownership does not happen when the parties sign the Purchase and Sale Agreement, but only when two copulative requisites are fulfilled: i) execution of the Purchase and Sale Agreement through a public deed granted before a notary public, and ii) the deed is then registered at the competent Real Estate Registrar.

2. If any of the parties needs to appear represented by a proxy, for example, in case they are unable to be physically present on the day of execution, a power of attorney must be granted by public deed and said power of attorney must give all the necessary authorities to the proxy, including agreeing the sale price and form of payment, granting settlements and waiving resolutive actions. If the property is owned

by a legally incapable person (such as a minor), the sale must be authorized by the competent judge.

#### VI. CLOSING COSTS/ADJUSTMENTS

1. The notary public's costs for authorizing the Sale and Purchase Agreement are usually borne 50% by each party, unless agreed otherwise. Costs of registering the Sale and Purchase Agreement before the competent Real Estate Registrar are usually borne by the Buyer. The fee paid to the Real Estate Registrar is of 0,002% of the sale price, considering a maximum price ceiling of CH\$ 128,000,000.- (USD 205,000.- approx.)

2. Buyer and Seller adjust for land taxes, which must be paid every quarter. In addition to the previous, if the property is commercial, adjustments are also made for rents, third party operating expenses and everyday area maintenance expenses.

3. Land that has been subjected to agricultural purposes may be subject to taxes and payments derived from obtaining agricultural/forestry subsidies. Those subsidies must usually be respected by the Buyer or previously terminated by the Seller. For example, subsidies for irrigation works make the property owner, even after it is sold by the owner who obtained the subsidy, liable for failure to maintain the irrigation works that were paid through the subsidy.

4. The sale is subject to VAT if the property is sold fully furnished, or in other specific cases, i.e., in case of a rural property, if the Seller obtained fiscal credit derived from investments in the property.

#### VII. OTHER CLOSING DOCUMENTS

1. Condominiums: The Seller will provide the Buyer with a copy of the corresponding



Co-ownership Regulation, in the case of properties that are part of a condominium regulated by Law 19,537 of Real Estate Co-Ownership. The Buyer also usually requires the Seller to provide a certificate, issued by the condominium's administrator, stating that the Seller does not owe any ordinary expenses for his unit.

2. Land tax: Real estate subject to land tax may not be transferred if land tax payments are owed to the National Treasury. Therefore, a land tax debt certificate issued by the Treasury or the Tax Authority showing no outstanding land tax payments has to be attached to the sale deed.

3. Utilities: Seller is usually required to prove to the Buyer that all bills for utilities, such as sanitary services, electricity, gas, cable TV/Internet services have been duly paid and no outstanding debts for these services exist. Buyer may request that some of these services, especially telephone and cable TV/Internet services, be terminated before the sale.

#### VIII. RECORDING REAL ESTATE DOCUMENTS

1. Since real estate must be transferred by a public deed registered before the competent Real Estate Registrar, copies of the deed are always available firstly in the notary public office that legalizes the deed, and then in the competent Judicial Archive, after one year counted from the sale and purchase's date.

2. Regarding the actual registration, the sale deed is registered in the property Registry of the competent Real Estate Registrar, which may then issue copies of the property's registration to the Buyer's name and a certificate evidencing all the liens and encumbrances on the property, including mortgages, prohibitions, seizures,

litigation, easements, usufructs, Co-ownership Regulations, etc.

3. Since the recommended form of transferring property is to settle all obligations that arise from the sale and purchase agreement in the same deed, this must be reconciled with the Seller's interest of not materially delivering the property until he or she receives full price paid, and the Buyer's interest of not delivering the payment of the purchase price until the inscription of the property to the Buyer's name in the Real Estate Registrar is completed. To leave no obligations pending, the parties agree in the Sale and Purchase agreement to state that the Seller received payment in that act, and the Buyer received the property in the same act. Then, along with signing the Sale and Purchase Agreement, the parties will also sign a separate document with instructions to the notary public that legalizes the deed. The Buyer provides the notary with the payment documents, which are left in escrow with the notary public. As instructed, the notary will hand over the payment documents once the notary has verified that the property is registered to the Buyer's name in the competent Real Estate Registrar and that the only encumbrances that lien the property are those that existed before the sale or those granted by the Buyer. If the instructions are not completed in a predetermined period, the notary will be entitled to return the payment documents to the Buyer once the Buyer signs a deed annulling the Purchase and Sale Agreement.

#### IX. ANNUAL COSTS FOR PROPERTY OWNERSHIP

1. Property Insurance: it is not mandatory, but very common. For condominiums, insurance is contracted for the condominium's common property.



When property is purchased through loans by banks or other financial institutions, the lender requires the Buyer to hire fire and earthquake insurance. Unemployment insurance for the Buyer, a natural person, is also usually demanded by financial institutions, which may be enforced contractually but is not legally mandatory.

2. Real Estate Tax: This tax is levied on a property's assessed value. It is an annual tax but can be paid in four installments in April, June, September, and November.





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**GAMBOA, GARCÍA & CARDONA ABOGADOS**  
Buying and Selling Real Estate in Colombia

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER COLOMBIAN LAW

### 1. Standard Forms of Agreements to buy and sell Real Estate:

Despite the existence of several types of agreements to implement real estate transactions in Colombia, the most common forms of agreements used to acquire real estate properties are the promise to sale and purchase agreement and the sale and purchase agreement.

#### *a. Promise to Sale and Purchase Agreement (Promesa de Compraventa)*

Considering that there are some formalities to acquire real estate properties in Colombia and the need of the parties to be bound by a legal document swiftly, regularly the parties enter first into the promise to sale and purchase agreement (the "Promise"). Under this agreement, the parties set the terms and conditions agreed by them to do the transaction of purchase and sale of the property, and the buyer paid a percentage of the price agreed as a down payment of the transaction. Under the Promise, the seller promise to sell, and the buyer promise to purchase the property when some conditions are fulfilled, usually when a specific date arrived, depending on the complexity of the transaction.

The following are some legal requirements to make valid and enforceable the Promise: (i) the agreement must be done in writing; (ii) the object of the agreement should not be prohibited or invalid by law; (iii) it must include the specific date or condition that sets the date to celebrate the purchase and sale agreement which must be done by

public deed. In relation to this requirement, as stated by case law, it is also necessary to indicate the Public Notary and the time where the purchase and sale agreement public deed will be executed; (iv) the agreement must determine the purchase and sale agreement, in such a way that to proceed with the closing of the transaction, only the formalities or the legal means to transfer and delivery the property are missing.

The last requirement mentioned above, refers to the necessity to include in the agreement on one hand, a full description of the property, among others, its identification name, address, boundaries, registration number, tax identification number and, those of the condominium, if applicable, including the public deeds by means of which the property was submitted to the condominium regime. On the other hand, the price agreed by the parties and its form of payment.

Some conditions are included in the Promise to assure its fulfillment, which means the execution of the promised purchase and sale agreement by the parties, the transfer of the property by the seller and the payment of the price by the buyer. Among others, it is common to agree the inclusion of penalty clauses equivalent at least to 20% of the price, escrow accounts, banking letters of credit or, the indication of the down payment amount as a confirmatory payment or prepaid penalty in case of breach of the contract by any of the parties, as



applicable.

b. *Sale and Purchase Agreement (Contrato de Compraventa)*

The sale and purchase agreement (the “SPA”) is the regular form of agreement used to acquire real estate properties. When it is preceded by a Promise, the SPA usually replicates the terms and conditions agreed on the Promise, unless the parties agreed to modify some of those terms. Under the SPA, the seller sells, and the buyer buys the property specified in detail in this agreement for the price set therein, just as it was mentioned before in relation to the Promise agreement.

When the SPA is used to instrument a real estate transaction, it must be done in writing by a public deed executed by the parties before a Public Notary. The SPA by public deed itself constitutes only the title by means of which the transaction is done, however, according to Colombian law, in order to transfer the property title to the buyer it is required the registration of the public deed under its registration number at the Registration Office to which the property is linked (according to geographic location). Only when the public deed is duly registered, the property can be considered transferred, and the main object of the SPA is fulfilled.

The same conditions indicated to guaranty the Promise may be included under the SPA. Those guarantees are included to secure, among others, the registration of the public deed, any breach of the contract in relation to its

reps and warranties or the existence of hidden flaws (*vicios ocultos o redhibitorios*) that could not be detected beforehand under a due diligence process but that may affect the property title after its acquisition.

2. Due Diligence:

In order to have certitude about the legal situation of the property at the time of the transaction, it is highly recommended to proceed beforehand with a due diligence process over the property. Such process should include the revision of the property titles, the urban applicable regulations or a land use analysis, when applicable.

a. *Revision of Property Titles:*

The revision of the property titles is conducted mainly to determine that the seller is the entitled owner of the property and, to rule out the existence of circumstances that affect or may potentially affect the ownership right over that property in case of acquisition (e.g., encumbrances, limitations to the property rights or registered lawsuits). In relation to residential properties, it is important to highlight the existence of some legal figures to protect family housing, such as the Family Housing Assignment (*“Afectación a vivienda familiar”*) and the Unattachable Family Assets (*“Patrimonio de familia inembargable”*) which are indeed encumbrances to the ownership right.

The aforesaid revision refers to those legal acts in relation to the property that are duly registered under the registration number of the property, which are reported under a no liens’ certificate (*certificado de tradición y*



*libertad*). Such certificate should have an issuance date no longer than ten previous days and, in any case, before the execution of any agreement, a new one should be requested and revised to prevent the appearance of recent unknown acts registered after the completion of the due diligence process.

Depending on the criteria used by the legal expert in charge of the due diligence, the revision could refer to the registered acts of the property since the beginning of the transference chain of the property, the last twenty years, or the last ten years. However, such acts that are part of the titles chain referring to encumbrances and property limitations, that have not been duly cancelled or those that reveal some inconsistencies under the certificate, must be revised in detail.

Some other documents are revised under this part of the due diligence process. For instance, proof of payment of property taxes at least of the last five years, its cadastral certificate to verify and compare the information of the property based on the information managed by the public entities.

*b. Urban or Land Use Analysis:*

An urban or land use analysis pretends to verify, according to the applicable urban law, which kind of constructions can be built on the real estate property or which limitations are imposed over the property in relation to its development or use destination. If this analysis is performed over a property that has already a building, it will

determine if the construction complies with the planning regulations applicable at the time of its construction and if the building can have its current or intended destination.

Some of the documents revised in this due diligence are the construction permits and all the urban licenses and urban legal documents of the property, as well as its specific applicable regulations.

**3. Forms of Ownership in Colombia:**

In Colombia, the ownership is the legal right of a person to use, enjoy and dispose over a thing (including real estate properties), without violating the law or the rights of other people. Nevertheless, there are some special forms of ownership in Colombia that are relevant to mention herein.

*a. Fiduciary Trust Property:*

A fiduciary trust is a legal vehicle whereby a settlor transfers the property to a trustee in exchange for fiduciary rights. Usually, but not always, the settlor is at the same time the beneficiary of the Trust. This legal vehicle is usually use for the development of construction projects, but it can also be used as a form of simple ownership. Trust property simplifies the transfer of real estate assets, as the seller is able to assign his fiduciary rights to the buyer by a private agreement, without granting a public deed. It also represents a guarantee for real estate transactions, as the trust property is managed by a trust company that must fulfill fiduciary obligations.



*b. Real Estate Investment Funds and Private Equity Funds:*

A real estate investment fund is a legal and financial vehicle (mutual fund) which mainly invest in real estate properties, in order to generate long-term income and asset valuation which become financial returns for its investors. The real estate investment funds are managed by professional and its investors have their investment represented in participation titles of the fund. The real estate investment funds are highly regulated by the Colombian financial authorities.

*c. Condominium Regime:*

There is a special ownership type called Condominium Regime (*Regimen de propiedad horizontal*) in which exclusive property rights over private property and co-ownership rights over common areas of the property concur, to guarantee the security and peaceful coexistence of the co-owners. This kind of ownership is very usual in the residential or commercial buildings. The main purpose of this type of property is the maintenance of the common areas of the housing or retail project. It constitutes a limitation to the ownership right and generates to the owners of private properties the obligation to contribute to the maintenance of common property areas, through a monthly administration fee which is paid to the condominium administration.

*d. Joint Ownership:*

Joint ownership consists of two or more people owning the same property. This joint ownership is

allocated in each person according to the percentage determined in the public deed by means of which they are acquiring the ownership right over the property. If it is not indicated in the public deed the participation percentage of ownership to which each person is entitled of, it is understood that the ownership right is distributed in equal percentages.

*e. Usufruct:*

There is an ownership retaining usufruct, that consists in the kind of ownership in which the owner conserves the right to dispose over the property but not the right to use and enjoy the property, which are given to another person. The usufruct title is an example of this ownership form.

*f. Rural Property:*

In relation to rural property is important to mention that the acquisition of these kind of properties must consider the accomplishment of legal requirements related to the statutory limitations to acquire rural property in Colombia according to the Colombian agrarian legislation.

**4. Notarial Aspects:**

As it was mentioned before, the transfer of real estate in Colombia must be done with the formality of a public deed held before a Public Notary. Similarly, when fiduciary contracts involving transfer of real estate are constituted, the formality of a public deed must be complied, even though the transfer of fiduciary rights over them can be made by means of a private document. The public deed content is public which means that anyone can access the



information of a real estate transaction.

The process to prepare a public deed begins when the interested party approaching any Public Notary office in the country, since there is freedom of choice except when dealing with transactions in which the state participates as a party, because there it would apply a distribution system to select among notaries. Once the request is made, the officials of the public notary will inquire which legal transaction is going to be held and request the documents required for each specific deal; in the case of the sale and purchase agreements, the required documents are: (i) No liens' certificate (*certificado de tradición y libertad*) of the properties involved in the transaction; (ii) Documents of existence and legal representation of the parties; (iii) Proof of payment of property taxes of the last five years; (iv) No debts certificate issued by the applicable tax authorities in relation to the properties; and, (v) No debts certificate issued by the administration when the properties are subject to the condominium regime.

The deed process takes approximately 5 business days, and the notary fees are regulated by decree for the entire national territory. Afterwards, the public deed must be registered at the Registration Office to which the property is linked.

#### 5. Registration Aspects:

Public deeds in Colombia must be registered to considering transferred the property, because without registration there is no transfer of ownership rights. The registration offices are divided into registry circles that are distributed according to the location of the real estate

properties. The purpose of the registration is to give knowledge to everyone about the transactions and legal acts that have been done or that may affect the property.

The registration process takes about 15 business days and its fees to register are set by the authorities at the national level, however, registration taxes must be paid as well, and they are set by each municipality government, so they may vary among municipalities. To register a deed, the first copy of the document issued by the Public Notary must be taken to the Registration Office of the circle to which the property belongs with the proof of payment of the applicable registration fees and registration taxes. Once the Registration Office receives the documents, it proceeds with the registration after checking that everything was made accomplishing the applicable laws, if not, the Registration Office can make return notes indicating the motifs of such return and/or those aspects that must be corrected before presenting them again for registration.

#### 6. Costs related to Real Estate Property:

##### a. *Property tax (Impuesto Predial):*

It is a tax that municipalities charge annually to real estate properties. In general, the tax authorities set the tax amount to be paid, however, sometimes there is a form of self-assessment in which the owners declare the value of the real estate to set the property tax to be paid, and the tax authority may present or not an objection to such value.



b. *Valuation contribution (Contribución por Valorización):*

It is a tribute that eventually the municipalities charge when they are going to carry out publicworks that may increase the value of a property. For the State, it is a financing mechanism, and it is usually used to finance the construction of city infrastructure, among others, roads, bridges, and public spaces.

c. *Added value tax (Participación en Plusvalía):*

It is a tax charged when by means a public action the municipality generates the possibility that in a property the construction index raised, the destination of the land changed to a more profitable one or, the land is incorporated from urban-to-urban expansion. This tax is set only once by each municipality, and the law defines when its payment become enforceable to theproperty owner.

d. *Administration Fees:*

The administration fees are the amount charged to each private property under a building or a group of buildings subject to the condominium regime. Such amount is intended to cover administration costs such as surveillance, cleaning, equipment maintenance or replacement, public utilities of the building, among others.

7. Brokerage:

The real estate brokerage contract has as object to put potential buyers and sellers in contact to enter a sale and purchase transaction over real estate. Brokerage is a partially regulated activity in Colombia;

however, a license is not required to operate as a real estate broker.

Commission rates are freely agreed by the parties but generally the commission is equivalent to 3% of the sale price of the property when located in urban areas and 5% when located in rural ones.

It is not necessary to have a real estate agent, it is simply an additional activity. However, real estate agents serving under this kind of transactions may help to find the best property and to save time to complete it.



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**CORDERO & CORDERO ABOGADOS**  
Buying and Selling Real Estate in Costa Rica

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## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER COSTA RICAN LAW

### General

Real estate law in Costa Rica is governed by the principles established in the Costa Rican Civil Code for acquiring, selling and in any way disposing of property. The official registration of real property is made through a registry system, which is administered by the Real Property Registry of the Costa Rican National Registry. This system consists of a registration deed system, which provides for the public registration of instruments affecting land.

### Non-Resident Ownership

Property ownership in Costa Rica is an individual right legally protected by our Constitution, which states that no person can be deprived of his or her property unless it is for a necessary public use, in which case it will be compensated. The constitution grants the same rights to foreign citizens. A natural person or legal entity that has acquired property can dispose of it in any way by selling, renting, encumbering, mortgaging, or using it for any desired purpose, as long as it is in accordance with the law and the regulations for land use. All natural persons or legal entities, whether Costa Rican nationals or foreigners, may purchase, sell, own and in any way dispose of property that belongs to them.

### Land Use Planning

Local governments known as Municipalities, govern the use of land in the towns, cities, and rural areas of their jurisdiction. These entities levy and collect real estate ownership taxes, and they pass bylaws and legislation to determine the use that will be allowed for private and public properties. As a consequence, local governments can regulate matters such as the type of construction that can be built, its height, density, and other building requirements. They also issue building and

remodeling permits, requiring that interested parties wishing to carry out any type of construction comply with the established regulations, including zoning laws. Some Municipalities, due to lack of funding, have not been able to legislate on subjects such as land use planning and building requirements. In such cases, the Costa Rican Construction Code and the regulations issued by the National Institute of Housing and Urban Planning will govern construction. Most Municipalities that do have regulations on building and construction abide by the standards and regulations contained in the Costa Rican Construction Code, but specific laws, such as those passed by the Municipalities will prevail over general legislation such as the Construction Code.

### Title Registration

As it was stated above, title registration in Costa Rica is based on a Registry System. This system applies to the entire territory of Costa Rica and therefore all properties must be registered in it. The Real Property Registry contains the registration of all real estate properties and those liens or encumbrances that affect them, such as easements, mortgage liens, encumbrances, and any other sort of limitation on property rights. In order for a property to be sold, it must be duly registered in the Costa Rican Public Registry and possess a registered land map or survey that describes it. Transfers of property as well as the registration of all kinds of deeds relating to real property must be carried out through a Notary Public, who will draft the deed for the desired property transaction, which will require that all interested parties participate in the granting of the deed. Once the deed has been prepared, reviewed, and signed, the Notary will collect from the parties involved funds to pay all the required duties and taxes and will submit it to



the Real Property Registry, in order to have it registered.

### Taxes on Real Property

The local Municipality collects taxes on the ownership of Real Property with jurisdiction over the area in which the property is located. There is an annual tax of 0.25% of the property value declared before the Municipality and, in most cases, payment is collected on a quarterly basis on calendar year. Owners are responsible for the payment of this tax and noncompliance could result in fines, interest, and possible encumbrances upon the property by the local Municipality, leading to possible foreclosure of the property in severe cases. Also, when transferring real property, the Tax Administration and the Public Registry charge a series of taxes and duties that must be paid in order process and register the deed, as follows:

**Transfer Tax:** 1.5% of the highest of: a) fiscal value; b) purchase price.

**Registration Fees:** 0.9% of the highest of: a) fiscal value; b) purchase price.

The indicated taxes and fees represent 2.4% of the property fiscal value or purchase price (highest of) and they must be paid before the deed is submitted to the Property Registry. Since Notaries are private parties who are authorized to perform public functions and vested with public faith, their fees are set by the Costa Rican Bar Association, in conjunction with the legislative power through a specific legislation, which is updated periodically. At this time, Notary fees for the drafting, issuing, and submitting for registration a deed for the sale of a real estate property are set approximately at 1% of the sales price. The notary fees generate a 13% Value Added Tax to be paid by the client.

Transfers of real estate by individuals are not subject to income tax. However, if an individual

sells a real estate which is directly linked to a lucrative activity carried on by this individual, then the proceeds of that sale might be considered as taxable income. The applicable principle is that the law excludes capital gains from gross income, unless the gains are derived from goods or rights that are part of the taxpayer's lucrative activity, or when the gains come from an ordinary activity.

The transfer of real estate is not subject to Value Added Tax because it is a transaction subject to the transfer tax (1.5% of the sale price) according to Law No. 6999, Real Estate Transfer Tax Law, of September 3, 1985, and its reforms and the Law No. 7088, Tax Readjustment and Resolution 18th Central American Tariff and Customs Council, of November 30, 1987, and its reforms. Nevertheless, services associated with the transfer of real estate such as notary fees, brokers fees, etc. are subject to a 13% Value Added Tax.

There are also some properties that are subject to a tax commonly known as "luxury home tax". Every 3 years, homeowners must perform a luxury home tax valuation with the purpose to determine if their house, condominium, or apartment in Costa Rica is subject or not to the Luxury Home Tax. The Tax Administration would first publish the new valuation parameters and criteria required to calculate this tax, at least 45 days before the year end. If the new parameters are not published pursuant to the above set dates, the values and amounts for the previous year will apply. The amount of the tax will depend on the valuation done to the home. The parameters of the tariff may start with 0.25% up to 0.55% of the home value as per the home valuation.

Starting July 1st, 2019, Costa Rica has new tax rules related to capital gains. Capital gains derived from the disposal of a property are taxed at a 15% tax rate. Owners that became



property owners prior to July 1st, 2019, have the alternative to pay 2.25% of the purchase price instead of 15% on the gain. The Costa Rican Tax Code requires the buyer to withhold, declare and pay on behalf of a non-domiciled real estate seller, 2.5% of the sales price to be used as an estimated tax payment towards any tax liability on the gain realized from the sale. Some Sellers may be eligible for an exemption.

There is a whole new chapter that regulates the taxation of capital income and capital gains of Costa Rican source. It is highly advisable to retain the services of a tax advisor and/or an accountant to obtain proper professional advice regarding these new rules.

Taxation is basically the same if ownership of a company (or other entity) owning real estate is transfer. However, it is important to take into consideration that when and if the company or corporation decides to distribute dividends among its members / shareholders, there will be an additional 15% withholding/dividend tax, on top of any ordinary income tax – if applicable – to be paid by the company or corporation.

### **Shoreline Concessions**

In 1973, Costa Rica passed legislation that regulated the ownership, sale and purchase of properties located on the Shoreline. The Shoreline is a strip of land measuring of two hundred meters wide, starting from the line set by the lowest tide and moving inward two hundred meters. Of those two hundred meters, the first fifty have been declared to be of public domain and therefore cannot be owned by any physical or legal person. Access to that fifty-meter strip is free since it is meant to be for public use. The administration of the remaining strip measuring one hundred and fifty meters wide, also known as the Restricted Area, has been awarded to the local Municipalities, who may grant concessions for its use. These

regulations are governed by the Shoreline Zone Act (“Ley Zona Marítimo Terrestre”), which establishes several conditions and regulations instated for the use of concessions granted in the maritime-terrestrial zone. These conditions and regulations are described below.

#### **❖ Requesting a Concession**

Concessions for land use can be requested by those persons who are in valid possession of a property located within the Shoreline Zone or by persons who owns properties bordering on the restricted area.

#### **❖ Limitations to Possessing Concessions**

The Shoreline Zone Act establishes that the following persons and corporations cannot be granted concessions in the Shoreline Zone: i- foreigners who have not resided in the country for at least five years; ii- corporations with bearer shares; iii- corporations registered or established abroad; iv- corporations and entities constituted by foreigners; and v- corporations in which more than fifty percent of the capital stock is owned by foreigners. New legislation is currently being discussed in the Costa Rican Congress to eliminate the prohibitions restricting the concession of shoreline areas to foreigners.

#### **❖ Regulatory Plans**

In order to file a concession request, the area in which the concession is located must have an approved and published Municipal Regulatory Plan. However, due to lack of adequate funding in some Municipalities, local regulatory plan has not been issued and concessions cannot be validly granted. In the face of this obstacle, some investors and real estate developers have opted to prepare a regulatory plan on behalf of the Municipality, assuming the costs involved. Municipalities will most likely accept this kind of offer, as long as the regulatory plan complies



with the conditions set forth by the Municipality.

#### ❖ Procedure to Register a Concession

The procedure to be followed for a land grant or concession consists mainly of submitting a request before the local Municipality. The request will be reviewed, and the land will be inspected, and if approved, the local Municipality will issue a notice that must be published in the official newspaper, providing an opportunity for interested parties to manifest the concerns, complaints or opposition regarding usage rights that may have existed previously. Once this procedure concludes, the Municipality will be able to pass a resolution approving the concession and authorizing the drafting of a contract with the selected beneficiary and such document must also be approved and signed by the Costa Rican Tourism Board. After this contract has been signed, a Public Notary must notarize the contract and file it before the Concession Registry of the Costa Rican Public Registry, to guarantee that the grant will be protected from potential future claims by third parties.

#### ❖ Term of the Concession

Concessions are granted for terms ranging from five to twenty years, but they may be extended for equal time spans if the beneficiary of the concession has complied with the Municipality's requirements and established concession fees have been paid on the required dates.

#### ❖ Payment of Concession Rights

At the moment in which the concession is granted, the Municipality will establish an annual canon (recurring tax obligation) that the beneficiary must pay in order to enjoy the rights granted to him by the Municipality.

### Condominium Property

Condominium property in Costa Rica is governed by the Condominium Property Law

#### ❖ Registration of Property in the Condominium Property Regime (System)

Private property developments may be admitted into the condominium property regime, if the owners have complied with the necessary legal requirements established for this special category of property ownership. The system operates under the principle of one principal or main property from which filial or branch properties will be derived. Each of these filial properties will be assigned a different registration number in the Real Property Registry and the number will always include the letter "F".

#### ❖ Areas Within the Condominium

Two types of areas are established in a condominium property, and together they comprise the total land area of the Condominium: i-Common Areas, which normally are for general use of the condominium owners, but such use may be restricted to only a portion of the owners, depending on numerous variations of the concept and, ii- Private Areas, which belong exclusively to each unit owner, who will have complete domain over the property.

#### ❖ Rights of the Condominium Owner

The unit owner is therefore the exclusive owner of his filial property and owner of a proportional right over the general common areas. Such proportional ownership will be determined by the size of the filial ownership as compared to the total land area of the condominium. No owner can be limited in the use and enjoyment of the general common areas, nor may he claim a preemptive right over other owners for having a larger percentage of ownership of the total property.



### ❖ **Condominium Owners Assembly and Condominium Administration**

The Condominium Owners Assembly is the governing body with maximum authority within any property subjected to the condominium property regime. Its members are the owners of the filial or branch properties and their task is to oversee the general administration of the condominium, including matters such as budgeting, condominium fees, repairs and maintenance and other issues of general interest which will be voted on in the assemblies or meetings that will be called. There is also an administrative entity, which will be in charge of the administration of the condominium, including the collection of condominium fees, maintenance of the common areas, minor repairs, and the judicial and private representation of the condominium. Such functions may either be carried out by a person or by a corporation, as appointed by the Assembly.

### ❖ **Condominiums in the Shoreline Zone**

Condominiums may also be constituted on concession areas within the Shoreline Zone. The most essential requirement for this kind of condominium is that the respective Municipality must have validly granted the concession and that it has been registered in the Concession Registry, in order for it to be submitted to the Condominium Property regime. Expenses such as the payment of the annual concession fee are distributed amongst the condominium owners, and compliance with the dispositions included in the concession contract and provisions of the Shoreline Zone Act will be the responsibility of the Condominium Administrator, who may carry our actions against condominium owners who in any way violate such dispositions.

### **The Gulf of Papagayo Tourist Development Project**

#### ❖ **General**

The area of Bahía Culebra was designated as an area of public interest in August 1979. This declaration allowed the creation of a major tourist development project in June 1982, whose stated purpose was to develop an area dedicated exclusively to tourism projects such as hotels, residences, golf courses, marinas, and other major tourism activities. The land is leased to applicants in the legal form of a concession, much like those granted for the Shoreline Zone described above, but with the special regulations detailed below. This tourist development is known as “Papagayo Gulf Tourist Development” or “Polo Turístico del Golfo de Papagayo.”

#### ❖ **Master Plan**

The project has been developed in strict compliance with the regulations and restrictions contained in the Master Plan to develop the area. Any new projects or development must comply with such regulations and restrictions. These vary in accordance with the location of the project and the tourist activity to be developed. Investors are advised to consult legal counsel before engaging in any activities in this special area.

#### ❖ **Managing Council for the Project**

A Managing Council to oversee the project was also created in the Papagayo Development Law, under the authority of the Costa Rican Tourism Institute. This council reports directly to the Board of Directors and is in charge of directing, coordinating, administering, and controlling the development of the project. The council has a total of five members, three representing the Tourism Board and two persons from the private sector, with experience in tourism,



which will be elected by the Board of Directors of the Tourism Institute.

#### ❖ **Term of the Concession**

Concessions may be granted for a minimum term of ten years and a maximum of fifty. These terms can be extended for equal periods as those granted, as long as the beneficiary of the concession has complied with the obligations stated in the specific concession contract and the laws and regulations that govern a project.

#### ❖ **Procedure to Obtain a Grant, Purchase, Sell or Transfer the Rights to a Concession**

In order to obtain a grant or concession over lands currently owned by the Costa Rican Tourism Board, interested parties must participate in a public bid, which will be reviewed by a technical office reporting to the Board of Directors. This review and recommendations will be presented to the Board of Directors of the Tourism Institute, who will have the final word on the approval or denial of the petition. The approval by the Board of Directors is also required when a request is made to transfer totally or partially, establish a lien or transfer concession rights into a trust.

Concessions that have already been granted to third party applicants may be validly purchased by new applicants and transferred, either totally or partially, by those legally empowered to do so. The transfer of the rights to a concession must be approved by the Board of Directors of the Costa Rican Tourism Institute and those interested in acquiring the rights to a concession must comply with the regulations stated for the original concession as well as comply with all the applicable requirements. The transfer of rights to a concession is made through a public deed in which the representative of the Tourism Board and the

purchaser and seller are present to grant the transfer. This deed is ultimately registered in the Project's Concession Registry, which will be explained in full in the following section.

#### ❖ **Registration of a Concession**

As stated above, once the Board of Directors has approved the granting of the concession, the interested party must register the concession in the Project's Concession Registry. This is a registry, which is part of the Concession Registry, an office under the jurisdiction of the Costa Rican Public Registry. In addition to the registration of new concessions, the Project's Concession Registry will also register mortgage liens, leases, and transfers of concession rights to trusts.

#### ❖ **Financing the Purchase and Development of a Concession**

Through the creation of the Tourism Development Project, all the banks belonging to the Costa Rican banking system were authorized to grant loans to the owners of concession rights in the Project, accepting as collateral the conceded land itself and any improvements or constructions made upon it. This is an incentive for Financial Institutions to provide loans to develop the project since they have the certainty of having sufficient and authorized collateral and they can also count on the legal rights granted to them by the registration of the lien in the Project's Concession Registry, which is a public record registry.



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# INTERNATIONAL LAWYERS NETWORK



**LLPO LAW FIRM**  
**BUYING AND SELLING REAL ESTATE IN CYPRUS**

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CYPRIOT LAW

### A. General

#### 1. Introduction

Cyprus is a common law jurisdiction, and its legal system is based on the UK one. It is a clear and robust system which leaves no uncertainty as to the ownership status of real estate in Cyprus. The Land Registry Office in Cyprus (with district offices in each of the major towns of the island) records and maintains up to date records of ownership and interests over land. In parallel, Cyprus' immovable property law, the cornerstone of real property ownership and transactions related to land, regulates the transfer of title, tenure, registration, disposition, and valuation of immovable properties in Cyprus and the creation of securities, charges, and interests over the same.

#### 2. Land Registry Department

The Land Registry Department was established in 1858 based on the model. It is said to be one of the most reliable and trustworthy worldwide. All rights, interests, and easements (for example mortgages, long leases, rights of way) associated with immovable property, cartography, registration, and of course transfer of title to immovable property, are monitored and registered by the Land Registry Department.

Accordingly, purchasers of real estate property in Cyprus can have full knowledge of the status of the property they are interested to buy, as the information related to their potential purchase can be traced from Land Registry records prior to the completion of the transaction. Their purchase transaction would be registered at the Land Registry.

### B. Standard forms of Agreements

The acquisition of a real estate property could be concluded with the following forms of agreements:

- ✓ **Reservation Agreement.** Usually this effected by a “reservation agreement” whereby the seller grants to the buyer an option to purchase the property within a certain period in consideration of a reservation fee. After paying the reservation fee the property is removed from the sale and reserved for the buyer. The paid amount of the reservation fee is included in the cost of the purchased object.
- ✓ **Sale and Purchase Agreement.** The sale and purchase agreement include the final terms and conditions of the agreement between the buyer and the seller. The contract contains important information about the transaction such as the **payment structure**. Usually an amount of around 20%-30% of the agreed sale/purchase price is payable with the signing of contracts and the balance is payable on the completion date. The **completion date** is the date on which the seller (or his power of attorney) and the buyer (or his power of attorney) will meet at the Land registry to finalize everything (transfer the title deed receive the balance of sale price hand over keys). The Sale and Purchase Agreement must be must duly stamped in accordance with applicable law and must be submitted to the relevant District Land Registry where the property is situated.
- ✓ **Assignment Agreement.** This is typically when the property is a resale. The assignment of a contract of sale has the purpose of assigning the existing legal and





equitable rights of the property in question over to the new buyer. By assigning the rights to the new buyer, the ownership of the property is effectively transferred to the assignee, who shall henceforth have all rights, including the issuance of the title of the property in his name.

The said assignment agreement must be duly stamped in accordance with applicable law and must be submitted to the relevant District Land Registry where the property is situated.

**Stamp Duty:** The sale contract or the assignment agreement must be stamped by payment of the applicable stamp duty calculated on the purchase price (at a rate of 0.15% for €5,001 - €170,000 and 0.2% from €170,001 and over). Stamp duty is customary to be paid by the purchaser.

### **C. Real Estate Agents**

It is common for real estate agents to be involved in real estate transactions. The estate agent profession is regulated in Cyprus and under the law the existing estate agents' fee cannot exceed 5% of the sale price plus VAT. The customary is for the agent's fee to be paid by the seller (except where agreement exists for other arrangement).

### **D. Buyer's Inspections – Property Due Diligence**

Prior to closing, buyers retain the right to inspect the property with their consultants. The buyers may also employ qualified engineers to carry out structural or surveyor to verify the market value of the real estate. It is strongly advisable to conduct a due diligence on the ownership status of the property. Among other checks, the process includes review of a recent official Recent Land Registry search certificate, and copies of the planning and building permits. Where the property purchased

includes a building, expert opinion (from architect or civil engineer), is also advisable to be obtained.

### **E. Forms of Ownership**

Real estate in Cyprus may be owned by a single person, or more persons collectively, it may be leased, and it may be placed under a trust.

#### ***Ownership of the whole***

Where real estate property is owned by one single person, that person is registered with the Land Registry as the sole owner of the whole of the property. The Land Registry issues a separate title deed in the owner's name showing him as owner of the whole 1/1 share in the property.

#### ***Ownership of shares***

Where real estate property is owned collectively by more than one person, they are registered with the Land Registry as co-owners of the whole of the property, with each of them as owner of a specified share in the property (e.g., 1/2, 3/4, 4/56 as they case may be Separation/allocation agreements are possible to be concluded, to designate and regulate the co-owners' rights over the different parts of the property. The co-owners can together lease or sell the property. Each of them has the right to mortgage or sell his share, subject to the rights of first refusal provided under the law for the other co-owners.

#### ***Leasehold Ownership***

Leasehold Ownership confers on the Leasehold title deed holder those rights which are provided in the lease which is deposited with the Land Registry. Such leasehold title deeds can be issued for long leases i.e., 15 years or over and subject to the provisions of the lease, can be sold, transferred, or mortgaged at the holder's option.



### **Trusts and Beneficial Ownership**

The concept of “trust” is recognized under Cyprus law, and it is regulated by both statute and common law principles. Accordingly, real estate property can be made part of the trust estate and afford to the beneficiaries the rights that the settlor provides in the trust instrument. Trusts can be registered with the Land Registry Office over the real estate to which they relate to. The beneficiaries do not hold title over the real estate, as title is registered in the name of the trustee to hold it under the terms of the trust. Trustees are appointed by the settlor. The trustees’ main duties are to administer the trust property prudently and to comply strictly with the terms of the trust. The general rule is that the trustees do not have the power to vary the terms of the trust under any circumstances.

#### ***The Cyprus International Trust (CIT)***

*The Cyprus International Trusts Law has been coming in force in 1992 and the last amendment made in 2013. This legislation ranked the Republic of Cyprus as one of the best jurisdictions for the creation of an international trusts due to their advantages compare to other jurisdictions. The duration of the CIT may continue perpetuity. As provided in the legislation a CIT is deemed irrevocable. It may revoke only if it is clearly provided for such an option in the trust deed.*

#### **Advantages**

Some of the advantages of the CIT are the exemption of the tax, for instance, income, gains, and profits from non-Cyprus sources are exempt from income capital gains tax, special defence contribution or any other taxes in Cyprus. Additionally, worldwide income, profit and gains are taxable in Cyprus only where the beneficiary is a Cyprus tax resident; beneficiaries who are non-residents of Cyprus are taxed only on Cyprus sourced income in

accordance with the Cyprus income tax laws. Dividends received by a CIT are not taxable and not subject to withholding tax in Cyprus. Also, there is no estate duty or inheritance tax in Cyprus.

It is worth to mention that the CIT may be used to protect assets from risks arising in tort, contract or otherwise in relation to transactions entered by the settlor.

#### **Confidentiality and reporting**

The registration of the CIT is necessary, but confidentiality of the beneficiary is safeguarded. There are no reporting requirements in Cyprus for the CITs other than registration of its existence.

#### **Complicated family structures – family wealth management and estate planning**

This scheme is ideal for high-net-worth individuals with somehow complicated family structures

Another form of beneficial ownership is the life interest reservation. This confers on the beneficial owner the right to possess or exploit the tenement for the period of his life while the title is in the name of another. This is usually a course adopted by parents when transferring their land to their children.

#### **F. Closing Cost – Completion**

**Transfer of property in buyer’s name.** The property is transferred in the name of the buyer at such time and upon such terms as stated in the sale contract. It is important to note that for the transfer of the property to be possible (a) the seller must obtain a Tax Clearance Certificate; and (b) Transfer Fees must be paid.

Transfer fees are calculated by the Land Registry on the value of the property (as valued by the Land Registry) as follows:



Value	Rate	Current rate of 50%
€0 - €85.000	3%	1,5%
€85.000,00 – €170.000	5%	2,5%
€170.001 and above	8%	4%

### **G. Recording Real Estate Documents**

The submission of the Contract of Sale or the Assignment Agreement at the District Land Registry, creates in favour of the purchaser a real interest (akin to an encumbrance) over the property and gives to the purchaser the right of “specific performance” of the contract.

### **J. Annual Costs for property ownership**

- a. **Property Insurance:** Usually property owners insure their properties. The cost for insurance varies depending on size and condition of the property.
- b. **Communal Expenses:** This refers to the properties that are consisting part of a unified complex that entails common areas. The cost for communal expenses varies widely depending on location, size of property and the communal area management company.
- c. **Local Authorities Taxes:** Property owner’s falls under either a Municipality’s or a village council’s jurisdiction. Taxes and rates vary depending on which municipality/council the property is located. Taxes roughly range from about €85 to €256 annually, depending on the size of the property. These usually entail sewage, refuse collection, street lighting and other local expenses.
- d. **Immovable Property Tax:** This tax was payable by owners of property to the

Inland Revenue up until the end of 2016. Since 2017, this tax has been abolished.

### **K. TAX**

The main types of tax that may be relevant to a real estate sale and purchase transaction, are VAT and Capital Gains Tax.

**VAT:** VAT may apply at the existing rate of 5%, 19% or it may not apply at all (depending on the type of the property purchased, the intended use by the purchaser and the condition (new or used) of the property).

**Capital Gains Tax:** It is imposed on the seller and is calculated where there is a “gain” from the sale (e.g., where the seller has purchased the property at a lower price and sells it at a higher). Generally, Capital Gains Tax is imposed at the rate of 20% subject to exemptions which may apply to reduce or exclude it.

**Inheritance Tax:** It is abolished in Cyprus since 1/1/2000.

**Taxes in relation to renting a property:** The rental income received from a property which is located in Cyprus is considered for tax purposes as a Cypriot sourced income and as a result is subject to personal income tax and General Healthcare System contributions, irrespective of the owner is tax resident in Cyprus. Depending on the tax residency and domicile status of the owner, rental income may also be subject to Special Defence Contribution.

*It is advisable to consult with a tax expert before concluding a real estate transaction.*

***Disclaimer.*** This note is for general guidance only. Specific legal advice should be obtained in all cases. LLPO Law Firm accept no liability for anything contained in this brochure or for any reader who relies on its content. Before any action or decision are taken by you or your business, you should seek specific legal advice.



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# INTERNATIONAL LAWYERS NETWORK



**PETERKA & PARTNERS**

Buying and Selling Real Estate in Czech Republic

**ILN REAL ESTATE GROUP**

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CZECH LAW

### I. Types of Real Property Transactions

- a) Purchase of an undeveloped plot of land;
- b) Purchase of a developed plot of land;
- c) Purchase of a building (that is not a part of a plot of land);
- d) Purchase of an apartment;
- e) Purchase of a right to build;
- f) Purchase by way of a share deal through a corporation that owns the real estate.

**Note:** The right to build is a *right in rem* related to a plot of land consisting in a right to have an above ground or underground structure on that plot of land, regardless of whether such a structure has already been built or is yet to be built. Under Czech law, a right to build is as an immovable asset.

### II. Essential Contents of the Purchase Agreement

- a. The contracting parties, as well as the purchase price and the payment terms.
- b. Exact description of the real estate, i.e., the land, any fixtures and fittings of the building or apartment and existing appurtenances, easements, pledges, etc. Czech law expressly prescribes how the land and buildings ought to be described in order to be successfully included in the Land Registry. The Land Registry contains all of the necessary components of the description required for the registration; it is thus advisable to extract the required information therefrom.

**Note:** A thorough review of the information lodged with the Land Registry is of major importance when gathering information on the realities of the seller's title to the property, existing mortgages, and possible ongoing proceedings the property may be

subject to. The register also contains records called "notices" which convey important information regarding the registered property or its owners or people holding any other rights to the registered property, for instance – information regarding dispossession, ongoing enforcement proceedings, prohibition of disposition, and prohibition on the establishment of a pledge.

c. Description of the necessary repairs or other regulations the seller/buyer has to comply with.

d. Date when the property was handed over to the buyer or the agreed upon date of transfer of ownership of the property (N.B. the ownership of the property is transferred on the day of registration in the Land Registry retroactively on the day of the filing of the request).

e. The conditions of the change of ownership.

f. Charges on the property.

g. A declaration regarding the mandatory municipal permits, such as, for instance, the occupancy permit determining the purpose of the use of the real estate.

h. Detailed representations and warranties regarding the current rights and titles to the property; substantial characteristics of the property such as: access thereto, access to utilities (gas, electricity, etc.)

i. The Energy Performance Certificate of the building must be obtained by the seller and handed over to the purchaser, it is thus recommended to include it in the purchase agreement as an annex thereto.

**Note:** The parties may choose to include several collateral provisions in the purchase agreement, which may be constituted as rights in rem and registered in the Land Registry. These collateral provisions may facilitate the negotiation of the sale of property by ensuring both parties' specific requirements are satisfied. The parties may choose to include the following collateral provisions in the purchase agreement: (i) reservation of ownership right, (ii) reservation of repurchase, (iii) reservation of resale, (iv) pre-emption right, (v) purchase testing, (vi) reservation of a better buyer. A detailed description of these stipulations exceeds the scope of this article, however, their inclusion in the purchase contract may be very practical in some cases. We will gladly provide more detailed information upon request.

### III. Conclusion of the Purchase Agreement

a. The purchase agreement has to be concluded in writing and the signatures of both parties must be on one document. As the Land Registry office investigates the authenticity of the parties' signatures on the purchase agreement, it is advisable that the parties officially certify their signatures. For the purpose of the registration in the Land Registry (i.e., for the filing of the application for the permission to enter a record into the Land Registry), it is not required that the parties to the contract prove their identities by their officially certified signatures.

### IV. Transfer of Ownership

a. The parties are advised to include in the purchase agreement an agreement on which party is to apply for the registration in the Land Registry. In most cases, it is stated that the seller has to apply for the registration in the Land Registry within a certain period of

time from the conclusion of the purchase agreement.

b. To ensure that the purchase price is transferred to the seller after the registration of the ownership of the property in favour of the buyer, the parties usually deposit the purchase price at a notary, attorney-at-law, or bank. The parties to the contract thus usually also conclude an escrow agreement with the bank, notary, or attorney-at-law, along with the purchase agreement. Under run-of-the-mill escrow agreements, the bank/notary/attorney-at-law is obliged to transfer the purchase price after the fulfilment of the conditions stated in the escrow agreement, which usually include the registration of the buyer in the Land Registry as the owner of the transferred real estate.

### V. Agents

a. The Buyer or Seller may employ the services of a real estate agent. The contract with the agent may be concluded as an exclusive agreement.

b. The real estate agent's commission is generally determined by the market situation and is usually around 3% of the purchase price.

### VI. Forms of Ownership

a. In general, all individuals and legal entities can invest into and own real estate assets.

b. It is irrelevant if the owners and purchasers are residents or non-residents, or which country they come from. However, it is important that the Czech Land Registry recognizes the legal personality of any foreign company or individual.

### A. Acquisitions

a. Real estate can be acquired by way of an asset deal or a share deal. The legal entities

involved in a share deal are mostly organized as limited liability companies or joint stock companies.

## B. Residential Property

Residential property is most often owned by natural persons. Most frequent forms of ownership of residential property by natural persons are:

**1. Sole ownership:** The owner is the only person authorized to control and dispose of the property in question.

**2. Co-ownership:** More than one person owns an undivided share of property. Each co-owner is entitled to dispose of their share.

**3. Community property:** Each of the spouses is entitled to the assets which comprise the community property, but neither is entitled to dispose of the assets independently, i.e., without the consent of the other spouse.

Legal entities, however, often own residential property as well.

## C. Commercial Property

Commercial property is usually owned by private legal entities. Joint-stock companies (a.s.) and limited liability companies (s.r.o.) are the most common forms of legal entities used for the purpose of owning real-estate (or for any entrepreneurial aim, for that matter) in the Czech Republic.

### 1. Limited Liability Company – s.r.o.

d. Most widely used legal form for corporations.

e. Highly flexible, with relatively few obligations.

#### a) Legal Entity

f. A legal entity acts autonomously, represented by executive director(s).

g. Subject to taxation independently of its members (shareholders).

h. The rights and obligations of an s.r.o. exist autonomously from those of the shareholders and the executive directors.

### b) Formation

i. An s.r.o. is founded by way of conclusion of a Memorandum of Association or via a Foundation Deed in the case of a sole shareholder. It has to be notarized.

j. Setting up an s.r.o. is uncomplicated and can be accomplished easily. Registration is done either directly by notaries or via the courts.

k. Under Czech law, it is not mandatory to set up a supervisory board as one of the bodies of an s.r.o.

### c) Costs of Formation

The estimated total notarial costs for the formation of a standard s.r.o. usually amount to approximately CZK 6,800 CZK (€250) (In the case of registered capital – CZK 200,000 (€7,300)) plus court costs, about approximately CZK 6,000 CZK (€220) and fees for legal counsel regarding the drawing up of the Foundation Deed or of the Memorandum of Association. Notarial costs are calculated based on the amount of the company's registered capital. The registration of an established company in the Commercial Register can be performed directly by a notary following the procurement of a certificated notarial deed. In such a case, the total costs of the formation of an s.r.o. are a little lower.

### d) Minimum Registered Capital

l. The minimum registered capital required for an s.r.o. is 1 CZK. It is, however, recommended to set up a company with higher registered capital, which will serve to cover the company's initial expenses and to

avoid having to declare bankruptcy due to lack of funds early on. It is thus recommended to set up a company with registered capital in the amount of at least CZK 100,000 (€3,700).

m. At least 30% of each shareholder's monetary contribution to the registered capital must be paid to a special bank account before the company's registration in the Commercial Register. If the company's registered capital is lower than CZK 20,000, contributions to the registered capital are not required to be paid to a special bank account but may be paid to a contribution administrator.

#### e) Limited Liability

- The shareholders of the entity are not personally liable for the company's debts. The shareholders' liability is joint and several and is limited by the extent of the shareholders' unpaid contributions to the registered capital registered in the Commercial Register at the time they are invited by the company's creditor to satisfy the company's debt.

n. The limitation of liability arises once the s.r.o. has been registered in the Commercial Register.

**Note:** If the corporate share is not yet fully paid, the shareholders must, if need be, pay the outstanding amount privately in full.

o. The company's statutory body is comprised of one or more executive directors.

The executive directors act in all matters on behalf of the company. The manner in which the executive directors are to act on behalf of the company is also registered in the Commercial Register. The Foundation Deed and the Memorandum of Association may

state that the executive directors constitute a collective body.

p. Any internal restrictions of the executive directors' powers are not effective against a third party. Under Czech law, a violation of these restrictions by an executive director will not affect the validity of a contract with a third party, but the s.r.o. may hold the executive director in question liable for damages.

#### 2. Czech Joint-Stock Company – a.s.

q. An a.s. (akciová společnost) is a legal entity in which the shareholders are not liable for the debts of the company during its existence.

r. It is much more complicated to form and to operate than an s.r.o.

s. Hence, the rules governing an a.s. are generally less flexible compared to the rules for forming a limited liability company.

##### a) Formation

t. At least one founding shareholder is required; this may be either an individual or a legal entity.

u. The minimum share capital is CZK 2,000,000 (EUR 80,000).

v. The Articles of Association must be notarized and contain certain mandatory information.

w. Application for registration in the Commercial Register is to be filed with the court with local jurisdiction (i.e., the place where the company is located).

**Note:** Previously, the founding shareholders had to pay a minimum contribution. In the case of cash contributions: each of the founders had to pay at least 30% of the subscribed registered capital by the time of the submission of the proposal to the Commercial Register.



x. Tax registration is to be carried out with the local tax authority.

y. The company must establish a website containing the obligatory information concerning the company without undue delay after its registration into the Commercial Register.

### **b) Structure – 2 options**

z. There are two options regarding the company's structure: (i) the monistic structure, (ii) the dualistic structure. Neither option is implemented in Czech law in their pure forms. The company may freely change its structure by changing its Articles of Association.

aa. The monistic structure is a relatively new option afforded under Czech law. The structure is typical in European countries such as Italy, France and Switzerland, and this structure is also used in European Companies (*Societas Europaea*).

bb. In a Czech Joint-Stock Company with a monistic structure, the Management board fills both the supervisory and executive roles and is the company's only corporate body. Members of the Management board are appointed by the General Meeting.

cc. The dualistic structure, which was originally the only structure used for a joint-stock company in the Czech Republic before 1 January 2014, which is also currently used in Germany, is the more common structure of corporate governance in a joint-stock company in the Czech Republic.

dd. A company with a dualistic structure has a Board of Directors and a Supervisory Board. The Board of Directors is the company's statutory (executive) body which is in charge of the company's business management. Nobody is authorized to instruct the Board of Directors as regards matters linked to business management. The Supervisory Board is the

controlling corporate body supervising the performance of the Board of Directors and the undertakings of the company. Nobody is authorized to instruct the Supervisory Board in controlling matters regarding the Board of Directors.

ee. The General Meeting is the third body of the a.s. in both types of corporate structure. It consists of all company shareholders. Its most important rights consist of (i) electing new members of the Board of Directors in the dualistic structure if the Memorandum of Association does not delegate this right to the Supervisory Board; (ii) electing new members of the Management Board in the monistic structure; (iii) deciding on the distribution of profits and amendments to the Articles of Association.

### **c) Liability**

ff. Only the company is liable towards the company's creditors, not the shareholders.

**Note:** Persons acting on its behalf are liable for the obligations which arise before the company's incorporation in the Commercial Register. If there are more persons acting together, they are liable for such acting jointly and severally. The company can assume the effects of such acts no later than three months from its incorporation and then it is bound by such acts as if it was bound by them from the very beginning.

### **3. Other types of entities**

There are two other types of Companies under Czech law, a Limited partnership company (*k.s.*) and an Unlimited partnership company (*v.o.s.*), these are, however, not often used in real estate transactions.

The same applies to private law associations that are not considered to be legal entities and where the liability of the members is unlimited.

## VII. Financing

- a. The usual method of financing real estate deals is by way of a bank loan/mortgage for at least a part of the purchase price. A bank generally insists on being provided with collateral beforehand.
- b. Usually, the buyer has to cover a certain portion of the price from their own sources. For large development projects, banks usually require a pledge on all possible claims which the buyer can gain in connection with the real estate.
- c. In connection with this, the buyer often has to present the seller with an irrevocable acceptance of loan financing by a reputable bank or show proof of sufficient funds before signing the purchase agreement.
- d. Normally, the mortgage/loan is provided for about 60%, up to 70%, of the purchase price.
- e. For special transactions such as large individual properties or real estate portfolios, a common alternative to a bank loan is the use of capital market products, for instance, bonds, receivables, or credit derivatives.

## VIII. Payments and Costs

- a. The costs and taxes are normally borne by the buyer. However, usually the seller has to bear the costs of deletion of old mortgages from the Land Registry.
- b. Usually, the purchase price is transferred to an escrow account maintained by a notary, a bank, or an attorney-at-law,

whereafter the money gets transferred to the seller following the successful registration of the transfer in the Land Registry.

- c. The tax on acquiring real estate was abolished. No notary or important registration fees are necessary. The necessary official registration stamp is only EUR 100.

- d. Agent fees are usually around 3% of the purchase price.

## IX. Examinations before closing

- a. The buyer is advised to check the title to the property for any potential or actual deficiencies and the financial condition of the seller as well.

- b. Commercial buyers should also check if there are any planning restrictions imposed upon the property, since a construction or alteration as well as change in use or the demolition of a building requires a building permit. The building project has to comply with the content of the local (or regional, as the case may be) development plans. Therefore, with regard to prospective plans of construction, the development and land use should be reviewed very carefully before the closing of the contract.

- c. In addition to this, environmental issues should be checked before closing too.

**Note:** It is highly recommended to undertake a due diligence review before the closing of the contract.



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# INTERNATIONAL LAWYERS NETWORK



**FLADGATE LLP**

Buying and Selling Real Estate in England and Wales

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER BRITISH LAW

### 1. Introduction

Historically, there has been significant investment by overseas individuals and corporations in real estate in England and Wales and in particular in central London, which is perceived as a safe haven for overseas investors. Much of the recent overseas investment has been focused on residential real estate, but there has also been substantial investment in commercial real estate.

This guide applies to real estate in England and Wales, but it is not applicable to other parts of the United Kingdom, namely Scotland and Northern Ireland; or to dependencies such as the Channel Islands or the Isle of Man, which have their own separate legal systems.

### 2. Tenure

Real estate in England and Wales may be any of the following:

#### Freehold

Freehold real estate is the absolute property of its owner, subject to any rights and title covenants in favour of third parties. These may affect how the real estate is used.

#### Leasehold

Leasehold real estate is held under a lease for a fixed period, usually subject to the payment of rent and the performance of obligations or covenants contained in the lease. The terms of the lease will dictate whether or not the leaseholder is entitled to transfer its interest to a third party or whether it can sublet either the whole or part of the real estate.

#### Commonhold

This is a relatively new type of real estate ownership. It allows perpetual “strata” ownership of a multi-occupied residential

property by the individual unitholders, with joint responsibility over common areas and facilities. However, commonhold has, for various reasons, failed to gain traction in the marketplace and is rarely used (although the UK government hopes to revitalise commonhold in the near future). Residential apartments are, therefore, almost always owned under a long lease.

### 3. Know your client (KYC)

It is necessary to carry out due diligence on the purchasing entity to comply with UK Anti-Money Laundering Regulations. The documents which are required will vary depending on the purchasing entity, but they need to establish the identity of the purchaser and its ultimate beneficial owner

### 4. Individual stages in a real estate purchase

It is customary for real estate to be sold by a two-stage process. Firstly, the parties enter into a contract in which the seller agrees to sell the property to the buyer. This process, known as “exchange of contracts”, has the effect of passing the beneficial interest in the property to the buyer. In the second stage, typically about 28 days later, the seller transfers the legal title to the buyer. This is known as “completion”. It is possible, however, for the parties to proceed straight to completion and this is sometimes done when timing is critical.

#### Before signing the purchase contract

After the buyer’s offer has been accepted, but before the purchase contract is “exchanged” (i.e., becomes legally binding), the buyer’s solicitors will negotiate with the solicitors acting for the seller and conduct investigations relating to various matters, such as:

- the form of the purchase contract;



- the title documents, including any leases and other matters subject to which the real estate is being sold; and
- searches with various local authorities or statutory bodies to ascertain matters which may affect the real estate or its use, including environmental matters.

It is important to note that, during this investigatory period, the seller of the real estate generally is not contractually bound to the buyer and is free to deal with other prospective buyers. It may be possible, however, to negotiate an exclusivity agreement that will prevent the seller from negotiating with a third party for a limited period.

A prudent buyer should always commission a structural survey of the real estate, and this should be carried out prior to any exchange of contracts, as generally no warranties are given by the seller as to the state and condition of the real estate. It may also be advisable for the buyer to have soil or other technical investigations made, particularly where a development site is being acquired or where it is possible that the real estate has been used for purposes causing contamination. Environmental protection legislation may require the owner of a contaminated site to incur substantial clean-up costs in respect of waste left by a previous owner, and a tenant can sometimes be liable for such matters under the terms of the lease either directly or indirectly through the service charge.

#### Exchange of contracts

Once the contract has been negotiated and agreed and the buyer's investigations have been completed, the parties will then proceed to "exchange" formal written contracts. It is usual for a buyer to pay a deposit, often but not always of 10% of the purchase price on exchange, which sum is liable to be forfeited if

the buyer does not "complete" (i.e., close) the purchase. Completion of the actual transfer of the real estate follows a pre-agreed period following exchange of contracts, typically about 28 days.

Once contracts have been exchanged, both parties, subject to the terms of the contract, become bound to continue with the transaction and neither party can withdraw. Where the buyer is borrowing all or part of the price, it is highly advisable that the lender's financial commitment is in place before exchange of contracts. The buyer may also need to arrange insurance as from exchange of contracts.

#### Registration of the buyer's title

Following completion, the buyer's solicitor will pay any purchase tax (in England, **SDLT** and in Wales, **LTT**) due on the purchase and apply to the Land Registry to have the change of ownership and any mortgage registered. If the buyer is a company, the mortgage will also need to be registered at Companies House. If the buyer is an overseas entity, details of the entity's ultimate beneficial owners need to be registered at Companies House.

### **5. Lender's requirements**

Each lender's requirements will vary depending on the real estate, the identity of the borrower and the nature of the transaction but, generally, on investment real estate a lender will require the following:

- a satisfactory valuation from the lender's valuers;
- a satisfactory certificate of title from the lender's solicitors confirming that the lender will obtain a good and marketable title to the real estate;
- full information about the proposed borrower, including company accounts (where applicable); and



- where the real estate is bought as an investment, details of the occupiers of the real estate and the passing rents.

## 6. Leasing of commercial premises

Leases of commercial real estate generally fall into one of two categories:

- a building or “ground” lease at a premium for a long period, usually at least 125 years, possibly acquired as a capital investment to be sublet to occupational subtenants; or
- an occupational lease for a shorter term (say, up to 25 years but often these days much shorter) at an open market rent.

Long-term leases of commercial real estate are not uncommon, especially where there are plant and machinery tax benefits (capital allowances) that the freeholder wishes to retain or where the freeholder will not willingly part with the freehold. Residential apartments are also owned by means of a long lease.

The liabilities of a tenant will depend on what is agreed between landlord and tenant and are subject to negotiation. Generally, however, an occupational tenant would expect to be responsible for the costs of repairs, insurance, business rates (local taxes) and outgoings. There may also be an obligation to contribute by way of service charge for services provided by the landlord. The lease is also likely to prevent the tenant from making substantial alterations. The lease may also prevent the tenant from subletting or disposing of the lease to a new tenant without the landlord’s prior written consent.

The rent under an occupational lease generally reflects the open market letting value of the premises and, depending on the length of lease term, there may be rent reviews at predetermined intervals (typically five years).

The rent under a building or ground lease, however, is usually nominal, reflecting the fact that a capital premium has been paid on the grant of the lease.

The occupying tenant of business premises normally has a statutory right to renew the lease on the expiry of the contractual term. This right can be excluded by agreement between the landlord and tenant by following a prescribed procedure. Most underleases and short-term leases (e.g., five years or less) will exclude the right to renew.

Depending on the state of the market and the particular real estate, the tenant of an occupational lease should seek to negotiate:

- an initial rent-free period;
- an unconditional right to terminate the lease early (a “break right”); and
- a limit on service charge payments.

The first draft of a lease will normally be prepared by the landlord’s solicitor and the terms will be negotiated by the tenant’s solicitor who will make similar searches and enquiries to those on a freehold purchase. A landlord will frequently require security if the tenant is an overseas company or a private limited company. This may take the form of a parent company guarantee or a “rent deposit”. A rent deposit is a sum of money equal to (say) six to 12 months’ rent, held by the landlord, to be used by the landlord in the event of a default by the tenant; it will be returned at the end of the lease or in other agreed circumstances.

A well-advised tenant will also want to commission a survey of the premises, especially where the lease requires the tenant to repair and maintain the structure.

A tenant taking a transfer of a lease from an existing tenant is unlikely to have the



opportunity to negotiate the terms of the lease but will have to take it on its existing terms.

An original tenant or a tenant who takes a transfer of a lease originally granted before 1 January 1996 is likely to have to remain liable under its terms for the remainder of the lease period, even though it subsequently transfers it to a new tenant, if there is a subsequent default.

An original tenant or a tenant who takes a transfer of a lease granted on or after 1 January 1996 is likely to have to guarantee any new tenant to whom it transfers the lease for the period that that particular tenant remains the tenant, but its guarantee will cease if the new tenant later transfers the lease to another party.

## 7. Ownership structure

The choice of ownership structure is often tax driven. We look at tax in the next section but here we focus on the non-tax facets of different types of ownership.

### **Personal ownership / Directly held**

**Advantages:** Simple and cost effective. There is no structure to maintain and no annual running costs.

**Disadvantages:** Details of land ownership are held on a central, searchable register at the Land Registry. If owned through a nominee (be they a corporate entity or trustees of a bare trust), only the nominee's details appear on the title, but UK corporate nominees have had to disclose their ultimate beneficial owner on a separate public register (see below) since June 2016. This has now been extended to offshore corporate nominees who now have to register as a trustee on HMRC's Trust Registration Service (not public) and verify their beneficial owners through registration on the new Register of Overseas Entities (ROE) (public). A

UK Will and UK Property and Financial Affairs Lasting Power of Attorney should be considered, to avoid a loss of control over the property in the event of death or incapacity. The asset will be exposed to claims from creditors and potentially also on divorce or relationship breakdown.

### **Company registered in UK**

**Advantages:** Annual running costs are usually less than for offshore registered companies where corporate fiduciaries located in offshore jurisdictions often provide the directors. The company affords limited liability.

**Disadvantages:** Since June 2016, those owning more than 25% of the ultimate beneficial ownership of a company must appear on a publicly searchable register held at the UK's Companies House. Corporate governance documentation, such as company articles and possibly shareholders' agreements, in addition to a Will (a UK Will may not be the most appropriate one in the circumstances) and a UK Property and Financial Affairs Lasting Power of Attorney, may be required in order to regulate who controls the company in the event of death, divorce or incapacity. The shares owned by the ultimate beneficial owner of the company will still be considered in the event of financial claims but pre-emption rights in the company's articles may prevent the shares being transferred to satisfy creditors.

### **Company registered offshore (i.e., outside UK)**

**Advantages:** Following the introduction of the ROE, it is hard to see any advantages over UK corporates.

**Disadvantages:** Annual running costs can be high. Provisions requiring the disclosure of ultimate beneficial ownership, similar to the rules that apply to UK companies, were introduced in August 2022. As with a UK company, local corporate governance



documentation and the most appropriate Will and a Power of Attorney (most likely in the jurisdiction of the offshore company) may also be required to determine who controls the company in the event of death, divorce, or incapacity.

### **Partnerships**

For UK partnerships, the identity of the partners is not disclosed unless the partnership is a Limited Liability Partnership, in which case the members of the partnership will appear on a publicly searchable register at Companies House. Offshore partnerships must register on the ROE and disclose their beneficial owners.

### **Trusts (UK or offshore)**

**Advantages:** Common law jurisdictions often have a significant body of law associated with trusts and their operation, providing certainty as to how they can be used. Trust assets can benefit successive generations. Often beneficiaries do not hold a fixed share of trust assets, so a beneficiary's death or incapacity does not affect the administration of the trust's assets. Appropriately structured trusts may also offer protection against claims by third parties, such as creditors or on divorce or relationship breakdown. Trusts do not have to register on the ROE unless the trustee is a corporate.

**Disadvantages:** Annual running costs can be high. The trust model may, in the opinion of some, confer insufficient control on the person contributing the wealth to the trust structure. In certain trust jurisdictions (especially the UK), the law may be perceived as allowing the beneficiaries to have too much influence. The trustees' fiduciary obligation to act in the best interests of the beneficiaries may prove too constraining. In 2022 The Trust Registration Service was expanded, requiring (broadly speaking) trustees of non-UK trusts who

acquire UK land on or after 6 October 2020 or enter into a business relationship with a 'UK relevant person' (e.g., a UK professional adviser) on or after 6 October 2020 to register. Trusts with a UK tax liability (on or offshore) are required to register in any event.

## **8. Tax implications of ownership structures**

A major consideration for investors. The taxes that need to be considered include:

- In England, stamp duty land tax (**SDLT**) at rates that differ significantly depending on whether the real estate is commercial or residential.
  - For commercial real estate, the rate of tax is 0% on the first £150,000 of the purchase price, 2% on the next £100,000 and 5% on the remaining amount.
  - For residential real estate, for individuals purchasing residential property in England on or after 22 September 2022, the rates are 0% on the first £250,000 of the purchase price, 5% on the next £675,000, 10% on the next £575,000 and 12% on any remaining amount. The relevant rates for purchasers of additional residential real estate (whether buy-to-let property or second homes) are 3%, 8%, 13% and 15% respectively. First-time buyers of properties worth up to £625,000 may pay a reduced rate of SDLT. An additional SDLT surcharge of 2% if certain other criteria are met for non-residents buying residential property in England was introduced on 1 April 2021.
  - Various reliefs may apply, such as a reduced rate of tax for purchasers of multiple dwellings. These are complex and outside the scope of this guide.





- With regard to leases, a 1% rate of SDLT will be due on the net present value of the rent, above £250,000 (residential) or £150,000 (non-residential/mixed), which is calculated using a formula that considers various factors, including the fact that rents to be received in the future have a lower value than rents received immediately.
- For commercial leases, where the net present value exceeds £5m, the rate of SDLT for the proportion of the net present value above £5m is 2% rather than 1%
- A 15% SDLT rate applies to the entire purchase price when residential real estate costing more than £500,000 is acquired by certain “non-natural persons” (NNPs). These include companies and partnerships with a corporate partner but not trustees. Relief from the 15% charge (with the effect that the normal rates apply) may be claimed by NNPs carrying on real estate development or using real estate for commercial renting to third parties. Conditions apply.
- In Wales, land transaction tax (LTT) is payable instead of SDLT. The two taxes (and the reliefs that apply) are broadly similar but there are some technical differences and also differences in the rates of tax that apply:
  - For commercial real estate, the rate of tax is 0% on the first £225,000 of the purchase price, 1% on the next £25,000, 5% on the next £750,000 and 6% on the remaining amount.
  - For residential real estate, the rates are 0% on the first £180,000 of the purchase price, 3.5% on the next £70,000, 5% on the next £150,000, 7.5% on the next £350,000; 10% on the next £750,000 and 12% on the remaining amount. Purchases of additional residential real estate (or purchases of residential real estate by companies) attract an additional 4% on each band. There is no first-time buyer’s relief in Wales.
  - With regard to commercial (but not residential) leases, a 1% rate of LTT is applied to the net present value of the rent above £225,000. Where the net present value exceeds £2m, the rate of LTT for the proportion of the net present value above £2m is 2% rather than 1%.
  - Unlike in England, NNPs of residential real estate do not pay an enhanced rate of LTT.
- Annual Tax on Enveloped Dwellings (ATED) came into effect on 1 April 2013 and is currently payable only in respect of residential properties owned by NNPs worth in excess of £500,000 on 1 April 2012 (or at acquisition if later). From ATED tax year 2018/19, the valuation date changed to 1 April 2017 for properties held on that date. ATED is an annual charge of up to £244,750 per year (as at ATED tax year 2022/23), calculated by reference to real estate value bands. Rates increase in line with the Consumer Prices Index each year. Relief may be claimed by NNPs carrying on real estate development or using real estate for



commercial renting to third parties, commercial trade purposes or as employee accommodation. Conditions apply.

- For interests in UK land (residential or commercial) owned by non-resident individuals or trustees, Non-Resident Capital Gains Tax (**NRCGT**) may be payable at rates of either 18% or 28% (residential property) or 10% / 20% (non-residential property) (rate depends on total UK income and gains) on gains realised on a disposal of the real estate. Main home relief may be available to exempt some or all of the gain if relevant conditions are met.
  - Disposals of interests in UK land (residential or commercial) directly owned by non-resident companies are subject to UK corporation tax. The current rate of corporation tax is 19%. No main home relief can be claimed.
  - From 6 April 2019, disposals of assets deriving at least 75% of their value from UK land (commercial or residential) by non-resident persons who have a substantial (25%) indirect interest in the land are also chargeable to NRCGT or corporation tax (other conditions apply). For example, disposals of shares in 'property rich' offshore companies are caught.
  - In certain situations, re-basing of assets to their 5 April 2019 market value will be applied automatically unless an election is made.
  - From 6 April 2020, disposals of UK residential property interests must be reported, and any CGT paid within 30 days of completion.
- Income tax (**IT**) is payable by individuals on rental income. Various deductions are permitted against rental income, including interest payable on a loan to purchase or improve the real estate. However, from 6 April 2017 a phased withdrawal of interest deductibility applies to individuals (but not companies). Capital allowances may also be available for commercial real estate.
  - UK resident companies are liable to corporation tax on their profits (rental income, capital gains or trading income). As from 6 April 2020, non-UK resident companies are subject to corporation tax on income deriving from UK properties.
  - Inheritance tax (**IHT**). Non-UK domiciled individuals are liable to IHT on their UK situated assets, which includes UK real estate. Holding UK situated assets on death, or gifting them in lifetime, can give rise to IHT liability of 40%. Since 6 April 2017, it is no longer possible to avoid an IHT exposure by holding UK residential property through an offshore company – the company is now effectively transparent for IHT purposes if it is the equivalent of a close company and its value is attributable, directly, or indirectly, to UK residential property. Trusts holding shares in offshore companies with UK residential property interests require review, as they can now be subject to periodic charges to IHT and give rise to IHT issues for settlors who are also beneficiaries. Loans made to third parties to facilitate the purchase of UK residential property can, in certain situations, cause the lender to have an IHT exposure. Certain debts, however, remain deductible



when calculating the value of an asset for IHT purposes.

- Value added tax (**VAT**). This is applicable to commercial real estate only. Commercial real estate is exempt from VAT unless the sale is of the freehold of a new or partly completed commercial property, or the owner opts to tax (which most do in practice). VAT is payable at the standard rate of VAT, which is currently 20%, unless it is possible to structure an acquisition as a transfer of a going concern (**TOGC**). A TOGC is generally

available to a purchaser of investment real estate, but there are conditions that include the buyer registering for VAT and submitting quarterly VAT returns to the UK's revenue authorities.

The interrelationship of each of these taxes and the formalities which need to be complied with are complex and careful consideration needs to be given to their application to the acquisition of any specified real estate. By way of example, the following table compares ownership by an offshore company with personal ownership.

	<i>Ownership by Offshore Company</i>	<i>Ownership by Individual</i>
ATED	Yes, annual charge, depending on value	No
CGT	No	Yes, on disposal on gains. At rates of 18% or 28% (residential) or 10% / 20% (commercial). Relief may be available if property used as main residence
CT	Yes, rental income (mortgage interest will remain deductible) and on disposal on gains at 19%. No main home relief	No
IHT	Participants in offshore company have IHT exposure (40% on death, subject to exemptions and reliefs)	Yes, immediate exposure (40% on death, subject to exemptions and reliefs)
IT	No (see CT above)	Rental income taxed at 20%/40%/45% (the 45% additional rate of income tax is to be abolished from April 2023). No deductibility of mortgage interest
SDLT	Potentially at higher flat 15% rate if purchase price >£500,000. Additional rates apply from 1 April 2021 to purchases by non-UK residents	Stepped rates between 0% and 12%. Higher rates apply to purchases of residential buy-to-let and second residences. Additional rates apply from 1 April 2021 to purchases by non-UK residents

**9. Expenses**

The buyer will have to meet at least the following additional expenses at completion of the transaction:

- Land Registry fees ranging from £20 to £1,105, depending on the value of the real estate. This is significantly less than the registration or cadastral fees payable in most other European countries.



- Legal and other professional fees, which are generally agreed at levels to reflect the purchase price and professional input. These fees will bear VAT at the then current rate (currently 20%), even for overseas investors. Each party usually meets its own professional advisers' fees unless agreed otherwise. A tenant who is subletting or transferring the lease will usually be required to pay the landlord's professional fees for the consent to the subletting or transfer.
- The seller, not the buyer, pays the selling agent's fees. These typically vary from 1%-3%, depending on whether the real estate is commercial or residential, with fees for auction sales generally higher than for private treaty sales. Payment of the agent's fee is normally conditional on completion of the sale.
- Some buyers may instruct a buyer's agent to help them find a suitable property. The fee payable to the agent normally varies from 1-3%. These "finder's fees" are common in the high-end London residential market, where there may be stiff competition for prime real estate.
- Fees incurred in obtaining finance.
- Miscellaneous expenses such as search fees of approximately £1,000-£1,500 per property and bank transfer fees.

## 10. Constraints on development

### Town planning legislation

Development may generally not be undertaken without planning permission obtained under the Town and Country Planning Act 1990 (although there are various exceptions).

"Development" may take one of two forms:

- the making of a material change in the use of land or of an existing building; or
- the erection of new buildings or the extension or other alteration of existing buildings (and, in some cases, the demolition of an existing building).

Applications for planning permission are made to the local planning authority in the first instance and there is a right of appeal to the Planning Inspectorate against a refusal of permission.

Certain additional controls apply if development is proposed within a conservation area or if listed buildings are affected.

### Other controls

The development and use of buildings may be governed by other statutory controls that regulate the quality and form of construction. Building regulations cover the technical standard that building works need to meet and the procedures that need to be followed.

In the case of leasehold land, the lease may have controls on both kinds of development.

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*September 2022*



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# INTERNATIONAL LAWYERS NETWORK



**A&K METAXOPOULOS AND PARTNERS**  
Buying and Selling Real Estate in Greece

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER GREEK LAW

### 1. PROCEDURE – MAIN STEPS OF REAL ESTATE ACQUISITION UNDER GREEK LAW.

Acquisition of a real estate property in Greece includes mainly the following steps:

- Finding of the property to be purchased, with the possible assistance of a real estate agent. Usually, the agent's fee amounts to 2% upon the purchase price but can be negotiated between the parties.
- Obtain a Greek Tax Registration Number. This procedure is simple and does not require the presence of the foreigner in Greece, since it can be carried out by a third party, by virtue of a Power of Attorney.
- Legal due diligence of the property. After having found the property and before proceeding to the execution of any deed or agreement, the purchaser should appoint a lawyer to perform a complete legal due diligence of the property, which includes a detailed audit of the rights of the seller and his predecessors, as well as a research on any possibly existing encumbrances (mortgages, claims, etc.). Legal due diligence is performed with the Land Registry or Cadastre of the region in which the property lies. It is noted that the responsibility for this very important step lies with the purchaser, given that Greek notaries are not obliged to (and will not) perform such a due diligence.
- Technical due diligence. It is performed by a civil engineer and is mostly needed in cases where the property to be purchased is a non-constructed land or lies outside the urban plan. Technical due diligence aims to ensure that the property meets all legal requirements for

the construction of buildings to be allowed, and, in cases where the property to be purchased is already built, to determine whether the already existing building(s) include any illegal constructions which need to be settled, according to the relevant laws.

- Issuance of the required certificates and other documents. In order for a property purchase to take place, a number of certificates must be produced to the notary public, which however pertain to the seller.
- Execution of the notarial purchase deed. In Greece, purchase of any real estate property is performed solely by virtue of a notarial deed. Execution of such a deed takes place before a notary public. The notary public is usually chosen by the purchaser, who also pays the relevant notary fees. Both the seller and the purchaser may either appear in person before the notary in order to execute the deed, or they may appoint someone else to execute it in their name and on their behalf, by virtue of a notarized Power of Attorney.
- Registration of the notarial purchase deed with the Land Registry or Cadastre. In Greece, a purchaser of a property becomes the property's owner *only after* the notarial purchase deed is registered with the competent Land Registry or Cadastre. Such registration entails certain fees which are paid by the purchaser (and their amount is indicated herein below).

### 2. TIMELINE

The time required for the conclusion of a purchase of a real estate property depends on

the complexity of each case. In regular cases, after the property has been found, purchase procedures are normally concluded within a period of 1,5 – 3 months approximately.

### 3. MAIN CONTENT OF THE PURCHASE DEED

- The Contracting Parties
- Detailed description of the property
- Detailed description of the ownership rights of the seller and his predecessors
- The price
- The payment terms in detail
- Other clauses depending on each case.

The notary will read the deed aloud for both parties, but purchase deeds are drafted only in Greek. Therefore, non-Greek-speaking purchasers (if personally attending the execution of the deed) will need to appoint a translator.

### 4. FEES AND EXPENSES CONNECTED WITH THE EXECUTION OF THE NOTARIAL PURCHASE DEED. TO BE PAID BY THE PURCHASER.

- Notarial Fees. They are calculated gradually, as a percentage upon the value of the purchase deed, ranging from 0,80% for the part of the value up to 120.000,00 € to 0,10% for any amount beyond 20.000.000,01 €. Notarial fees are subject to VAT 24%.
- Lawyer's Fees. The presence of a lawyer at the time of execution of the purchase deed is no longer required under law. It is, however, strongly recommended, in order to secure the accuracy of the deed's content in relation to the description of the property, the description of the sequence of rights of the seller and his predecessors, etc. Lawyer's fees for the performance of the legal due diligence

and the attendance of the execution of the purchase deed are agreed between the client and the lawyer and depend on the value of the transaction and the complexity of each case. Lawyer's fees are subject to VAT 24%.

- Registration Fees. The fees for the registration of the notarial purchase deed with the Land Registry or Cadastre amount approximately to 0,475% upon the value of the deed and are subject to VAT 24%.

### 5. FINANCING

The most common way of financing the purchase of a real estate property is through a bank loan. In order to grant a loan, Greek banks examine the financial situation of the purchaser. Greek banks have the current commercial value of the property estimated by a civil engineer of their own choice and grant loans for an amount not exceeding the 70-75% of such estimation. Before the loan is disbursed (directly to the seller) the bank shall register a mortgage upon the property for an amount of approx. 120% of the loan.

### 6. TAX TREATMENT

#### a. Taxes imposed at the time of purchase of the property. To be paid by the purchaser.

- Transfer Tax  
Before the execution of the notarial purchase deed, the purchaser is obliged to pay the corresponding transfer tax. Such tax amounts to 3% upon the value of the property.

It should be noted that Greek Law also provides for an exemption – under certain conditions – from the payment of the transfer tax. This exemption applies only to purchasers that already reside or intend to be established in Greece and fall

into the following categories: (i) Greeks, (ii) repatriates from Albania, Turkey, and countries of the former Soviet Union, (iii) EU citizens and citizens of the European Economic Area, (iv) acknowledged refugees, and (v) nationals of non-EU countries who enjoy the status of long-term residency in Greece.

- Value Added Tax for new buildings

When it comes to new buildings, namely buildings the building permit of which has been issued or revised from 01.01.2006 onwards, a VAT of 24% upon the value of the property shall be imposed at the time of their first sale / transfer by a manufacturer, or by a person who deals professionally with the construction and sale of buildings. In cases where VAT is applicable, the purchaser is *not* required to pay any transfer tax. The application of VAT on new buildings is currently on suspension until 31.12.2022 and the Greek Government has recently announced that they intend to extend this suspension until the end of 2024.

*Important Note: due to frequent legislative amendments in taxation of property, it is strongly recommended that all property related taxes are re-visited and re-calculated before any purchase.*

**b. Annual fiscal obligations of property owners.**

- Real Estate Property Tax (sic: "ENFIA")

Any real estate property located in Greece belonging to individuals or legal entities on the 1<sup>st</sup> of January of each year, is burdened with Real Estate Property Tax. This is the major annual tax imposed on real estate properties. Such tax is calculated on the basis of the surface of the real estate property, its location, etc. When it comes to buildings, it ranges from

to 2,00€ per m<sup>2</sup> to 16,20€ per m<sup>2</sup>, while when it comes to plots of land, it ranges from 0,003 € per m<sup>2</sup> to 9,25 € per m<sup>2</sup>. The Greek Government has applied reductions of 10-30% to such Tax, in proportion to the total value of the real estate properties belonging to the same owner. Such reductions shall apply from the year 2022 onwards.

- Real Estate Duty (sic: "TAP")

This is a special duty imposed upon real estate properties, in favor of the Municipal Authorities. It is calculated by multiplying the value of the property by a rate ranging from 0,25 o/oo to 0,35 o/oo. This duty is collected through the Electricity Bills of the property.

- Special Real Estate Property Tax

This is a special property tax imposed upon legal entities having their registered seat in countries with a privileged tax regime and possessing full or bare ownership or usufruct of properties located in Greece. Such tax amounts to 15% upon the value of the property. This tax has been imposed in order to deal with the phenomenon of tax evasion of offshore companies possessing real estate property in Greece. Law provides for a number of exemptions from the application of the above tax, depending on the type of company and its statute.

- Tax on Income from Property Rents

Annual income from property rents is taxed by a rate of 15% on the amount of income up to 12.000€, by a rate of 35% for the amount of income between 12.001€ and 35.000€, and by a rate of 45% on any amount above 35.001€.





Rents of properties leased for business or professional purposes is surcharged by a stamp duty of 3,6%, which however is usually paid by the lessee, subject to an agreement.

*Important Note: due to frequent legislative amendments in taxation of property, it is strongly recommended that all property related taxes are re-visited and re-calculated as need may be.*

## **7. RESTRICTIONS IN ACQUIRING REAL ESTATE PROPERTY IN GREECE**

- **Cross-border Areas.**

Greek law provides restrictions for the acquisition of property rights in cross border areas of Greece, by individuals or legal entities that are not nationals of the European Union or the European Free Trade Association (“EFTA”). Furthermore, the transfer of shares or the change of partners /shareholders of companies not located in the EU or EFTA that own real estate property in cross-border areas of Greece, is also prohibited. Any such natural or legal persons (which are not nationals of the EU or EFTA) wishing to acquire real estate properties located in cross-border areas, must apply to a special Committee in order to obtain permission to acquire or rent the real estate property. Any transaction taking place in breach of the above provisions is null and void.

The following areas of Greece are considered as cross-border areas, in which the above restrictions apply: Dodekanisa, Evros, Thesprotia, Kastoria, Kilkis, Lesvos, Xanthi, Preveza, Rodopi, Samos, Florina, Chios, Thira (Santorini), Skiros, as well as certain regions of the areas of Drama, Ioannina, Pella and Serres.

Restrictions are lifted depending, in principle, on the legal form of the requested transaction, its monetary value, the exact location or value

of the property, and unless national security reasons exist.

- **Purchase of Islands**

Greek law also provides that in order for a natural or legal person to acquire ownership of or rent a privately owned island or a property located in a privately owned island, they have to apply for the issuance of a permit by the Minister of Defense.

When it comes to public islands, acquisition of ownership is not possible; such islands may only be leased under the same above conditions (prior issuance of a permit by the Minister of Defense).

## **8. IMMIGRATION RULES RELATED TO PROPERTY INVESTMENT**

Greek law provides that a residence permit of 5 years shall be granted to citizens of non-EU countries who are the owners (either personally or through a legal entity established in Greece or in an EU country, the shares of which belong entirely to them) of real estate property in Greece, or who have concluded a timeshare agreement, or have leased hotel accommodations for at least 10 years. The minimum value of the real estate property and the contractual value of the hotel accommodations lease agreement has been set to the amount of 250.000 Euros. Such residence permit may be renewed for an equal period (5 years) for as long as the real estate property remains in the ownership of the non-EU citizen, or the timeshare-lease agreements remain in force.

Said non-EU citizens may be accompanied by their family members (spouse, unmarried children under 21 years old, parents), to whom a separate residence permit may be also granted following their request. Their permit shall be terminated at the same time as the permit of the property owner. To children over



21 years old, a separate residence permit may be granted, having a duration of 3 years, for reasons of family reunification.



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# INTERNATIONAL LAWYERS NETWORK



**SIT, FUNG, KWONG & SHUM**  
Buying and Selling Real Estate in Hong Kong



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER HONG KONG LAW

### Introduction

Hong Kong is one of the most densely populated cities over the world. Due to historical reasons, almost all lands in Hong Kong are leasehold tenures. Over the centuries, the Government leased or granted to individuals or corporations pieces of land for use or for development. Therefore, a sale and purchase of landed property in Hong Kong is in fact a transfer or assignment of a lease. In a sale and purchase transaction, the vendor agrees to sell, and the buyer agrees to purchase both the legal estate and the equitable interest of and in the landed property. This article provides a brief introduction to land law in Hong Kong and sets out a summary of the procedures of the sale and purchase of landed properties in Hong Kong.

### System of Deeds Registration

Unlike other common law jurisdictions, the Hong Kong registration system is not one of registration of title but a deeds registration system. Registration of instruments alone does not confer title but only serves as a notice of having an interest in the landed properties which are affected by the instruments. Instruments affecting landed properties are required to be registered at the Land Registry in Hong Kong in order to have priority over any other subsequent registrable interests in land. While the general rule is that the priority of the registrable instruments shall be determined by the sequence of their respective dates of registration, there is a special rule that priority shall take effect by reference to the date of execution instead of the date of registration if such registrable instruments (excluding charging orders and lites pendentes) are registered within one month after the date of execution. Failure to register a registrable interest will render the same to be null and void

against any subsequent bona fide purchaser or mortgagee for valuable consideration but will not affect the legality, validity, and enforceability of the instrument as between the parties of the unregistered registrable instrument.

### The Procedures of the Common Sale and Purchase of Landed Properties in Hong Kong

#### *Provisional Agreement for Sale and Purchase*

Before a potential purchaser decides to purchase a landed property, he/she usually inspects the landed property (flat/apartment/house) through the arrangement by an estate agent first and considers if he/she requires any financing when purchasing the property. It is advisable that, at least, a rough estimate verbal valuation of the relevant property should be obtained beforehand in order to apply to bank(s) for mortgage loan. Nowadays, a mortgage loan of around 50%-80% (depending on the value of the landed property) of the market value of the property can be obtained. In the circumstance, a purchaser should consider carefully whether he/she can afford to pay for the remaining purchase price and the Ad Valorem Stamp Duty.

When a purchaser agrees to purchase and a vendor agrees to sell a landed property, both parties will enter into a written agreement. In Hong Kong, the preliminary agreement, also known as the provisional agreement for sale and purchase (the "PASP"), is not required by law but commonly used. Such written agreement is usually prepared by estate agents which contains the basic terms such as details of the subject property, parties, consideration, and completion date. Upon signing of a PASP, the purchaser will pay to the vendor or the vendor's solicitors (as stakeholders) a sum being the initial deposit (which is usually 3%-5%



of the consideration) to show his/her sincerity to purchase the landed property. The purchaser will usually register the PASP at the Land Registry (after stamping of the PASP).

The PASP generally contains, inter alia, a standard clause which gives both the vendor and the purchaser a chance to “get out” of the contract after signing the PASP. The vendor is entitled to forfeit the deposit paid by the purchaser if the purchaser decides not to proceed further, whereas the vendor shall refund the deposit to the purchaser and compensate the purchaser with a sum equivalent to the amount of the deposit paid if the vendor decides not to sell the property to the purchaser. However, both the vendor and the purchaser can choose to enter into a “binding” agreement without the chance to get out of the contract unless the title to the property is defective.

Ad Valorem Stamp Duty will be payable on the PASP only when the terms of the formal agreement for sale and purchase (the “Formal ASP”, as hereinafter defined) cannot be finalized and the Formal ASP cannot be signed within 14 days of the signing of the PASP. The Formal ASP is also required to be submitted for registration at the Land Registry.

#### *Formal Agreement for Sale and Purchase*

After signing the PASP, the parties have to appoint their respective solicitors as soon as possible. Solicitors for the respective parties will negotiate and agree on the terms and conditions of the Formal ASP. After execution of the Formal ASP, Ad Valorem Stamp Duty will be payable, and the Formal ASP will be presented for registration at the Land Registry.

#### *Use of Power of Attorney in the Sale and Purchase*

It is common for a purchaser or a vendor to execute a Power of Attorney (the “POA”) in the

sale and purchase of a landed property, especially when the purchaser or vendor is physically unable to be present in person when executing the Formal ASP and/or Assignment (as hereinafter defined). A POA is an instrument that allows a person (or corporation) to give power to an attorney to act for and on his/her/its behalf in performing certain acts or obligations, for example, for the purpose of enabling the sale or purchase of a landed property. To determine whether a POA is in order, a number of criteria has to be fulfilled:- (1) whether the POA has been properly executed; (2) whether the specified power(s) is/are clearly defined therein; and (3) whether the POA is still valid and not revoked as at the time when the relevant instruments such as the Formal ASP and/or Assignment is/are executed. Generally, the validity period for a POA is 12 months from its date of creation.

If a POA is being relied upon by any party in a sale and purchase transaction, it is important for the purchaser’s solicitors or the vendor’s solicitors to produce the POA to the other side for verification. More importantly, it is always advisable to consult your own solicitors before executing the POA to ensure that the proper procedures are observed, especially where the POA will be executed abroad for use in Hong Kong. For POA executed abroad, it is always a good conveyancing practice for the execution of the POA to be witnessed by a notary public and sometimes further authenticated/legalized depending on different jurisdictions.

Notwithstanding the foregoing, a POA might not be applicable or acceptable to all landed property transactions. For example, if a purchaser needs to obtain mortgage loan for financing the purchase of the property, a bank or financial institution may not accept POA when executing the mortgage deed. As such, it is advisable to obtain legal advice and/or consent from the relevant bank or financial



institution prior to the execution of a POA for use in a landed property transaction.

*Title Requisitions: Proving & Investigating Title*

The parties shall abide by the terms and conditions set out in the Formal ASP and prepare for completion after the execution of the Formal ASP. If the landed property is subject to any existing mortgage, the vendor will have to arrange for discharge or release of the existing mortgage before completion to ensure that the landed property shall be sold to the purchaser free from all encumbrances. The purchaser is advised to apply for mortgage loan from the relevant mortgage bank reasonably in advance of completion if he/she requires financing to pay the balance of the purchase price of the landed property.

Prior to completion, unless otherwise agreed by the parties, the vendor shall be under a duty to prove good title to the purchaser of the landed property by (1) delivering to the purchaser all relevant title deeds and documents in respect of the landed property; and (2) satisfactorily answering requisitions on title raised by the purchaser. As previously mentioned, one cannot prove his/her title of the landed property under the said deeds registration system. Hence, it is always the duty of the purchaser's solicitors to check the title to the landed property by perusing all the relevant title documents provided and delivered by the vendor's solicitors. This also explains why lawyers are actively involved in a sale and purchase transaction in Hong Kong. The rights of the purchaser's solicitors to investigate title and to raise requisitions are also generally set out in the Formal ASP. The vendor's solicitors have to satisfy the purchaser of the vendor's good title to the property or the vendor's title agreed to be delivered to the purchaser. The purchaser has the right to insist on a good title being proved and showed and the vendor is

obliged to clear all title encumbrances or to remedy all the title defects upon completion.

*Mortgage Financing*

In Hong Kong, if the purchaser requires financing for payment of the balance of the purchase price, the purchaser will apply for the mortgage loan as soon as practicable before completion and/or even get an indication from the bank(s) before entering into the PASP. When choosing a bank or financial institution for mortgage loan, the purchaser should consider the following (not exhaustive) :-

- (i) the landed property valuation and mortgage amount to be offered;
- (ii) the repayment term, number of installments and the amount of each installment;
- (iii) the criteria for determining interest rates; and
- (iv) the early redemption penalties and the notice period.

Depending on the value of the landed property, the banks or financial institutions usually offer the purchaser a loan of up to 60%-70% of its market value.

Usually, the purchaser's solicitors also act for the purchaser's mortgagee in respect of the mortgage transaction by preparing all the relevant mortgage and security documents.

*Preparation before Completion: Apportionment of the Outgoings*

Before completion, purchaser's solicitors have to make enquiries with the management company or the incorporated owners of the building as to whether there is any outstanding management or other fees payable by the owner of the property. The vendor's solicitors will usually prepare an apportionment account to the purchaser's solicitors to show how all the relevant outgoings will be apportioned



between the vendor and the purchaser. It is common that management fee, rates and Government rent, and rental payment (if any) will be apportioned as at the date of completion. The vendor usually pays up to and inclusive of the actual date of completion. Nonetheless, utility payments such as electricity, gas and water will be dealt with by the vendor and the purchaser with the respective utility companies directly.

#### *Preparation before Completion: Inspection of the Landed Property*

Purchaser will make a final inspection of the landed property through the arrangement with the estate agent before the completion date if the property will be sold to the purchaser with vacant possession. There may be fixtures and fittings which have been agreed to be sold or delivered to the purchaser together with the landed property upon completion. One must note that even if the purchaser discovers that any or part of the fixtures and fittings which have been agreed to be sold to the purchaser is/are not available upon final inspection, he/she is not entitled to terminate the PASP/Formal ASP on this reason alone and the only claim which is available to the purchaser is a claim for damages.

#### *Execution of Assignment*

On completion, the vendor shall execute a deed of assignment (the "Assignment") upon receipt of the purchase money of the landed property. Assignment shall be in the form of a deed. It is required for transferring the legal estate of and in the landed property from the vendor to the purchaser upon completion. In usual practice, the purchaser will execute the assignment in escrow (i.e., to execute the completion documents before completion and the completion documents will only become effective upon all the conditions having been satisfied).

#### *Completion of the Sale and Purchase*

Completion for sale and purchase of the landed property usually takes place by way of solicitors' undertaking. This form of completion places an important reliance on the solicitors by requiring the solicitors giving their professional undertakings (i.e., promises).

On the completion date, the purchaser's solicitors shall deliver the balance of the purchase money in exchange for an undertaking given by the vendor's solicitors to return (1) the assignment duly executed in the purchaser's favour by the vendor; (2) all original title deeds (which relate exclusively to the landed property and are required for giving good title to the landed property) including the release or discharge of the existing mortgage/legal charge (if any); and (3) the keys of the landed property (if vacant possession is agreed to be delivered to the purchaser on completion).

After the vendor has delivered a duly executed assignment to the purchaser, the purchaser's solicitors will then arrange to pay stamp duty on the assignment (which is a nominal sum of HK\$100) and register the assignment at the Land Registry.

#### **Stamp Duty Implications**

Under the Stamp Duty Ordinance (Cap.117) ("SDO"), the vendor and/or the purchaser may be liable for the payment of Ad valorem duty ("AVD"), Buyer stamp duty ("BSD") and Special stamp duty ("SSD") for the sale and purchase of a landed property. However, payments of AVD, BSD and SSD are not mutually exclusive. The following stamp duty implications will have to be carefully considered prior to entering into a sale and purchase transaction in relation to landed property:-

#### *Ad Valorem Duty ("AVD")*



Unless specifically exempted or otherwise provided in the law, the sale and purchase or transfer of more than a single residential property under a single instrument executed on or after 12 April 2017 will be subject to AVD at a flat rate of 15% of the consideration or value of the residential property, whichever is the higher.

Any instrument executed on or after 5 November 2016 for the sale and purchase or transfer of **residential** property, either by an individual or a company will be subject to AVD at the rate set out under “Part 1 of Scale 1” under Schedule 1 to the Stamp Duty Ordinance (Cap.117) (i.e., a flat rate of 15% of the consideration or value of the residential property, whichever is the higher), unless specifically exempted or provided otherwise.

Part 1 of Scale 1 does not apply to an agreement /conveyance for a residential property where the purchaser/transferee is a Hong Kong permanent resident (“HKPR”) (or he/she is a tenant or an authorized occupant of the Housing Authority who acquires the residential property under the Tenants Purchase Scheme) acting on his/her own behalf and does not own any other residential property in Hong Kong at the time of acquisition of the subject property. In those circumstances, only the rate set out under “Scale 2” under Schedule 1 to SDO (i.e., a rate ranging from \$100 to 4.25% of the consideration or value of the residential property, whichever is the higher) will apply to such agreement/conveyance.

Any agreement executed on or after 26 November 2020 for the sale and purchase or transfer of **non-residential** property, either by an individual or a company will be subject to AVD at the rate set out under “Scale 2” under Schedule 1 to SDO (i.e., a rate ranging from \$100 to 4.25% of the consideration or value of the residential property, whichever is the

higher), unless specifically exempted or provided otherwise.

While it is typical for the purchaser to agree to bear the AVD, it is important to note that under the Hong Kong law, the purchaser, the vendor, and any person who uses the instrument will be jointly and severally liable to pay AVD, irrespective of any agreement to the contrary made between them.

#### *Buyer’s Stamp Duty (“BSD”)*

Unless specifically exempted or provided otherwise, BSD is chargeable on an agreement/conveyance for the sale and purchase or transfer of any **residential** property acquired on or after 27 October 2012, except where the purchaser or transferee is a HKPR acquiring the subject property on his/her own behalf. It is the purchaser (not the vendor) who is liable to pay BSD, the rate of which is 15% of the consideration or value of the residential property, whichever is the higher.

#### *Special Stamp Duty (“SSD”)*

SSD is chargeable on a transaction involving the sale and purchase or transfer of a **residential** property if the subject property is acquired on or after 27 October 2012 and resold within 36 months after acquisition. The rate of the SSD payable varies from 10% to 20% of the consideration or value of the residential property, whichever is the higher, depending on when the subject property was resold within those 36 months. The purchaser and the vendor to the property transaction and any person who uses the instrument will be jointly and severally liable to pay SSD.

#### **Sale and Purchase of Property by way of Transfer of Shares**

On the other hand, it has now gradually become a common practice for potential purchaser in Hong Kong to acquire property by way of transfer of shares in a limited company.





Under such arrangement, the vendor, who is actually the shareholder of the limited company, agrees to sell and the purchaser agrees to purchase all the issued share capital and liabilities of and in that limited company. As a result, the purchaser will acquire the property through becoming the shareholder of that limited company in place of the vendor.

Unlike the usual PASP as aforesaid, an agreement for the sale and purchase of shares of limited company is a more complicated legal document. Apart from taking over the shares of a limited company, the purchaser will also have to take over the debts and liabilities of that limited company which is associated with the share transfer transaction. However, such debts and liabilities of the limited company may not be easily discovered by the purchaser unless a thorough due diligence examination of the accounting records and corporate documents of that limited company has been conducted. Further, complications may arise from the share transfer transaction if financing is required by the purchaser. The approach will be totally different from applying for mortgage loan for financing the purchase of a property through a simple sale and purchase as aforementioned.

From a tax perspective, a purchaser may prefer making his/her purchase through a company in order to enjoy lower stamp duty. As mentioned above, purchase of property in Hong Kong may be subject to three types of Stamp Duties, namely, AVD, BSD and SSD. Meanwhile, a share transaction is subjected to a significantly lower stamp duty, which is 0.13% of the amount of consideration or the underlying net asset value of those shares, whichever is the higher.

If parties intend to sell and purchase a property by way of transferring shares of a limited company, it is important that the parties' interests are adequately protected, and comprehensive legal documentation is required.

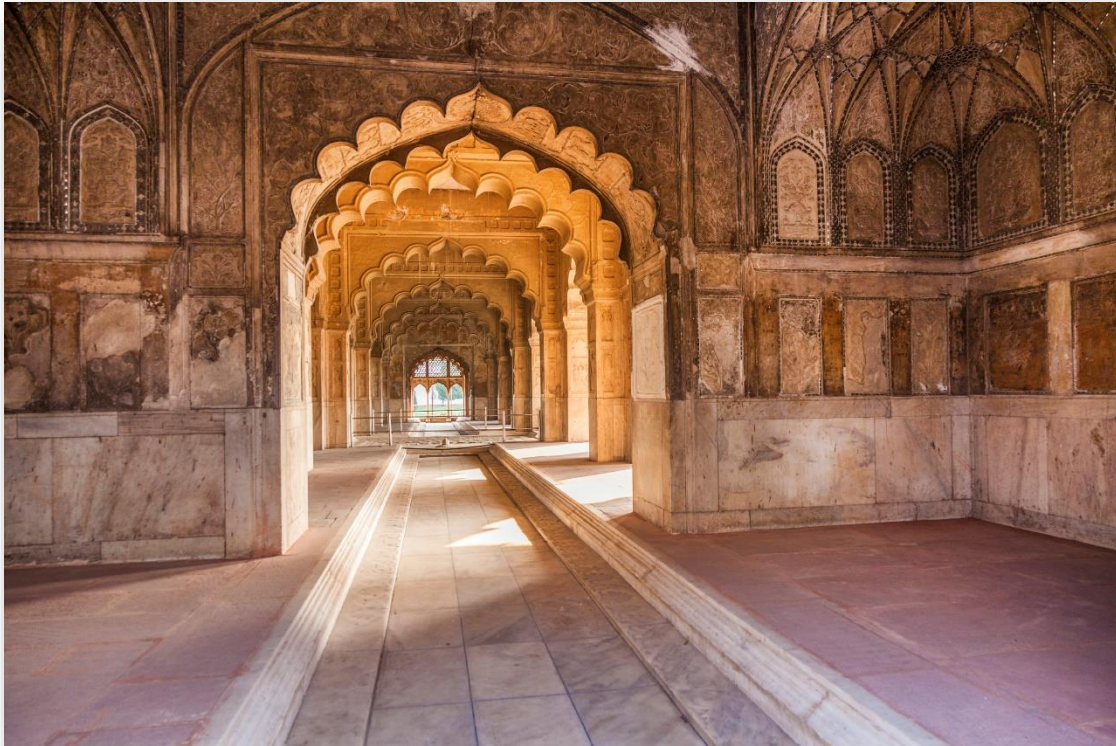
It is advisable to obtain legal advice before acquiring a property by way of share transfer.



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## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER INDIAN LAW

### INVESTMENT AND CONVEYANCE OF REAL ESTATE IN INDIA

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This chapter offers an overview with respect to investment in and conveyancing of real estate in India. The contents of this chapter are not intended to create and do not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

This chapter describes the law and procedure in force in India at the date of preparation of this chapter and the contents, statutes, regulations, and/or rules are subject to amendments and alterations in due course. The author hereby does not assume any duty to update the contents of this guide.

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### 1. INTRODUCTION TO REAL ESTATE IN INDIA

Since the liberalization of Indian economy, the real estate sector has been gradually growing and adopting to technologies that improve the market access, efficiency, quality, and consumer experience. In the last fifteen years, post liberalization of the economy, Indian real estate business has taken an upturn and is expected to grow multifold in the next decade.

The developments in real estate sector has been influenced by the all-around developments in the retail, hospitality, entertainment, education, and information technology sectors. Major factors contributing to this development are favorable demographics, increased purchasing power, existence of customer-friendly banks and housing finance companies and favorable reforms initiated by the government to attract global investors. Further, increase in the business opportunities and migration of the labor forces acting as a fuel has increased the demand for commercial and residential space.



The real estate sector in India is being recognized as a developing sector that is driving the economic growth engine of the country. At present, there are various developments and elevations which are taking place in the real estate sector, on the basis of which Non-Resident Indians and Person of Indian Origin (PIO) have been permitted to own immovable property in India. On this basis, the past and future expected transformation of India, the real estate sector is being looked at as a unique market to invest for a long term with high possible rate of return.

## **2. LEGISLATIONS GOVERNING REAL ESTATE**

Despite there being plethora of laws governing the real estate sector in India, most of the enactments are quite old and major amendments to existing laws are required to make them relevant to modern day requirements and transformations in the ever-changing dynamic sector. The Central laws governing real estate include:

### **2.1. Transfer of Property Act, 1882**

The transfer of Property Act is a central act regulating the transfer of property particularly immovable in nature and enumerates the general principles of realty, like part-performance. The Act also specifies provisions for dealing with property through sale, exchange, mortgage, lease, lien, and gift. A person acquiring immovable property or any share/interest in it is presumed to have notice of the title of any other person who was in actual possession of such property.

### **2.2. The Indian Contract Act, 1872**

This legislation is the primary enactment governing essentials of a contract including parameters to ascertain capacity

of an individual to contract. A contract pertaining to realty can be entered into, among others, by an individual (who is not a minor or of unsound mind, as per the Indian laws), partners of a firm, a corporate legal entity, a trust, a sole corporation, the manager of an undivided family, and a foreigner, however, all the essential requirements of a valid contract, i.e., consideration, intention to contract and validity under the law of the land must be satisfied.

### **2.3. The Registration Act, 1908**

The Act was enacted to ensure conservation of evidence, assurances, title, publication of documents and prevention of fraud. It details the formalities for registering an instrument and specifically enumerates the instruments which are mandatorily required to be registered. An unregistered document, effectuating transfer, will not affect the property comprised in it, nor such unregistered document be received as an evidence of any transaction affecting such property (except as evidence of a contract in a suit for specific performance or as evidence of part-performance under the Transfer of Property Act or as collateral), unless the document/instrument has been duly registered.

### **2.4. The Indian Stamp Act, 1899**

The Stamp Act is a fiscal enactment on the basis of which stamp duties are levied on transactions and the instrument effectuating the transaction, and the same is directly linked to the aforementioned Registration Act. The stamp duty is required to be paid on all instruments which are registered, and the rate varies from state to state. Some states even have double stamp incidence,



primarily on immovable property and then on the development thereupon.

### **2.5. The Real Estate (Regulation and Development) Act, 2016**

The Central Government, through the Ministry of Housing and Urban Poverty Alleviation, has enacted the Act. It is an Act to establish the Real Estate Regularity Authority for the regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, or a real estate sector project in an efficient and transparent manner and to protect the interests of the consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority.

### **2.6. The Indian Evidence Act, 1872**

Under the Act, in the event status of any person as the owner of a piece of immovable property is questioned, of which such person is shown to be in possession of, the burden of proof clarifying that such person is not the owner lies on the person who asserts that person in possession of immovable property is not the owner.

## **3. CATEGORIZATION OF REAL ESTATE**

### **3.1. On the basis of ownership**

#### **3.1.1. Freehold Property**

Refers to an estate which is free from the hold of any entity, besides the owner. In its true essence the owner alone enjoys the complete ownership and can utilize the estate for any purpose (renovate or transfer or lease) in accordance with

the local regulations. In its strict interpretation, sale of such estate will not require any prior legal or government consent and thus has less paperwork attached. For such reasons, a freehold asset is more expensive when compared to a leasehold asset.

#### **3.1.2. Leasehold Property**

Refers to an estate which has been leased to a person for a certain number of years but the estate at all times remains under the ownership of the state. Utilization of the Leasehold estates if affixed to the purpose for which it was obtained. Since the person is possession of such estate is not the owner and property is not freehold, transfer of such estate requires prior state consent (obtained at the land office).

### **3.2. On the basis of land use**

#### **3.2.1. Residential**

Such land is utilized exclusively or intended to be used for family dwelling or associated uses for residential purposes. Zoning for residential use may permit some services or work opportunities or may totally exclude business and industry. It may permit high density land use or only permit low density uses.

#### **3.2.2. Commercial**

Such land is utilized for development of such structures or office buildings, medical centers, hotels, malls, retail stores, warehouses, garages etc.

### 3.2.3. *Mixed Use*

Refers to the provision for undertaking non-residential activity in residential premises/land. Such land allows access to commercial activities in the proximity of the residences and reduces the need for commuting across zones in the city. However, at the same time, it needs to be regulated in order to manage and mitigate the associated adverse impact related to congestion, increased traffic, and increased pressure on civic amenities.

### 3.2.4. *Industrial*

Such land is typically a premise for undertaking industrial activity with non-hazardous, non-polluting performance and may include a group of small industrial units with common services and facilities of non-polluting nature.

## 4. PURCHASE OF IMMOVABLE PROPERTY

In the earlier constitutional regime, the right to property was guaranteed by the Constitution of India as a fundamental right. However, later vide 44<sup>th</sup> constitutional amendment, the right to property was moved from being a fundamental right to be a constitutional right under article 300A. The said article of the Constitution of India embodies the doctrine of eminent domain which specifies that the Government of India has the right to acquire immovable property of person in India in public interest.

A foreign national of non-Indian origin resident outside India cannot buy any immovable property in India. At present, apart from Indian non-residents as specified below, no person who is resident outside

India can acquire any immovable property in India.

- Citizen of India residing outside; and
- Person of Indian origin residing outside.

The aforementioned persons are permitted to acquire immovable property in India, however, cannot acquire agricultural property, plantation property or a farmhouse, provided that the payment for purchase of the same has been made out of:

- Funds received in India through normal banking channel by way of inward remittance from any place outside India;
- Funds held in any non-resident account maintained in India in accordance with the foreign exchange regulations.

## 5. PRE-REQUISITES TO PURCHASE OF IMMOVABLE PROPERTY

### 5.1. Verification of title and ownership of Seller:

Buyer should conduct due diligence over the immovable property to ascertain the existence of the title with the seller, the nature of the title and its marketability and the ability of the seller to convey a clear and marketable title free from any kind of encumbrance over the immovable property.

### 5.2. Verification of identity and authority of Seller

Similar to verification of title to the property, the purchaser must ascertain the identity of the seller and any specific conditions, governing the ability of the seller to convey the immovable property.

### 5.3. Conversion and land use permission

With increasing urbanisation and merging of revenue lands with urban conglomerates, and restriction on purchase of agricultural property by non-agriculturists, conversion of property for non-agricultural usage has assumed crucial significance. In the event actual use of land is different from the notified zoning, it is mandatory to obtain orders from the Town Planning Authority permitting change of land use.

### 5.4. Encumbrances search

Inspection of registers and records at the jurisdictional sub-registrar of assurances, where documents pertaining to immovable property are registered and information available on the official web portal of the Ministry of Corporate Affairs, in case of the seller being a corporate entity, must be conducted as the same will reveal information of any registered encumbrance on the property.

### 5.5. Physical inspection of the immovable property

It is recommended that the purchaser must undertake a physical inspection and confirm the extent and measurement of the immovable property intending to be purchased. In case of a vacant land, it is recommended to identify and demarcate the boundaries and access to the property and further, ascertain any other physical attributes that may impede enjoyment of the property.

## 6. MODES OF CONVEYANCING IMMOVABLE PROPERTY

Conveyancing is the legal process for transfer of ownership of property from a seller to the buyer and this term is used in

both buying and selling of immovable property. Amongst various modes of conveyancing, the most commonly used means of transferring a property in India are:

### 6.1. Sale

Sale is a transfer of ownership in exchange for a price paid or promised or part paid, and part promised. It is pertinent to mention that as per the Transfer of Property Act, 1882 immovable property does not include standing timber, growing crops or grass.

### 6.2. Gift

A gift can be movable or immovable property that is transferable and tangible. As gifting is a voluntary action, the instrument evidencing gift must mention that the instrument has been made voluntarily and out of the donor's own choice without any force or coercion. The deed should also declare that the donor i.e., person who is gifting, is solvent (not bankrupt) and that the gift is being made without any consideration. However, there are certain aspects that need to be kept in mind while making gift – (i) as minor is not capable of entering into a valid contract, so the minor cannot make a valid gift deed; (ii) a gift once made cannot be revoked; (iii) gifts made to relatives defined by the Income Tax Act, 1961 are exempt from tax in the hands of the donee.

### 6.3. Lease

Section 105 of the Transfer of Property Act, 1882 states that a lease of immovable property is a transfer of a right to such property, for a certain time in consideration of the price paid or promised or any other thing of value, to



be rendered periodically on specific occasions to the transferor by the transferee, who accepts the transfer on such terms. In simple terms, a lease is a contract that outlines the terms under which one party agrees to rent property owned by another party. It guarantees the transferor, tenant, use of an asset and guarantees the transferor, the property owned or landlord, regular payments from the transferor for a specific number of months or years.

#### **6.4. Inheritance or Will**

After the death of a person, his property devolves in two ways - according to his Will i.e., testamentary, or according to the respective laws of succession, when no Will is made. In case an individual dies intestate (no Will is made), the laws of succession come into play. The law of succession defines the rules of devolution of property in case a person dies without making a Will. These rules provide for a category of persons and percentage of property that will devolve on each of such persons.

Under the Indian Succession Act 1925, a Will is a legal declaration of the intention of the testator, with respect to his property which he desires to be carried into effect after his death, however certain formalities must be complied with in order to make a valid Will. It must be signed and attested, as required by law. A Will is primarily intended to dispose of property in the manner the Testator desires.

#### **7. REGISTRATION AND MUTATION OF LAND RECORDS**

The registration of a property involves adequate stamping and paying the

registration charges for a sales deed and having it legally recorded at the sub-registrar's office. If the property is purchased from a developer, registering the property amounts of an act of legal conveyance. If it is the second or third transaction for the property, it could involve a duly stamped and registered transfer deed.

The second step after registering a property is Mutation of land records with respect to the same. Mutation refers to the change of title ownership from one person to another when the property is sold or transferred. By mutating a property, the new owner gets the property recorded on his name in the land revenue department and the government is able to charge property tax from the rightful owner. The documentation procedure and the fee payable vary from state to state. In case of ownership related to land, mutation is considered a vital document.

#### **8. REAL ESTATE INVESTMENT TRUST**

REIT is an acronym for Real Estate Investment Trust, which is basically a company which develops and own 'income producing' real estate properties. Initial Public Offering of India's first REIT was launched on 18<sup>th</sup> March'19. Shares of Indian REIT started trading from 01<sup>st</sup> April'19 in Bombay Stock Exchange. REITs are registered with the Securities and Exchange Board of India (SEBI) under SEBI (REITs) Regulations, 2014 (the Regulation) as amended from time to time. The SEBI REITs Regulations, inter alia, set out the registration requirements, procedure of registration, and eligibility requirements of REITs as well as that the primary players. It is mandatory for units of all REITs to be listed on a recognised stock exchange





having nationwide trading terminals, whether publicly issued or privately placed.

REITs are companies that own or finance income-producing real estate in a range of property sectors. They provide all investors the chance to own valuable real estate, present the opportunity to access dividend-based income and total returns, and help communities grow, thrive, and revitalise. REITs allow anyone to invest in portfolios of real estate assets the same way they invest in other industries – through the purchase of individual company stock or a mutual fund or exchange traded fund. The stockholders of a REIT earn a share of the income produced through real estate investment – without actually having to go out and buy, manage, or finance property.

REITs may invest either directly or through a Special Purpose Vehicle (SPV). Where the investment is through a SPV, it is required to hold controlling interest and not less than 50% equity in such SPV. Also, the SPV in turn is required to hold 80% equity in the REIT assets.

Foreign investments have now been permitted in REITs after a circular notification by Reserve Bank of India. The Reserve Bank of India clarified that downstream investment by REITs will be regarded as foreign investment if either the sponsor or the manager is not Indian 'owned and controlled' as detailed in Regulation 14 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017.

## 9. FOREIGN DIRECT INVESTMENT IN REAL ESTATE SECTOR

Foreign Direct Investment in India is governed in accordance with the FDI policy

and norms as laid out and amended from time to time by the Government of India. Furthermore, FDI in India is also governed by the Master circular on foreign investments issued by the Reserve Bank of India and Foreign Exchange Management (Transfer or Issue of security by any person residing outside India) Regulations, 2017 (TISPRO). The 'Consolidated FDI Policy Circular' is issued annually by the Department of Industrial Policy and Promotion (DIPP) of the Ministry of Commerce and Industry which elaborates the policies and processes with respect to FDI in India.

At present, 100% FDI under automatic route is allowed for construction development projects including but not limited to development of townships, roads or bridges, hotels, resorts, hospitals etc. However, it is important to note that FDI is not permitted in an entity which is engaged in Real Estate activities or construction of farmhouses. However, it has been clarified that the Real estate business shall not include the development of town shops, construction of residential/ commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

The present FDI policy also stipulate that each phase of the construction development project would be considered as a separate project. Further, the investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e., roads, water supply, street lighting, drainage, and sewerage. However, a foreign investor can exit and repatriate foreign investment before the completion of project under automatic



route, provided that a lock-in period of 3 years has been completed.



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# INTERNATIONAL LAWYERS NETWORK



EXP LEGAL – ITALIAN AND INTERNATIONAL LAW FIRM  
BUYING AND SELLING REAL ESTATE IN ITALY

ILN REAL ESTATE GROUP

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ITALIAN LAW

### I. INTRODUCTION

This brief guide has the goal to provide legal explanation on the main aspects of the real estate transactions in Italy.

### II. REAL ESTATE TRANSACTIONS ACCORDING TO ITALIAN LAW

#### Land

There are different types of land that can be purchased, such as agricultural or building lands. Although these are always and, in any case, real estate sales, rules and taxation may vary according to the classification of the land.

For agricultural lands, it is possible to build under certain conditions; the agricultural land can be transformed into building land at the discretion of the Municipality.

#### Residential properties

The most common forms of residential property purchase and sale concerns independent units or property inside a condominium.

Residential properties are known to be a low risk and medium yield investment option. It is possible to buy a property to refurbish and sell, or to rent.

#### Commercial properties

The purchase of a commercial property essentially recalls what has been indicated above for residential properties, although obviously not for residential use.

Commercial properties are a medium to high yield investment option and are associated with longer leases (6 + 6 – year period or 9 + 9 – year period).

### III. METHODS OF SALE AND PURCHASE

#### III A) Private sale

A real estate may be sold and purchased through a sales agent or by private sale directly between a seller and a purchaser.

##### 1. Assistant of a Real Estate Agent (“REA”)

REAs are usually appointed for the research of a residential and commercial property in Italy.

REAs charge a commission that usually varies from 3% to 6% of the purchase price.

REAs accompany to visit/s the real estate and provide the preliminary basic information, including legal information and the main conditions established by the seller to complete the sale.

If the real estate meets the purchaser’s approval, purchaser is requested to sign a binding unilateral offer to purchase (“Unilateral Offer”).

This is usually a form produced by the REA, containing the purchaser’s offer to buy the real estate for the price requested by the seller.

In the majority of the cases the Unilateral Offer is issued together with the deposit in the REA’s hands of a bank check representing a percentage of the sale price, that will be utilized as part of the payment of the purchase price.

The bank check, depending on the case, may be cashed by the seller when accepting the Unilateral Offer or in one of the following steps of the deal.

It is important to underline that the Unilateral Offer is binding for the purchaser only, until the seller declares in writing to accept it.

One of the most delicate issues relating to the Unilateral Offer is that the standard form

utilized by the REAs are not usually accurate legal documents and often miss relevant element of the sale i.e., existence of mortgages or other burdens and encumbrances; condominium debts; regularity of the construction from the applicable real estate construction laws; litigation on the ownership of the real estate etc.

Thus, the Unilateral Offer should be properly examined to avoid that it is not enough protective for the purchaser and is enforceable also in case one or more of the previously mentioned problems is disclosed after the Unilateral Offer is accepted (or to be granted that if this happens the deposit will be returned to the purchaser).

## 2. Preliminary Agreement

The preliminary agreement is the key step for the purchase of real estate, and it is a contract utilized when the REAs assistance is present too.

The preliminary agreement is drafted after the seller delivers to the purchaser all the documentation and information pertaining to the real estate, such as the title of property, mortgages and encumbrances, the condominium's account reports when appropriate, compliance with construction laws and regulations, existence of proper concessions and authorizations for possible refurbishment, compulsory energy certification, and other details delineated on a case-by-case basis.

The supply of the above-mentioned documentation and information allows the purchaser to conduct a due diligence whose results will be the basis for the drafting of the final deed of sale or for the execution of the pre-closing activities that may be necessary to legally transfer the property of the real estate to the purchaser without limitation or conditions (cancellation of mortgages, payment

of condominium arrears, regularization of construction irregularities etc.).

At the time of the signature of the preliminary agreement, the purchaser makes a down payment that constitutes an anticipation of the purchase price, that varies depending on the conditions of sale and is usually between 20% and 40% of the price.

The down payment (so called "*caparra*") has also the function of a guarantee, on behalf of both parties, for the execution of the final deed of sale.

With the preliminary agreement, the parties will also agree on the timeframe for the execution of the final deed of sale.

In some cases, it is worthwhile to register the preliminary agreement in the Real Estate Public Register to avoid that, pending the term for the execution of the final deed of sale the seller, breaching the preliminary agreement, sell the same real estate to a different purchaser or that seller's creditors attack the real estate with mortgages or seizures.

Since the moment of the registration, the real estate remains fully available for the purchaser and is not available for any third person right or demand.

The registration of the preliminary agreement is advisable for example when the "*caparra*" is particularly high, or the term for the final deed of sale is far away, or lack of trust on the seller, or risk of seller's bankruptcy .

## 3. Notarial Deed of Sale

The role of the Notary in the real estate transactions is compulsory since a legally and fully valid deed of sale enforceable toward the seller and any third party must be executed by a public Notary.

On the other hand, the Notary has also a role of guaranteeing the regularity of the transfer of ownership.

The Notary must verify the respect of all the compulsory provisions that regulates the legal transfer of real estate and the details of the sale.

In order to validly stipulate the final deed of sale, under penalty of nullity of the deed itself

- in the case of land: the seller shall produce the certificate of urban use (so called "*certificato di destinazione urbanistica*");

- in case of properties: the deed must include the details of the license or building permits/concessions according to the age of construction; for works executed prior to September 1, 1967, the seller may render a declaration about the date of construction without need to report the details of license/concession/permit.

It is also necessary that the conformity with urban-cadastral planning of the properties be documented or declared.

The Notary is also in charge for:

- drafting the final deed of sale, based on the preliminary agreement;
- confirming in the deed of sale that the payment has been duly completed and the contract therefore constitutes an acknowledgment and evidence of the payment;
- registration of the deed and assessment and payment of stamp duties;
- registration of the transfer of the ownership on the name of the purchaser with the Real Estate Registry and with the Real Estate Land Registry.

These two last formalities conclude the process of ownership transfer.

After the mentioned formalities are completed, the purchaser has in his/her hands the document that testifies the title of property and if all the steps are duly completed has all the rights for future disposal of the real estate.

Although the role of the Notary is neutral with respect to both the parties, it is usual that the Notary is appointed and paid by the purchaser.

### III B) Auction

An important segment of the real estate market is made up of auction sales, resulting from real estate foreclosures.

The methods for participating to an auction for the purchase of real estate are as follows:

#### 1. Consultation of portals / publications

It is possible to consult the internet portals connected to the Courts, with reference to the place of interest, on which the announcements relating to the auction sales of the foreclosed properties in the various executive procedures are published; or, alternatively, printed publications, available free of charge at the Courts or available for purchase at kiosks.

#### 2. Report consultation

Once the asset of interest has been identified, it is advisable to read the report drawn up by the consultant appointed by the judge, to assess the condition of the real estate.

#### 3. Judge's ruling

Of extreme importance is the examination of the sale order issued by the Judge, which contains the conditions for the offer, including i) the amount of the deposit to be paid, which shall not exceed one tenth of the target price and the term within which to pay it, ii) the minimum amount of the increase to be made to the offers, iii) the term, not exceeding sixty days from the

award, within which the price shall be deposited and the methods of deposit, iv) the date and place where the auction will be held. Everyone, except the debtor, can submit an offer for the purchase of the foreclosed real estate, personally or by means of a solicitor, in the registry of the property enforcement section of the competent Court.

The offer must be filed in a sealed envelope, on the outside of which are noted, after identification, of the person who materially provides for the deposit, by the receiving registrar, the name of the execution judge or the delegated professional and the date of the hearing fixed for the examination of the offers.

#### 4. Opening the envelopes

If the sale takes place by auction at the hearing set in the sales order, the judge's delegate will open the envelopes, or the envelope in the case of a single offer.

In the latter case, if the offer is equal to or higher than the value of the property established in the order of sale, the same is certainly accepted; if, on the other hand, the price offered is lower than the price established in the sales order by no more than a quarter, the judge may proceed with the sale when he/she considers that there is no serious possibility of obtaining a higher price with a new sale and no requests for assignment were presented by creditors.

If there are more bids, the delegate invites the bidders to bid on the highest offer, with the possibility of a raise; the asset, therefore, will be awarded to whoever has made the highest offer, also considering other elements, such as the deposits given, forms, methods, and times of payment.

#### 5. Conclusion of the auction

The successful bidder shall pay the balance of the price within the term and in the manner set by the order of the Judge that orders the sale and deliver the document proving the payment to the registry; only following this payment the Judge issues the decree of transfer of the estate that completes the transfer of ownership and that is registered in the competent registers.

#### IV. OTHER MAIN METHOD OF ACQUIRING PROPERTY

##### Gift

This is a typical act of gift which involves an increase in the assets of the donee (the one who receives the gift) with a corresponding patrimonial sacrifice of the donor (the one who transfers the asset).

The law requires for the donor the "*full capacity to dispose of his/her assets*". For the donee, by way of derogation from the general discipline on legal capacity, and similarly to the provisions for the will, the law states that the gift can also be made on behalf of the unborn, even if not yet conceived.

The law also allows legal entities to gift if this capacity is recognized by their statutes or articles of association, and to receive them.

The gift is a personal act that does not allow, therefore, representation, except for the possibility, for the donor alone, to release of a special power of attorney through which to give a third party the task of designating the donee from a category of subjects (natural or legal persons) or things indicated by the same.

##### *Mortis causa succession*

The real estate can be acquired by succession.

Succession may be regulated by the will or, in the absence of the same, directly by law (so

called “*successione testamentaria*” and “*successione legittima*”).

The phases that mark the succession are three:

i) the first coincides with the opening of the succession, which is the first phase immediately following the death of the person. The succession opens at the time of death, in the place of the last domicile of the deceased.

ii) the second consists in the so-called denunciation of the inheritance, i.e., determining who owns the assets and to what extent, and whether on the basis of a will or according to law.

iii) the third consists in the acceptance of the inheritance and the consequent attribution of assets to the heir/heirs.

### **Usucaption**

The usucaption is an original way of acquiring the ownership of real estates through the continuous, uninterrupted, and uncontested possession for a certain period of time.

The ordinary term of usucaption requires 20 years to elapse, while the abbreviated one requires 10 years to elapse and occurs when possession of the real estate was purchased in good faith "by virtue of a title that is suitable for transferring ownership and that it has been duly transcribed".

For the small rural property, the abbreviated term of usucaption is further reduced to 5 years from the date of the transcription of the title.

The purchase by usucaption of the property requires a judicial assessment, having the purchaser to provide rigorous proof of continuous, uninterrupted and unobjected possession for the period required by law.

## **V. FORMS OF OWNERSHIP**

The forms of ownership vary according to the needs of the interested person depending by a

number of elements, such as taxation issues, estate planning, costs.

The most common structures of ownership are single ownership, co-ownership, companies, trust. It is also possible to buy an interest in a property by buying shares or units in the ownership structure.

### **Single ownership**

Single ownership is the simplest and less expensive option in which the owner has the sole control of the real estate. The main disadvantage with individual ownership is that it does not offer any asset protection, as the individual's creditors will have the right to claim against the personal assets of the owner, including the real estate.

### **Co-ownership**

Co-ownership may be of different type: i) joint ownership by two or more persons holding undivided quota over the real estate such as ownership by spouses, ii) co-ownership by two or more persons holding specific quota of the real estate.

### **Companies**

The real estate may be acquired through a company structure. The most used legal forms are limited liability companies.

Residential property is typically owned by individuals, while owners of commercial property are most frequently legal entities under either private or public law.

### **Trust property (*negozio fiduciario*)**

Trust is a “*sui generis*” hypothesis of ownership, in which the beneficiary (that can be individuals, trusts or companies) transfers to the trustee the ownership of the real estate that shall be managed in the interest of the beneficiary and under the indications of the latter.



The trustee, by virtue of the so-called “*pactum fiduciae*”, is required to re-transfer the property to the beneficiary, either at his request or at the expiry of the agreed term.

The trust is created by a document called trust deed.

right expire due to non-use for the 20-year period.

## VI. TYPES OF *IN REM* RIGHTS IMPACTING ON OWNERSHIP

The ownership over the property is the principal and main real right that allows the widest powers.

According to article 832 of the Italian Civil Code the ownership is' "*the right to enjoy and dispose of things fully and exclusively, within the limits and in the ways provided by the law*".

The referred limits include the other real rights, so-called minor *in rem* rights.

They are:

i) real rights of enjoyment: emphyteusis, surface rights, usufruct, real right of use, real right of residence, easements (or predial easements);

ii) real warranty rights: pledge and mortgage.

Minor *in rem* rights are constituted and remain linked to the real estate, regardless the change of the ownership of the estate itself (i.e., right of *sequela*).

Minor *in rem* rights are enforceable against purchasers of the real estate subject to the transcription in the Real Estate Registry.

Minor *in rem* rights not transcribed are opposable to the purchasers if mentioned in the deed of sale of the real estate, as in this case the real estate is transferred encumbered by the minor *in rem* right.

Differently from the right of ownership, which is not subject to statute of limitation period and is protected by specific actions (*rei vindicatio* action, *actio negatoria servitutis*), minor *in rem*



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# INTERNATIONAL LAWYERS NETWORK



**C. MPUTHIA ADVOCATES**  
Buying and Selling Real Estate in Kenya



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER KENYAN LAW

### I. STANDARD FORMS OF AGREEMENTS

- A. The transaction usually begins with a letter of offer from the seller setting out the purchase price, completion period, description and details of property and any other salient terms of the intended purchase. The purchaser is given a time within which he may or may not accept the offer. Issuance of letters of offer is not mandatory, however if the letter of offer and acceptance is made it may be deemed to be a contract.
- B. Most parties prefer to enter into a formally binding sale agreement. In Kenya any transaction for sale of land must be in writing as provided under Section 3(3) Of the Law of Contract Act. Contracts for sale of land must also be witnessed by a registered Advocate.
- C. There are many forms of sale agreement and parties are free to choose the terms of sale. Section 38 of the Land Act provides that no suit can be brought in a breach of contract case unless the agreement is in writing.
- D. The Law Society of Kenya provides a model sale agreement and the Law Society Of Kenya Conditions Of Sale 2015. Most agreements adopt this format except where any clause is specifically omitted/exempted in the agreement between the parties.

### II. BROKERS

- A. Each party is free to appoint a broker to act on their behalf in the transaction. Broker fees are paid as per the commission/agency agreement between the appointing party and the broker.

- B. Real estate agents are licensed under the Estate Agents Act. Fees are guided by Legal Notice 198 of 2012 or by agreement between the parties.
- C. The relationship between the parties governed by separate agency agreement between the parties. Agreement should conform to the Consumer Protection Act in so far as full disclosure and representations are concerned.

### III. BUYER'S INSPECTIONS

- A. Due diligence on seller: - for individuals' verification on identification numbers and tax numbers, for registered bodies undertake a search of the business and company to verify ownership and company status.
- B. Due diligence on title deed: - land verification search to ascertain ownership and presence of any encumbrances and other overriding interests on the land such as long-term leases, mortgages, easements, and cautions. The due diligence is also to ascertain the permitted user of the land as residential, commercial, industrial, or other user. Search done on Ardhi Sasa Online Platform. ([www.ardhisasa.lands.go.ke](http://www.ardhisasa.lands.go.ke))
- C. Due diligence on other documentation: - Verification of regulatory approvals and compliance checks. Verification of building permits, architectural plans, survey maps and other documents
- D. Physical due diligence: - Buyer physically inspects the property by viewing beacons, land boundaries. If the buyer is purchasing a building, then he/she



physically inspects the building. If the buyer is buying a building off-plan, then he/she will inspect the show house to ascertain standards. Most contracts of sale are sold on “as is basis, “therefore necessitating physical inspection.

#### IV. FORMS OF CONVEYANCE IN KENYA

##### A. LAND RIGHTS IN KENYA

1. Land in Kenya is classified as either public, community or private land under Article 61 (2) of the Constitution.
2. Public land includes all land held by state agencies, county and national government and includes minerals, forests, roads, and water bodies. Public land is held by government and is managed by the National Land Commission. No dispositions can be made of public land except by legislation. (Article 62 Constitution of Kenya)
3. Community land is land held by authorized group representatives of any community or held by a specific community. It includes ancestral and grazing rights. No dispositions can be made on community land except by legislation in Parliament (Article 63).
4. Private land is land held by individuals or other registered entities. It includes freehold land and leasehold land. Dispositions of privately held land can be made by private contract. (Article 64 Constitution).
5. Article 65 of the Constitution places a limit as to the land rights of non-citizens. Non-citizens can hold land

for a maximum 99-year-old leasehold term. A non-citizen is one who has not acquired Kenyan citizenship or if it is a company/trust one whose majority ownership is comprised of non-citizens. In as much as the provision is in the Constitution it has not yet been effected. In practice non-citizen individuals and entities still own land under freehold terms or leasehold terms exceeding 99 years.

##### B. TYPES OF LAND TRANSACTIONS IN KENYA

6. Transfer of land: - Section 43-49 of the Land Act. A transfer will include a conveyance, transfer, assignment, transfer of lease and other instrument that records transfer of disposition in land. A transfer gives the transferee land ownership rights once the transfer deed is registered. A transfer is made subject to the permitted user, conditions on title (if any) and interest in land (leasehold/freehold). Transfers are made subject to any other interests registered against the title. If a long-term lease is registered against the title then the transfer shall be subject to lease. If a mortgage/charge is registered against the title, then the transfer shall be subject to the charge.
7. Transmission of land: - this is disposition of interest in land after the death of the registered owner. Under Section 48 of the Land Act upon death of a co-owner of land in a joint proprietorship then the remaining interest shall be transmitted to the surviving co-



owner. Upon death of a tenant in common then his/her share shall be transmitted to his/her estate. The same applies to a sole owner of any title, then his/her title would be transmitted to their estate under Section 50 of the Land Act.

8. In the event of bankruptcy, the bankrupts' trustee shall be registered as the proprietor under Section 52 Land Act. Under Section 53 the title to a liquidated/wound up company is passed on to the liquidator through a transmission
9. Leases: - Part VI recognizes various forms of leases of private land and include periodic leases, short term leases, leases terminating on occurrence of future event, future leases, sub-leases, and other forms. The terms of leases can be statutory under Part VI of the Land Act, express (as drafted by parties) and implied (by conduct).
10. Charges: - Recognized under Part VII of the Land Act. Must be made in prescribed form to charge the interest in the title on payment of existing or contingent debt or the fulfillment of a condition. Charge of matrimonial property cannot be effected unless spousal consent is given. Section 80 charged land operates only as security and does not create any land rights in favor of charge. Charges rank in order in which they have been registered (Section 81) allowing for the creation of subsequent charges subject to the prior chargees' consent. Charges can be transferred under Section 86. The charger has a

right to discharge his property under Section 85 once he completes the obligations. Chargee powers remedies and rights are set out under the Land Act.

#### V. THE "CHECK-THE-BOX" REGULATIONS

- a) Property transactions are subject to the Land Act, Land Registration Act, Sectional Properties Act, Distress for Rent Act and the Landlord and Tenants (Hotels, Shops and Catering Establishments Act).
- b) Stamp Duty Act and Finance Act which provide the rate of tax payable in property transactions. The Income Tax Act would apply if an entity were tax exempt.

#### VII. FORM OF DEED

- A. The Land Registration Act No. 3 of 2012 Subsidiary Legislation contains the form of deed and instruments effecting dispositions in land. The instruments/deeds must be in approved statutory format

#### VIII. CLOSING COSTS/ADJUSTMENTS

- A. The Vendor pays capital gains tax on net gain at a rate of 15% of the gain
- B. The purchaser pays stamp duty at a rate of 4% of purchase price in urban areas. In rural areas the percentage is 2% of the purchase price
- C. Where land is leasehold then consent to transfer/lease/charge is paid at a rate of approximately USD 10 if the land is non-agricultural. If the land is agricultural then land control board consent must be given and costs between USD 60-100 depending on the nature of consent. Special Land Control Board Consent is approximately USD 100.



- D. The purchaser shall pay the registration fees of less than USD 10
- E. The parties pay their advocates legal fees for acting for them in the transaction. Usually, each party pays his own advocate. A guide on the legal fees payable is contained in the Advocates Remuneration Order, 2014. Advocates may opt to follow the Remuneration Order or charge a higher fee as agreed on between the parties.

**IX. OTHER CLOSING DOCUMENTS**

- A. The instrument of conveyance in triplicate which must be signed, dated, and witnessed by an advocate
- B. Copies of the parties’ tax certificates (PIN) and identification documents (identity card or passports). v In the event of a transmission the certificate of grant.
- C. Three colored passport sized photographs
- D. In the event of conveyance of a lease hold title interest, a rent clearance certificate and consent to transfer/charge. In the event of agricultural land, the Land Control Board Consent
- E. Stamp duty/capital gains payment slip
- F. Any other document required or requested for by the regulatory body.
- G. Residential Properties: Seller has to have a smoke/carbon monoxide in

**X. RECORDING REAL ESTATE DOCUMENTS**

- A. An application to register interest in land is made to the Land Registrar in the approved statutory format.

- B. There is a land registry that registers all dispositions in land and the land registry maintains a record of all transactions in the land register
- C. The registrar shall issue the relevant document upon completion of the conveyance transaction

**XI. ANNUAL COSTS FOR PROPERTY OWNERSHIP**

- A. Annual land rent paid annually as indicated in the title deed. Annual land rent is payable only in leasehold titles. Estate that are held as freeholds are not subject to any annual rents.
- B. Rates payments payable to the county government at the rate assessed



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# INTERNATIONAL LAWYERS NETWORK



**TGS BALTIC**

**Buying and Selling Real Estate in Latvia**

**ILN REAL ESTATE GROUP**

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER LATVIAN LAW

### I. STANDARD FORMS OF AGREEMENT

- A. Offer to Purchase sets forth Buyer's offer of price and date for closing. Seller may accept or reject.
- B. The purchase contract sets forth the terms of purchase and sale, including other things participants in the transaction, price, allocation of costs of the transaction, settlement procedure, date for closing, encumbrance, and default provisions, and transfer of ownership.

### II. BROKERS

- A. Buyers and sellers are not required to use services of real estate brokers; however, parties may use such services. Broker services may be provided only by such individual person who has been included in the Register of Real Estate Agents. Currently the general commission fee in the market does not exceed 5% (depending on the value of the transaction).
- B. Usually, the seller pays the broker's commission, but parties may agree otherwise.

### III. BUYERS INSPECTION

The seller shall be liable to the buyer that the real estate has no hidden defects, and it possesses all the good qualities which are warranted or presumed. Defects which the buyer should have discovered before buying the real estate cannot be claimed, thus inspection of the real estate is advisable.

#### A. Residential property:

Parties usually prepare and sign a deed of delivery and acceptance so confirming the condition of the real estate at the time of

its acceptance.

#### B. Commercial property:

Before buying the property, the buyer will normally conduct due diligence on the real estate. Also, parties usually prepare and sign a deed of delivery and acceptance.

### IV. TYPES OF REAL ESTATE

#### A. Types of real estates are:

##### 1. Land estate

Consists of one or several land plots.

##### 2. Land and building estate

Consists of one or several land plots and one or several buildings or structures located on the land plot (plots).

##### 3. Building estate

Consists of one or several buildings or structures. In case of a building estate, the land plot, on which the respective buildings or structures are located, is owned by another person, and does not belong to the owner of the building estate (please see *Section C. Divided estate*, in this paragraph).

##### 4. Residential estate

Consists of

**a** an individual property (apartment, nonresidential premises, or artist's workshop in a residential house) in a residential building; and

**b** the relevant undivided share of the joint property (external enclosing structures, internal load bearing constructions and intermediate coverings of the residential house, premises for common use, engineering communication



systems, devices servicing the residential building and other indivisible elements functionally associated with the exploitation of the residential building, as well as the auxiliary buildings and structures belonging to the residential building). The joint property also includes the land plot, on which the respective residential building is located, unless it is owned by another person (*please see Section C. Divided estate*, in this paragraph).

#### B. Undivided share of the real estate

It is possible to acquire not the entire real estate, but an undivided share of the real estate, i.e., to acquire the undivided share of the joint property (*Note: do not mix up with the joint property included in the composition of the residential estate*). The joint property is the undivided real estate owned by several persons - joint owners of undivided shares so that only the substance of the rights is divided.

A joint owner owns the undivided share of the joint property; therefore, the joint owner is entitled to deal with the undivided share, including alienating or pledging the respective undivided share.

However, to deal with the joint property itself, either in its entirety or with respect to a part of it, the consent of all the joint owners shall be obtained. The joint owners can agree on divided use of the joint property proportionally to the amount of the undivided shares by signing a respective agreement.

If one of the co-owners causes harm to other co-owners, maliciously using his rights or not fulfilling his duties as a good and caring owner, the majority of the co-

owners may demand the alienation of the share of such a co-owner. The share of a co-owner is subject to alienation to other co-owners, transferring it to one or several co-owners with the obligation to reimburse the cost of the share in money, or the share is alienated by selling at a closed auction among the other co-owners. If none of the co-owners is willing to acquire the alienated share or the court has reasonable doubts about the expediency of such a method of alienation, the court decides to sell this share at public auction.

#### C. Divided estate

The general principle provided by Latvian law is that buildings and structures located on the land plot are part of the land plot and therefore owned by the landowner, and only in exceptional cases, buildings, and structures as separate building property could be owned by another person, who is not the owner of the land plot - the so-called divided estate.

In case of the divided estate, namely, if the building (structure) is located on the land lot, which does not belong to the owner of the building (structure), but is owned by another person, the status of such building (structure) and therefore the legal consequences, which depending on the status of the building (structure) may vary, should be evaluated.

There are two forms of divided estates, depending on the status of the building (structure) on the land plot:

##### *First form.* Compulsory divided estate

Generally, a building (structure) built during the Soviet time and until September 1, 1992, when the Civil Law of

the Republic of Latvia entered into force.

The divided property was formed when the ownership rights of the land plot under the building (structure) were renewed to the previous owners or their heirs during the land reform, or the land belonging to the state or local government, or building (structure) was acquired by privatizing the state or municipal undertakings or separate real estate objects.

The owner of the building (structure) is entitled to use the part of the land plot functionally related to the building on the grounds of the so-called compulsory lease. In case of a compulsory lease, the parties should agree on the size of the leased area of the land and on the amount of lease payment, and, if the parties cannot agree on the mentioned, the dispute shall be resolved by the court. The building owner is obliged to pay the landowner a fee of 4% of the cadastral value of the land per year, but not less than 50 EUR per year.

In order to address the problems with divided residential estate a special law will enter into force on 1 January 2023 adopted to enable the end of forced shared ownership between the apartment owners and the landowner of an apartment building, through a special statutory right of redemption granted to the apartment owners' association over the land under the apartment building.

*Second form.* Voluntarily established divided estate.

Buildings built after September 1, 1992, when the Civil Law of the Republic of Latvia entered into force, based on a specific long term (at least 10 years) lease

agreement providing the rights to the lessee to build buildings on the leased land plot as separate real estate objects. After 1 January 2017 it is no longer possible to establish a new voluntary divided ownership relationship.

The separate ownership of the building (structure) is established only during the validity of the lease agreement.

Amendments to the Civil Law entered into force on 1 January 2017, by introducing a new institute of build-up rights, which henceforward replaces the institute of specific long-term lease for the voluntary established divided estate.

The build-up rights are rights *in-rem*, established based on the agreement entitling, during the validity of such rights, to build and use non-residential buildings or engineering structures on the land plot owned by another person. The building (structure) built based on the build-up rights is an integral part of the build-up rights. It is not permitted to build residential buildings based on the build-up rights.

The validity of the build-up rights cannot be less than 10 years, and the build-up rights shall be registered with the Land Registry.

The build-up rights can be alienated and encumbered with rights *in-rem*, unless explicitly prohibited in the agreement on granting of the build-up rights.

After expiry of the build-up rights, the building (structure) built based on the build-up rights becomes an integral part of the land plot, i.e., becomes the property of the land plot owner. The owner of the land plot acquires the building (structure) without remuneration, unless such

remuneration has been provided in the agreement on granting of the build-up rights. In the agreement on granting of the build-up rights the parties may provide that, prior to the expiry of the build-up rights, the holder of the build-up rights shall vacate the land plot from the constructed buildings (structures).

#### D. Restrictions for acquisition of land in Latvia

There are certain provisions and legal restrictions for acquisition of real estate in Latvia; however, these restrictions are imposed only regarding ownership of the land, there are no restrictions regarding ownership of other types of real estate such as buildings, structures, apartments, business premises etc.

Restrictions for acquisition of land vary depending on whether the land is located in the city or in rural areas.

In cities land may be acquired by:

- a the citizens of Latvia and any European Union (EU) member state;
- b the State and local government, and state and municipal companies;
- c a capital company (a limited liability company or a joint stock company) registered in Latvia or any EU member state, if more than a half of the share capital of the company belongs to:
  - 1) the citizens of Latvia and EU member state; or
  - 2) the State and local government, and state and municipal companies; or
  - 3) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal

Protection of Investment and such agreement has been approved by the Parliament of Latvia prior to 31 December 1996 (*such countries are: the United States of America, Austria, Belgium, Luxemburg, Czech Republic, Denmark, France, Greece, Estonia, Israel, South Korea, United Kingdom, Lithuania, the Netherlands, Norway, Poland, Portugal, Finland, Spain, Switzerland, Uzbekistan, Germany, Vietnam, Sweden*); or

- 4) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment after 31 December 1996, and the respective concluded agreement prescribes the rights of the private individuals and legal entities from Latvia to acquire land in the respective country (*countries, which have concluded agreements for the Encouragement and Reciprocal Protection of Investment after 31 December 1996 are - Armenia, Azerbaijan, Belarus, Bulgaria, Egypt, Georgia, Croatia, India, Iceland, Canada, Kazakhstan, China, Kirgizstan, Kuwait, Moldova, Rumania, Singapore, Slovakia, Turkey, Ukraine, Hungary, but regarding these countries the exact*

*provisions of the agreements should be reviewed);*

- d** a public joint stock company registered in Latvia or any EU member state, if its shares are quoted in stock exchange;
- e** religious organizations, which were registered in Latvia before 21 July 1940;
- f** the state or municipal institutions of higher education.

Other private individuals and companies that do not correspond to the aforementioned conditions may acquire the land in Latvia with the permission from the local government; however, it is also prohibited for such private individuals and companies to acquire the following types of land: land in the border zone;

- land in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga and land in the protection zones of public bodies of water and water courses, except if the build-up is allowed on the land in accordance with the spatial plan of the city;
- agricultural and forest land in accordance with the spatial plan of the city.

In rural areas land may be acquired by:

- a** the citizens of Latvia, citizens of the EU member states or European Economic Area (EEA) states or citizens of Member States of the Swiss Confederation and the Organization for Economic Co-operation and Development;
- b** the Republic of Latvia or derived public persons (such as municipal or other public person established based on law);
- c** a capital company (a limited liability company or a joint stock company) registered in Latvia, EU, EEA country or in

the Swiss Confederation or in a Member State of the Organization for Economic Co-operation and Development, if the respective company has been registered in Latvia as a taxpayer and if all the shareholders of the company are:

- 1) citizens of Latvia, citizens of the EU member states or EEA country, or citizens of Member States of the Swiss Confederation and the Organization for Economic Co-operation and Development; or
- 2) the Republic of Latvia or derived public persons; or
- 3) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment and such agreement has been approved by the Parliament of Latvia prior to 31 December 1996; or
- 4) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment after 31 December 1996, and the respective concluded agreement prescribes the rights of the private individuals and legal entities from Latvia to acquire land in the respective country;

- d** legal subjects registered in Latvia, EU, EEA country or in the Swiss Confederation or in a Member State of the Organization for Economic Cooperation and Development, if the respective legal subject has been registered in Latvia as a taxpayer or as a commercial activity performer and if the legal subject is:

- 1) an individual merchant owned by a

citizen of Latvia, citizen of the EU member state or EEA country, or citizen of Member States of the Swiss Confederation and the Organization for Economic Cooperation and Development;

- 2) an individual undertaking registered by a citizen of Latvia, citizen of the EU member state or EEA country, or citizen of Member States of the Swiss Confederation and the Organization for Economic Cooperation and Development;
- 3) a co-operative society, if all the members of the society are legal subjects mentioned in clause 1), 2), 3) or sub-clause a), b), d) of clause 4);
- 4) other legal subject registered in the EU member state, EEA country or in the Swiss Confederation or in a Member State of the Organization for Economic Co-operation and Development, which can be compared to the above individual merchant, individual undertaking, or co-operative society;
- 5) religious organizations registered in Latvia; the activity whereof is at least 3 years;
- 6) associations and foundations registered in Latvia, the activity whereof is at least 3 years, and the purpose of activity whereof is related to the environmental protection, production of agricultural cultivated plants or products, or hunting management or maintenance, if the land is acquired to ensure the mentioned purpose of activity.

Other private individuals and companies that do not correspond to the abovementioned conditions may acquire the land in Latvia with the

permission from the local government; however, it is also prohibited for such private individuals and companies to acquire the following types of land:

- land in the border zone;
- land in nature reserves and other protected nature areas in zones of nature reserves;
- land in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga;
- land in the protection zones of public bodies of water and water courses;
- agricultural and forest land;
- land in the mineral deposits of national significance.

If, due to the changes, the status of the legal subject does not correspond to the aforementioned conditions, in order to keep the land in the cities or rural areas, the permission from the local government should be received within a period of one month, and if the permission is not granted the land should be alienated within a period of two years.

If a private individual or a company, which has acquired land in the cities or rural areas with the permission of the local government, does not use the land for the prescribed purpose the land should also be alienated within a period of two years

#### E. Agricultural land

The additional limitations are set on the acquisition of agricultural land in rural areas of Latvia. Legal entities are entitled to acquire 5 ha of agricultural land in aggregate without additional limitations, but private individuals are entitled to acquire 10 ha of agricultural land

in aggregate without additional limitations.

In order to acquire more agricultural land, private individuals and legal entities should confirm that the acquired land will be used for agricultural activities, and the respective private individuals and legal entities shall comply with the specific criteria prescribed by law, including clear information on the true beneficiaries and statement that total amount of tax debts of which in Latvia or in the state where these persons are registered does not exceed EUR 150. In addition, the citizens of the European Union Member States, the Member States of the European Economic Area or citizens of Member States of the Swiss Confederation and the Organization for Economic Co-operation and Development, if they wish to acquire the agricultural land as private individuals, or if they are sole shareholders or shareholders jointly representing more than a half of the share capital of the company intending to acquire the agricultural land, or persons entitled to represent the respective company, shall receive a registration certificate of the Union citizen and the document certifying knowledge of the official language (Latvian) at least at B level grade 2 (*namely, the person is able to communicate on everyday subjects and professional issues, to clearly phrase and justify his or her opinion, reads and understands texts of different content, is able to write the documents necessary for work (for example, statements, summaries, minutes, reports, deeds), as well as expanded texts regarding everyday life and professional topics, comprehends, and understands naturally paced spoken texts on different topics*). However, with the judgment in case No C-206/19 dated on 11 June 2020, the Court of Justice of the European Union has recognized that the language knowledge requirement is discriminatory and cannot be applied to the citizens of the

European Union Member States. Although the law has not been changed, the court's finding is respected in practice.

If the language criteria shall be applied upon the request of the local government, the person shall make a presentation in Latvian explaining the intended usage of the land in agricultural activity. If the agricultural land is to be acquired by a legal entity -the usage of the land in agricultural activity shall be presented by the individual - the sole shareholder or individual shareholder jointly representing more than one half of the share capital of the company (in case of beneficiaries - presentation shall be made by those beneficiaries).

For a person, who meets the criteria, to be able to acquire agricultural land, he or she shall first submit an application to the local government of the territory in which the relevant land is located, and after examination of the application and offering to exercise the rights of first refusal to the registered lessee, if any, of the agricultural land and to the Land Fund of Latvia, the commission of the local government shall decide on giving its consent or refusal to acquisition of the agricultural land.

In addition, one private individual or legal entity can acquire up to 2,000 ha of agricultural land. The local government has the right to determine the maximum area of agricultural land one private individual or legal entity can possess within their administrative area, but no more than 2,000 ha. Related parties can acquire up to 4,000 ha of agricultural land.

#### V. Real estate registries

There are two registries related to real estate in Latvia: The Land Registry and the National Real Estate Cadastre Information System (Cadastral Registry).

The Land Registry is the main real estate registry and is kept by the respective Regional Court Land Registry Offices, each of them operating within a particular administrative territory. All rights (including ownership rights, all kinds of legal encumbrances, mortgages, restrictions, etc.) regarding real estate shall be registered with the Land Registry.

Ownership rights of real estate shall be registered with the Land Registry and only a person, whose ownership rights have been registered with the Land Registry, shall be considered the owner of real estate, except when the ownership rights of the real estate are established by the law.

Entries registered with the Land Registry have public credibility. Thus, not only the owner of the real estate is guaranteed credibility of its title registration, but also every third party is provided with valid information on the current status of the real estate. However, this does not mean that transfer of title to real estate or the title itself cannot be challenged (for example, the seller has no rights to sell the respective real estate, or any third party's rights of first refusal have been violated and thus this person may possibly exercise his or her redemption rights).

The Cadastral Registry is kept by the State Land Service. The cadastral value (determined mainly for the real estate tax and Land Registry state duty purposes), detailed information on buildings and structures (area, number of premises, etc.) as well as detailed information on every real estate object, including graphical information and technical encumbrances, are held in this register.

However, not all encumbrances prescribed by law are actually registered in the registers, for example, protection zones and consequential restrictions and limitations are set by law, notwithstanding whether they are registered

with the Land Registry and/or Cadastral Registry, therefore the actual situation on site shall be considered prior to the acquisition of the real estate.

In practice, frequently the information in the Cadastral Registry differs from the information in the Land Registry.

The law also specifies buildings and structures, which are not registered in the Land Registry as separate and independent objects of property, for example - fences, small buildings, except for garages, linear engineering structures, except for transport structures, engineering structures the area of which is less than 50 square metres or height is less than 10 metres. But some transport structures, such buildings and structures are registered in the Cadastral Registry.

Therefore, to obtain more detailed information on the real estate, the information in both registries - the Land Registry and the Cadastral Registry should be reviewed and considered prior to the acquisition of the real estate.

#### VI. Agreement and re-registration of the title with the Land Registry

Any transfer of the title of the real estate should be registered with the Land Registry. Agreement on alienating the real estate should be prepared in writing and signed by both parties personally. It should be also noted that an oral agreement is binding to the parties, and each party is entitled to claim from the other party to express the oral agreement in a written form.

It is not required, but signatures of the contracting parties on the agreement could be certified by a notary public, as well as an agreement could be concluded in the form of notary deed.

Agreement on alienation of real estate is

binding upon the parties from the moment of its conclusion, but for any third party, only a person, whose ownership rights have been registered with the Land Registry, shall be considered as the owner of real estate.

The title (ownership) is transferred to the buyer from the moment of re-registration of the title with the Land Registry (i.e., a Land Registry judge has adopted a decision on registration of the buyer's title). This rule would be always applicable in relation to reliance of third parties on the owner of real estate; however, the contracting parties may agree otherwise on the moment of transfer of title.

To re-register the title with the Land Registry, the registration request to the Land Registry on the transfer of the title should be personally signed before a notary public chosen by the contracting parties. This can be done in person at a notary's place of practice or remotely, using video conferencing mode and signing necessary documents electronically with a secure digital signature with a time stamp.

The notary verifies the identity of both parties, and in case of legal entity also the rights to represent the legal entity. The persons signing the registration request need to provide proof of the identity - passport or ID card for private individuals and also a representative of the legal entity. If the contractual party is a legal entity not registered in Latvia an excerpt from the company register certifying registration of the company and the representation rights of the representative should be provided. Depending on the registration country of the legal entity, the excerpt from the company register should be certified by a notary public or by an authority of the company register of the respective country (for the EU or the EEA countries, or the Swiss Confederation or a Member State of the Organization for Economic Co-operation and Development), or

the excerpt should be legalized in accordance with the international regulatory enactments. The excerpt from the company register should also be translated in Latvian and translation should be certified by a notary public.

A registration request for the re-registration of the title with the Land Registry should be submitted with the respective district (city) court in the territory of operation of which real estate is located. The following documents should be enclosed with the registration request:

- an agreement on alienation of the real estate;
- a refusal to exercise the rights of first refusal (except the refusal of the joint owner or owner of divided property)

*(Please see Section IX. (A));*

- a consent from third parties, if such is required in the particular situation, for example, a consent from the bank in case of a mortgage, or a consent from the spouse of the seller, if the real estate is the co-property of spouses;
- permission from the local government to acquire the land in Latvia, if such is required by the law *(please see Section V. (D));*
- documents certifying representation rights of the parties;
- receipts for the payment of the state and stamp duties.

#### VII. CLOSING COSTS/ ADJUSTMENTS

Notary fees are determined by secondary legislation, i.e., the Regulations of the Cabinet of Ministers.

For the re-registration of the title with the Land Registry, a state duty, and a stamp duty should be paid prior to the submission of the



registration request with the respective Land Registry Office.

The amount of the Land Registry state duty depends on the person in whose favor the property rights to the real estate are secured - the rate applicable to the state duty depends on the cadastral value of the real estate or the transaction amount, whichever is higher. The state duty for the consolidation of property rights in the Land Registry for each real estate is set at the following amount:

- 1.5% of the value of the real estate (euro), but no more than 50,000 euros, if the property rights are acquired by a private individuals on the basis of a contract or a court decision to approve the statement of auction, or on the basis of a court decision on registering ownership rights to the real estate to a bidder, co-owner, or creditor;
- 2% of the value of the real estate (euro), but no more than 50,000 euros, if the property rights are acquired by a legal entities on the basis of a contract or a court decision to approve the statement of auction, or on the basis of a court decision on registering ownership rights to the real estate to a bidder, co-owner, or creditor;
- 3% of the value of the real estate (euro), but no more than 50,000 euros, if the property rights are acquired on the basis of a gift agreement;
- 1% of the amount of investment of real estate that be invested in the share capital of the capital company (euro), but no more than 50,000 euros, if real estate is invested in the share capital of the capital company.

The ratio of 1.5 is applied to the state duty, if more than 6 months have passed, starting from

the day of signing the document that confirms the rights to be registered.

Costs for the re-registration of the title with the Land Registry, including notary fees, are usually covered by the buyer, or equally divided between both the seller and the buyer, however, the seller usually bears the costs of deleting of the existing mortgage on the real estate, if any.

The seller should also pay the real estate tax for the entire year of the transaction, and no ownership will be transferred until the real estate tax is paid.

#### VIII. OTHER INFORMATION

##### A. Rights of first refusal

The rights of first refusal are priority rights to purchase a real estate if the owner sells the real estate.

##### 1) Local government rights of first refusal

In case of alienation of the real estate, a local government shall have the rights of first refusal of the real estate if the real estate is necessary for performance of local government functions.

The local government decision on exercising its rights of first refusal or on refusal to exercise its rights of first refusal is adopted within 20 (twenty) days after submission of the copy of the purchase agreement to the local government.

The local government rights of first refusal shall not apply to the following real estates:

- production objects with all
- their accessories;
- real estate, from which an undivided part has been alienated and which remains in the joint property of the seller and the purchaser;

- real estate that is being sold through voluntary or compulsory auction;
- real estate, to which third parties have the rights of first refusal or redemption rights based on the law, agreement or will.

## 2) Joint owners' rights of first refusal

If any of the joint owners of the real estate alienates its undivided share (*please see Section V. (B)*) to a person, who is not a joint owner, then the other joint owner(s) shall have the rights of first refusal. A joint owner is entitled to express the will to exercise its rights of first refusal within a 2 (two)-month period as from the receipt of the purchase agreement. But, if by the fault of the seller, the joint owner is not able to exercise the rights of first refusal, such joint owner will have the redemption rights, namely, within a period of 1 (one) year as from the registration of the acquirer's title to the real estate with the Land Registry, the joint owner will be entitled to claim for acquisition of the real estate, by taking precedence over the acquirer and by assumption of the rights of the acquirer.

## 3) Rights of first refusal in case of divided property

In case of divided property (*please see Section V. (C)*), the owner of the land and the owner of building (structure) have mutual rights of first refusal and redemption rights, if the respective land or building estate is alienated. The rights of first refusal shall not apply if the building (structure) is built based on the build-up rights.

## 4) Other rights of first refusal

Rights of first refusal can be established also by the agreement or will.

The law also provides for other specific cases when third parties have the rights of first refusal or redemption rights to real estate, for example, if the real estate is alienated in the territory of a civil aviation aerodrome of the state significance (also the territory necessary for further development thereof) and the civil aviation aerodrome is owned by a capital company where the state has a decisive influence - the state has the rights of first refusal, but if the civil aviation aerodrome is owned by a capital company, where the local government has a decisive influence - the respective local government has the rights of first refusal, or rights of first refusal to the real estate in the territory of the port may be exercised by the local government, represented by the port authority, but the rights of first refusal to the real estate in the territory of the port of Riga shall be exercised by the port authority of Riga as a derived public person and in the territory of the port of Ventspils shall be exercised by the port authority of Ventspils as a derived public person.

## A. Permitted use of the real estate (zoning) and environmental protection regulations

Prior to the acquisition of real estate, the permitted use of the real estate (zoning) and possible restrictions for the usage, including construction, of the real property should be additionally reviewed in the local government spatial plan and Territory Usage and Build up Regulations.

Prior to the acquisition of real estate, it should also be reviewed whether the territory of the real estate is not

registered with the Register of Polluted and Potentially Polluted Areas. However, it should be noted that, even if the territory of the real estate has not been registered as polluted or potentially polluted, depending on the historical usage of the respective real estate there is a risk that historical pollution may appear.

construction works period, depending on the type of construction.

## IX. ANNUAL COSTS FOR PROPERTY OWNERSHIP

### A. Property Insurance

Property Insurance is not mandatory, but very common. When property is purchased through loans by banks or other financial institutions, the lender requires the buyer to insurance. The buyer, a private individual, may be insurance against unemployment and incapacity for work, if it is demanded by financial institutions, which may be enforced contractually but is not legally mandatory.

### B. Real Estate Tax

Real estate tax is levied on a property's assessed value. Real estate tax is payable for land and buildings, and certain infrastructure. It is an annual tax but can be paid in four installments in March, May, August, and November. The local municipalities are free to set tax rates on real estate in their area from 0.2% to 3% of its cadastral value, otherwise tax rates defined by state apply. A tax rate exceeding 1.5% of cadastral value may be charged only if the real estate is improperly maintained.

An increased real estate tax rate of 3% may be applied if the maximum allowed duration of construction works is exceeded, i.e., 5 years or 8 years of



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# INTERNATIONAL LAWYERS NETWORK



MARTÍNEZ, ALGABA, DE HARO & CURIEL, S.C.  
MARTINEZ BERLANGA ABOGADOS, S.C.  
BUYING AND SELLING REAL ESTATE IN MEXICO

ILN REAL ESTATE GROUP



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER MEXICAN LAW

### Preface

Martínez, Algaba, De Haro y Curiel, S.C. (“**MAHC**”) and Martínez Berlanga Abogados, S.C. (“**MBA**”) are law firms in Mexico with recognized trajectory, based in Mexico City and Monterrey, committed to provide the highest standard of professional legal counsel and representation.

MAHC was established in 1969 and is comprised of a highly experienced and qualified team of professionals in the diverse areas of law practiced by the firm. MAHC is reputed to be one of the few law firms in Mexico that offers first class litigation services, encompassing virtually every aspect of commercial, civil, and administrative legal procedures, including domestic and international arbitration, as well as a consulting legal area in matters related to corporate, financial, banking, regulatory, restructurings, real estate, energy, and communications.

MBA, established in 2006, is comprised by professionals with high experience in general corporate matters, restructurings, corporate finance, mergers and acquisitions, joint-ventures, cross border transactions, real estate, local and cross border trust structures, and testamentary successions, as well as regulatory matters.

These combination of practice areas and fields of expertise allow our firms to render enhanced legal advice, a result of the synergy and collective experience of our trial and consultant lawyers that grants our clients a competitive advantage hard to match by any law firm in Mexico.

### **I. Real Estate General Overview**

The real estate business in Mexico has been increasingly growing during the last decades to the point that now it is considered as a

serious, viable and promising economic activity among both Mexicans and foreigners. This growth has developed in a more dynamic and secure economic sector in our country. However, in some respects it is still a relatively new business in Mexico, in which real estate agents are not yet required to be licensed and real estate professional organizations are not that regulated as in other countries.

Investors now can find a variety of specialized agents and corporations that provide tailor-made services, ideal for foreign investors that seek to buy or sell real estate in the country. These services are highly recommended specially for those not familiar with the local real estate regulations and the Spanish language.

### **II. Property Rights in Mexico and Limitations**

In Mexico, all property rights come from the State itself, who owns “*the original property of lands and water... and has had and has the right to transfer ownership of property to private persons, thus, transforming it into private property.*”<sup>1</sup> Accordingly, the Mexican Federal Civil Code (*Código Civil Federal*), as well as those Civil Codes of each Mexican State, provide that it is the people’s right to use, enjoy and dispose of their property, under the limitations and modalities established under Mexican law.

There are also other several limitations to the ownership rights of real estate property imposed in the Mexican Constitution, like, for example, the Nation’s direct domain over natural resources such as oil, minerals and underground water, or the

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<sup>1</sup> Article 27 of the Mexican United States Political Constitution (*Constitución Política de los Estados Unidos Mexicanos*) (the “**Mexican Constitution**”).



expropriation of the land by the State in case of public interest situations pursuant to a prior indemnification.

As a general rule, only Mexican citizens, by birth or naturalization, and Mexican corporations, have the right to acquire real estate property or to obtain concessions from the Mexican State to exploit national natural resources. However, the Mexican Constitution states that the Nation may grant the same rights to foreigners, provided that they agree before the Mexican Ministry of Foreign Affairs (*Secretaría de Relaciones Exteriores* or “**SRE**”) to consider themselves as nationals in respect of such acquired property and shall agree not to invoke the protection of their government in respect thereof, under the penalty, in case of failure to honor such commitment, to forfeit such real estate property to the benefit of the Mexican Nation. This covenant or statement is known as the “Calvo Clause”.

Another restriction to foreigners imposed in the Mexican Constitution is that they will not be able to directly acquire real estate within 100 kilometers (approximately 62.13 miles) along the borders and 50 kilometer (approximately 31.06 miles) from the coast, referred to in Mexican law as the “**Restricted Zone**”. However, pursuant to the Mexican Foreign Investment Law (*Ley de Inversión Extranjera* or “**LIE**”) and its regulations, foreigners may acquire property located in the Restricted Zone for non-residential purposes, in which case, they would require to give a notice to the SRE of such acquisition within the next sixty (60) days following the date of the acquisition. In such cases, as we will analyze hereinafter, a foreign-owned Mexican corporation or a Mexican trust must be created to acquire the real estate property.

Non-residential purposes pursuant to the regulations of the LIE are considered as those destined to time sharing, industrial, commercial or tourism related activities and generally those used by entities pursuant to their corporate purpose, such as sales or transfers, urbanization, construction, or development of real estate projects.

Finally, foreigners may acquire real estate properties outside of the Restricted Zone provided that they must obtain a permit from the SRE for such purposes.

### III. Ways of Acquiring and/or Invest in Real Estate Property in Mexico

After the prospective buyer has find the desired real estate property and its offer has been accepted by the seller, there are several legal vehicles or capacities classically used to own real estate property in Mexico.

An individual may hold title over real estate property in Mexico, directly or indirectly, allowing her/him to use, enjoy and dispose such property, through three different means: (i) as the direct owner, holding a property title under her/his name; (ii) through a Mexican corporation, as a stockholder; or (iii) through a bank trust, as a beneficiary. As a foreigner, the latter two would be the most recommended vehicles to hold title of land in Mexico.

#### (a) Foreign-Owned Mexican Corporation

A foreign-owned Mexican corporation (a “**Mexican Corporation**”) is a vehicle frequently used by foreign investors to carry on business in the country and not just to hold title over real estate. As a national, provided that all LIE requirements are met, a Mexican Corporation complies with the Mexican Constitution requisite in order to hold



title over private property. However, it is important to point out that holding title of real estate through a Mexican Corporation has to be achieved in accordance with the corporate purpose of the entity.

A Mexican Corporation is typically incorporated before a “public faith officer”, such as *Notarios Públicos* (authorized by local governments) or *Corredores Públicos* (authorized by federal authorities) and requires a minimum of two (2) shares or equity holders since the concept of single-stockholder corporations —with a sole exception<sup>2</sup>— is not allowed under Mexican law. It will have to carry out the corporate activities of any company, such as annual stakeholders’ meetings, have an active administrative body, file tax statements, etc. We strongly advise to seek local legal counsel in order to properly incorporate and tailor-made the corporation’s purpose to the specific client’s needs.

The main advantages of holding real estate property through a Mexican Corporation could be, for example, that a national entity, pursuant to applicable immigration requirements, would directly own the real estate, it could allow its stakeholders to live and work in the country and there is no

limit as to the number of properties it may own.

While the main disadvantages of a Mexican Corporation could be, for example, the undertaking of the daily corporate activities, including, but not limited to, its management, accounting reports, tax filings, LIE filings regarding its foreign stakeholders, etc.

(b) Mexican Trusts

Mexican trusts are very useful and flexible and therefore widely used as a vehicle by foreigners not only to acquire real estate, but for general business purposes as well. It provides solution to a wide range of personal and commercial needs. Trusts are mainly regulated by the Mexican General Law for Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito* or “LGTOC”).

Pursuant to the LGTOC, a Mexican trust is a commercial contract by which a settlor transfers title and management of certain assets and/or rights to a trustee —*generally a bank or any other financial institution authorized to act as such under applicable Law*—, so that the trustee manages such assets under agreed terms, for the benefit of a person —*could be, among others, a Mexican Corporation, a foreign individual, or a foreign entity*— appointed as beneficiary thereto.

The bank, as trustee, will be subject to fiduciary duties while representing the settlor’s interests in the trust assets. For example, should the trust purchase real estate property, the trustee should only carry out the transaction after verifying that all the title documents,

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<sup>2</sup> Simplified stock corporation (*sociedad por acciones simplificada*), which is a recently created type of entity not useful to acquire real estate. It is allowed to be incorporated by an individual single-shareholder (no entities allowed as shareholders). However, this type of entity is not recommended for foreign investment purposes, since its main purpose is to regulate small businesses. Its shareholders may not have any equity participation in any other Mexican entity that allows them to control such entity and the corporation’s annual total income shall not exceed the equivalent to \$6.3 million Pesos (approximately \$314,630.00 Dollars, as of September 2022).



property dimensions and/or any other documentation related to the property, are in order. On the contrary, if the real estate is not in good standing or up to date with the applicable legislation, the bank's fiduciary duties shall prevent the trust to acquire such irregular property.

During the past few decades, it has been very popular among foreign investors to hold property of real estate through a Mexican trust, where the individual investor or a corporation transfers financial resources to the trust and then the trust itself acquires the real estate and holds title thereof. Thus, it can be created to indirectly acquire the property, whereby the real estate is settled in trust, since no real estate rights would be owned directly by the trust beneficiaries, they would only hold trust rights.

The maximum duration of such trust is 50 years, subject to renewal; provided further that, in such cases it is required to obtain a permit from the SRE in order for such trust to own the relevant real estate property in the Restricted Zone. As of today, there have been no amendments to the relevant laws in order to delete this foreign investment restriction on real estate.

There are great benefits and advantages of holding real estate property through a Mexican trust, for example, the trustee shall be legally responsible for the administrative work and for the conservation and protection of the trust assets —*subject to an annual fee paid to the trustee*—, the investor's heirs can inherit the

rights to the trust and some tax advantages, among others. However, trustees often require that the day-to-day administration of the trust property —*the real estate property*— be delegated either to the settlor, a technical committee or a hired administrator through a management or services agreement. Nonetheless, the trustee's fiduciary duties and responsibility cannot be delegated.

(c) Real Estate Investment Trusts

In recent years, Real Estate Investment Trusts (*Fideicomiso de Inversión en Bienes Raíces* or "**FIBRAS**") have also become important investment vehicles for foreigners who seek to invest their capital in Mexico. They are a specific type of trusts designed for the real estate business and are regulated by, among others: (i) the LGTOC; (ii) the Mexican Securities Law (*Ley del Mercado de Valores* or "**LMV**"); and (iii) the Mexican Income Tax Law (*Ley del Impuesto sobre la Renta* or "**LISR**"). A FIBRA would be the equivalent to a REIT in the USA.

The Mexican Congress, in order to make more attractive the investment of capital in the real estate market in Mexico, included in the LISR special tax benefits for FIBRAS.

According to the LISR<sup>3</sup>, in order for a trust to be considered a FIBRA and to have the tax benefits provided by the LISR, it needs to comply, among others, with the following requirements:

- (i) to be executed pursuant to Mexican laws and with a Mexican trustee.

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<sup>3</sup> Article 187 of the LISR.





- (ii) to have as its main purpose the acquisition or construction of real estate in Mexico that may be destined for lease, or the right to obtain income from the real estate.
- (iii) that the real estate contracted or acquired by the FIBRA be destined to lease (or equivalent) and not be sold within a period of 4 years following the date the construction of the real estate was completed or as of the date of the acquisition of the real estate, as applicable.
- (iv) that the trustee of the FIBRA issues trust certificates to represent the assets allocated in the FIBRA so that such certificates may be placed through a public offering in the Mexican Stock Exchange and registered before the National Securities and Intermediaries Registry (*Registro Nacional de Valores*); and
- (v) that the trustee of the FIBRA distributes to the holders of the relevant trust certificates issued through the public offer, at least once a year and no later than March 15th of each year, at least ninety-five percent (95%) of the total taxable income accrued during the immediately preceding fiscal year.

Please be aware that a FIBRA is a way for investors to invest in securities in a stock market of a special vehicle trust backed by leased real estate property but in no way can it be a vehicle that can be settled by a foreigner to invest, use, and enjoy real estate property in Mexico.

#### IV. Preparatory, Promissory and Purchase Agreements

Once the buyer has decided in what capacity she/he will acquire title over the real estate, whether directly or through a Mexican Corporation or through a Mexican trust, the transfer of ownership will take place through the execution of a definitive agreement.

It is customary and sometimes recommended, before closing of the definitive agreement, to undertake a thorough due diligence and seek proper legal advice before engaging in any transaction.

The following are the agreements typically used to formalize the real estate property acquisition in Mexico:

##### (a) Preparatory, Promissory Agreement (*contrato de promesa*)

A promissory purchase agreement is a very common way to agree with a seller the acquisition of a real estate property, without executing at that point the final purchase agreement itself. Through a promissory purchase agreement both parties reciprocally agree or promise, one to sell and the other to purchase real estate property at a stated price, as well as to enter into a definitive purchase agreement within a certain period of time, having agreed upon the essential terms thereof.

This type of agreement is different from a “letter of intent” since, under Mexican law, a promissory agreement is binding on its parties and may be judicially enforced, in order to oblige the promisors to execute the final agreement. Meanwhile, a letter of



intent is largely used merely to express a non-binding intention of one party, lacking the essential terms of the final agreement. It is customary to also have a letter of intent or an offer to purchase signed before the promissory agreement. Letters of intent and promissory agreements do not require more formalities other than to have the signatures of the parties involved.

The promissory purchase agreement, as well as the private purchase agreement —*as analyzed herein after*—, is commonly used as a preparatory agreement providing the parties with an agreed timeframe generally used to finalize the due diligence and draft the final and definitive agreement to be executed at a later date. For instance, before executing the final agreement, the public notary needs to draft the correspondent public deed comprising the definitive agreement, collect data and personal information of the parties and the real estate property, file a preemptive notice and a lien certificate before the Public Property Registry for priority or preference purposes, calculate taxes, etc.

It is not uncommon to agree therein to a down payment from the promisor buyer, usually held in deposit by the promisor seller. After the agreed period of time, should the promisor buyer fail to buy, at no fault of the promisor seller, then the promisor buyer will forfeit the down payment. On the contrary, failure from the promisor seller to sell would generally trigger an agreed penalty, usually consisting of an amount equal to the down payment, plus returning the

deposit to the promisor buyer. In the case that the promisor seller does not return the down payment and/or pays the agreed penalty, then the promisor buyer will have a strong claim against the promisor seller, in order to judicially demand either the deposit and penalty due or the execution of the final purchase agreement, as some courts may consider some promissory purchase agreements —*pursuant to the provisions therein*— as a definitive private purchase agreement.

Upon the agreed period, the parties shall execute the final purchase agreement before a public notary —*as analyzed herein after*—, pursuant to the essential terms agreed upon on the promissory agreement.

(b) Definitive Purchase Agreement  
(*contrato de compraventa*)

Contrary to the promissory agreement<sup>4</sup>, the definitive purchase agreement itself is the final and definitively contract. However, it may be executed either privately, as a preparatory agreement —*needing to later comply with the relevant legal formal requirements*—, or directly through a public deed granted before a notary public. As a rule, the sale is perfect and obligatory for the parties when they have agreed on the object —*the real estate*— and its price, even if

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<sup>4</sup> However, pursuant to the terms and conditions set forth therein, courts may consider some promissory purchase agreements as final agreements. “*When a promissory purchase agreement contains elements that belong to definitive transactions, such as the way in which the price will be paid, or it is stipulated that the purchased thing is delivered, the promissory purchase agreement is disrupted, because then the consent therein no longer refers to granting a future contract, but actually the final contract is being entered into.*” Judicial precedent entitled “PURCHASE UNDER APPEARANCE OF PROMISSORY PURCHASE” (“*COMPRAVENTA BAJO ASPECTO DE PROMESA DE VENTA.*”), with registry number 241344.



the first has not been delivered nor the second satisfied.<sup>5</sup>

The private purchase agreement, similar to the promissory agreement, is commonly used as a preparatory agreement providing the parties and the notary public with an agreed timeframe to prepare the definitive agreement. As mentioned above, before executing the final agreement, preparations need to be made, such as due diligence, drafting of the correspondent public deed, filing a preemptive notice and a lien certificate before the Public Property Registry for priority or preference purposes, etc.

Pursuant to the legal formal requirements stated on the applicable Civil Codes, a real estate purchase agreement shall be generally executed through a public deed and recorded before the local Public Property Registry, in order to be effective against third parties.<sup>6</sup>

The public notaries will be responsible to ensure the validity and enforcement of the transaction. Prior to closing, they will check for the existence of any debts or liens against the property; that the correspondent taxes and other government fees are paid in full, that the real estate description is correct, and that the seller has the capacity to execute the transaction. In addition, they will take care of the tax matters of the transaction, for instance, that the property taxes, transfer fees/taxes and any capital gains taxes are paid at or prior to closing. They are also

responsible to properly record the transaction before the local Public Property Registry.

After closing, the notary public will be responsible to provide each party with a certified copy of the property title, duly registered before the relevant authorities.

## V. Closing and Ongoing Costs

### (a) Closing costs

For guidance purposes only, the following are the expenses that a buyer typically needs to take into consideration when acquiring real estate in Mexico, subject to different local requirements that each City or State may have in the correspondent local regulation:

- (i) In case of a Mexican Corporation, incorporation costs such as notary public fees and registration fees — *regulated locally in each State*—;
- (ii) In case of a regular Mexican trust, notary public fees and registration fees —*regulated locally in each State*—, as well as applicable trustee's fees;
- (iii) Real estate appraisal;
- (iv) Notice to SRE, if applicable;
- (v) Tax or services certificates, evidencing that no government fees or taxes are outstanding;
- (vi) Taxes, whether local or federal, if applicable, such as income tax —*for the seller*—, acquisition of real estate tax, value added tax, etc.; and
- (vii) Notary fees and filing fees, such as, preemptive notices, certificate of

<sup>5</sup> Article 2249 of the Mexican Federal Civil Code (*Código Civil Federal*).

<sup>6</sup> Articles 2316 to 2322 of the Mexican Federal Civil Code (*Código Civil Federal*).



encumbrances, registration of the change of title thereof, expedition of public deeds, etc.

(b) Ongoing costs

For guidance purposes only, the following are the ongoing expenses that a real estate owner, direct or indirect, typically needs to take into consideration in Mexico, subject to different local requirements that each City or State may have in the correspondent local regulation:

- (i) In case of a Mexican Corporation, issuance of annual financial statements and filing fees before the Public Commercial Registry in case of Stakeholders Meetings minutes required to be recorded therein, for example, amendments to by-laws, transformation, mergers, spin-offs, dissolution, liquidation and, optionally, the powers of attorney granted by the corporation<sup>7</sup>;
- (ii) In case of a regular Mexican trust, formalization, and trustee's annual fees;
- (iii) Annual property taxes, like real estate tax (*impuesto predial*); and
- (iv) Payment of services, such as water, electricity, and gas supply, among others.

### Disclaimer

This note is for general guidance only. Specific legal advice should be obtained in all cases.

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We remain at your disposal in relation to questions regarding this note and in relation to your business and look forward to assisting you.

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<sup>7</sup> Articles 19 and 21 subsection VII of the Mexican Commercial Code (*Código de Comercio*).



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# INTERNATIONAL LAWYERS NETWORK



**PLASBOSSINADE ADVOCATEN NOTARISSEN**  
Buying and Selling Real Estate in the Netherlands

**ILN REAL ESTATE GROUP**

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER DUTCH LAW

### Introduction

The purchase of an immovable property is a mutual agreement.

Neither the seller nor the buyer has the obligation to make use of the services of a real estate agent. In practice actually one often sees that the seller instructs a real estate agent to act as an intermediary. A purchase agreement cannot be effected by the real estate agent himself: he is merely the intermediary. Should the seller engage a real estate agent, the seller must also pay the charges arising from the use of his services.

A real estate purchase agreement is often preceded by a pre-contractual stage. If the parties have agreed upon essential conditions, a purchase agreement has been achieved.

Generally, no formal requirements need to be observed, which means that a *written* purchase agreement is not necessary. This requirement only applies in the event of consumer sale i.e., that a residence is purchased by a natural person. In case of a consumer sale a so-called reflection period applies. During three days after signing the purchase agreement the consumer buyer has the right to dissolve the agreement without having to give reasons and without consequences.

### Conformity – examination

The Dutch Civil Code (article 7:17) stipulates that a seller is obligated to supply to the buyer an immovable property that must be in conformity with the agreement. The immovable property is not in conformity with the agreement if it does not have the characteristics that the buyer, given its nature and the statements of the seller about it, could have expected on the basis of the agreement. The buyer may expect that the immovable property has the characteristics necessary for a normal use and on the presence

of which he did not need to doubt, and also that it has the characteristics necessary for a particular use which was foreseen in the agreement.

The parties can derogate from this statutory main rule at the time of the purchase agreement. This is often done by giving substance to the duty of disclosure and examination and laying down the outcome in the agreement.

### Elements purchase agreement

The following items require attention during the negotiations and in the purchase agreement:

- object description
- purchase price
- transfer of ownership by means of a notarial deed of delivery
- costs and taxes
- current agreements with regard to the immovable property
- transfer and transmission of claims
- guarantees seller
- oversize/undersize
- environmental regulations
- risk transfer of damage
- notice of default/omission/dissolution/penalty
- energy performance certificate
- registration in the public records
- Municipalities Preferential Rights Act
- suspensive or dissolving conditions

## Various types of registered immovable property rights

The Dutch Civil Code distinguishes four main immovable property rights which confer full ownership or a limited right in rem to the purchaser. These rights are:

### Property right

The property right (ownership right) is the most comprehensive immovable property right one may acquire, free and unencumbered with any limited right belonging to other (third) parties. The owner of the immovable property is in the position to sell and dispose of the immovable property, to encumber the immovable property with limited rights in rem such as leasehold or mortgage.

### Leasehold

Leasehold ("erfpacht") is a limited immovable property right in rem and provides the leaseholder the right to hold and use the immovable property which is owned by another person or legal entity. The rights and obligations of the leaseholder are generally limited by law and can be specifically limited by the leasehold conditions which are concluded between the owner and the leaseholder.

The following items are usually determined by the leasehold conditions:

- duration of the lease (temporary, permanent, or perpetual);
- ground rent ("erfpachtcanon"); - designated use;
- (conditional) right of transfer;
- (conditional) right of sub-leasehold.

The leaseholder is entitled to mortgage the leasehold without the consent of the owner. Therefore, in case the leaseholder requires the written consent of the owner under the leasehold conditions to transfer the leasehold, the mortgagee is not bound by this condition in

a situation of a forced sale. However, after the execution sale the new leaseholder is again fully bound by the leasehold conditions.

### Apartment right

The apartment right is a distinct share in an immovable property with its appurtenances, giving entitlement to the sole use of a certain part of the immovable property. The immovable property is divided into apartment rights by way of a notarial division deed, containing a division plan and rights and obligations of the owners of the apartment rights. The application of apartment rights is widely used as to legally structuring immovable property, whether residential or commercial or otherwise.

The notarial division deed contains, as required by law, the establishment of an owner association. All apartment right owners are members of this owner association by operation of law. The objects of the owner association are to manage the immovable property and the general interests of the joint owners directly relating to the immovable property.

An apartment right may be encumbered with limited rights in rem such as leasehold or mortgage.

### Right of superficies

The right of superficies ("opstalrecht") is a limited right in rem and provides the holder the right to own or to acquire constructions and structures in, on or above immovable property which is owned by a third party. The right of superficies may generally be compared with leasehold, but a distinctive contrast is that the leaseholder may use and hold the immovable property itself while the holder of the right of superficies has the ownership and use of constructions and structures *in, on or above* a third party's immovable property.

A second difference between leasehold and the right of superficies is that leasehold is an independent right while the right of superficies may be an independent right or a right dependent on another agreement between the owner and the holder, such as a lease agreement. In such case ending of the lease agreement would mean the end of the right of superficies.

The rights and obligations of the holder of the right of superficies are generally limited by law and can be specifically limited by the conditions which are concluded between the owner and the right's holder, equal to leasehold conditions.

An independent right of superficies can be transferred and encumbered by a limited right in rem such as mortgage. Since the dependent right of superficies depends on another agreement, such right cannot be transferred nor be encumbered with a limited right in rem.

The right of superficies is widely used for pipelines, cable networks and other valuable structures or equipment.

The property right, leasehold, apartment right and right of superficies can all be leased to a third party.

#### **Nonregistered immovable property rights (economic ownership)**

Economic ownership can be defined as the separation of full ownership in legal ownership and economic ownership. It is based on obligations between involved parties by means of contracting. The economic owner is usually entitled to the value and profits of the real estate. The legal owner is registered at the Land Registry but does not necessarily hold any economic or financial interest of the real estate.

For third parties only the legal owner is known due to registration.

#### **The role of Dutch civil-law notaries in immovable property transactions, payment procedure and the Public Registers**

Under Dutch law a notarial deed is compulsory in order to transfer title to immovable property or to establish limited rights in rem, such as a mortgage. Notarial deeds are conclusive proof of the transactions laid down therein.

Dutch civil-law notaries are impartial legal professionals appointed by the Government. In his capacity the civil-law notary must consider the interests of all parties involved in a transaction regardless of who pays the notary's fee. Also, in general, the interests of third parties who are affected by a transaction must be considered. The civil-law notary advises the parties and oversees the transaction.

The notarial deed containing the transfer of ownership or the establishment of the limited right in rem are recorded by the notary with the designated Public Registers, kept by the Land Registry "Kadaster", by way of filing a certified copy (or an excerpt) of the deed. These Public Registers are accessible for everyone. The civil-law notary is the custodian of the original deed and therefore it remains with the notary. Parties entitled to it will receive a certified copy or, when required, an authenticated copy.

In an immovable property transaction, the purchase price (or secured loan amount) must be deposited with the (impartial) civil-law notary prior to the closing of the transaction. This has the meaning that at the time of the transfer of ownership of the transaction, the purchase price is in place but out of the hands of the Buyer and Seller alike. After the transfer of ownership has been completed (by way of recording the deed of transfer in the designated public registers and checks of various other registers), the civil-law notary releases the funds to the Seller. Each civil law



notary is obliged to keep a special account in his name with a bank acknowledged by the Dutch authorities, stating his capacity; this/these account(s) is/are exclusively intended for funds the civil-law notary retains in relation to his activities in that capacity.

The aforementioned statutory provision further implies that the funds in this special account, which is called a third-party account, do not belong to the civil-law notary, but to the parties entitled to them. This means that the balances in this account cannot be attached by the civil-law notary's creditors and that, should the civil-law notary get into financial difficulties or go into involuntary liquidation, the balances in the account cannot be involved in the financial difficulties or the liquidation.

The above has been included in the law to protect the interests of the civil-law notary's clients who need to be able to rely on the fact that the funds they have deposited with the civil-law notary will reach the parties they are intended for. The civil-law notary is the only party who can dispose of this account.

### **Tax issues**

#### **Value added tax (VAT)**

In general acquisition of real estate is not subject to VAT (21%), except for newbuilding and/or building sites. In case VAT is applicable, there is usually an exemption from Transfer tax. Newbuilding is considered newbuilding in the building phase, when it is completed and occupied, up until two years after occupation.

In the event newbuilding is purchased within two years after occupation and the seller is subject to VAT, VAT and Transfer tax are both applicable. Depending on the tax status from buyer for VAT purposes, VAT can be reclaimed in the VAT tax return. When a natural person – not subject to VAT - is selling newbuilding

within two years of occupation only Transfer tax is applicable.

In case seller and buyer are both subject to VAT and buyer will use the real estate for 90% or more for VAT business activities, they can opt for a transfer of real estate with VAT. Transfer tax is also payable. VAT can be reclaimed by buyer in the VAT return. A revision period is applicable for 1/10 of the initially reclaimed VAT in the following nine years. When buyer in any year performs less than 90% business activities for VAT, the buyer has the obligation to partially pay back VAT.

Research on the tax history of real estate between a tax advisor and a civil-law notary is highly recommended especially with regard to commercial real estate.

#### **Transfer tax**

Transfer tax is imposed on the acquisition of existing, used immovable property and limited rights in rem thereto (not security rights such as mortgage). The tax rate is 2% for residential properties and 10.4% (2023) for commercial and all other properties. Persons between 18-35 years can use a one-off exemption for transfer tax on residential property. The exemption is intended to improve the market position of starters.

The taxable base is the purchase price or the fair market value of the real estate when this value exceeds the purchase price.

Subject to Transfer tax is the transfer of:

- I. Real estate including rights derived from real estate such as leasehold, right of superficies and apartment right.
- II. An economic ownership in real estate. The economic ownership includes the risks of change of value of the real estate. Participation rights in real estate investment funds are exempt when acquiring interests below one-third in

the fund, interests above one-third are subject to transfer tax (including interests already held).

- III. So called fictitious real estate, to be distinguished as follows:
- a. Shares in a (separate) real estate entity, which possessions mainly consist of real estate (acquisition of one-third or more of shares, including interests already held).
  - b. Rights on membership of association of cooperation in case the rights include the (exclusive) right

Several acquisitions of real estate are under conditions tax exempt for Transfer tax among which:

- the acquisition of new building and/or building sites in the phase before occupation (subject to VAT 21%);
- acquisitions under the scope of business/family succession;
- acquisitions in the event of mergers, restructuring and division of corporate entities.

#### Corporate income tax

A Dutch corporate entity investing in leased real estate is subject to corporate income tax. Real estate held by foreign corporate entities is considered as a permanent establishment for corporate income tax purposes.

Taxable income is profit (rental income, realized capital gains) minus costs and depreciation. Depreciation is limited to 100% of the determined value of the leased real estate of for the purposes of the Valuation of Immovable Property Act. Depreciation of real estate that is used by the corporate entity itself, is limited to 50% of the determined value of for the purposes of the Valuation of Immovable Property Act. Transfer tax is not deductible as costs from taxable profit and is part of the cost price of the

real estate on the balance sheet. Interest on loans is in general deductible from profit.

The 2023 corporate income tax rates for:

19% for taxable income between € 0 - €200,000;

25.8% for taxable income exceeding € 200,000.

#### Income tax

Real estate (not the residence/permanent home in the Netherlands) can be taxed with (personal)

Income tax within three categories (Box 1, 2 and 3).

Real estate which is part of a personal business (including partnerships that qualify as business) is subject to Box 1 progressive income tax rates with a maximum rate of 49,50%. Box 1 can be applicable for personal held real estate leased to certain affiliated companies. Net income from real estate may also fall under the scope of Box 1 in case the owner performs active real estate management in order to make more return on investment compared to passive real estate management.

Box 2 is a flat rate of 26,90% (2022 and 2023) for owners of more than 5% of the shares in a corporate entity (a substantial interest). Income from real estate from the corporate entity is not directly taxed by the shareholder but with the entity itself with corporate income tax. Valuation of the real estate held by the entity is directly related to the value of the shares held by the shareholder. In case the shareholder sells shares in the real estate entity a rate of 26,90% is applicable in case capital gain on the value of the shares is realized. Instead of a flat rate the government proposed two tax rates for box 2 as of 2024. Taxable income between € 0 - € 67,000 is taxed against 24.5% and 31% for taxable income exceeding the latter amount.

The wealth tax is levied in box 3. In general, per 1 January of each year the market value of real estate is subject to a notional annual income of 6,17% (2023) minus notional interest costs on debts of 2,46%. The net notional annual income calculated is taxed with 32% (2023).

With respect to the lease of residential real estate, different valuation rules may be applicable. Landlords may qualify for a deduction under box 3. This deduction depends on the rental income as a discounted percentage on the market value of the real estate as per 1st of January of each year, the so-called WOZ-value. This annual valuation is arranged on behalf of the local authorities. If the annual rental income is between 1-5% of the WOZ-value, the landlord is allowed to use a deduction of maximal 27% to 5% of the WOZ-value. This means that the notional annual income will decrease, and less tax will be charged. This is the so-called vacant value ratio.

The abovementioned Boxes are also applicable for non-resident investors subject to Dutch income tax. They are considered as non-resident taxpayers for Dutch Income tax purposes. The Netherlands have an extensive network of tax treaties with other countries in which the effects of double taxation are mutually arranged, with regard to Box 1, 2 and

#### Real estate tax

Real estate tax is a local tax which is charged at owners of residential real estate or business premises. The WOZ-value is also the basis of taxation for this tax. How much real estate tax you have to pay, depends on the property rate which is annually determined by the municipality. This income is used by the municipality for all kinds of general provisions. For example, the construction and maintenance of roads, sidewalks, and public gardens. The real estate tax is always charged for the whole year. If you buy real estate during the

year, you will receive a tax assessment at first in the following year.

#### Landlord taxation on social housing

Landlords and housing associations might be subject to a landlord levy in the social housing sector. This levy is applicable if you let at least more than fifty properties with an rental income per month of less than € 752,33 each; the so-called rent allowance which can be claimed by lower-income households. The total market value (on the 1st of January) of the social housing portfolio decreased with the market value of the first fifty properties is taxed against a percentage of 0,526%.

#### Future plans box 3

The government has announced further plans to adjust the regime of box 3. As of 2026 it is expected that income tax will be levied on the basis of actual realized returns instead of taxation on notional annual income minus notional interest costs.

Foreign investors in Dutch real estate are strongly recommended to acquire further tax advice.

#### Capital gains on real estate or shares in a Dutch corporate entity holding real estate

Capital gains made by a Dutch corporate entity and a foreign corporate entity (also by means of a partnership) is subject to Dutch Corporate income tax. Capital gains made by individuals under the regime of Box 1 of Income tax are progressively taxed.

In case there is an intention to reinvest a capital gain, profit from selling real estate can be reserved in a fiscal reserve up until three years after selling. Within these three years reinvestment has to take place. If not, the capital gain is taxed in the third year after selling at the latest.

Capital gains on the sale of shares in a corporate entity by a Dutch corporate entity is in general exempt from corporate income tax. The Corporate income tax act provides for a participation exemption on dividends and capital gains for Dutch and foreign held shares by Dutch corporate entities under the following conditions:

- at least 5% of the shares is held by the Dutch corporate entity;
- the shares are not held as an investment;
- the participation is subject to a corporate tax with a realistic tax rate compared to Dutch tax rates, or less than 50% of the assets of the participation consists of low tax rated investments (surplus liquidities, assets related to passive financing of group companies, or assets that are placed at the disposal of group companies).

#### Dividend withholding tax

Dividends are subject to Dividend withholding tax. Below the current Dividend withholding tax

rules for the following categories:

- dividends paid to shareholders natural persons with a substantial interest;
- dividends paid to shareholders natural persons without substantial interest;
- dividends paid to a resident corporate entity;
- dividends paid to a non-resident corporate entity.

Dividends paid to shareholders (natural persons) with a substantial interest (5% or more of the shares) are subject to 15% Dividend withholding tax. Dividend withholding tax is an advance levy before Box 2 flat rate of 26,90% (2021) in Income tax. In case the shareholder with a substantial interest is a non-resident the same rules in

principle apply. The non-residential shareholder is considered as a non-resident taxpayer for Dutch income tax purposes. Dutch tax regulations and tax rates may be overruled and/or adjusted in case a tax treaty is applicable with the country of residence of the non-resident shareholder.

Dividends paid to resident shareholders without substantial interest are subject to 15% Dividend tax. Dividend withheld tax is refundable and/or can be settled with due Income tax. Non-resident shareholders without substantial interest are also subject to 15% Dutch withholding Dividend tax. Dutch tax rates may be overruled and/or adjusted in case a tax treaty is applicable with the country of residence of the non-resident shareholder. On request the Dutch tax authorities will refund Dividend tax entirely or partly, depending on the applicable treaty.

Dividends paid by a Dutch corporate entity to another Dutch resident corporate entity are exempt from withholding Dividend tax in case the participation exemption of the corporate income tax applies. The participation exemption applies in case a corporate entity holds 5% or more of the shares in another corporate entity. Dividend tax withheld in other situations will be refunded and/or settled with Dutch Corporate income tax.

Dividends paid by a Dutch corporate entity to a non-resident corporate entity is subject to 15% Dividend withholding tax unless the non-resident corporate entity holds more than 5% of the shares and the EU Parent Subsidiary is applicable. In other cases, the 15% Dividend tax rate may be adjusted due to the applicable tax treaty with the country of residence of the non-resident corporate entity, depending on conditions.



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# INTERNATIONAL LAWYERS NETWORK



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Buying and Selling Real Estate in Norway

ILN REAL ESTATE GROUP



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER NORWEGIAN LAW

### I. STANDARD FORMS OF AGREEMENT

- A. Offer to Purchase sets forth Buyer's offer of price and date for closing. Seller may accept or reject.
- B. The purchase contract sets forth the terms of purchase and sale, including among other things, price, allocation of costs of the transaction, date for closing, encumbrance, insurance, and default provisions.

### II. BROKERS

- A. Buyers and sellers are not required to use a real estate broker or agent, but normally the settlement is carried out by a real estate broker or a lawyer. The broker or the lawyer shall be independent. Both the real estate broker and the lawyer must be licensed.
- B. The seller pays the broker's commission.

### III. BUYERS INSPECTION

#### A. Residential:

Inspection is not mandatory, but the buyer will normally examine the property before purchasing. Defects that the buyer discover or should have discovered before buying the property cannot be claimed. After taking possession of the property, the buyer is obligated to examine the property. Time of allowed claims starts running from the point of time the buyer detect defect or should have detected defects, so it's important that the buyer examine the property after taking possession of it.

#### B. Commercial:

Before buying the property the buyer will normally conduct due diligence on the property, including investigation and analysis of the property for potential problems, below here an inspection of the property.

### IV. FORMS OF OWNERSHIP

#### A. Residential property is typically held in an individual's name. The property might also be held by a company, a trust, or the municipality.

1. Freehold housing – typically houses, row houses, freehold flats, and holiday houses.
2. Cooperative housing - an arrangement in which an association or corporation owns a group of housing units and the common areas for the use of all the residents. The individual participants own a share in the cooperative which entitles them to occupy an apartment.
3. Ground lease – a leased property is a plot that is rented out to the person using the plot. The person using the plot only owns the residence.
4. Commercial property is normally held in a company's name but might also be held in an individual's or trust's name.

### V. DEED

- A. At the same time as the buyer pays for the property, the seller is obligated to issue the deed. By issuing the deed, the buyer gets the title to the land. To get legal protection from competitive



acquisition the buyer must register the deed in the Register of deeds.

#### VI. CLOSING COSTS/ADJUSTMENTS

- A. The buyer pays the documentary stamp duty. The fee is 2.5 per cent of the value of the property at the time of registration.
- B. Among other things this do not apply to the following transfers:
1. transfers between spouses,
  2. transfers which is a consequence of separation,
  3. transfers which is a consequence of inheritance,
  4. transfers which is a consequence of legacy,
  5. transfers of properties which is not used earlier,
  6. transfers of buildings under construction,
  7. transfers of a leased property,
  8. transfers which is a consequence of termination of co-ownership,
  9. transfers which is a consequence of termination of cooperative housing and
  10. transfers after mergers, demergers and restructuring of businesses.
- C. The buyer also pays the registration fee to the government. The registration fee is NOK 585.
- D. The general rule is that gains/losses made on the sale of residential property are taxable/deductible. Gains made on the sale of residential property are tax-free if certain occupancy and ownership

conditions are met. The following conditions must be met:

1. The sale must take place or be agreed upon more than one year after the property was acquired and
  2. The owner must have used the property as its own home for at least one year during the two-past year before the sale takes place.
- E. Gains made on sales or other realization of plots of land will always be tax liable, and any loss will be deductible.
- F. Commercial properties are also taxable/deductible.

#### VII. ANNUAL COSTS FOR PROPERTY OWNERSHIP

- A. Property insurance
1. Property insurance is not obligated, but most people sign up for a property insurance.
- B. Property tax
1. Municipalities can opt to introduce property tax. The fee differs between the municipalities within the country.



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# INTERNATIONAL LAWYERS NETWORK



**QUIJANO & ASSOCIATES**

Buying and Selling Real Estate in Panama

**ILN REAL ESTATE GROUP**





## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER PANAMANIAN LAW

- 1) Once you find a real estate property that you want to acquire by yourself or through a local real estate broker, it is strongly recommendable to hire a local attorney to perform a thorough due diligence on the property.
- 2) Once the due diligence is finalized, and the property is clear from any restriction that will impede its sale, you or through your broker, should negotiate the terms and conditions of the transaction, which will include the price and payment method.
- 3) The next step will be to subscribe a Promissory contract that will contain all the terms and conditions of the purchase/sale.
- 4) At the moment of the signing of the promissory contract, a down payment is given to the seller so that he may settle the taxes (5% of the higher value between the purchase price and cadaster value of the property) that generate the transaction.
- 5) Once taxes are paid by the seller and all the documents for closing are in place, the parties will need to sign before a local notary the final purchase/sale contract, which will be subscribed in a Public Deed.
- 6) The final step of the purchase/sale is to register the final purchase /sale contract in the Panama Public Registry, so that the transfer of the property can be consummated.

### Important Aspects:

#### a) Registration

Panama has a public system where all matters related to real estate are registered, including title, any improvement to the property, burdens, impediments, and limitations to ownership.

- When a real estate property is registered, it is assigned with a parcel number, which will be used to identify the specific property, as it will include information such as the name of the owner(s), its registered value, measures of its areas, borderlines and any boundaries which have been registered on the specific property.
- Any person (foreign or national, natural, or legal entity) can hold real estate title in the Republic of Panama. To proceed with the acquisition of a real estate, the buyer will register the title under his/her/its name, with the registration of a Public Deed at a Public Notary office, which includes the Purchase & Sale Contract, and by paying the correspondent taxes to the Panamanian Tax Authority.
- The registration of this public deed at the Public Registry is obligatory for the transfer to be executed.

#### b) Taxes

The following is intended to provide basic information about taxes related to the most common real estate transactions, and any tax liabilities enquiries should be handled on a case-by-case basis.

- Property Tax (Impuesto de Inmueble)  
Real estate in Panama, whether in urban or rural areas, is subject to property taxes.
- All properties registered at a value of \$30,000 or less, including improvements of land, for instance, construction.



- Land occupied exclusively for agricultural purposes like farming and registered with the Ministry of Agriculture and Development at no more than \$150,000.

The real estate tax basis should be understood as being the combination of the value of land and the improvements of the property, which includes any construction on the land, as appraised by Land Commission (Oficina de Catastro). Real estate transactions at prices surpassing the appraisal value are automatically registered with the new, higher value, and thus becomes the new basis for taxation.

- Real Property Transfer Tax

When a property is sold, the Real Property Transfer Tax is assessed and calculated on the greater of the total value, whether the sale price or the registered value, plus the value of the improvements. The tax rate is 2% of the greater of these two values, plus 5% for each year since owning the property.

- Real estate taxes season in Panama occurs 3 times every year, at the end of April, August, and December.

#### c) Financing

- Local or Foreign Banks and/or Lenders are usually used to acquire / buy real estate in Panama, which secure the buying through a mortgage agreement with the buyer. Mortgages must be granted in the form of a public deed before a Notary Public in Panama and registered at the Public Registry to perfect the security interest.

#### d) Leasing

- Panamanian Civil Code regulates Leasing in Panama, which are divided in two categories: the first covers residential

leases with a monthly rental fee up to US\$150, and the second category covers residential leases with a monthly rental fee of US\$150 or more, as well as leases of premises for commercial, professional, industrial, or educational use (regardless of the amount of the rental fee).

- A leasing agreement must include: The right of the lessee (in residential leases) to waive the minimum lease term, and terminate the lease agreement at any time (with a written notice sent at least 30 days prior to the termination date), the right to sub-lease, the obligation to deposit with the Ministry of Housing a sum equal to the agreed rental fee, the right of the lessee (in residential leases) to exercise his/her profession inside the leased property, unless it interrupts the peaceful enjoyment of the property or violates the law. Lease agreements must be registered at the Ministry of Housing; and also, as a public deed at a Notary Public (when its term exceeds six years) – being 20 years the maximum time period a lease agreement is permitted. Nevertheless, both categories of leasing could be registered at the Public Registry to inform potentially interested third parties.

#### e) Constructing

- In order to build in Panama, prior to the beginning of construction, the necessary plans must be accordingly signed by a professional who is duly licensed by the Technical Board of Engineers and Architects of the Ministry of Public Works; and then approved by the Directorate of Municipal Works and Constructions.



- After the construction is finished, an application for an occupancy permit must be submitted to the Directorate of Municipal Works and Constructions. In order to be granted with the occupancy permit, the builder must already have the construction permit, the permit issued by the Security Office of the Fire Department, an electricity permit, and a permit for installation of air conditioners (when applicable).
- Panama's condominium law is called the “**horizontal property regime**” which regulates owners' rights when owning an apartment in a building built on commonly used land; and divides property into common and private areas and establishes the rights, obligations, and the limitations that each unit owner has with respect to these areas.



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# INTERNATIONAL LAWYERS NETWORK



**MGRA & ASSOCIADOS LAW FIRM**  
Buying and Selling Real Estate in Portugal

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER PORTUGUESE LAW

### I. INTRODUCTION

Portugal is an Iberian Peninsula country, bordered by the Atlantic to the west and south and Spain to the north and east. In addition to its continental landmass, it also comprises the archipelagos of the Azores and Madeira. Portugal has around 10.3 million inhabitants.

Portuguese territory is split up into three administrative divisions: the first division includes 18 administrative country districts, while the others include the autonomous regions of the Azores and Madeira. All country districts are sub-divided into 308 municipal districts and approximately 3,100 parishes.

Lisbon is the capital of Portugal and its largest city with approximately 545,000 inhabitants and head of a metropolitan area of 18 municipalities with 2.5 million inhabitants. Portugal's second and third largest cities are Sintra, in Lisbon metropolitan area and Vila Nova de Gaia, in the Oporto metropolitan area, with approximately 385,000 and 303,000 inhabitants, respectively.

Portugal is a democracy. Its sovereign bodies are the President of the Republic, Assembly of the Republic, Government, and the Courts. The current President of the Republic (and head of state), re-elected in 2021 for a five-year term, is Marcelo Rebelo de Sousa. Elections for the 230 deputies of the Assembly of the Republic are held every four years and are followed by the appointment of the Prime Minister (the head of government, currently António Costa), who then forms the government (currently a government with an absolute majority, elected in January of 2022 will run to 2026).

Portugal has been a member of the European Union since January 1<sup>st</sup>, 1986, and a founding member of NATO on April 4<sup>th</sup>, 1949. It has been

a member of the United Nations since the 14<sup>th</sup> of December 1955.

### II. REASONS TO INVEST IN PORTUGAL

Renowned for its pleasant weather and safety environment, Portugal has an extensive Atlantic coast, a wide system of motorways, excellent infrastructures for living and leisure time, including prime health facilities, competitive operating costs, proactive pensions, an advantageous tax system for investors and flexibility in human resource management systems. These singularities have made Portugal a privileged place to invest, to do business and to live.



### III. OVERVIEW OF THE NATIONAL REAL ESTATE MARKET

The main characteristics of the Portuguese real estate market are:

Transparency, with various international consultants regulated by the most demanding professional organizations of the commercial real estate sector.

Vitality were quality of supply in all sectors pars with main European markets, dynamic demand, and a considerable presence of foreign occupiers.

Diversity, with a strong international contingent of developers and investors performing and looking for new opportunities in the Portuguese market



### III.1. REAL ESTATE INVESTMENT MARKET

The road for real estate investment funds in Portugal was opened in 1985. Since launching up until the 1990s, these funds had typically been used as SPVs rather than as an actively managed, pooled, closed-end-fund. Portuguese market, up to 1998, was relatively small and not particularly professional, with few and distanced foreign investments.

With the perspective of elimination of foreign exchange risk to most of other European markets, in 1998, ahead of the Euro's launch, investment increased from around €180 million to more than €400 million, around 90% of which was foreign.

Joining the Euro in 1999, highlighted the country on the radar of international investors. Almost all asset transactions in this early years were in the office or shopping center sectors, with retail property accounting for more than 60% of the capital involved.

Portugal saw a steady grow in real estate investment during the last decade:

- In 2008 and 2009, real estate investment was relatively low, mostly due to restrictions and scarcity of bank funding for the sector.
- A slight recovery was noticed in 2010 with a total investment volume of €690 million.
- The two following years continued to reflect the sector investment tendencies. 2011 saw a total investment value of €167 million, while 2012 reached the lowest level of the century, recording only a total investment of € 108 million.
- 2013 marked the growth of the market activity, closing a total of €322 million investment in commercial real estate

assets, tripling the previous year volume, followed by a significant growth also in 2014.

- In 2015, numbers largely surpassed the investment of latter years, including the historical high of 2007, with a €1.9 billion registered in commercial real estate assets transactions, doubling the volume of the previous year. Significantly 90% of the invested capital came from outside the country.
- During the year of 2016, the value of real estate transactions stabilized around € 1.3 billion) and then reached a new historical high in 2017, with € 2 billion invested in real estate.
- In 2018, a new historical high was registered, with investments over € 3.5 billion. During this period, the volume of the number of transactions also increased exponentially ;
- Despite the decline in the number of transactions from 2019 to 2020, related to the worldwide pandemic caused by the Covid-19 disease, the number of properties transacted only decreased by 19.7%. On the other hand, the average value of the properties transacted in 2020 increased slightly (+0.5%) when compared to 2019;
- In 2021, the increase in the value and number of housing transactions, reached a new record in the available series, as evident in the figures below. Therefore, the increase represents a new maximum in the series available and a growth of 20.5% when compared to 2020. During the year of 2021, the value of housing transactions amounted to €28.1 billion, 31.1% more than in 2020.



Source: INE, Índice de Preços da Habitação

Number of real estate purchases of the last seven years.

### III.2. FOREIGN INVESTMENT IN REAL ESTATE

The entry to the EU in the 1986 slowed the Portuguese economy volatility and brought the country to the spotlight of international companies, in a first instance infrastructure development and then urban planning and inner cities requalification. In these early years real estate investment was little significant, mainly led to housing, or second housing and UK investors were almost the only presence in the market – specially the south (sun and beach market).

The boost of foreign investors in the Portuguese real estate market was felt since the country joined the Euro in 1999.

Several billion euros of foreign capital have been invested mostly by Germans, British, Dutch and Americans on the acquisition of several real properties since then. Recently, investors from China, Russia, Brazil, and France have also made a significant impact in Portuguese market. This value could have been higher as the Portuguese market was, on occasions, simply not large enough to supply enough products in terms of number, quality and/or scale, to fully meet the demand.

Portugal remained present in the investment intentions of several of the most important European investment houses over the past 15 years, with buyers interested in effectively diversifying risk and achieving slightly higher income returns than those available from other markets, in a country offering security, transparency and less competition.

Dramatic changes impacting European economic situation, in particular Portugal, drove away the attention of foreign institutional investors until 2013. However, the second half of 2015 brought back international investment into Portugal and, more particularly the last quarter of the year, showed signs of what may be considered an upturn of real estate investment activity. The successful outcome of the political crisis, the continued improvement of economic indicators, greater public debt market stability and Portugal's good performance, made important contributions to the market recovery.

It should be noted that in Portugal, in July 2022, the median bank appraisal value (€/m<sup>2</sup>) was set at 1,417, and the implicit interest rate on housing credit contracts was set at 0.912.

### IV. HOW TO MAKE A REAL ESTATE INVESTMENT

Portugal, lined with other continental legal systems such as France (propriété), Germany (Voll Eigentum) and England (freehold), adopting the concept of "full ownership" which is defined by the full and exclusive rights of use, fruition, and disposal of the property.

#### IV.1. INDIVIDUAL (DIRECT ACQUISITION)

The formalization of a real estate acquisition requires the compliance of some important steps, as follows:



#### IV.1.1. INVESTIGATION

Investigating the property intended to be acquired by checking its commercial, legal, tax, environmental and urban status it's essential for a clean and structured execution of the sale and purchase agreement.



Usually, it is done by commissioning due diligence procedures, which should ensure and guarantee that the property in question belongs to the seller, is duly licensed, is not subject to any encumbrance, costs, or limitations (registered with the respective Land Registry Office), or that any impediments have been extinguished before or after the sale.

If the intention is to acquire a plot of land, the buyer should also verify, with the competent entities, the urban planning in all its different forms, as well as any restrictions and licenses.

On the other hand, when acquiring a building, or building unit, the use permit license which defines the purpose of the property, must also be verified.

#### IV.1.2. SALE AND PURCHASE PROMISSORY AGREEMENT

Before the formalization of the real estate sale, it is common practice to celebrate a promissory agreement (or pre-contract agreement) as an immediate binding document, in which case the signing of the definitive sale agreement is usually

conditional upon the parties' compliance with several obligations.

The parties can also agree with a deposit and down payment of the property price. In the case of default by the promissory seller, the promissory purchaser may receive twice the amount paid; if the default is caused by the promissory purchaser, the promissory seller can keep the amounts he has already received.

#### IV.1.3. SALE AND PURCHASE AGREEMENT

The real estate sale is formalized either in a deed, signed before a notary, or by a certified private document, which can be signed in the presence of a lawyer.

Altogether with the deed, or certified private document, there is the Land Registry Office record, which is one of the main instruments of a real estate deal, destined to make public the property's actual legal status.

Due to the principle of the priority of registration, the first registered right is effective before third parties and prevails over their incompatible rights even if those rights have been established before the date of registration.

Accordingly, together with the sale and purchase agreement, the registry of the property acquisition is vital to assure the protection of the purchaser before third parties.

#### IV.1.4. REAL ESTATE WARRANTY

According to Portuguese Law, the real estate seller (and the property builder, when applicable) is responsible for any defects or flaws in the property for a ten-year period upon delivery, regarding non-conformities concerning structural construction elements, and, for a five-year





period upon delivery, regarding all other non-conformities.

Lack of conformity is presumed to exist at the time of delivery, except when this is incompatible with the nature of the property or with the characteristics of the lack of conformity.

Purchaser must report the defect or flaw to the real estate seller or property builder within one year from the date of detection of the defect (always within the warranty periods referred to above). Problems that arise during this period cannot be deemed as result of bad use by the purchaser.

Warranties with distinct deadlines may be stipulated between the parties and expressly stated in the sale and purchase agreement.

This legal warranty can also be refused by both parties, specifically if they agree to sell the property “as it is” at the moment of the sale.

#### **IV.2. SPECIAL PURPOSE VEHICLE (INDIRECT ACQUISITION)**

The second form of real estate investment is the indirect acquisition of property, via a special purpose vehicle, previously incorporated, or acquired, for such purpose. This procedure requires the compliance of some steps, as follows:

##### **IV.2.1. DUE DILIGENCE**

Also, in this case commissioning a *due diligence* procedure by the purchaser is recommended, in order to i.) verify the property legal status, as detailed above, and to ii.) analyze the investment vehicle’s commercial, financial, tax, corporate and legal status, ensuring the legal acquisition of equity stakes as well as that no undesired

obligations or rights are dragged along with the entity to be used as vehicle.

##### **IV.2.2. SHARE DEAL**

This process involves the acquisition of equity stakes in investment vehicles, such as commercial companies (usually joint-stock and limited liability companies) and undertakings for collective investment of a contractual nature or of a corporate nature.

##### **IV.2.3. SALES GUARANTEES**

In special purpose vehicles acquisitions, it is common practice for the seller to accept liability for a specific length of time for any infringement of its representations and warranties on the object of the sale and underlying assets.

#### **V. TYPES OF SPECIAL PURPOSE VEHICLES**

It is standard practice in Portugal to make real estate investments through one of these three vehicles which, in other words, represent the process of a special purpose vehicle acquisition deal: (i) commercial companies, (ii) real estate investment funds and, (iii) real estate investment companies.

##### **V.1. COMMERCIAL COMPANIES**

Joint-stock companies as well as limited liability companies are on the Portuguese frontline, representing most of the existing national commercial entities.

##### **V.1.1. LIMITED LIABILITY COMPANIES BY SHARES (PLC)**

In a PLC, share capital is divided up into shares, with a minimum initial amount of €50.000,00, and must, only at the moment of its incorporation, have a minimum of five shareholders, unless it is incorporated by another company as its sole shareholder. Also, only two founding shareholders are required when the State, or a State holding



company, owns more than 50% of the capital stock.

After the incorporation, restrictions to the minimum number of shareholders no longer apply.

In its most common composition, the company is governed by a General Meeting Board, the Board of Directors, and the Sole Supervisor, who should be a Statutory Auditor. PLCs with a maximum registered share capital of EUR 200.000,00 may be managed by a Sole Director (“administrador único”), by means of a provision of the bylaws, rather than having a Board of Directors.

In most PLC companies, the share transfer agreements require no special formalities, and its necessary registration is executed directly and internally at the company itself.

#### **V.1.2. LIMITED LIABILITY COMPANIES BY QUOTAS (LTD)**

Usually representing the small and medium sized companies, the LTD companies are the most found type of companies in Portugal due to the inexistence of a minimal initial share capital requirement and a simpler functioning and structure, as well as the bigger control given to the founder partners.

Its share capital is divided up into quotas, with a minimum initial amount *per* quota of €1. The limited liability company can have or be incorporated by a sole quota holder (in which case the company must bear the corporate expression “sole quota holder limited liability company by quotas” – “SPUQ”), or by any other number of quota holders (“SPQ”).

Differently from PLC companies, the information about the quota holders’

identity is public, accessible through the commercial registry official records.

The quota transfer requires writing form and an official registry of the transmission.

#### **V.2. REAL ESTATE INVESTMENT FUNDS**

Over the last few years, these vehicles took up the Portuguese market, mostly due to its favorable tax regime.

The so called “*Fundos de Investimento Imobiliário*” (“FII”) are autonomous assets under the joint ownership of individuals or corporate entities, usually called “unit-holders.” FII’s are also divided up into identical investment/participation units.

Portuguese FII’s assume one of the following forms:

- i) Open-ended funds – with a variable number of investment units according to the market demand;
- ii) Close-ended funds – with a fixed number of investment units, established at the moment of its emission. Increasing or reducing its number is only possible if and when mentioned in the law and in the management regulation ;
- iii) Mixed funds – Comprising a category of fixed number of investment units and another of variable number, .

FII’s are a type of undertaking for collective investment (“OIC”) of a contractual nature, which management and representation must be performed by third entity specialized in the real estate market – as a general rule, by a management company of a collective investment undertaking (“SGOIC”). The management company of a real estate investment fund must be a public limited company and have its head office and effective management in Portugal.



The creation of these entities requires a formal process, which includes authorization and official supervision from the Securities Commission ("*Comissão do Mercado de Valores Mobiliários*" or "CMVM").

The assets of a FII may comprise liquidity, real estate property and shareholdings in real estate companies, including units in other real estate companies.

### V.3. REAL ESTATE INVESTMENT COMPANIES

In 2010, Portugal included in its legislation a possibility that already existed in most of European countries, which consisted in forming FII's with a corporate form (aside of the contractual form previously mentioned).

The so-called "*Sociedade de Investimento Coletivo*" are collective investment entities ("OIC") with legal personality, which shall take the form of a public limited liability company of variable capital ("SICAVI") or fixed capital ("SICAFI").

These collective investment companies can be self-managed or managed by management companies of collective investment undertakings ("SGOIC").

The share capital of the collective investment companies (is divided into identical nominative shares with no nominal value and they shall have a minimum initial capital of 50,000€ (fifty thousand euros) or 300,000€ (three hundred thousand euros), depending on whether they are heterogeneous or self-managed.

In addition to the activities permitted for the type of collective investment undertaking in question, these companies also have the exclusive corporate purpose of conducting the following activities:

- Investment management, undertaking the acts and operations necessary for the proper implementation of the investment policy;
- Management of the collective investment undertaking;
- Marketing the units of the collective investment undertakings under management.

Both SICAVI AND SICAFI are subject to the General Framework of Collective Investment Undertakings ("*Regime Geral dos Organismos de Investimento Coletivo*") and, except when it is incompatible with the specific nature and object of these companies or with the provisions of this General Framework, by the provisions of the Portuguese Companies Code.

Additionally, it is important to point out that the rules behind the incorporation of FII's (contractual form) are equally applied to the incorporation of these collective investment companies, as well as the applicable Portuguese corporate legislation. Therefore, the creation of these entities also requires a formal process, which includes authorization and official supervision from the Securities Commission ("*Comissão do Mercado de Valores Mobiliários*" or "CMVM").

### V.4. INVESTMENT AND PROPERTY MANAGEMENT COMPANIES (SIGI)

Finally, on January 2019, a new type of investment and property management companies ("*SIGI*") was legally established, aiming to (a) diversify companies' funding sources, (b) increase the investment in the economy and competitiveness of the securities market, (c) attract foreign investment, and (d) dynamize the Portuguese real estate market, especially the leasing market.

The SIGI corporate purposes are limited to:



- i) Acquire property rights or other equivalent rights on real estate, to subsequently rent them, including atypical forms of contract which include the supply of services necessary for the use of the real estate property;
- ii) Acquire and maintain shares of others SIGI or companies with their head office in Portuguese territory or in another Member State of the European Union or the European Economic Area which is bound to administrative cooperation in the area of taxation equivalent to that established within the European Union and which meet certain requirements;
- iii) Acquire and maintain participation units or shares in (i) real estate investment undertakings funds or (ii) residential rental real estate investment funds and residential rental real estate investment companies.

However, the property rights should constitute the major assets of these companies.

The “SIGI” are public limited companies (“PLC”) and must have a minimum share capital of €5.000.000 (five million euros), represented by ordinary shares. The shares are admitted to trading on a regulated market.

The “SIGI” must bear the business name “*Sociedade de Investimento e Gestão Imobiliária, S. A.*” or “*SIGI, S. A.*”, and may be formed with or without a call for public subscription. However, the deferment of any capital contributions is not permitted.

Debt limitations are applicable.

Furthermore, both public limited companies (“PLC”) and real estate investment undertakings (“OII”) in corporate form

(“SICAVI” or “SICAFI”) may be converted into a “SIGI”, subject to compliance with certain requirements stipulated by law. In both cases a resolution of the general meeting is required, with the majorities provided for by law.

Finally, the following relevant aspects of the regime applicable to SIGI should be noted:

- i) Indebtedness of SIGI may not correspond, at any time, to more than 60% of the value of the total assets of the SIGI;
- ii) Shares representing the entire share capital of SIGI must, within one year from the registration of the company's incorporation, be admitted to trading on a regulated market or selected for trading on a multilateral trading facility located or operating in Portugal or in another Member State of the EU or European Economic Area;



- iii) Within nine months of the end of each financial year, SIGI companies must distribute, in the form of dividends, at least: (i) 90% of the profits of the financial year resulting from the payment of dividends and income from shares or units distributed certain entities; and (ii) 75% of the remaining profits of the financial year distributable under the terms of the Companies Code.



## VI. TAX REGIME

The following information is general and describes only the main features related to real estate investment in Portugal, namely the rules applicable to general operations and legal entities, not covering, for example, complex and specific operations or entities whose qualification/legal nature is not provided for under Portuguese law, such as fiduciary structures or company's groups.

### VI.1. PROPERTY ACQUISITION

#### VI.1.1. REAL ESTATE TRANSFER TAX ("IMPOSTO MUNICIPAL SOBRE AS TRANSMISSÕES ONEROSAS DE IMÓVEIS") AND STAMP DUTY ("IMPOSTO DO SELO")

Acquisition of real estate is subject to two types of taxes, which must be paid by the purchaser to the tax authorities before the signing of the real estate acquisition agreement.

IMT – Real Estate Transfer Tax, which is calculated over the price of the real estate or its tax patrimonial value ("VPT"), if higher.

IMT tax rates for housing buildings are progressive on the value (brackets ranging from 0% to 7,5% for values over €1.010.000,00) and there are fixed rates for plots of land for construction or other urban buildings and assimilated (6.5%) and rural property (5%), or if the non-individual purchaser is resident, or is deemed as being held or controlled by an entity domiciled, at a *tax haven* as defined by Portuguese law (10%). Nevertheless, Portuguese law foresees some exceptions or deferrals on IMT payments, some of them applicable at the acquisition moment by using some of the special purpose acquisition vehicles identified above.

For instance, real estate companies benefit from an actual exemption as long as the property acquired is re-sold (i) within 3 years;

(ii) its destiny is not changed; and (iii) without the purpose of being re-sold again. Upon the acquisition of property in the context of urban rehabilitation operations, some reliefs are available upon meeting certain conditions.

IS – Stamp Duty, calculated over the price, or the tax patrimonial value, if higher. IS tax rate is fixed, in most frequent situations at 0.8%.

#### VI.1.2. VAT ("IVA")

Under Portuguese law, real estate acquisitions are exempted from VAT.

Upon sale and purchase or letting of properties, it is possible, if certain conditions are met, to waive the VAT exemption and subject the operations to VAT at the rate of 23% (22% in Madeira; 18% in the Azores). The exemption from VAT does not cover "office center" type contracts, which are subject to, and not exempt from, VAT under the general terms.

### VI.2. PROPERTY OWNERSHIP

#### VI.2.1. PROPERTY TAX - "IMI"

Owners of real estate located in Portugal, which are registered as such as of 31 December of a certain year, are subject to IMI. Nowadays, IMI reaches a variable rate between 0.3% and 0.45% (depending on the municipality) for urban buildings and plots of land for construction, a fixed rate of 0.8% for rural property, and a fixed rate of 7.5% for owners' resident in tax havens or deemed as being held or controlled by entities established therein.

IMI is levied on a yearly basis and becomes payable in the following year to which it refers, upon the issuance of the tax assessment by the tax authorities.

IMI must be paid: (i) in one installment, in the month of May, when its amount is equal to or less than € 100; (ii) in two instalments, in the months of May and



November, when the amount is greater than € 100 and equal to or less than € 500; (iii) in three instalments, in the months of May, August and November, when the amount exceeds € 500.

### **VI.2.2. PROPERTY TAX - "AIMI"**

Additional to the IMI ("AIMI") is due by the owners of urban properties, located in Portugal, intended for residential purposes and plots of land for construction.

The taxable basis corresponds to the sum of the VPT of all urban properties owned by each taxpayer, reported as of 1 January of the year concerned.

If the owner is an individual, an exclusion from taxation up to € 600,000 applies. Married or living in non-marital partnership taxpayers who opt to submit a joint tax return for AIMI purposes, have an exclusion from AIMI of € 1,200,000.

In case of individuals, the AIMI rates vary between 0,7% and 1,5% (progressive rates).

For corporate entities, the AIMI rate is of 0,4% (with no exclusions on the taxable basis).

The value of buildings owned by legal persons and used for the personal use of the holders of the respective capital, the members of corporate bodies or of any administrative, directing, managerial or supervisory bodies or of their spouses, ascendants and descendants, is subject to an aggravated rate of 0.7%, being subject to a marginal rate of 1% for the portion of the value exceeding € 1,000,000 and equal to or less than € 2,000,000, and to a marginal rate of 1.5% for the portion exceeding € 2,000,000.

AIMI is assessed by tax authorities in June of each year, being the respective payment made in September.

### **VI.2.3. SPECIAL CONTRIBUTIONS**

Special Contributions are required when properties are intended to construction of new buildings and whenever the value of plots of land for construction increases significantly due to public works improving major infrastructures (mostly in Lisbon, Porto, and their outskirts). The applicable rate varies between 20% and 30% and is levied on the aforesaid increased value.

### **VI.2.3. TAX ON INCOME FROM PROPERTY OBTAINED IN PORTUGAL BY NON-RESIDENTS**

Income from property obtained in Portugal by non-residents (e.g., rentals) is taxable at a special rate of 28% (applicable to individuals), or 25% (applicable to corporate entities), being in both cases subject to a 25% withholding tax.

## **VII. LEASING LEGAL FRAMEWORK**

### **VII.1. GENERAL ISSUES**

In Portugal, leasing is, day by day, acquiring a more relevant economic weight.

On 14 August 2012, a pack of Laws entered into force with the purpose of implementing structural reforms in the Portuguese legal framework of real estate lease to boost the market.

The real estate lease is divided into two types: (i) leases for non-housing purposes and (ii) leases for housing purposes.

### **VII.2. LEASES FOR NON-HOUSING PURPOSES**

The most relevant aspect of lease agreements for non-housing purposes, usually for commercial or industrial purposes, is the free stipulation rule, allowing the parties, to agree



on issues related to length, termination, and opposition to the renewal of lease contracts, with subsidiary application of the rules regarding leases for housing purposes. However, in the first five years after the beginning of the contract, regardless of the stipulated period, the landlord cannot oppose the renewal.

According to the law, the lease agreements may be entered into for fixed term or be of non-specified duration. The last option is not commonly used in the property market in recent years. If no provision is made by the parties, the contract is deemed to be concluded for a fixed term, for a period of five years. If entered on a fixed-term basis, the duration may be freely agreed between the parties. The agreement can be automatically renewable unless the parties agree or any of them decide otherwise and duly notifies the other.

Maintenance works are freely regulated between the parties. In this case, if no provision is made by the parties, the landlord is responsible for carrying out the conservation works, and the tenant is deemed as being authorised to carry out the works required by law or by the purpose of the lease.

The costs and expenses related with the property are freely agreed between the parties, who are also free to agree the criteria for updating them.

Parties can subject the transmission of tenant's contractual position to landlord's permission, although, if nothing is stipulated, the transmission is possible in the most frequent situation of transfer of the commercial or industrial business carried out in the property ("*trespasse*").

Any party may cancel the lease agreement based on a serious breach of duty committed by the other. The legal framework specifies some of those situations that justify the termination of the lease agreement by the landlords, with a compensation for the tenants.

Additionally, the contract can be simply terminated by means of a written communication sent by the landlord to the tenant in situations of delay or lack of payment of the rent.

On all other serious breaches, the termination can be declared by the Court.

### VII.3. LEASES FOR HOUSING PURPOSES

Lease agreements for housing purposes, unlike the lease agreements for non-housing purposes, have less contractual freedom. Some of the most relevant matters are imperatively established by law. That is the case of rules regarding the early termination and the opposition to lease renewal which were, nevertheless, softened in 2012, favoring and strengthening the landlord position.

These lease agreements may also be entered for a fixed term or be of non-specified duration. If no provision is made by the parties the contract is deemed to be entered for a fixed term of five years.

Regarding the fixed-term lease agreements, the minimum period for permanent habitation is 1 year. These agreements are necessarily renewable for 3 years, except when the parties stipulate a different period.

The landlord may legitimately terminate the contract grounded on the need to live in his own house, or the necessity of construction work or maintenance that will result in the disappearing of the house. Otherwise, the



agreement will be suspended during the maintenance period, but the tenant has the right to be re-housed in an equivalent house. If the tenant lives in the house for more than 15 years, the agreement can only be terminated by demolition or severe works that do not allow remaining in the house.

The tenant is entitled to oppose to the renewal of the lease, by means of a prior notice, as well as to terminate the lease agreement at any time and without justification, provided that 1/3 of the lease duration has elapsed, by means of a written communication sent to the landlord with a prior notice provided in the applicable law.

As to non-fixed term agreements, the law provides the conditions and the prior notices that the landlord and the tenant must comply in order to legally terminate the agreement.

Like in the non-housing lease agreements, any party may cancel the lease agreement based on a serious breach of duty. The legal system provides a non-exhaustive list of cases of breach justifying a landlord’s decision to terminate the lease agreement.

Additionally, the contract can be simply terminated by means of a written communication sent by the landlord to the tenant in eligible situations of delay or lack of payment of the rent.

In 2019 tax incentives were introduced, foreseeing a signification reduction of taxes in longer renting agreements.

Residential lease agreements may also be entered for non-permanent residence or for transitory purposes, such as, labour, education, or touristic reasons and, in these cases, they have a specific regime.

#### VII.4. SPECIAL PROCEDURE FOR EVICTION

One of the ultimate goals of the urban lease regulation’s reform in 2012 consisted of speeding up the procedure for eviction. A special eviction regime was established to ensure the effectiveness of the termination of lease agreements – regardless of its purpose – applicable when the tenant has not vacated the leased property on the date foreseen in the law or agreed by the parties.

This eviction procedure is specially used when the lease agreement was terminated by non-judicial means. The landlord can cumulate the request for eviction with the claim of payment of rents and other expenses and charges due by the tenant. This procedure takes place before an extrajudicial entity and is aimed to ensure fast procedures, although it can, under certain circumstances, be transferred to court, namely when the tenant opposes eviction.



#### VIII. URBAN REHABILITATION

To promote the properties’ rehabilitation, the new reforms simplified the urban licensing procedure required for these operations as well as for termination of lease agreements when the landlord desires to perform rehabilitation works on the property.

Urban rehabilitation of buildings must, however, meet energetic efficiency, seismic vulnerability, and accessibility requirements subject project to approval by the municipality.





There is a special procedure applicable to the prior licensing control regarding buildings that were built at least 30 years ago and that show high levels of deterioration. According to this procedure a prior formal communication and a “visa” by the competent entity is requirement enough to allow the works to commence the execution of works, thus waiving the bureaucracy of a construction license. path.

In case the property is leased, and the landlord intends to carry out refurbishment works or deep restoration, in most situations, and as stated above, the landlord is entitled to terminate the lease agreement without having to resort to court and to obtain the release of the leased property, provided that he relocates the tenant or, alternatively, awards the tenant with the legally foreseen compensation.

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# INTERNATIONAL LAWYERS NETWORK



**PETERKA & PARTNERS**

Buying and Selling Real Estate in Romania

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ROMANIAN LAW

### I. Types of Real Property Transactions

- A. Purchase of an undeveloped plot of land (agricultural);
- B. Purchase of brownfield renewable power generation projects along with land rights for power generation installations, connection, and the collection network;
- C. Secure land rights (ownership right, superficies right, concession right, use and easement rights) to enable the development and delivery of turnkey renewable power generation greenfield projects;
- D. Purchase of a buildable plot of land (with or without a building);
- E. Purchase of a building without the land (with superficies right over the land);
- F. Purchase of a flat (condominium);
- G. Purchase of a company having real estate assets.

### II. Major Content of the Purchase Agreement

The contract must include: the identities of the parties, description of the real estate (address, surface area, buildings, cadastral number, and Land Book registry number), purchase price (which must be serious – not derisory, real – not fictitious, and determined or determinable), as well as the main obligations of the parties (i.e., to transfer the property rights and to pay the price).

The rest of the contractual provisions are, in principle, freely negotiated between the parties: conditions precedent, transfer date, risk allocation (with certain legal exceptions), guarantees, payment date, etc.

A separate note should be made in respect to purchase agreements for brownfield/greenfield renewable power generation projects, which usually include specific conditions precedent related to project permitting.

Permitting of a renewable project in Romania is split into several streams, sometimes interconnected: (i) civil construction permitting stream (covering also urban planning and environmental aspects), (ii) Sector-specific permitting stream.

The relevant authorities have already significant experience with the permitting process from the first generation of renewable projects. Difficulties may appear given that several pieces of legislation regulating land use and building permitting was amended in 2022 to make the permitting process for renewable energy projects easier by reducing land planning formalities and thus, project development time, so that different interpretations may be embraced by different stakeholders.

Thus, for renewable power generation projects (i.e., solar, wind, biomass, bioliquid and biogas projects) covering an area of up to 50 hectares, until 31 December 2026, was eased the removal from agricultural purposes category.

Another amendment aiming to facilitate the development of renewable power generation projects was introduced by Law no. 159/2022, into Law 50/1991 on the authorization of construction works, to provide that building permits may be issued without land planning documentation for the production of electricity from renewable sources and hydrogen.

Further coordination is necessary between Law 18/1991 and Law 50/1991 as recently amended, in order to clarify the uncertainties about the



implementation of simplified urbanistic procedures.

### III. Conclusion of the Purchase Agreement

**Validity requirements on the form of the purchase agreement.** All *in rem* rights over real estate (including ownership) must be transferred through authenticated agreements concluded before a Romanian notary public, under the sanction of absolute nullity of the agreement. The notary public may be chosen by either of the parties. An agreement relating to rights *in rem* over a real estate property located in Romania must be governed by Romanian law.

The persons who sign the agreement before the notary public must have proof of identity (ID Card, Passport, etc.) and, if the case may be, proof of power of attorney (which must also be authenticated by a notary public and must expressly give power to sell/purchase the specific property). If the buyer/seller is a legal entity, proof of status of the company must also be provided.

The notary shall verify the status of the property and shall obtain an authentication excerpt from the relevant Land Book which shall block any further registrations in the Land Book until the agreement is registered after signing. All the Land Book registrations/de-registrations in respect of the ownership title shall be carried out by the notary public.

The parties will sign only one copy of the agreement which remains in the notary public's archives. The notary shall provide as many duplicates as necessary, which shall be only signed by him/her.

It should be noted that in Romania there are certain pre-emption rights or other statutory (imposed by law) limitations potentially applicable in relation to some specific categories of real estate properties (outside city

limits, agricultural). Examples include pre-emption rights of the State, of the tenants of agricultural land or public service providers (public schools, hospitals), neighbours, etc. Land near the borders may be sold only with the prior approval of the Ministry of Defence. The rules for the exercise of the pre-emption right have been changed (the amendment entered into force on 13 October 2020), and they have become more cumbersome. The methodological norms for the implementation of the law are unclear, still raising many questions from the notaries who are supposed to authenticate sale purchase agreements (i.e., the first sale purchase agreements according to the new law were concluded starting in July 2021). Clarifications are being sought by notaries from the relevant ministries, which are expected either to clarify the norms by amending them or to provide to the notaries a manual of good practice.

### IV. Transfer of Ownership

As a general rule, the property right transfers automatically upon the execution of the agreement, unless the parties have otherwise agreed (e.g., until fulfilment of conditions precedent).

The registration in the Land Book is made for opposability purposes only and is to be carried out by the notary public following the execution of the agreement.

Certain rules shall come into effect after the finalization of the cadastral works on all land in Romania. Specifically, once the entire cadastral works for all land in Romania are finalized (a date which is difficult to estimate at this stage), the registration of the property right transfers with the relevant Land Books shall no longer be performed for opposability purposes only but shall become constitutive of a right (i.e., the transfer will operate as of and on the basis of the registration with the relevant Land Book).



In relation to brownfield/greenfield renewable power generation projects, the project company must secure, already from the development phase, a title to land proper for building purposes, which would typically be ownership right or superficies right.

A legal difficulty may be encountered in rooftop solar projects (if the owner of the building is not the owner of the land as well) given that the legal definition of superficies relates to land.

## V. Agents

Both parties may use a real estate agent. In general, the agents conclude mainly exclusivity agreements.

The general commission on the market today is approximately 1-3% (depending on the value of the transaction).

## VI. Forms of Ownership

In general, Romanian and EU individuals/entities may own land in Romania. While there may be some restrictions for other foreigners to own land in Romania, the practice for foreign investors is to incorporate a Romanian legal entity which has no restriction on owning lands.

The “right of ownership” gives the owner the power to possess, use and dispose of the property.

### A. Acquisitions

A real estate deal in Romania may be made either (i) by way of an asset deal (direct acquisition of an asset) or (ii) by way of a share deal (acquisition of the shares in the holding entity of the asset).

Share deals are often preferred to asset deals due to cost and tax optimization purposes, as they are not subject to the fees and costs entailed by an asset deal, as they do not entail the transfer of ownership

of the real estate. However, according to Law 175/2020 which entered into force on 13 October 2020, the company who owns, outside city limits, lands, and which sells enough shares to ensure control over the company, shall pay a tax of 80% applied to the positive difference between the value of the agricultural lands from the date of sale and that from the date of purchase, determined according to the indicative value established by the expertise made by the chamber of notaries public or to the minimum value established by the market study carried out by the chambers of notaries public, as the case may be, from the respective period.

This rule is also applicable if the sale of the control package takes place before the anniversary of 8 years since the acquisition of such lands and if such lands are more than 25% of the company’s assets. This tax is an additional tax to the ones due in consideration of the Fiscal Code, moreover, this tax is not considered a deductible expense when calculating the tax on profit.

### B. Residential Property

The most frequent forms of ownership of residential property are:

1. **Sole ownership:** The owner is the only person authorized to control and dispose of the land in question.
2. **Common ownership:** More than one owner over the property; there are two types:
  - (a) joint ownership (ownership by two or more persons holding undivided – undetermined – shares over the property – such as ownership by spouses); no deed may be concluded without



the consent of the other co-owner.

- (b)** co-ownership (ownership by two or more persons holding determined shares over the property) which, in turn, can be ordinary co-ownership (e.g., two buyers acquire 50% each of a property) or forced co-ownership (e.g., forced co-ownership of the owners of apartments in a building over the common parts of a building – stairs, lobby, elevator, rooftop, etc.) – deeds may be concluded by each co-owner for its share of the property.

### C. Commercial Property

Owners of commercial property are most frequently legal entities. The most commonly used entities under Romanian law are joint-stock companies (SA) and limited liability companies (SRL).

#### i. Limited Liability Company – SRL

##### 1. Legal Entity

SRLs are the most commonly used vehicles.

An SRL is managed by directors who act under the control of the general meeting of shareholders. Shareholders may also be appointed as directors.

No restrictions on citizenship or residency apply for directors or shareholders.

##### 2. Formation

The main steps for the establishment of an SRL are:

Applying for and obtaining reservation of the SRL's trade name,

- a. Choosing a Registered Office,
- b. Drafting and submitting the SRL's constitutive documents to the Trade Registry, and
- c. Subscribing the share capital.

An SRL may also be incorporated by a sole shareholder even if:

- (i) this shareholder is sole shareholder in another company; or
- (ii) the sole shareholder is a legal entity which, in turn, has a sole shareholder.

Timing: In principle, after all documentation is submitted, incorporation is completed within three (3) business days as of the filing of the registration with the Trade Registry (if no other issues arise and no additional documents are requested).

##### 3. Costs of Formation

The administrative fees are approximately RON 1,200 (approximately EUR 250).

##### 4. Minimum Registered Capital

The minimum share capital is RON 1.

##### 5. Limited Liability

The shareholders are liable for the obligations of the company up to a limit equal to the amount of their contributions to the company's subscribed capital.



## ii. Romanian Joint-Stock Company – SA

### 1. Legal entity

The minimum number of shareholders of an SA is two.

An SA is more complex than an SRL. The supreme corporate body is still the general meeting of shareholders as in the case of an SRL.

The management of a joint-stock company is carried out:

- (i) either by a director or a board of directors (one-tiered management) – the board of directors may delegate the management to one or more managers;
- (ii) or by a supervisory board and a management board (two-tiered management).

The board of directors, as well as the supervisory board, must hold quarterly meetings.

### 2. Formation

The main steps of the establishment of a joint-stock company are:

- a. Applying for and obtaining reservation of the joint-stock company's trade name,
- b. Choosing a Registered Office,
- c. Drafting and submitting the joint-stock company's constitutive documents to the Trade Registry, and
- d. Subscribing the share capital.

Timing: Once all of the documentation is available, incorporation is completed within three (3) business days as of the filing of the registration with the Trade Registry so long as no issues are identified, or additional documentation is required.

### 3. Minimum registered capital

The minimum share capital is RON 90,000 (approximately EUR 20,000).

### 4. Liability

The shareholders are liable for the obligations of the company up to a limit equal to the amount of their contributions to the company's subscribed capital.

## VII. Financing

Financing is typically secured by way of bank loans. In most cases, banks will require securities (collateral) from the borrower.

Securities or collateral may consist of one or more of the following: mortgage of immovable assets (typically, but not necessarily the real estate which is bought with the loan); mortgage of movable assets (bank accounts, receivables, shares, cars, etc.), assignment of receivables for guaranteed purposes or autonomous bank guarantees.

## VIII. Payments and Costs. Taxes Involved in Real Estate Transactions

### A. Asset deals: Related taxes

The following fees are due in an asset deal involving real estate:

- (i) public notary fees for authenticating the SPA – up to 0.5% of the purchase price,



- (ii) Land Book registration tax – 0.5% of the purchase price.

In practice, usually the purchaser bears all of the fees and taxes of the sale, but the parties may agree to split the costs between them. The seller usually pays the sale tax for sale of immovable property.

VAT shall apply to the purchase price if the land might be buildable (according to the urbanism certificate) or new buildings are being sold (or parts thereof). Standard VAT is 19% but there are special VAT percentages in some cases (e.g., starting on 1 January 2023 – 5% for a natural-person buyer individually or together with other natural person of a property under Euro 120,000, and with a surface of a maximum 120 m<sup>2</sup>, provided that the property is fully constructed – the buyer can immediately move in and only for the first acquisition). Nevertheless, if both the seller and the buyer are registered for VAT purposes, VAT is not effectively paid as the reverse charge mechanism is applied.

#### **B. Share deals: Related taxes**

If the shares are sold at their nominal value, no special taxes shall be imposed. However, if the shares are sold at a price higher than their nominal value, the seller shall pay profit/revenue taxes on the difference between the nominal value and the value of the transaction.

Also, certain fees must be paid to register the transfer of the shares with the Trade Registry (approximately EUR 200).

#### **IX. Examinations Before Closing**

The buyer should make the relevant examinations in order to determine any deficiencies in the property right or in the property itself.

Pursuant to Romanian law, a legal conclusion on whether there is a valid title to certain real estate may be given only after examination of the whole chain of transfers in respect of the particular real estate. There is no rule under Romanian law that the last registered owner of the real estate is its true owner/holder. The registered owner is only presumed to own a valid title until proven otherwise by an interested person. If any of the current owner's/holder's predecessors' rights over particular real estate suffer from any defect in title, such defect survives the subsequent right transfer and affects the right of the current owner/holder.

Thus, under Romanian law, if the ownership title over real estate is cancelled, all subsequent acts of the ownership transfers might also be cancelled by Romanian courts, at the request of interested persons.

Cancellation of the subsequent acts may be requested at any time, no statute of limitations is provided by Romanian law in such cases, in consideration of the fact that property right is guaranteed under the Romanian Constitution.

Nevertheless, according to the Land Book Law, if no deficiency arises from the analysis of the relevant Land Book, a third party may no longer be deregistered after three years from the moment the last owner was registered in the Land Book. This provision is applicable only if the third party is at least the third owner registered for that particular Land Book – i.e., if the Land Book is newly opened, this should not apply, and the third party may be deregistered at any time. Consequently, in practice, as the





safeguarding of concluded transactions is preferred, it becomes more difficult to amend the content of the Land Book and implicitly, to challenge the ownership title once the aforementioned conditions are met.

The seller should disclose any relevant hidden defects in the property itself or in the property rights.

If the buyer intends to build on the land, verifications should be made in order to assess the existence of restrictions on building in that area (general, zonal, and detailed urbanism plans). Note that a permit is, in most cases, needed for building, as well as for demolition.

If the acquired land is agricultural, its type may be changed to buildable, in order to be able to actually build on it, by requesting modifications to the zonal urbanism plans – if the land is outside the city limits. However, in consideration of Law 175/2020, which entered into force on 13 October 2020, this operation has to be carefully assessed as it might be extremely difficult to amend the zoning urbanism plans and to move the land within city limits.

In light of the aforementioned, it is strongly recommended to undertake a due diligence investigation prior to proceeding with real estate investments in Romania.



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# INTERNATIONAL LAWYERS NETWORK



**MILLER SAMUEL HILL BROWN**  
Buying and Selling Real Estate in Scotland

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SCOTTISH LAW

### 1. Introduction

This guide applies to real estate in Scotland only.

### 2. Tenure

Real estate, both commercial and residential in Scotland may be either of the following:

#### Freehold

Freehold real estate is the absolute property of its owner, subject to any rights and title burdens or servitudes in favour of third parties. These may affect how the real estate is used.

#### Leasehold

Leasehold real estate is held under a lease for a fixed period of time, usually subject to the payment of rent and the performance of obligations specified in the lease. The terms of the lease will dictate whether or not the leaseholder is entitled to transfer its interest to a third party or whether it can sublet either the whole or part of the real estate.

### 3. Know your client (KYC)

It is necessary to carry out due diligence on the purchasing entity to comply with UK and European-wide Anti-Money Laundering Regulations. The documents which are required will vary depending on the purchasing entity, but they will need to establish the identity of the purchaser and its ultimate beneficial owner. Actual requirements are set out at greater length in Section 4.

### 4. Guide to purchase and sale of Residential Property

We are frequently asked by purchasers and sellers to answer many basic and wide-ranging questions concerning all types of residential property and investments. It is difficult to produce a comprehensive guide covering every

aspect of a purchase/sale and conveyancing transaction. In these notes, we have attempted to highlight only the main topics. Each transaction has its own peculiarities and potential problems. We shall be pleased to answer more detailed questions and to advise as required.

### INDEX

<u>Section</u>	<u>Subject</u>
1	The Survey
2	Home Report
3	The Offer and Acceptance
4	The Title Deeds and Conveyancing
5	Land and Buildings Transaction Tax
6	Money Laundering Regulations
7	Insurance
8	General

### 1. THE SURVEY

Ideally a purchaser should always obtain the most detailed survey report on the property to be purchased. Better to be “safe than sorry.” While a prospective purchaser is entitled to instruct their own report, generally, they may choose to rely on the home report referred to in the following section.

### 2. HOME REPORT

With a very limited number of exceptions (for example new build properties) all homes (all types) that are advertised for sale in Scotland from 1st December 2008 require a home report. This is a statutory requirement. The report consists of a pack of documents that will report on the condition of the property. It will contain



a valuation of the property, and a report on the home's energy efficiency. The responsibility for providing the home report rests with the seller, who will be responsible for the costs involved in obtaining the information required and producing the report. A prospective purchaser will be able to rely on its contents and is entitled to ask the seller for a copy of the report. The report comprises three documents:

#### (1) THE PROPERTY QUESTIONNAIRE

This is completed by the seller and contains useful information helpful to a purchaser, for example, details of any alterations to the property, the council (local authority) tax banding, any managing agents' details, and details of repairs affecting the property.

#### (2) SINGLE SURVEY

Although instructed by the seller, the survey is prepared by a chartered surveyor and will report on the valuation of the home and its condition. A purchaser may rely on that survey and providing the purchaser is happy with the terms of that survey report and providing the purchaser's lender (if any) is also satisfied with the terms of that survey report, then a purchaser may feel it unnecessary to obtain and pay the cost of an independent report.

#### (3) THE ENERGY REPORT

Again, this is prepared by a chartered surveyor and will report on the energy efficiency of the property, its environmental impact and if appropriate will suggest ways to improve the property's energy efficiency.

Home reports dramatically change the level of information that a seller is legally obliged to have available when selling their home. The home report needs to be available to be exhibited to prospective purchasers before a property is marketed for sale.

We always advise that a prospective buyer should obtain the most detailed Report possible on a property, before proceeding with any purchase and should be comfortable and satisfied with the terms of any home report or survey instructed directly, before entering into a binding contract for the purchase of any property.

### 3. OFFER AND ACCEPTANCE – “MISSIVES”

When a written offer is submitted, that itself does not create a binding contract between the seller and purchaser. The offer for the property will, if generally acceptable to the seller as to purchase price and entry date, be accepted usually with legal qualifications. The offer, and any qualifications made by the two solicitors on behalf of their respective clients as part of the contract negotiations and the final acceptance will together constitute a binding contract between the seller and the purchaser (called “the missives”). Only after the final acceptance is issued will there be a binding contract and “missives will be concluded.” The contract must be written. Verbal agreement is not sufficient to conclude a contract. It should be understood that individual purchasers and sellers do not usually sign the missives and the contract is made binding by the signature of the purchaser's and seller's solicitors.

### 4. TITLE DEEDS AND CONVEYANCING

Once there is a binding contract, the two solicitors (one for the seller and the other for the purchaser) will carry out the necessary conveyancing formalities and prepare the legal documentation. The purchaser's solicitor will receive and examine all the relevant Title Deeds of the property and will check the conditions, which apply to ensure that there are no unusual and exceptionally oppressive or onerous conditions. They will check to ensure that Local Authority Consents are in place for



any structural or other alterations to the property requiring consent. The existence of any structural alterations should be highlighted in the Survey/Home Report. During the Conveyancing process, checks are made to ensure, for example, that there are no previous Securities or mortgage deeds affecting the property, which will remain undischarged after the purchase has been completed, and to ensure that there are no court orders (such as a Bankruptcy Order) which prevent the seller from granting a good and marketable clear title to you. Similar procedures operate in reverse in the case of a sale. The seller's solicitors will answer any reasonable observations made on the conditions in the title deeds and searches.

The purchaser's solicitor will prepare the conveyance of title deed in favour of the purchaser, and after settlement of the transaction takes place, ensure that the purchaser's title is registered in the Land Registers. The registration system is electronic, and all deeds are now held electronically by the Scottish Land Registry.

#### **5. LAND AND BUILDINGS TRANSACTION TAX (formerly Stamp Duty)**

This tax has been recently introduced by the Scottish Government and replaces Stamp Duty. It is based on the price of the property purchased, and the level of tax has been increased for more expensive properties. Please ask us for a calculation of the tax payable when considering purchasing a property in Scotland.

#### **6. MONEY LAUNDERING REGULATIONS**

Every solicitor in Scotland must comply with The Law Society of Scotland's money laundering regulations. This means that if we have not acted for a client in the past, we must in every case obtain verification of identity. If the documentation required cannot be

produced, then we may have to report the transaction to the relevant authority. We would also likely withdraw from acting. We will need to see the original of one of the following: UK passport, resident's permit issued to EU nationals, UK (or EU equivalent) photo driving license, Inland Revenue Tax Notification, firearms certificate, or suitable ID from client who reside out with the EU and the original of one of the following: bank statement, utility bill, council tax bill, mortgage statement, land registry confirming house purchase, confirmation of house purchase from other solicitor, tenancy agreement or confirmation of address from Electoral Register, or the equivalent from clients residing out with the EU. Clients from the EU and further afield will also be required to provide information about the source of funds to be used for their purchase. If the purchaser is buying or selling as a limited company, partnership, or other body, but not as an individual, we still need to carry out such money laundering checks, as are required by the laws in force at the time. We will supply prospective clients with details of the current requirements at the outset of the transaction.

#### **7. INSURANCE**

We recommend that buildings insurance on the property and if relevant life policies on purchaser's lives are effected (provided proper advice is taken and given) and, subject to that, put into force as soon as missives are concluded in any purchase because from that date a purchaser will be under a legal obligation to purchase the property and pay the purchase price.

#### **8. GENERAL**

Hopefully, we have covered some of the more relevant issues that may arise during a residential sale or purchase transaction. We did



not set out in these notes to answer every question but have simply dealt with some of the most often raised questions.

### **5. Purchase/Leasing of Commercial Property**

The principles of commercial property practice in Scotland are not dissimilar to English practice. There will be differences in terminology, legal variances where the actual law differs in each country, and the Land and Buildings Transaction Tax payable. We would refer you to Fladgate LLP's excellent guide for general information, but should you have a specific query relating to purchase or leasing in Scotland generally, or indeed any planned purchase, sale, lease, or development of commercial property in Scotland, please refer your query to us and our experts will be pleased to assist you.



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# INTERNATIONAL LAWYERS NETWORK



**GOODWINS LAW CORPORATION**  
Buying and Selling Real Estate in Singapore

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SINGAPOREAN LAW

### INTRODUCTION

There are two systems of land registration in Singapore: registration under the Registrations of Deeds Act, known as “unregistered land”, and registration under the Land Titles Act, known as “registered land”. Currently, most land in Singapore has been converted and brought under the latter registration system. As such, most of this article will be concerned only with land registered under the Land Titles Act. The entity overseeing the land registration in Singapore is the Singapore Land Authority (“SLA”).

Other relevant legislation governing real estate law in Singapore include the Land Titles (Strata) Act, the State Lands Act, the Land Acquisition Act, the Planning Act, the Residential Property Act, and the Housing and Development Act.

### ESTATES & INTERESTS IN LAND

Land may be held in different ways such as:

- i) estates in fee simple (or freehold);
- ii) estates in perpetuity; and
- iii) leases (typically, 99-year leasehold);

Both estates in fee simple and in perpetuity are where a person holds the land indefinitely. However, the latter is subject to covenants and conditions such as the payment of quit rent.

Leases are for definite terms and are also subject to covenants and conditions. Leases are distinguishable from tenancy agreements in that the latter are not considered disposals of land which require the approval of the President.

While smaller estates or interests can be carved out of larger estates (e.g., the owner of an estate in fee simple may grant a lease of 99 years to a lessee, or the owner of a 99-year

lease may grant a lease of 30 years to a sub-lessee), the creation of some estates or interests may require the prior written approval from the relevant authority.

All land may be reclaimed by the State under the Land Acquisition Act.

### REAL ESTATE OWNERSHIP

#### Manner of Holding

Property in Singapore may be held in sole or joint ownership. Joint ownership can come in the form of joint tenants or tenants-in-common. In joint tenancy, the joint owners own the whole interest in the property and there is no separation in shares. Conversely, tenants-in-common own the same property in distinct and separate shares. The right of survivorship applies only to joint tenancy, meaning the survivor will eventually own 100% of the property.

It is possible to convert one manner of joint holding to the other. This is usually done by way of registering with SLA a declaration which has been signed before a Commissioner of Oaths.

#### Public Housing

Public housing in Singapore is subsidised and comes under the purview of the Housing and Development Board (“HDB”) and are more commonly known as “HDB flats”. Currently, more than 80% of Singapore’s population live in HDB flats.

The eligibility criteria for HDB flats are generally assessed based on Singapore citizenship, income, age, family nucleus and non-ownership of other residential property. A person who owns a private property (whether in whole or in part) is precluded from purchasing a HDB flat unless he sells the private property.





Executive Condominiums (“EC”) are a hybrid public housing property under the Executive Condominium Scheme Act which resembles private condominiums with security and amenities such as swimming pools and clubhouses. Strict eligibility criteria similar to that for normal HDB flats are imposed. ECs may only be sold after the expiry of a minimum occupation period of five (5) years and until the tenth (10<sup>th</sup>) year, only to Singapore citizens or permanent residents, after which, they may be sold like any other private condominium.

### **Planning, Zoning & Use**

Planning and control of use of land and its development fall to Urban Redevelopment Authority (URA) under the Planning Act. Land in Singapore can be zoned as residential, commercial, or industrial, each type of zoning carrying its own set of rules for ownership, use and development. Permission from URA or such other relevant authorities may be required for deviations such as change of use of properties, subdivision of land, etc.

### **LEGAL FORMALITIES IN ACQUISITION**

#### **Option to Purchase & Sale and Purchase Agreement**

The Civil Law Act requires agreements for the sale and purchase of property to be in writing and signed by the parties involved.

The majority of sales and purchases of property in Singapore are initiated with the issuing of an Option to Purchase (“Option”) by the vendor to the prospective purchaser in exchange for an initial sum paid by the prospective purchaser to the vendor which is typically 1% of the purchase price.

An Option is used to reserve the property for an agreed period, typically 14 days, during which the prospective purchaser may confirm whether he is proceeding with the transaction.

In the event that he chooses not to proceed with the transaction, it is usually a term of the Option that the initial sum paid shall be forfeit to the vendor.

The purchaser will confirm the transaction by countersigning the Option and paying the remaining deposit amount to the vendor or the vendor’s appointed lawyer as a stakeholder – this is commonly known as “exercising the Option”. An exercised Option is considered the instrument effecting the sale and purchase of the property and no further agreement is required to capture the intention of the parties.

In some cases where the parties are certain of the transaction, they may decide to enter a Sale and Purchase Agreement immediately.

Completion (or closing) of the sale and purchase typically takes place within 8 to 12 weeks from the time of exercising the Option. This period is to allow the purchaser to complete the investigation of title and government requisitions on the property. This period also allows the purchaser to arrange for financing of the purchase either through his own funds or a bank mortgage.

#### **Properties under Development**

Developers of both residential and non-residential properties are subject to specific rules under the Housing Developers (Control and Licensing) Act and the Sale of Commercial Properties Act respectively which are designed to protect purchasers.

Developers of residential properties are required to be licensed. The sale of property by developers of residential and non-residential properties alike are subject to terms and conditions prescribed and regulated by the relevant governing Act.



### **Registration**

A transaction of unregistered land is achieved by way of a deed, signed, sealed, and delivered, and registered with the Registry of Deeds to secure priority based on the date of registration. Tracing of title is important with unregistered land, and usually requires careful checking of at least 15 years prior to its registration to ensure a good root of title.

Registered land relies on only one document of title, on which every transaction affecting the property is endorsed. Registration with SLA is required to effect the transfer of the interest in the land. Upon such registration, SLA will issue a certificate of title to the registered proprietor.

As most land in Singapore has now been converted to registered land, the change in proprietorship of the property will be effected by the execution of the prescribed form. Upon completion of the sale, this form is lodged and registered with SLA together with the pre-existing version of the certificate of title. Following the registration of the form, SLA will update the land registry to reflect the new proprietor(s) of the property and issue a new version of the certificate of title to the new proprietor(s), and to reflect the mortgage or charge, if any, over the property.

### **TAXES**

Stamp duty is payable on the acquisition or disposal of a property situated in Singapore, or both. The amount of duty payable is computed based on the purchase price or market value of the property, whichever is higher. Such dutiable acquisitions or disposals include those by way of gift or by way of a trust (where there is a change in the beneficial ownership of the property), but do not include acquisition of properties by way of inheritance under the terms of a will or by effect of law.

Stamp duty is payable within 14 days of the date of the instrument effecting the acquisition or disposal of the property if the instrument is executed in Singapore. For instruments executed outside of Singapore, stamp duty is payable within 30 days. A penalty of up to four (4) times the amount of unpaid duty may be imposed for any late or non-payment.

### **For Purchasers**

A purchaser is liable for Buyer's Stamp Duty ("BSD") and may also be liable for Additional Buyer's Stamp Duty ("ABSD").

Prior to 20 February 2018, the BSD rate was up to 3%. With effect from 20 February 2018, BSD rates differ for residential and non-residential properties, with the BSD rate for the former going up to 4%, depending on the purchase price of the property.

Whether ABSD is payable depends on whether the purchaser is an individual or entity, the residency status of the purchaser and the number of residential properties owned (in whole or in part) by the purchaser prior to the acquisition in question and whether the property is acquired under a trust arrangement.

Prior to 6 July 2018, the ABSD rate was up to 15%. Cooling measures were introduced in December 2021 which caused ABSD rates to be readjusted, with the highest rate at 35%. With effect from 8 May 2022, a new ABSD for properties acquired under a trust arrangement is introduced known as ABSD (Trust). The ABSD(Trust) rate of 35% is to be paid upfront but an application for remission can be made if certain criteria are met. Where there are multiple purchasers, the ABSD payable will be computed based on the purchaser with the profile who attracts the higher rate.

It should be noted that there are also remissions available such as remissions to



married couples of certain profiles and remissions under Free Trade Agreements.

Purchasers should also note that where a mortgage is obtained to finance the purchase of the property, the mortgage is also subject to a stamp duty of 0.4% of the loan amount, or if an equitable mortgage, then 0.2% of the loan amount, both capped at a maximum stamp duty of S\$500.

### **For Vendors**

A vendor may be liable for Seller's Stamp Duty ("SSD") if the property is zoned as residential or industrial.

#### ***(i) Residential***

Where a vendor had purchased the property concerned before 11 March 2017, he will be liable for SSD if he sells or disposes of the property before the expiry of four (4) years of the date of his purchase. The applicable SSD rate can go up to 16%, depending on the date on which the vendor had purchased the property and the holding period.

Where the property was purchased on or after 11 March 2017, the vendor will only be liable for SSD if he sells or disposes of the property before the expiry of three (3) years from the date of his purchase. The applicable SSD rate ranges from 4% to 12%, depending on the holding period.

#### ***(ii) Industrial***

Where a vendor had purchased the property concerned on or after 12 January 2013, he will be liable for SSD if he sells or disposes of the property before the expiry of three (3) years of the date of his purchase. The applicable SSD rate ranges from 5% to 15%, depending on the holding period.

### **Additional Conveyance Duties (for companies owning primarily residential properties)**

Additional Conveyance Duties ("ACD") was introduced on 11 March 2017 and is applicable on top of the existing stamp duty for share transfers to qualifying acquisitions or disposals of equity interests (e.g., shares or units) in property-holding entities ("PHEs") that own primarily residential properties in Singapore effected by instruments executed on or after 11 March 2017.

An entity is considered a PHE if at least 50% of its total tangible assets comprise prescribed immovable property pursuant to the Stamp Duties Act, being primarily residential properties.

A qualifying acquisition occurs when equity interest in a PHE is acquired and the buyer (together with any associates) already held 50% or more equity interest or voting power in the PHE before the acquisition, or following the acquisition, comes to hold 50% or more equity interest or voting power in the PHE.

A qualifying disposal occurs when the seller (together with any associates) hold 50% or more equity interest or voting power in the PHE, the equity interest being disposed of was acquired on or after 11 March 2017 and is being disposed of within three (3) years of its acquisition on a first-in-first-out basis.

Currently, the applicable ACD rate for buyers on instruments executed on or after 6 July 2018 is up to 34%, while the applicable ACD rate for sellers is 12%.

### **ONGOING COSTS OF PROPERTY OWNERSHIP**

#### **Property Tax**

Property tax on residential property is payable, whether owner-occupied or not, and at rates which follow a progressive scale. All other properties are taxed at 10% of the annual value



of the property (i.e., the estimated gross annual rent of the property if it were to be rented out).

Property tax reliefs may be available in certain scenarios such as where a residential property is being demolished and rebuilt for subsequent owner-occupation, or where a non-residential property is owned and being used by a registered charity for charitable, public religious worship or educational purposes.

**Conservancy & Maintenance Charges**

HDB properties are subject to monthly conservancy charges which are dependent on the relevant town council in charge of the property. Similarly, private condominiums and developments are subject to monthly maintenance fees payable quarterly to the relevant management corporation.

**PROTECTION OF LANDED RESIDENTIAL PROPERTY**

There is generally no restriction on foreign ownership of commercial or industrial property. However, transactions of restricted residential property (generally landed property) involving foreigners require prior approval by the Minister of Law in accordance with the Residential Property Act. Besides individuals who are foreigners, a foreign person is also defined in the Act to include a company incorporated in Singapore if the company has directors or members who are not Singapore citizens.



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# INTERNATIONAL LAWYERS NETWORK



**PETERKA & PARTNERS**

Buying and Selling Real Estate in Slovakia

**ILN REAL ESTATE GROUP**

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SLOVAKIAN LAW

### I. Types of Real Property Conveyance<sup>8</sup> Transactions

- a) Purchase of an undeveloped plot of land
- b) Purchase of a developed plot of land
- c) Purchase of a building
- d) Purchase of a flat
- e) Purchase of non-residential premises
- f) Establishing a right to build<sup>9</sup>

#### Note:

A separate form of acquiring real property (indirectly) is a share deal – acquiring control over the entity (see below) owning the real property through purchase of shares in such entity.

Conveyance of title to real property may also take the form of a donation (see below) or exchange contract (basically a mirrored purchase contract).

### II. Formal Requirements

A contract for the transfer of real property (purchase, donation) must be in writing and the expressions of will of the parties must be contained in the same document, i.e., signing in counterparts is not possible.

The signature of the transferor (on a paper-form contract) must be certified by a notary or a Slovak municipality's registry department.

Exceptions apply in cases where (i) the state, a state body, a municipality, etc. is a party to the

contract, (ii) the conveyance agreement is drafted in the form of a notarial deed or (iii) the conveyance agreement is drafted by an attorney-at-law (so called "authorisation").

A transfer contract may also be concluded in electronic form – by means of guaranteed electronic signature. Signature certification by notary is not required in such case. For electronic submission, all attachments must be submitted electronically and authorised with qualified electronic signature.

### III. Contents and documents

#### a. Mandatory Content

- Identification of the legal transaction at hand (purchase, donation, etc.), place and time of the legal transaction;
- Identification of the contracting parties;
- Purchase price or manner of its determination;
- Exact description of the real property, i.e., a description of the
  - **land** – details of the cadastral territory, the exact plot number, the land register "C" or "E", the type of land, and the area of the land;
  - **building** – details of the conscription number and the plot number on which the building is erected;
  - **apartment or non-residential premises** – details of the number, floor number, entrance number and co-ownership shares in common parts and common facilities of the house and on the built-up and adjacent land, the conscription number, and the plot number on which the building is erected;

<sup>8</sup> Please note that for the purposes hereof, we focus on conveyance of real properties based on a contract (in contrast to other types of real property transfer, such as inheritance or in auction).

<sup>9</sup> The right to build is a *right in rem* related to a plot of land consisting in a right to have an above ground or underground structure whether yet existing or existing in future. It is not considered as real property *per se* under Slovak law.

**Note:** Under Slovak law, the land (*solum*) and the building (*superficies*) constitute two distinct objects of ownership. Thus, the land and the building built upon it may be owned by different persons.

- Where the real property is jointly owned by several owners, the ownership title expressed as a fraction of the total (e.g., 1/2) must be stated;
- Other specific requirements applying on content of a contract for transfer of a flat, such as accession to the facility service agreement.

#### b. Recommended Content

- Specific payment terms reflecting, e.g., loan, involvement of a bank, etc.;

**Note:** Deposit of the purchase price at a notary, attorney-at-law, or bank (escrow account) and its release after the transfer is effective is commonly used. The parties conclude a separate escrow agreement with the bank, notary, or attorney-at-law. According to the escrow agreement the bank/notary/attorney-at-law is obliged to transfer the purchase price upon the fulfilment of the condition precedent(s) for the release of the purchase price detailed in the escrow agreement. These usually include submission of an official extract from the land register evidencing the registration of the transferee in the land register as the owner of the transferred real property (and additional content, e.g., that the real property is free from any mortgage and/or easement).

- Handover procedure details;
- Liability for defects – from extended liability (compared to statutory standard) to limited liability (excluded

defects etc.);

- Declarations, if necessary, regarding the required municipal decisions such as, for instance, the occupancy permit determining the purpose of the use of the real property;
- Detailed representations and warranties regarding the current ownership and substantial characteristics of the real property such as: access to public roads, connectivity to supplies (gas, electricity, etc.);
- Determination of the technical condition of the flat based on expert appraisal with specification of the repairs to be carried out within the next 12 months;

**Note:** Collateral provisions may be agreed in the conveyance agreement dealing with specific requirements of the parties, such as (i) reservation of the ownership right (e.g., until full payment of the purchase price), (ii) repurchase clause, (iii) pre-emption right, (iv) trial purchase. A detailed description of these institutes exceeds the scope of this overview however they could be useful in some cases. We will gladly provide more detailed information upon request.

#### c. Required Documents

- Declaration of the facility services provider or the chairman of the community of flats and non-residential premises owners in the building that the transferor does not have any arrears of rent or payments for the services (heating/cooling, electricity, garbage, etc.).
- Energy certification - owner of a

building is obliged to keep the energy certification during its validity and to hand it over to the new owner in case of transfer.

#### IV. Legal Title & Due Diligence

##### Legal Title

The legal systems that have historically governed the ownership of real property in the territory of the Slovak Republic have resulted in a situation characterized by fractioned ownership of lands and legal uncertainty due to the fact that the same lands can sometimes be concurrently recorded in different registers and still (although in very limited extent now) in the name of different owners.

The records of ownership recorded in the land registry do not represent definitive proof of ownership as these records are considered veracious until proven otherwise.

**Thus, a review of the land register is of major importance where ownership status is concerned. In particular, in major transactions a detailed review of title records for the past 10 years is highly recommended.**

##### Due Diligence

In addition, depending on the location and nature of the real property, the seller should conduct a detailed due diligence review focussed on specific issues (as applicable):

- unrestricted right to transfer the real property, pre-emption rights, long-term lease of arable lands, existence of mortgage over the real property;
- specific historical forms of ownership, e.g., “Urbarium” and ramifications on the transaction or intended use;
- (non)existence of unresolved ownership restitution claims raised by entitled persons persecuted by the fascist/communist

regimes;

- construction planning aspects/restrictions;

**Note:** Construction, alteration as well as a change in use or the demolition of a building in most cases require a territorial and (building) permit issued by the local building authorities. The building project has to comply with the local (or zoning, as the case may be) development plans. Therefore, with regard to the prospective plans of construction, the development and land use should be reviewed very carefully before the closing of the contract.

- environmental burdens and issues;
- access to utilities networks;
- public law limitations (civil defence structures, inundation area, etc.);
- sufficient access to the real property (e.g., public road connection).

#### V. Transfer of Ownership

The transfer of ownership to real property in each case requires initiating a procedure before the local District Office (land registry department) on the basis of paper documents and/or documents in electronic form.

The proceedings for the entry of the ownership right in the land registry are instituted by means of an application filed by any party; the deadline for a decision on entry is 30 days, in “accelerated” proceedings 15 days.

A frequent instrument used in the conveyance of real property in Slovakia is a “geometrical plan” which is a set of descriptive data and geodetic layouts used for outlining the new boundaries of separated lands or a corridor of a possible easement, etc.

**Note:** Since a recent amendment to Slovak law, any errors in writing, calculation or other obvious errors can be rectified only through an



amendment to the agreement.

The ownership is legally transferred to the transferee upon a decision of the land registry department (as of the date of application for entry in the case of flats).

Recently (between 2014 and 2019), sale of agricultural land was subject to several procedural and material restrictions following from Act on the Acquisition of Ownership of Agricultural Land which were aimed at establishing preferential right of local agricultural operators to acquire the offered land (mandatory public notification of the offered agricultural land, preferential right to acquire). The restrictions placed on the prospective seller of agricultural land as well as on the eligible preferential buyers have been eventually considered contrary to constitutional right to own property (Constitutional Court Decision PL. ÚS 20/2014). Hence, since February 2019 the restrictions no longer apply. Nonetheless, it cannot be excluded that similar, less intrusive regulation is taken in the future.

## VI. Forms of Ownership

In general, all individuals and legal entities can invest into and own real property assets. It is irrelevant if the owners and purchasers are resident or non-resident or which country they come from. It is only crucial that they have legal capacity.

The most frequent forms of ownership are:

- 1. Sole ownership:** The owner is the only person with ownership right to the real property.
- 2. Co-ownership:** More than one person owns an undivided share in the real property. Each co-owner is entitled to dispose with its share. In

case of transfer, the other co-owners have pre-emptive right (save for transfers to close persons such as a child, etc.)

### 3. Joint ownership of spouses:

Share on the joint is not expressed (e.g., by percentage or fraction), and a spouse is not entitled to dispose with it independently, i.e., without the consent of the other joint owner (spouse).

Finally, owing to the historical developments, especially agricultural/forest lands are quite often owned or co-owned by so-called “unidentified owners”, i.e., persons who are either not sufficiently identified, deceased, or not known at all. The acquisition of such lands may require tracking down the current successors in ownership (heirs) and/or liaising with the competent authorities (e.g., Slovak Land Fund) that represent such unidentified owners.

## VII. Agents

The buyer or seller can both use the services of a real property agent. Currently there are several renowned firms on the market providing services for the intermediation of retail premises and industrial areas.

The agent commission is determined by agreement of the parties without specific limitations (except for general requirement to adherence to good morals).

Caution is recommended when using local agents as the legal-technical quality of the documents used by them is generally not at a level ensuring clear distribution of rights and obligations among the seller, buyer, and the

agent in case an issue should arise.

### VIII. Donations

Real property can be donated by means of a donation agreement. Please note that given the specific nature of the donation, the return of a gift can be demanded only if the beneficiary commits a gross violation of good morals against the donor or the members of their family.

### IX. Financing

The usual way of financing real property is a bank loan/mortgage which is mostly connected with insisting on collaterals by the banks.

Typically, the banks do not provide 100% coverage (in any case in the area of mortgages taken by individuals) and a buyer has to pay a certain portion of the purchase price from their own sources (the use of such financial resources is usually a condition precedent to drawing the loan). For large development projects banks usually require multiple security by establishing a pledge over the real property, shares in the buyer-legal entity as well as a pledge over receivables (both current and future ones).

For special transactions, such as large individual properties or real property portfolios, a common alternative to a bank loan is the use of capital market products, for instance, bonds, receivables, or credit derivatives.

### X. Costs and Taxes

The costs associated with the registration of the transfer are typically borne by the buyer. However, the seller usually has to bear the costs of deleting of existing mortgages (e.g., securing the seller's debts) from the land register.

There is no real property transfer tax, i.e., specific tax applying on transfers of real property, currently applied in Slovakia.

However, the transfer of real property may involve other tax aspects, particularly when a VAT regime applies.

The real property tax, i.e., tax imposed on owners of the real property, is a local tax the amount of which is determined by the respective local municipality for different types of land and premises.

The real property tax is paid for a tax period of a calendar year in advance. The purchaser shall report the acquired real property within 31 January of the following calendar year. The tax is payable upon receipt of the decision of the local municipality containing the calculation of the tax (within 15 days of the decision becoming final).

We strongly advise that tax advisors are involved in order to ensure that these aspects are dealt with comprehensively, e.g., in view of differing VAT regimes applicable to buildings and lands.

### XI. Acquisitions

Real property can be acquired by way of an asset or a share deal. In the case of a share deal, the legal entities used for these purposes are mostly organized as limited liability companies or joint stock companies.

#### 1. Limited Liability Company (in Slovak: "*spoločnosť s ručením obmedzeným*", abbreviation: "*s.r.o.*")

The most widely used legal form owing to its high flexibility, low capital requirement and relatively few obligations.

#### a) Legal Entity

- A legal entity acts autonomously, represented by executive director(s);
- Independently subject to taxation;
- The particular rights and obligations of an s.r.o. exist autonomously from those of the

shareholders and the executive directors;

- The company's statutory body is one or more executive directors. The executive directors act in all matters on behalf of the company in the way of acting that is registered in the Commercial Register. The Foundation Deed (the Memorandum of Association, see below) may state that the executive directors constitute a collective body. The internal restriction of the executive directors' powers is not effective against a third party, even if published. Under Slovak law, a violation of these duties by an executive director will not (alone) affect the validity of a contract with a third party, but the s.r.o. may hold the executive director in question liable for damages.

#### **b) Formation**

- The foundation act is a Memorandum of Association or Foundation Deed in the case of a sole shareholder. It has to be notarized;
- Setting up an s.r.o. is not complicated and can be accomplished easily;
- A supervisory board is not an obligatory company body.

#### **c) Costs of Formation**

Typically, the estimated total public fees (signature certification & Commercial Register fee) for the formation of an s.r.o. amount to few hundred euros. The attorney's fees for services rendered in the process of establishing and incorporating an s.r.o. vary depending on the number of shareholders, business authorizations sought and instruments the shareholders wish to put in place, such as a Shareholder Agreement, etc.

#### **d) Minimum Registered Capital**

The minimum registered capital required for an s.r.o. is €5,000. In the light of recent developments in Slovakia's corporate law, it is

recommendable to set up a company with capital reflecting the amount of liabilities assumed by the company in order to mitigate the risk that the company could be considered "in crisis" or even insolvent.

Nevertheless, at least 30% of each shareholder's monetary contribution and a half of the total registered capital must be paid-up before the company's registration in the Commercial Register. In the case of a sole shareholder, the registered capital has to be paid-up entirely.

#### **e) Limited Liability**

The shareholders of the entity are not personally liable for the company's debts. The shareholders however provide a guarantee for the company's debts up to the extent of their unpaid contribution in the registered capital.

### **2. Slovak Joint-Stock Company (in Slovak: "akciová spoločnosť", abbreviation: "a.s.")**

#### **a) Legal Entity**

- It is a legal entity in which the shareholders are not liable for the debts of the company during its existence;
- It is more complicated to form and operate than an s.r.o. and additional costs arise in connection with keeping the register of shareholders;
- Hence, the rules for an a.s. are generally less flexible compared to the rules for forming a limited liability company;
- A company can be founded by one founding shareholder – a legal entity; otherwise, there must be two or more individuals or legal entities;
- An a.s. may have the form of a private a.s. or, where its shares (or some of them) have been listed on the stock exchange in any EEA member state, a public a.s.;

- Registered shares may be issued as certified or book-entry securities, whilst bearer shares are issued in book-entry form only;
- Corporate bodies mandatorily include a General Meeting, a Board of Directors, and a Supervisory Board;
- A General Meeting consists of all company shareholders and takes place at least once a year. It is positioned as the supreme body holding powers, e.g., in personal matters (electing, remunerating corporate body members) as well as deciding on the distribution of profits and amending the Articles of Association.

#### **b) Formation**

The foundation act is either a Foundation Deed or Foundation Agreement in the case the company is established without a call to subscribe shares or the minutes from the constituent General Meeting where the registered capital is subscribed by more shareholders on the basis of a call. All of these documents must include Articles of Association (By-laws) containing mandatory information and must be prepared in the form of a notarial record.

#### **c) Costs of Formation**

Typically, the estimated total public fees (signature certification & Commercial Register fee) for the formation of an a.s. amount to few hundred euros (notary fees depend on the amount of the share capital of the company to be established and the number of founders). The attorney's fees for services rendered in the process of establishing and incorporating an a.s. may vary significantly depending on the number of shareholders, method of establishing, etc.

#### **d) Minimum Registered Capital**

The minimum registered capital required for an

a.s. is €25,000. At least 30% of its subscribed registered capital must be paid up by the time of the submission of the proposal for registration to the Commercial Register.

#### **e) Limited Liability**

The shareholders of the entity are not personally liable for the company's debts.

**Note:** Persons acting on behalf of the company before the company's incorporation in the Commercial Register are liable for the obligations which arise therefrom – these obligations can be assumed by the company within 3 months from its incorporation, and then it is bound by such acts from when it began.

### **3. Other types of entities**

There are three other types of business companies: a Limited partnership company (k.s.), an Unlimited partnership company (v.o.s.), and a Simple joint-stock company (j.s.a.) However, these forms are not very often used as vehicles in real property transactions.

A specific form of entity, a “flat owners’ cooperative” is not unusual in Slovakia. However, it is more a residue from past cooperative ownership of blocks of flats. Only rarely is it used as an investment vehicle for developing blocks of flats today.

*This overview is for information purposes only.*

*Under no account can it be considered as either a legal opinion or advice on how to proceed in particular cases or on how to assess them. If you need any further information on the issues covered by this overview, please contact Mr. Marián Lauko ([lauko@peterkapartners.sk](mailto:lauko@peterkapartners.sk)).*

*PETERKA & PARTNERS is a full-service law firm operating in Central and Eastern Europe providing one-stop access to an integrated regional service.*

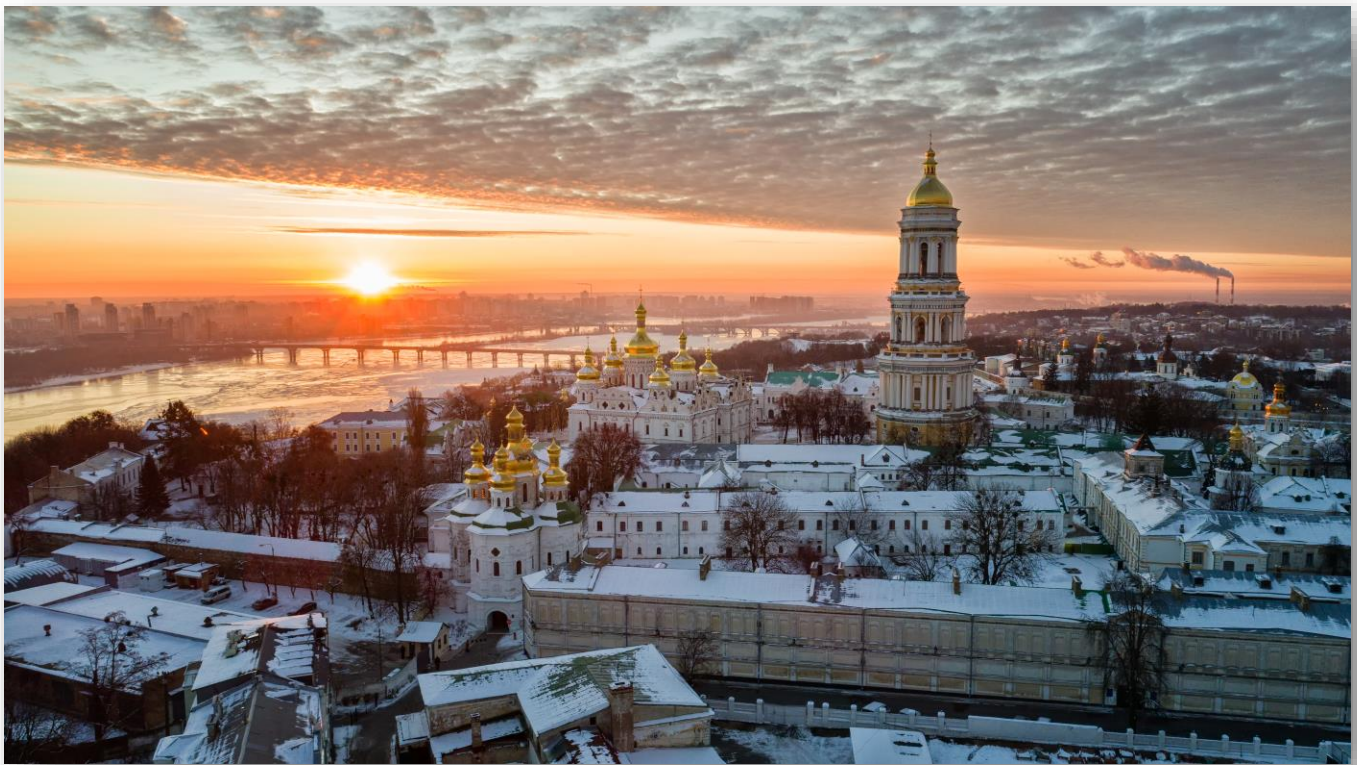
*The firm provides legal services to multinational companies active in the region, as well as leading local groups, providing them with complex legal solutions with exceptional commercial value.*



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# INTERNATIONAL LAWYERS NETWORK



**PETERKA & PARTNERS**  
**BUYING AND SELLING REAL ESTATE IN UKRAINE**

**ILN REAL ESTATE GROUP**

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER UKRAINIAN LAW

### I. Types and specifics of real estate in Ukraine

The main types of real estate in Ukraine are the following:

- plots of land;
- other objects that cannot be removed without their depreciation and change of their designation, such as buildings (residential and others), constructions, as well as their separate parts, apartments, premises (residential and non-residential).

The regime of real estate property may be extended by law to aircraft and ships, inland waterway vessels, and objects in space, as well as other property, the rights to which are subject to state registration.

In Ukraine, a plot of land and a real estate object located on such plot of land (building, construction, etc.) are considered as two separate real estate objects. Thus, in practice, there are situations when a plot of land and a real estate object located on such plot of land are owned (or used on another title) by different persons and based on different titles (e.g., a person can own a building and lease the underlying plot of land which is initially owned by the state).

However, the latest developments to Ukrainian legislation aim at implementation in practice of the principle of "unanimous legal destiny of the plot of land and the real estate object located on it". Such principle shall ensure that in the case of acquisition of the real estate object (a residential building (except an apartment building), other building or construction), object of unfinished construction located on a plot of land, into ownership, the right to the underlying plot of land is transferred simultaneously to the acquirer.

### II. Ownership title to real estate

There are the following types of real estate ownership:

- State ownership

Certain real estate objects are owned by the state of Ukraine (land for nuclear energy and the space system; military land; the land under state railways, objects of state ownership of air and pipeline transport; property of state authorities, state reserves, state entities, etc.). The state exercises its ownership right through the relevant public authorities (Cabinet of Ministers of Ukraine, State Property Fund of Ukraine, state administrations, etc.).

As a general rule, state real estate which is not forbidden for sale shall be sold on a competitive basis (auctions).

- Municipal ownership

Under the law, certain real estate objects are owned by local communities (e.g., all land within settlements, except for private and state-owned plots of land). As in the situation with state-owned real estate, municipal property (which is not forbidden for sale as well) is sold by municipal authorities on a competitive basis (auctions).

- Private ownership

Real estate objects can be owned by individuals and legal entities on the basis of private ownership, which can be individual or co-ownership (when property is owned by two or more persons (co-owners)).

The co-ownership can be either shared (when each co-owner has determined a

share in co-ownership) or joint (when the co-owners' shares in co-ownership are not specifically determined, e.g., co-ownership of spouses).

### III. Restrictions for foreign investors

Under the current laws of Ukraine, foreign investors are limited in the acquisition of plots of land.

For non-agricultural land:

- foreign individuals are allowed to acquire ownership rights to non-agricultural plots of land:
  - within settlements;
  - outside settlements where real estate objects belonging to such foreign individuals on private ownership title are located.
- foreign legal entities (established and registered according to foreign state legislation) are allowed to acquire ownership rights to non-agricultural plots of land:
  - within settlements in the case of acquisition of real estate objects and for construction of objects related to business activities in Ukraine;
  - outside settlements in the case of acquisition of real estate objects.

For agricultural lands, foreign investors are currently prohibited from acquiring (directly or indirectly) agricultural plots of land in Ukraine. However, subject to a positive decision of a referendum, foreign investors (with certain exceptions) may be provided with an opportunity to acquire agricultural land through legal entities established and registered under the laws of Ukraine.

### IV. Data and documents on titles to real estate

Prior to concluding a sale and purchase agreement (hereinafter – “SPA”) for real estate, it is recommended that parties to the transaction obtain valid and up-to-date information about the real estate object in question, verify title to it and the existence of possible encumbrances as well as other details related to the real estate object.

In Ukraine, the right of ownership (as well as other rights to real estate), encumbrances of these rights, their commencement, transfer, and termination are subject to state registration in the Ukrainian State Register of Proprietary Rights to Real Estate (hereinafter – the “*Register*”). State registration in the Register is considered to be official recognition and confirmation by the state of the facts of acquisition, change or termination of proprietary rights to real estate, and encumbrances of such rights. Information on proprietary rights, and encumbrances of proprietary rights recorded in the Register shall be considered reliable and may be used in a dispute with a third party until the state registration of termination of such rights, and encumbrances within the procedure prescribed by the applicable laws on real estate.

Information on registered rights to real estate and their encumbrances contained in the Register is open, publicly available and is charged for. For individuals and legal entities, information on a real estate object and the subject of proprietary right is provided in electronic form through the official website of the Ministry of Justice of Ukraine (<https://online.minjust.gov.ua/rrp/>), subject to identification of such person (individual or legal entity) by using an electronic digital signature or other alternative means of identification of a person, or in paper form.

In some cases, in order to verify title to real estate, it is also necessary to examine other documents related to such real estate such as a sale-purchase agreement of such real estate by which it was initially acquired by the seller, certificate on ownership title to such real estate, etc.

## V. Sale and purchase of real estate

### *Due diligence*

Before execution of a real estate sale-purchase transaction, it is usually recommended to undergo a real estate due diligence procedure to verify possible risks or consequences related to the acquisition of certain real estate which may have a material adverse effect on the transaction.

Due diligence usually includes verification of the following aspects:

- validity of a title to real estate property;
- existence and details of other proprietary rights to real estate property (lease, easement, etc.);
- existence and details of encumbrances (mortgage, tax lien, etc.);
- history of title transfer;
- unrestricted right to transfer of the real estate property;
- disputes, litigations in respect of real estate property;
- permitting situation;
- other details related to real estate (designation purpose of the plot of land, etc.).

### *Preliminary agreement*

Before entering into the main sale and purchase agreement for real estate, the parties may be interested in concluding a preliminary agreement.

By concluding such preliminary agreement, the parties undertake, within a certain period (but not later than within 1 year from the moment of conclusion of the preliminary agreement), to conclude a main sale and purchase agreement in the future based on the terms and conditions established by the preliminary agreement.

The preliminary agreement shall contain conditions which allow the determination of subject matter as well as other essential terms and conditions of the main sale and purchase agreement and be concluded in the form established for the main sale and purchase agreement.

The obligations established by the preliminary agreement shall be terminated if the main sale and purchase agreement is not concluded within the period established by the preliminary agreement, or if neither party sends a proposal to the other party to conclude it.

The party who unreasonably evades the conclusion of the main sale and purchase agreement provided for by the preliminary agreement, shall reimburse the other party for damages caused by delay, unless otherwise established by the preliminary agreement or legislation.

Contrary to the preliminary agreement, the agreement of the parties on intentions (protocol of intentions, etc.) is not considered as a preliminary agreement and does not entail legal consequences.

### *Sale and purchase agreement (SPA)*

Under an SPA for real estate, one party (a seller) shall transfer a real estate property (plot of land, building, etc.) to the ownership of the other party (a purchaser), and the purchaser shall accept the real estate property and pay for it a certain amount of money.



- The form of the SPA

As a general rule, an SPA for real estate shall be concluded in written form and is subject to notary certification.

- Essential and other important terms and conditions of the SPA

In order to consider the SPA concluded, the parties shall agree on all essential terms and conditions of such agreement – its subject matter, terms and conditions determined by law as essential or needed for such types of agreements (like price, term, cadastral number of underlying plot of land) as well as all other terms and conditions which shall be agreed at the request of at least one of the parties.

- The **subject matter** of the SPA shall be well defined and described, so that it is possible to distinguish the real estate object from among other similar real estate objects. Usually, the SPA of real estate shall contain information on the location of the real estate, its address, purpose, area, and other parameters that allow it to be determined unambiguously.
- Usually, the **price** is set by agreement of the parties, which shall not be less than the value of such real estate property as defined by an independent appraiser.
- Transfer of rights to the underlying plot of land

Following the principle of “unanimous legal destiny of the plot of land and the real estate object located on it”, a **plot of land (or a share in co-ownership right to it)** must be the subject matter of the SPA, which provides for the transfer of the right of ownership to the real estate object

(residential building (except apartment building), other building or structure, object of unfinished construction or share in the right of co-ownership to such object) located on such plot of land owned by the seller of such object. The condition on simultaneous transfer of ownership right to such plot of land (a share in co-ownership right to it) from the seller to the acquirer of such real estate object shall be an essential condition of the SPA, which provides for such transfer of ownership right.

Also, an essential condition of the SPA under which the right of ownership (shares in co-ownership) to the real estate object (residential building (except an apartment building), other building or structure), or the object of unfinished construction connected with the transfer of ownership right to the plot of land is acquired, is a **cadastral number** of a plot of land, the right to which is transferred in connection with the acquisition of ownership right to such real estate object.

If under such real estate SPA, the right shall be transferred only to part of a plot of land, the conclusion of the real estate SPA shall be made after the allocation of such part into a separate plot of land and assigning a cadastral number to it.

The **size of the underlying plot of land** to be transferred shall also be specified in the SPA.

- Warranties

According to Ukrainian legislation, the parties to an SPA may agree on a list of warranties provided by one party or

parties regarding the circumstances significant for conclusion, performance, or termination of such agreement.

A party who intentionally or negligently provided the other party with false warranties about the circumstances significant for conclusion, performance, or termination of the agreement, is obliged to reimburse the party who relied on such warranties for damages caused by the falsity of such warranties, unless otherwise provided by the agreement.

The typical warranties in a real estate SPA are the following:

- clear title to the real estate;
  - the seller is the sole owner of the property;
  - absence of encumbrances (mortgage, tax lien, prohibition on alienation, etc.);
  - absence of third-party rights to real estate property (leases, easements, etc.);
  - absence of pending disputes, litigations in respect to real estate property;
  - absence of any quality defects;
  - absence of necessity of capital repair;
  - the parties or their representatives have all the needed authorizations to enter into a real estate SPA;
  - others.
- The parties to the SPA shall also pay attention to other terms and conditions of the SPA such as liability

of the parties, payment conditions, bank details of the parties, allocation between the parties of possible expenses related to the SPA (notary fee, bank commissions, etc.) and others.

## VI. State registration

As was noted above, the right of ownership (as well as other rights to real estate), encumbrances of these rights, their commencement, transfer, and termination are subject to state registration in the Register.

Usually, the state registration of rights to real estate in the Register is made by the notary, who certifies the SPA, simultaneously with the performance of such notary action.

Following state registration of rights to real estate property in the Register, a new owner is provided with the related excerpt from the Register.

## VII. Costs and taxes (general notes)

### 1. Natural persons:

#### *1.1. Seller:*

- Personal income tax (PIT):
  - for sale of certain residential real estate/certain categories of plots of land owned for more than 3 years (one sale within the reporting tax year) – 0%
  - for sale of a second real estate object among certain residential real estate/certain categories of plots of land or an object owned less than 3 years – 5%
  - for sale of a third and following real estate objects

or in other certain cases – 18%

- for non-residents, an increased rate of 18% may apply in certain cases
- Defence contribution (applies if PIT rate is not 0%): 1.5%

#### 1.2. Buyer (natural person):

- A pension fund levy of 1% (for certain types of real estate)

#### 1.3. To be distributed between the parties upon their agreement:

- state fee of 1%;
- notary fee (depends upon exact notary);
- broker's fee (depends upon exact broker, usually around 5%)

As a general rule, the base for the above accruals is a contractual price, which shall be not less than the price identified by an independent appraiser. In some cases, the tax base for PIT and defence contribution purposes can be reduced by the expenses incurred upon acquisition of the respective real estate object.

## 2. Legal entities

In general, paragraphs 1.2 and 1.3 (re: pension fund levy, state, notary, and broker's fees) apply to legal entities as well.

In addition, it should be considered whether the transaction is subject to withholding tax (if the seller is a foreign legal entity), and to VAT.

The statutory WHT rate is 15%; double tax treaty benefits are available in some cases.

The VAT rate is 20%. As a general rule, the sale of land is VAT exempt, while the sale of other real estate objects is usually VAT-able.

## VIII. Share deal

Real estate property can also be acquired by way of a share deal – acquiring a share/participatory interest in a company holding title to real estate property. In some cases, real estate acquisition through a share deal may be preferable for the purchaser due to the tax and other advantages of such a transaction. Sale of shares in a joint stock company or participatory interest in a limited liability company is not subject to VAT.

A share deal does not entail registration of transfer of ownership title to real estate, though within the share deal a target company is acquired by the purchaser along with all its rights, obligations, and liabilities.

Contrary to an asset deal, a share deal may be governed by foreign law according to the parties' choice.

## IX. Agents

The seller and purchaser can both use the services of a real estate agent (broker). Currently, the use of a real estate agent (broker) in Ukraine is voluntary.

## X. Donations

Real estate property can also be acquired by means of a donation agreement. Due to the specific nature of the donation, there are some cases when a donor can demand termination of the donation agreement (e.g., if the beneficiary intentionally committed a criminal offence against the life, health, property of the donor, his/her parents, wife (husband), or children).

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*The above information is provided for general understanding and information purposes only. Real estate acquisition may also involve other legal and tax aspects.*

*In general, information is provided according to the standard legislation of Ukraine and does not focus on specific regulations that may from time to time be introduced into the legislation of Ukraine due to the martial law introduced in*



*Ukraine since February 24, 2022, in response to the military aggression of the Russian Federation against Ukraine.*

*We strongly advise that legal and tax advisors be involved in order to ensure that each specific case is dealt with comprehensively. If you need any further information on the issues covered by this overview, please contact Mr. Taras Utiralov ([utiralov@peterkapartners.ua](mailto:utiralov@peterkapartners.ua)) or Ms. Galyna Melnyk ([melnyk@peterkapartners.ua](mailto:melnyk@peterkapartners.ua)).*

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# INTERNATIONAL LAWYERS NETWORK



**SHUTTS & BOWEN LLP**

Buying and Selling Real Estate in the United  
States - Florida

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER FLORIDIAN LAW

### I. STANDARD FORMS OF AGREEMENTS

A. Purchase and Sale Agreement sets forth the complete terms of the purchase and sale including, among other things, price, security deposit, allocation of costs of the transaction, date for closing, inspection period, financing, title contingencies, escrow information, representations, warranties, covenants, and default provisions.

1. Either party's attorney can prepare the initial draft of the Purchase and Sale Agreement.
2. FARBAR Form – this is the pre-printed form of Purchase and Sale Agreement typically used in Florida for residential real estate transactions; parties can freely negotiate the terms and provisions contained in the FARBAR.
3. The assignment of a Purchase and Sale Agreement can be prohibited or restricted if expressly stated in the document (for example, seller can restrict buyer to only being able to assign contract to an entity related to buyer).

B. Letter of Intent, like a term sheet, is sometimes utilized in commercial transactions to outline the basic terms of a transaction before drafting and negotiating a Purchase and Sale Agreement.

1. Beneficial because allows parties to put to paper key terms to deal, which helps facilitate agreement on the remaining terms.
2. Signing letter of intent adds level of formality and gravitas to negotiations.

3. Letters of Intent may or may not be binding depending on the language utilized; they are usually non-binding.

C. While utilized in other states, an Offer to Purchase is not commonly used in Florida.

### II. BROKERS

A. There are four general types of brokers:

1. Residential Brokers
  - a. Sell homes, condos, vacant lots
2. Commercial Brokers
  - a. Office buildings, vacant land, shopping centers, apartment buildings, raw land, warehouses, industrial facilities. Multi-family Apartments: include Retail, Office, and Industrial subcategories.
3. Leasing Brokers
  - a. Specialize in leased properties (tend to focus on commercial properties, which includes retail, office, and industrial).
4. Mortgage Brokers
  - a. Facilitate mortgage lending in both residential and commercial transactions
  - b. They typically receive commission based on a percentage of the loan amount or a flat fee

B. Must be licensed in Florida and they are regulated by state law

C. Real estate brokers usually enter into listing agreements with sellers, and they typically receive a commission based upon a percentage of the sales price (generally 6%, but commonly negotiated); if there is a co-broker, the listing broker



will usually share the commission with the co-broker.

- D. Real estate brokers are paid by the seller, and they owe fiduciary duties to the party that they represent.

### III. BUYER'S INSPECTIONS

- A. Residential: Prior to Closing, the Buyer will typically perform property inspections including inspection for structural issues, radon, asbestos, pest infestation or damage, title searches, survey, and in certain rare circumstances, lead paint and underground storage tanks (for oil or propane). Buyers should also order municipal lien/open permit searches to confirm there are no outstanding governmental violations, liens, or fines and to confirm that all alterations and renovations have been completed in compliance with permits and all permits are properly closed out.
- B. Commercial: In addition to the inspections described above for residential buyers, commercial buyers also usually obtain an environmental inspection (Phase I, and if necessary, Phase II), and a land use and zoning/permitting analysis.
- C. The Purchase and Sale Agreement typically designates an inspection period (also known as due diligence period), during which buyer has a specified amount of time (usually 30-45 days) to conduct the above referenced inspections as well as investigate any title issues or zoning and land use concerns; buyer generally may terminate the contract during this inspection period for any or no reason and receive a return its initial deposit.

### IV. SURVEYS

- A. As-Built Surveys – depict the improvements over a given parcel of land and can be utilized both prior to construction and post-construction.
- B. ALTA/ACSM – standards by which surveyors are held; many lenders require that the surveyors meet these standards and requirements (these are national requirements, not just Florida).
- C. Benefits of Surveys
  1. Ensure property actually exists
  2. Determine relationship of property to other properties
  3. Ensure the record boundary lines are actually the ones being occupied/used
  4. Determine physical location of improvements and easements
  5. Determine whether there are any encroachments on the property

### V. FORMS OF OWNERSHIP

- A. Residential Property is usually held in a nominee trust, an estate planning trust, or an individual's own name (especially if the property is the owner's homestead so that the owner is afforded certain homestead rights and protections provided under Florida law). Joint owners may take title as:
  1. Tenants in Common (each own 50%);
  2. Joint Tenants with rights of survivorship (they own the property jointly and upon the death of one of the joint tenants, the property automatically passes to the surviving joint tenant(s)); or



- 3. Tenants by the Entirety if the owners are married (they each own the undivided whole of the property and if one spouse dies, the property automatically passes to the other spouse).

B. Commercial Property may be held as follows:

- 1. As the Owners pursuant to the forms set forth in A above, (highly unusual for commercial properties to be held in an individual's personal name for liability purposes)
- 2. General Partnership/Joint Venture
- 3. Limited Partnership
- 4. LLPs
- 5. LLCs (has become the most common form of ownership)
- 6. Business Trusts
- 7. Business Corporations
  - (i) C corporation
  - (ii) S corporation

**VI. FORM OF DEED**

- A. General warranty deed – most protection for buyer
  - 1. Grantor warrants title for all times that the property has existed, including before grantor took title to the property
  - 2. Most likely to see this form of deed in the residential context
- B. Special warranty deed – middle-level protection for buyer
  - 1. Grantor warrants title for the period that grantor has owned the property

- 2. Most likely to see this form of deed in the commercial context

C. Quitclaim deed – least protection for buyer

- 1. Contains no warranties of title
- 2. Typically used for gifting property or for situations where necessary to correct title defects or issues
- 3. Title companies do not like to insure quitclaim deeds

**VII. CLOSING COSTS/ADJUSTMENTS**

A. Documentary Stamp Taxes (Doc Stamps) – levied on documents that transfer interest in Florida Real Property (i.e., deeds)

- 1. In most counties in Florida, the documentary stamp taxes are calculated at the rate of \$0.70 per \$100 of purchase price; in Miami-Dade County the rate is \$0.60 per \$100 of purchase price plus an additional \$0.45 surtax per \$100 of purchase price on documents transferring property other than a single-family residence
- 2. The documentary stamp tax and, if applicable, the surtax, is paid to the Clerk of Court when the deed is recorded; the Clerk then sends the money to the Department of Revenue.

B. Title Insurance Commitment, Title Policy, and Municipal Lien Searches

- 1. The cost of the title insurance commitment is usually paid by Seller, even if ordered by the Buyer or Buyer's attorney.
- 2. The premium for the title insurance policy is a promulgated rate based upon the purchase price for the property being purchased. The





attorney for the party that is responsible for paying for the title insurance premium generally is the agent that issues the title insurance policy. Whether the Buyer or the Seller pays for the title insurance premium is negotiable, but in most counties in the Florida, the custom is for the Seller to pay for the title insurance premium. The main exceptions are Miami-Dade County and Broward County, where the custom is that the Buyer is responsible for paying the title insurance premium.

3. The cost of the municipal lien searches (also known as lien letters) is usually paid by the Seller.

C. Inspections, Survey, Due Diligence, and Financing Costs are usually the responsibility of the Buyer.

D. Real property taxes, association maintenance fees, special assessments, rents, and operating expenses are usually prorated as of the closing date, with the Seller responsible for those costs/revenues incurred prior to the closing date and the Seller responsible for those costs/revenues incurred from and after the closing date.

## VIII. OTHER CLOSING DOCUMENTS

- A. Bill of Sale – conveys personal property (i.e., refrigerator, washing machine, appliances, equipment, etc.); usually does not get recorded.
- B. Seller's Affidavit – also can be referred to as title affidavit, lien affidavit, gap affidavit, or some combination of these terms i.e., title, lien, and gap affidavit.

1. Title Company will typically require on Title Commitment as a requirement for Title Policy to be issued.
2. Purpose of the Affidavit is for Seller to provide assurance to the Title Company and the agent for the Title Company that no liens or other encumbrances have been placed on the property in the past 90 days and that no work has been performed the cost of which is remains unpaid; this is important because there is a gap period between when the Title Commitment is issued by the Title Company and when the Title Policy is issued.

### C. FIRPTA Affidavit – IRS requires

1. Proof that grantor is a US entity paying US taxes
2. If Seller is a foreign entity not paying US taxes, the transferee/settlement agent must withhold 15% of the purchase price and remit it to the IRS to ensure that taxes will be paid on the income if any taxes are owed.
3. One important exception to FIRPTA withholding is a transferee/settlement agent is not required to withhold when the Buyer is purchasing a home and the purchase price is not more than \$300,000.

### D. Assignments

1. Can include Assignment of Leases, Assignment of Contracts, Assignment of Bulk Buyer Rights, etc.
  - (i) Would typically see these in the context of buying and selling a commercial building
  - (ii) Both buyer and seller usually sign these assignments.



E. Closing Statement – also typically called Settlement Statement

1. Sets forth the purchase price, closing costs and prorations of the transaction as debits and credits to Buyer and Seller.
2. Will usually include the financing costs for the Buyer's loan; provided, sometimes in a commercial transaction, the Buyer's lender will have its own, separate loan closing statement.

**IX. RECORDING REAL ESTATE DOCUMENTS**

A. Deeds need to be witnessed by two witnesses and notarized

1. Only the Grantor signs the deed (not the grantee)
2. Regarding recording, Florida is a Notice state, i.e., last bona fide purchaser without notice who pays value has priority
3. Must record the original of the deed (cannot record copies, except with e-recording but must have original in possession)

B. Other than the Deed, most other conveyance documents are not recorded; sometimes a limited liability company affidavit is recorded to evidence authority for execution of the Deed

C. If the conveyance is a condominium unit which requires the approval of the condominium association, then the condominium association approval is usually recorded with the Deed



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# INTERNATIONAL LAWYERS NETWORK



**DAVIS, MALM & D'AGOSTINE**  
Buying and Selling Real Estate in the United  
States - Massachusetts

**ILN REAL ESTATE GROUP**



## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER MASSACHUSETTS LAW

### I. STANDARD FORMS OF AGREEMENTS

- A. Offer to Purchase sets forth buyer's offer of price, date for closing, contingencies for inspections, financing etc. and date for signing a formal purchase and sale agreement. Seller may accept or reject.
- B. Purchase and Sale Agreement sets forth the complete terms of the purchase and sale.
- C. **Note:** In Massachusetts, an Offer to Purchase may be enforced as a binding contract even if it contemplates the execution of a Purchase and Sale Agreement.

### II. BROKERS

- A. All brokers in Massachusetts whether they are working with the buyer, or the seller represent the seller unless the buyer enters into a separate Buyer's Broker or Dual Agency Agreement.
- B. Seller usually pays the brokers commission unless negotiated otherwise.

### III. BUYER'S INSPECTIONS

- A. **Residential:** Prior to Closing, the buyer performs property inspections including inspection for structural issues, radon, asbestos, pest infestation or damage, title, and in certain rare circumstances, lead paint and underground storage tanks (for oil or propane). Buyers should also check the town/city building file on the property to make sure all alterations and renovations have been completed in compliance with permits and all permits are properly closed out. Buyer or its lender will also obtain a plot plan of the premises.
- B. **Private Septic.** If the property is on a private septic system (rather than municipal sewer), then seller has to provide buyer with a Title V inspection (with passing

results) from the town in which the home is located.

- C. **Commercial:** In addition to the inspections performed by residential buyers, commercial buyers also usually obtain a survey, an environmental review, and a use and zoning/permitting analysis.

### IV. FORMS OF OWNERSHIP

- A. Residential Property is usually held in a nominee trust, an estate planning trust, or an individual's own name. Joint owners may take title as:
  - 1. Tenants in Common (each own 50%);
  - 2. Joint Tenants with rights of survivorship (they own the property jointly and the survivor ends up with 100%); or
  - 3. Tenants by the Entirety if the owners are a married couple (they each own the undivided whole of the property).
- B. Commercial Property may be held as follows:
  - 1. As the Owners pursuant to the forms set forth in A above, (highly unusual for liability purposes)
  - 2. General Partnership/Joint Venture
  - 3. Limited Partnership
  - 4. LLPs
  - 5. LLCs (most common)
  - 6. Business Trusts
  - 7. Business Corporations
    - i. C corporation
    - ii. S corporation

### V. THE "CHECK-THE-BOX" REGULATIONS

- A. Treas. Reg. §1.7701-1 *et seq.* provides that domestic business corporations are *always*



classified as corporations for Federal income tax purposes; GPs, LPs, LLCs, LLPs, and business trusts are automatically classified as partnerships (with pass-through treatment) *unless* they “check-the-box” on Form 8832 electing to be taxed as corporations.

- B. C corporations are subject to a “double tax,” once on the corporate level, and again on dividends or distributions to shareholders. S corporations are taxed only at the shareholder level, with a few exceptions. Partnerships “pass-through” income or loss to the partners. Single-owner LLCs and business trusts are “disregarded entities.”

## VI. DISTINGUISHING FEATURES

### A. Nominee Trust

1. Fiduciary relationship between “trustee” and beneficiaries listed on an unrecorded schedule.
2. Trustee has no power to deal with the trust property except as specifically directed by beneficiaries – legally an “agent” for beneficiaries.
3. Third parties are entitled to rely on certificates signed by trustees of record.
4. Beneficiaries may terminate or amend trust at any time.
5. On termination, the trust property is conveyed to beneficiaries.
6. Advantages
  1. Beneficiaries are undisclosed (privacy).
  2. Trust property can be effectively conveyed by assignment of beneficial interests. Useful for intra-family gifts.

3. No income taxation on trust level; “pass-through” to beneficiaries.
- ### 7. Disadvantages
1. No limited liability for beneficiaries.
  2. Sole trustee and sole beneficiary may not be identical – merger will result.
  3. Poor draftsmanship can result in trust being treated as a “true trust,” which may result in the trust being subject to tax on capital gains and undistributed income and inability to pass through losses.
  4. Ancillary probate for deceased non-Massachusetts beneficiaries (who are deemed to own Massachusetts real estate).
  5. Potential for fraud by beneficiaries.
  6. Creation of a partnership if two or more beneficiaries.
  7. Deeds excise tax on transfer of beneficial interest (DD 95-2).

### B. General Partnership/Joint Venture

1. GP is an agreement (oral or written) among two or more people to engage in business.
2. A joint venture is a GP which is limited to a specific project or business.
3. Governed by Massachusetts Uniform Partnership Act, G.L. c. 108A.
4. In absence of written agreement, a numerical majority of partners control decision-making.
5. Limited transferability of interests.
6. Limited life. Withdrawal of partner dissolves partnership, but partnership can be reconstituted.



7. Advantages

1. Simplicity, informality.
2. Pass-through treatment.

8. Disadvantages

1. No limited liability. Partners are jointly and severally liable for partnership liabilities. New partners liable only for future obligations; retired partners for past obligations.
2. Limited transferability of interests.
3. Conveyancing issues:
  - (i) If title to real estate is in the name of the partnership, any partner may convey title in the name of the partnership. A BFP may rely on the deed, notwithstanding any limitations on the partner's authority (G.L. c. 108A, §10(1)).
  - (ii) If title in the name of less than all partners (and the record does not disclose the partnership's rights), the named partners may convey title to a BFP, notwithstanding the existence of an undisclosed partner (G.L. c. 108A, §10 (3)).
  - (iii) If title in the name of all the partners, all must sign the deed. (G.L. c. 108A, §10 (5)).
  - (iv) Attachments against partners individually can affect the partnership's title if the claim relates to a partnership liability.
4. Fiduciary duties – self-dealing, corporate opportunities. Can be modified by contract.

C. Limited Partnerships

1. A statutory entity governed by G.L. c. 109. Creation requires filing of a brief certificate of limited partnership.
2. Limited partnership is managed and controlled by general partners (GPs). Limited partners (LPs) are passive investors.
3. Certain extraordinary actions can require approval of LPs.
4. Written limited partnership agreement not required but highly advisable.

5. Advantages

1. Limited liability for LPs.
2. "Pass-through" tax treatment. No entity-level tax.
3. Names of LPs not publicly disclosed.

6. Disadvantages

1. Unlimited liability for GPs, but a limited liability entity, such as an LLC or a corporation, can be a GP.
2. Unlimited liability for LP who takes part in control of business or knowingly permits his name to be used in the name of the limited partnership.
3. Limited transferability of interests requires consent of all partners to admit a new LP; unadmitted transferees are entitled to distributions but have no other rights as LP.
4. Fiduciary duties.

D. LLP

1. A general partnership that files a registration form with the Secretary of State under G.L. c. 108A, §§45-47.



2. Same advantages and disadvantages as a general partnership, but partners have limited liability.
3. Must renew LP status by annual filing with Secretary of State.

E. LLCs

1. Governed by G.L. c. 156C. Requires filing of certificate of organization naming manager (of if no manager, at least one person authorized to sign filings with the Secretary of State).
2. Very flexible, can be member-managed or manager-managed.
3. "Pass-through" tax treatment unless it elects to be taxed as a corporation.
4. Single-member LLCs can be treated as "disregarded entities" for tax purposes.
5. Written operating agreement unnecessary, but highly desirable in most cases.

6. Advantages

1. Limited liability and pass-through tax treatment.
2. Less formality than a corporation. No minute book, stock ledger, etc. Query: Is that an advantage or disadvantage?
3. Flexibility. Operating Agreement can create (i) a "corporate model" LLC, with officers and a board of managers elected by members (like a corporation); (ii) a "partnership model" LLC, with management by the members (like a general partnership); (iii) an "autocratic model" LLC, with one or more managers having sole control of the LLC (like a limited partnership); or (iv) any combination of the above.

4. Can limit or eliminate fiduciary duties.

7. Disadvantages

1. Limited transferability. Effectively disqualifies LLCs from being public companies.
2. Operating agreements can be complex and expensive to create.
3. Uncertainty as to "corporate veil" doctrine.
4. Uncertainty re legal status in other states.

F. Business Trust

1. An unincorporated organization governed by the common law, but subject to regulation under G.L. c. 182.
2. Written declaration or agreement of trust and all amendments must be filed with the Secretary of State and the clerk of every municipality in which trust has a usual place of business and recorded in the registry of deeds if it owns real property.
3. Trustees are the managing body of the trust and may delegate duties to officers. Shareholders may elect trustees, but this may give rise to personal liability. See Paragraph 4 below.
4. Trustees have personal liability for contracts, but typically limit liability to the trust assets. Shareholders who participate in excessive control or management may be personally liable, as partners, for the debts of the trust.
5. Shares are represented by certificates, which are freely transferable subject to applicable securities laws.



6. The existence of a business trust may be subject to the Rule against Perpetuities. Many trusts have specified dates of termination.

7. Advantages

1. Free transferability of interests.
2. Limited life.
3. May elect “pass-through” treatment.
4. Once popular, now uncommon outside the utility, mutual fund, and REIT industries.

8. Disadvantages

1. Potential unlimited liability.
2. Fiduciary duties.

G. Business Corporations

1. Statutory entity – G.L. c. 156D.
2. C corporation taxable as an entity (max. Federal tax, 35%; Mass., 8%).
3. S corporation gives pass-through of income and loss (Federal and Mass.) *pro rata* based on shareholdings.
  1. Requires election by all shareholders.
  2. One class of stock.
  3. 100 shareholder maximum.
  4. Shareholders must be individuals (no non-resident aliens), certain trust and estates, certain tax-exempt entities.

4. Advantages

1. Limited liability of shareholders by statute.
2. Free transferability of stock.
3. No deeds excise tax on sale of stock.

4. Pass-through treatment for S corporations.

5. S corporation dividends are tax free to extent of basis.

5. Disadvantages

1. Double taxation for C corporation.
2. No pass-through of C corporation loss. S corporation losses limited to shareholder’s basis (*plus* loans to corporation and corporate liabilities assumed by S corporation shareholders). Guaranties not considered as debts.
3. Unlike partnership, S corporation allocation of income and loss is inflexible.
4. Mass. “sting tax” to “big” S corporations with over \$6 million in income (1.87%) or \$9 million (2.8%). (G. L. c. 63, §32(b)).
5. Corporation excise tax lien (G.L. c. 62C, §51).
  - i. (NOTE: excise tax lien now also applies to *unincorporated entities* electing corporate tax status).
6. Two-thirds shareholder vote required to approve sale of all or substantially all assets. (G.L. c. 156D, §12.02).
7. Dissolution by Secretary of State – but reinstatement possible. (G.L. c. 156D, §108). Note that assets can be sold after dissolution as part of “winding up.”
8. Corporate signatories: President or Vice President *and* Treasurer or Asst. Treasurer, who may be the same





person. (G.L. c. 156D, §8.46).  
Corporate vote authorizing other officers may be recorded.

### VII. FORM OF DEED

- A. The common deed in Massachusetts is the Quitclaim Deed whereby the Seller gives covenants as to Seller's period of ownership only.

### VIII. CLOSING COSTS/ADJUSTMENTS

- A. Seller usually pays the transfer taxes due at the time of the conveyance to the Commonwealth of Massachusetts. The tax is \$4.56 per \$1,000 of sale proceeds.
- B. **Note:** In a few jurisdictions in Massachusetts the tax is higher.
- C. **Note:** In Nantucket and Martha's Vineyard, there is an additional land bank tax that is paid at the time of conveyance.
- D. Buyer and Seller adjust for water, sewer, gas/oil, electricity, and taxes. In addition to the foregoing, if the property is commercial property, adjustments are also made for rents, third party operating expenses and common area maintenance expenses.
- E. Land that has been subjected to agricultural purposes may be subject to certain taxes and payments if it the agricultural purposes are terminated.
- F. Withholding Tax – Foreign Seller
- 10% of amount realized (subject to reduction in certain situations (i.e., maximum tax liability on disposition is less than amount required to be w/held; installment sales rule exception, l/c or bond is posted etc.)
  - Buyer becomes withholding agent and must remit by the 20th day of the date of transfer; file Form 8288
  -

### IX. OTHER CLOSING DOCUMENTS

- A. Residential Properties: Seller has to have a smoke/carbon monoxide inspection performed by the town/city fire department and provide a certification at Closing.
- B. Title V Inspection Certificate – if the property is on a private septic system.
- C. Buyer has to obtain a municipal lien certificate from the Town/City where the premises are located stating the current status of real property taxes payments and balances due. This certificate also advises if water and sewer charges are due.
- D. Residential Property – If the property is to be used as a principal place of residence, the buyer may want to consider filing a Homestead Exemption.
- E. Sales by a Corporation are subject to the seller's procurement of a Tax Lien Waiver. The Commonwealth of Massachusetts has an inchoate lien on the real and personal property of a seller if the sale of the property constitutes a sale of all or substantially all of the seller's assets in the Commonwealth and the waiver advises the buyer that the lien has been waived and all taxes have been paid.

### X. RECORDING REAL ESTATE DOCUMENTS

- A. Title Documents are recorded on a county basis in Massachusetts. In other states, title documents are recorded in the towns and city records.
- B. Unlike most other states in the United States, Massachusetts has two recording systems.
1. Registered Land. Some property is registered land whereby real estate documents are filed with the Registry District of the Land Court within each county in which the premises are



located. Registered Land means that the land has been certified, all documents affecting registered land are confirmed at the time of filing, and the Commonwealth of Massachusetts guarantees the title to the property. The Land Court issues a certificate of title certifying title to the owner of each registered property.

2. Recorded Land. Unless the property is registered, it is recorded land and is recorded with the Registry of Deeds in the County where the premises are located.

#### **XI. ANNUAL COSTS FOR PROPERTY OWNERSHIP**

- A. Property Insurance
- B. Real Estate Taxes
  - A. Ad Valorem/Town & City Assessments
  - B. Rental Properties (Florida – tax on rental income)
  - C. Personal Property Taxes (Cars, Boats, etc.)

NOTE: The tax implications of Foreign Purchases and ownership of US-based real estate are outside the scope of this outline.