



**LEGALINK**  
A Global Network of Independent Law Firms

## Real Estate Law

# Guidelines for Investments in Commercial Real Estate

2<sup>nd</sup> edition







Real Estate Law  
Guidelines for Investments  
in Commercial Real Estate

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## Introduction

Two years ago when compiling the first edition of this book, we saw governments all over the world trying to stabilize the financial systems in their countries with huge amounts of money after the sharp decline of almost all markets. In particular, the governments helped the banking industry which struggled with severe cash flow problems because markets had suddenly stopped buying financial instruments which are now widely regarded as intentionally designed to obscure the huge risks associated with them. From a global perspective, governments were all in all quite effective with their measures and 2010 saw the start of a broad recovery not only in the financial industry, but also in the commercial real estate market in almost all business centers worldwide. As a consequence of the last financial crisis, investors and all other players in this field became more cautious and real estate-related financial products are now more transparent. In parallel to the market recovery, a new phenomenon became reality: the markets asked if the governments of the countries which had organized the rescue of their major banks would now have the financial strength to re-pay the bonds they had sold to finance the bank rescues and other economic programs. In particular in Europe, countries like Greece, Spain, Portugal and even Italy now have to face high interest rates on their bonds and are suffering because their economies are not growing fast enough to balance all the competing economic interests. On the other hand, interest rates for real estate project financing are lower than ever before in countries which were not severely affected by the financial crisis during the last few years and inflation in those countries is higher than the interest rates banks pay on simple monetary investments. Therefore, in addition to investments in the stock markets, we see broad investments in real estate in countries like Germany where prices continue to increase, while in other countries like Spain, real estate prices decline. In this situation it is more than ever necessary to carefully evaluate the long-term viability of investments in real estate, keeping in mind that history shows that if the investments are professionally reviewed and professionally executed, then most are ultimately successful.

We are very happy to have in our growing Legalink network, which has more than 3000 lawyers in independent law firms located in most business centers on all five continents, experts in the field of real estate acquisition and finance. These lawyers are ready to advise and assist investors in all aspects of invest-

ments and transactions involving commercial real estate, and other real property issues, as well.

The experts of the Legalink network know each other personally from attending at least two meetings a year, which include meetings with colleagues in special interest groups focused on real estate practice, and from working together on cross-border projects. In discussions with our clients, we found that many of them, as well as other potential investors, would like to receive an introduction to the rules governing investing in commercial real estate throughout the world, as well as other aspects that have to be taken into account in commercial real estate transactions. In this book, we are pleased to give potential investors a first overview of various factors which must be taken into account when investing in commercial real estate in many countries of the world in which they might be interested. Of course, every single placement has to be reviewed in detail by specialists.

You will find contact data of the firms within this book and on the website of our Legalink network ([www.Legalink.ch](http://www.Legalink.ch)). All firms are pleased to assist in this field and will give you professional advice.

If you require a cross-border analysis of diverse law aspects, a joint effort to facilitate a cross-border transaction, or if you have any questions concerning how our network can get you the most advantageous solutions for investments in commercial real estate, please do not hesitate to contact us. We will be happy to refer you to the specialists of our network who can best assist you in your case.

Berlin, October 2012

Markus Jakoby  
Jakoby Rechtsanwälte

Maria Nogueira  
Chief Administrative Officer  
Legalink

\*A word of caution: the goal of this project is simply to provide the reader with a general idea of what needs to be taken into consideration about the law pertaining to investments in commercial real estate.

**This book does not provide legal advice, which can be obtained only by discussing specific facts with a qualified lawyer who is expert in this subject matter in the jurisdiction in which you are doing business.**

What may be perfectly acceptable in one country may be an invitation to legal liability across the border. Please also remember: laws change. This book is being published in October 2012. Although we may publish an update sometime in the future, the only way to know that the information you are reading still is current is to talk to a qualified lawyer in the relevant country.





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# Questions

## I. Procedure of a real estate transaction

1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?
2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?
3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?
4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?
5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?

## II. Costs for transaction

6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?
7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?
8. Can the seller get his money out of your country after the transaction (repatriation of funds)?
9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?
10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?
11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )?
- estate agent?
- others?

### **III. Costs for holding real estate**

12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?
13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

### **IV. Foreign investors**

14. Would you advise foreign investors at the moment to invest in your country
  - directly in real estate?
  - through real property funds, open or closed ones?
  - through other clear and secure financial products?
  - at the moment not because of the impacts of the world wide financial crisis?
15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?
16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?
17. Could your firm assist foreign investors in
  - Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?
  - Developing construction projects?
  - All legal aspects involved in these contexts?

# **Australia I**

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## **I. Procedure of a real estate transaction**

### **1. Outline about the formal procedure of a real estate transaction in Australia starting from the signing of the contract (including settlement) until formal ownership vests in the purchaser.**

Australia is a Federation of six States and two Territories:

- Victoria,
- New South Wales
- Queensland
- Tasmania
- South Australia
- Western Australia
- Australian Capital Territory
- Northern Territory

Each State or Territory has different laws dealing with the sale and registration of property. Australia follows the Torrens system that allows a purchaser to become registered on title showing that he has an indefeasible right of ownership, subject to any mortgage or other encumbrance known when transacting the acquisition. This paper deals with the laws of the state of Victoria and Behan Legal can provide further details on specific transactions in particular states on request.

In Victoria, for example, before parties can execute a contract of sale of real estate, the vendor must provide a disclosure statement to a purchaser, which forms part of the contract. The purchaser must acknowledge and sign receipt of the disclosure statement before executing a contract of sale. The disclosure statement deals with statutory obligations of disclosure that the vendor must give before selling real property. A contract of sale of land is unenforceable if the purchaser does not first sign the disclosure statement.

The contract of sale contains general conditions, special conditions, warranties, procedures for settlement, agreement on payment of Goods and Services Tax, finance terms, property condition, and procedures on default. The contract will have a particulars page identifying the selling price and the settlement date, which is the date the transfer of ownership, takes effect in equity, as the purchaser must register the transfer to complete the legal transfer.

Estate agents often negotiate the sale. They will obtain the signature of both the Vendor and Purchaser to bring a binding Contract into effect. If there are no estate agents, lawyers can exchange signed contract counterparts to bring

the contract into force with the purchaser paying the deposit on signing the contract and the balance paid at settlement. The purchaser submits the legal document that is necessary to transfer the title in the period between signing and settlement by the purchaser. The Vendor ultimately hands the executed transfer to Purchaser's representatives at settlement, along with a stamp duty declaration from the Vendor used in assessing "stamp duty" a tax paid by the Purchaser on the transfer of land.

On settlement day, the vendor receives the balance of the purchase price in exchange for the Certificate of Title to the land, which is the deed that denotes ownership in the land registry office, a government body that keeps record of ownership of land in the state under the Torrens System of registration.

All outgoings for the property including land tax, water authority service charges, local council rates, rents, and Owner's Corporation fees are 'adjusted' proportionately between the Vendor and Purchaser. The parties notify the authorities by either a Notice of Acquisition or Disposition. Once settlement occurs, the estate agent, Vendor or representative hands over the keys to the property and give vacant possession (unless a lease is in place).

Once the purchaser obtains the transfer document and the declaration for stamp duty, the duty for the property is paid and "stamped" on the transfer document so it may then be registered at the land registry office and legal title passes to the purchaser.

## **2. Does the Australian legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or many units (condominium of the improvements)?**

Ownership allows ownership of the land as a whole including the building, or portions of the land/building specified in the Certificate of Title. A "strata" plan of subdivision of a block of land can issue separate Certificates of Title for each 'unit' or 'apartment', which confers the applicable rights for the land on the proprietor registered on that title. In this situation, there is often 'common property' which confers rights on proprietors of each unit or apartment in relation to that common property and is generally managed by an 'Owners Corporation' responsible for decision making, maintenance, etc. of the common property.



**3. Does the Australian legal system permit joint ownership of real property? Which kind of entities can be owner of real property in Australia?**

It is possible for ownership of property by two or more people or corporations or other legal entity. Co-ownership can take the form of ‘Joint Tenants’, which under the “rule of survivorship” means that if one owner dies or ceases to exist, the title to the property passes to the surviving proprietor or proprietors as specified on title.

Alternatively, co-ownership can exist as ‘Tenants in Common’ where a fraction of ownership exists on the title registered, and this portion can be ‘disposed’ of by the owner in any way available to them. Under this form of ownership, if a Tenant in Common dies, they can bequeath their fraction of ownership to whom they wish by way of will or otherwise.

**4. In some countries, the ownership of a building is implied in the ownership of the land. Is it this way in Australia as well or is it possible to have different owners of the land and the building erected on it?**

Ownership of land includes ownership of any building on the land, as well as ownership of a limited space below the boundaries of the land and above the land.

Technically, under the ‘strata’ scenario, it is possible to own independently ‘part’ of a building. However, if this were the case, any accessible land on which the building is erected, the Owners Corporation would own being common property. A Certificate of Title exists for each unit, and the accessible land detailed on title will indicate it is common property, therefore the ownership of that land is not held in the same manner as the unit itself.

**5. Is the land or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Certificates of Title are registered at the land registry office. The ‘doctrine of indefeasibility of title’ means that the registered proprietor of land specified in the land registry office’s registry has a paramount interest (subject to any encumbrances such as mortgages, easements etc.) in the land. The registered proprietor is protected from losing title to a good faith purchaser who purchases the property without notice of the current owner’s title to the property.

## II. Costs for transaction

### 6. What tax aspects are directly involved in a purchase of real property, for example, real property transfer tax and what is the percentage of it?

Each state or region has different tax structures applicable to land acquisition and ownership. In Victoria, the two main sources of revenue derived from real property are land tax and stamp duty. Land tax is an annual charge on owners of land at midnight on 31 December of the year before the year of assessment. The State Revenue Office assesses on a calendar year basis on the unimproved value of the land determined by general valuations carried by the relevant council every two years. There are some exemptions to land tax but it is generally payable on investments properties and vacant land. As an example, the 2010 general land tax rates for Victoria are:

<b>Total taxable value</b>	<b>Tax Rates</b>
0 < \$250,000	Nil
\$250,000 < \$600,000	\$275 plus 0.2% for each dollar over \$250,000
\$600,000 < \$1,000,000	\$975 plus 0.5% for each dollar over \$600,000
\$1,000,000 < \$1,800,000	\$2,975 plus 0.8% for each dollar over \$1,000,000
\$1,800,000 < \$3,000,000	\$9,735 plus 1.3% for each dollar over \$1,800,000
\$3,000,000 and over	\$24,975 plus 2.25% for each dollar over \$3,000,000

State Revenue Office assesses stamp duty on the greater value of the consideration or unencumbered value of the land at the time of entering the contract of sale. The Duties Act sets out the following formulae for calculating the stamp duty:

<b>Dutiable Value of Property Transferred</b>	<b>Duty</b>
\$0-\$25,000	1.4% of the dutiable value of the property
\$25,001-\$130,000	\$350 plus 2.4% of the excess over \$25,000
\$130,001-\$960,000	\$2870 plus 6.0% of the excess over \$130,000
\$960,001+	5.5% of the dutiable value of the property

Stamp Duty is payable before a purchaser can register title, and in some states, it is payable before settlement can take place.

**7. Does a purchaser have to hold the property for a specific time for tax reasons or is it in the context no problem to buy and sell property on a short term basis for example within a year?**

Capital gains taxation on the sale of real property is payable at the owning entity's normal marginal tax rate. It is possible to offset capital losses from the capital gains in a financial year to calculate the net capital gain for a specific entity, which could mean a smaller liability amount for this tax.

**8. Can the vendor get his money out of Australia after the transaction (repatriation of funds)?**

There are no general rules or restrictions on repatriation of funds from Australia under normal circumstances involving a sale of real property.

**9. If one buys real estate that is leased, are you allowed to terminate the lease; or which restrictions have to be taken into account?**

When a property owner of freehold interest in the land disposes of that interest, any lease applicable to that land will remain in force, and its particulars disclosed in the Contract of Sale and vendor disclosure statement. The new property owner will generally stand in place of the previous owner and have the same rights and obligations in relation to the tenant of the land.

**10. Is one allowed to change the use of a building from residential use to office space or does one need approval for doing so or is it not allowed at all?**

Local councils define the use of land in any particular area within their planning scheme by zoning. The zones include residential, business, industrial, parks and recreational, mixed zones and more. Each zone type carries with it requirements, permitted, and prohibited uses of the land within that zone.

Each zone has uses that are permitted without a permit, uses that require a permit, and uses that are prohibited or have conditions attached to them.

If a use is not permitted under a particular zone, a person may apply to the Minister to have the planning scheme amended. Depending on the circumstances of the amendment, this could prove quite difficult to achieve.

**11. To understand the amount of costs involved, what costs are likely if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly:**

- Notary's costs
- Land register
- Real property transfer tax
- Advising lawyer (due diligence)
- Estate agent
- Other

Lawyer draft the contract of sale and vendor disclosure statement for a sale of real property, and handle the conveyance of the land for the entire transaction. The type of property and its intended use determine the complexity of the transaction, and there are many variables in determining legal fees. The legal fees will usually be determined on an hourly or item basis or mixture of the two. Therefore, the more complex the transaction and attendances required to complete it, the higher the legal fees.

The stamp duty on the legal transfer of the property differs from state to state. As an example, in Victoria, in the case of EUR 5 Million (\$7,153,680.24 AUD) this would equate to \$393,452.00 AUD or EUR 274,985.75. The registration of the new proprietor's name on title is calculated by another table of formulae, when used for the amount specified (EUR 5 Million), it would equate to \$1,352.00 AUD or EUR 944.73, which is the maximum fee for registration of a transfer.

Estate agents fees are negotiable and usually a percentage of the sale price generally around 2 to 5% of the sale price.

### **III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Land tax is levied and is payable on a yearly basis. Land tax forms a charge on the land; calculated on the unimproved value of the land determined every two years by local councils. This varies from state to state.

There are some exemptions to land tax such as property used for primary production or as a principal place of residence. Land tax usually applies to

investment properties and holiday houses. A surcharge may apply if a trustee of a trust, with certain exceptions, holds the land.

**13. What are the costs one has to calculate as a foreign investor, if one engages a manager for the purchased property? How does the manager normally charge for their work?**

Real estate agencies that organise a tenant for a property generally manage that property for the duration of the lease. Fees can vary but are usually approximately 5% of the gross monthly rent. In the case of a unit dwelling or condominium; the Owners Corporation is responsible for the management of the common property, and will levy annual fees. This fee will vary greatly depending on the quality and services of the common property (gym, pool, etc.).

**IV. Foreign Investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

There are factors to consider when investing in real property, as the prospects of capital gains can vary depending on where the property is located. Potential purchasers should make their own financial enquires as to whether the investment best suits them. Purchasers should seek the advice of licenced financial advisors who are the only professionals allowed to give advice on financial products.

**15. Is there any individual person and legal entity allowed to buy property in Australia or are there restrictions for example to nationality or registered office of legal entities? If there are restrictions, are there ways to organise a domestic entity for the purchase on a valid legal structure notwithstanding?**

If a foreign person wishes to acquire land in Australia, they must give notice to the Treasurer of their proposed acquisition. If there is an objection to the

acquisition, the Australian Government will provide that advice and make an order prohibiting it. If a person is required to give notice of their intention and they fail to, they may be liable for criminal charges.

There are controls and restrictions on the ability of non-residents being able to own property in Australia even using a company. The ability to contract for the acquisition of property is subject to approval from the Foreign Investment Review Board. Any foreign person wishing to invest in Australia must consider whether there is a requirement to notify, or obtain government approval under its foreign investment policy. The proposals that require approval are:

1. Transactions involving certain foreign interests, and
2. Where the government considers few benefits accrue from foreign investment and where the proposal exceeds the \$50m threshold.

It is critical to understand the Purchaser's property intentions to determine if it will come under the threshold arm, however it falls under the foreign interest arm, and a foreign interest includes:

1. A natural person, not ordinarily resident in Australia, and
2. Any entity in which there is a substantial foreign interest, which is defined as an interest of 15% or more in ownership or voting power held by a single foreign person (including associates), or an interest of 40% or more in the aggregate ownership or voting power held by more than one foreign person (or their associates).

Proposals involving the acquisition of interests in Australian urban land are subject to special scrutiny. The definition of urban land is wide and includes leaseholds and these proposals are subject to examination by the F.I.R.B, irrespective of value.

**16. If a foreign investor buys a land in Australia to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Subject to the issues stated above, a foreign company can also register with ASIC as a foreign company under the Corporations Act.

It is important to note that if a foreign person intended to come to Australia from overseas to work in the business, strict guidelines on obtaining a working visa must be adhered to and the visa must be granted before this can occur.

**17. Could Behan Legal assist foreign investors in:**

- **Finding interesting real estate and related valid investment products real property in Australia where required through personally known agents and other advisers**
- **Developing construction projects**
- **All legal aspects involved in these contexts**

Yes, Behan Legal deals with numerous and diverse real estate transactions including construction projects and organising legal and corporate structures to assist clients in their property holdings.

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## **I. Procedure for a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

#### **(a) Prior to Contract**

##### **(i) Role of agents/brokers**

Interests in real estate are normally marketed by licensed real estate agents or land brokers appointed by and acting in the interests of the vendor, who will normally advertise the property online and usually in combination with various other marketing techniques designed to encourage the greatest possible potential buyer interest.

##### **(ii) Methods of Sale**

Properties are conventionally offered for sale at public auction, by private treaty (direct negotiation) or by way of select or open invitations to tender. Where the value of the property or the extent of interest in it is difficult to gauge, a prior procedure known as submissions of a non binding expression of interest is sometimes utilised.

##### **(iii) Activities prior to contract**

During the period prior to formal contracts being entered into, purchasers normally conduct their due diligence, satisfy themselves as to the state or condition of the property, confirm availability of finance if necessary to complete the purchase and negotiate any required alterations to the conditions of sale. As a great deal of risk in relation to the property passes to the purchaser on entering into a formal contract, issues such as the quality or characteristics of the property or the conditions on which it is sold and accepted need to be satisfied prior to the contract being entered into.

##### **(iv) Formulation of contract**

Generally the parties are not bound to proceed with a real property transaction until formal contracts are entered into and the property transaction laws governed by each relevant State in Australia mandate compulsory requirements as to matters which must be disclosed prior to contract are complied with, so as to provide intending purchasers with a minimum required level of disclosure concerning the property.

##### **(v) Role of Purchaser's advisors**

Except in the case of very large or special use properties, purchasers are usually not represented by agents or brokers but take advice from their lawyers and other professional consultants as to tax matters and legal issues; where major leases of real estate are however being entered into it is common for the tenant to be represented by a tenant representative specialising in giving advice on market conditions and the most advantageous structuring of the lease from the tenants point of view.

(b) Entry into Contract and pre-closing/completion

(i) Form of Contract

The final agreed form of contract is usually prepared in duplicate and a copy signed by each party is exchanged with an identical counterpart, to record the final and binding set of terms and conditions governing the sale of the property and any matters that must be attended to between the time of contract and completion/closing. Most States require a number of annexures to the contract to ensure its validity.

(ii) Deposit

A deposit of up to 10% of the purchase price is normally paid on the date contracts are entered into.

(iii) Post contract, pre completion matters

Matters which are commonly dealt with in this period are:

- (1) satisfaction of any conditions to which the contract is subject such as the obtaining of approval under the Foreign Acquisitions and Takeovers Act (1975) (commonly called FIRB approval);
- (2) obtaining of statutory approvals such as development consent to permit development of the property in a particular manner to occur after completion or the subdivision of the title where required to create the particular title or envelope of property that the purchaser wishes to acquire;
- (3) enquiries are made of statutory Authorities as to whether the property is affected by any proposal that may interfere with the purchaser's intended use;
- (4) the vendor arranges for a discharge of any existing mortgages on the property and puts itself in a position to transfer unencumbered title to the purchaser on the agreed terms of the contract as at the date of completion.

(c) On and after completion/closing

(i) Transfer of title

Title to the property in the condition required by the contract is transferred by the vendor to the purchaser on the day of completion, and the purchaser

is bound to pay the balance of purchase money with adjustments made on a per diem basis for rates, taxes, rents and other outgoings and incomings of a periodic nature.

(ii) Title by registration

Immediately following completion, the purchaser will be concerned to have its interest in the property registered in the appropriate State government register – in Australia the bulk of real estate is held in what is known as the Torrens System by which the relevant State government guarantees to the person registered as holding a relevant interest (either of freehold or leasehold) that they hold the property with good title save only as to other interests such as mortgages and leases which are also entered on that register.

(iii) Possession on Completion

Possession of the property or the benefit of rental income normally passes to the purchaser on the date of completion; from which date the purchaser assumes responsibility for periodic outgoings for the property.

(d) Corporate or Trust interests in underlying real estate

The above summary relates to the transfer of a physical real estate title but of course where the property is held either in a trust or corporate structure, shared interests in underlying real estate can be acquired by either acquisition of units in the relevant trust or shares in the relevant company where the trustee or corporation in turn holds title to the property; these transactions are generally structured and proceed in a manner more akin to a corporate acquisition and the costs of acquisition and disposal can be considerably reduced where the land holding entity is listed on a recognised stock exchange.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Differing forms of ownership/interests in parcels of land in Australia

The following forms of ownership are generally available in all Australian States:

(i) Conventional lots

Ownership of an identified parcel of land or area as a registered proprietor of land divided horizontally by cadastral boundaries on a registered plan of subdivision.

(ii) Strata lots

It is also possible to be registered on a government guaranteed title as the owner of an envelope of space defined both vertically and horizontally (commonly known as a strata or stratum title, depending upon the method of subdivision). Generally in the case of envelope type subdivisions there will be shared property owned in common such as elevators, stairs, access ways, plant equipment and the like. The various proprietors of lots in the overall strata subdivision will have proportionate entitlements to that common property depending on the respective values of the parcels in the strata. Normally owners of lots in strata forgo any ability to compel a redevelopment of the whole development, and are also required to contribute on a unit entitlement basis towards various shared costs such as insurance and the maintenance of common facilities as required over time.

(iii) Co-operative or Company title

In some densely settled residential parts in major cities there are a limited number of co-operatives or what is known as company title structures in which a unit “owner” holds shares in a corporation which in turn owns the overall land and structures on it pursuant to the constitution of that corporation, the owner acquires by virtue of holding those shares a right to occupy a defined space or spaces within the building owned by the corporation. Such structures are usually reserved for residential accommodation and are often more difficult to finance as there is no defined and easily transferrable legal title to an envelope of space such as is the case with a strata subdivisions.

(iv) Sale of properties to be built, “off the plan”

It is possible to enter into a contract to acquire a strata or stratum lot which does not physically exist at the time the contract is entered into; and the contract is subject to a condition requiring the construction of relevant building required and the registration of a strata title plan of subdivision delineating the horizontal and vertical boundaries of the completed lot or unit.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

**Forms of Joint Ownership**

There are two (2) commonly used forms of joint ownership in Australia being:

- (i) Tenants in Common, where either equal or differential interests on a percentage share basis are held by two or more owners; it is possible to transfer between

those owners or to third parties those differential interests in the underlying real property; and

- (ii) Joint Tenancy, where real property is held in equal shares between two or more individual persons, the distinguishing feature with joint tenancy being that where one of the owners dies, then irrespective of any will or bequest the deceased person may have left, the surviving joint tenant will automatically by law be deemed to have acquired the deceased persons share of the real estate. Joint tenancy is commonly used for ownership of residential premises between persons in a committed relationship.

#### **Entities that can own Real Property**

Generally speaking any entity having the legal capacity to enter into a contract can own real property in Australia and the entities commonly holding real property are:

- (i) individuals over the age of 18 years;
- (ii) corporations holding either on behalf of shareholders or as a trustee or responsible entity for beneficiaries, either being unit holders or discretionary beneficiaries;
- (iii) partnerships or joint ventures can hold real estate, usually as tenants in common in equal or differential shares.

#### **4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Title to land normally includes permanent structures on it

Ownership of the land normally implies ownership of all buildings and improvements erected on that land, but this is subject to specific provisions in lease documents dealing with ownership of tenants' fixtures, fittings and other property.

Other than in the case of certain mobile or relocatable dwellings, and subject to specific contrary provisions in lease documents, generally speaking the proprietor of the land will also own all permanent improvements, buildings and structures erected on the land from time to time.

In most Australian States it is possible by virtue of stratum (or building envelope forms of subdivision) to separate ownership of underlying land and differing envelopes of space or buildings erected on that land. For example, a multiuse development may be owned in separate parcels as between residen-

tial, commercial/offices and retail components and it is also possible to then further subdivide interests within each of those separate parcels by an internal strata subdivision. The overall development is regulated by statutory instruments governing the legal relationship between the owners for the time being of the land and the various separate parcels.

It is also common that ground leases are held by an owner with long term leases (usually of, or in excess of, 99 years) being granted to legal entities or groups who then develop and hold a leasehold estate in improvements erected within defined leased areas on the land. On expiration of the long term lease, the owner of the land by operation of law is deemed to have acquired by reversion any entitlement the former lessee may have held in the improvements erected unless the lease permits or requires the removal of those improvements at the expiration of the lease.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Most land in Australia governed by Torrens Title concepts

In all Australian States and Territories the relevant property legislation implements a version of the Torrens system whereby an owner, who becomes registered as proprietor of an estate or interest in land, is deemed by statute and by virtue of registration an unchallengeable (“indefeasible”) title free of any prior adverse interest (unless that interest is in turn registered on the register of title).

Exceptions to that situation occurs where:

- (i) Land grants were made by Government prior to the implementation around 1900 of that Torrens system – such land is commonly called old system title; or
- (ii) the land is still owned by the Government but is subject to Crown leases to the tenants. These are often used for large scale agricultural purposes where the interest held by the occupier of the land is leasehold and may require a renewal dependent on satisfaction of leasehold conditions.

Leasehold Title normal in Australian Territories

Both the Australian Capital Territory (in which the nation’s capital Canberra is located) and the Northern Territory (in which Darwin is located), it is normally not possible to acquire freehold title – all titles are based on long term leases from the Government. In practice, transfer of such leasehold interests

are (unless the term of the lease is becoming unacceptably short) transacted in a similar manner, and for similar value, as freehold titles.

#### Exceptions to Indefeasible Title

Whilst the proprietor registered under a Torrens system holds an indefeasible title guaranteed by the relevant State government, it is important to understand that a number of exceptions to that principle exist such as:

- (i) compulsory acquisitions by Government authorities are permitted where the whole or some part of the land is required for a public purpose – normally compensation at market value is payable to the affected owner where any such compulsory acquisition of the whole or part of an interest in land occurs;
- (ii) ownership of land and registration under the Torrens system does not confer any interest in the minerals, petroleum or gas as may be located in that land, as the title held by the owner is subject to an exception in favour of the Government reserving all such rights in perpetuity to the Government. Owners of land may be affected by exploration and/or production activities by parties who acquire mining or petroleum titles in their land.

## II. Costs for transaction

### 6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?

#### Three tiers of Government in Australia

Irrespective of location in Australia there will be three tiers or levels of Government able to impose differing taxes and charges on real estate and its transactions being:

- (i) the Federal or Commonwealth Government, which imposes income and capital gains taxes and a value added tax known as a Goods and Services Tax (GST);
- (ii) State Governments which impose a property transfer tax known as stamp duty and a tax on the holding of income producing land not used for agriculture or as a primary place of residence known as land tax; and
- (iii) local Councils which have the ability to impose annual council and water/sewage rates and impose and recover charges for works done on land adjacent to particular properties.

#### Federal/Commonwealth Taxes

Individuals and Corporations deriving income from real estate holdings in Australia will normally be subject to the imposition of an income tax at varying rates depending upon the amount of net income earned annually.

In addition, holders of real property in Australia who make a profit on the disposal of the same will be required to pay capital gains tax (at the same rates otherwise payable for income tax) on the difference between the cost base for which the property was acquired (adjusted for inflation by reference to CPI increases) after deducting costs of improvements made. Capital losses on disposal can be carried forward and applied against subsequent capital gains.

In addition to income tax and capital gains tax, a goods and services tax (GST) is payable by a landholder making a taxable supply of real property calculated at 10% of the greater of the consideration paid or the unencumbered value of the property being transferred, whichever is the greater (“Dutiable Value”). Whilst the GST is payable by the supplier/vendor, most vendors will by contract require that the amount of the GST be reimbursed by the purchaser on the date of closing/completion, thereby increasing the acquisition cost of the property to the purchaser by the amount of the GST. However, there are a number of GST exemptions and GST refund entitlements which apply and accordingly prudent purchasers of real estate will seek to attract one of these entitlements when entering into a contract to purchase real estate.

If the purchaser is registered for GST and carrying on a business it will by return furnished to the Australian Taxation Office be entitled to claim by way of deduction from its other income tax liabilities the amount of GST paid by it in relation to such acquisitions but note that acquiring parties not carrying on business in Australia and subject to Australian Income Tax will normally be able to claim such a refund of GST.

Generally speaking, holdings of real estate used as a primary place of residence for individuals are generally not subject to capital gains tax or GST (with the exception of newly constructed never occupied residential real estate which is the subject of GST) – this particularly applies to sales of units or lots in Strata plans which are brought into existence after a contract is entered into.

#### State Duties and Taxes

In each State and Territory, acquisitions of real property are acquisitions which are liable to a tax known as a stamp duty that is calculated on Dutiable Value of the property being acquired. Typically for the acquisition of a property in excess of \$1m AUD depending on the State, the amount of that stamp duty will vary between approximately 5% and 6% of its Dutiable Value, with that



duty being required to be paid by the purchaser within three (3) months of the date of the relevant contract.

As an effective collection measure each State will generally not permit registration of the transfer of title to real property without evidence of payment of the required stamp duty.

Whilst many States have abolished certain real estate stamp duties (for example, on leases and mortgages of real estate), it is likely, given the amount of revenue raised and importance of the same to each State for its budget purposes, that stamp duty on the acquisition of real property will remain very much in force and payable for the foreseeable future.

In addition to stamp duty some States charge a land transfer registration fee and each State and Territory levies a land tax based on an aggregate of all taxable land values held by an individual land holder varying between approximately 0.5% and 3.5% of the taxable value of that land. The tax is payable annually to the relevant State taxing authority. Affected owners of real estate are required to file an annual return aggregating all their taxable holdings and pay tax on an annual basis.

#### Local Government Rates and Charges

Local Governments in Australia generally speaking provide local level services such as road works, garbage collection and control approvals for the grant of development on individual parcels of land. Councils will impose as a statutory charge based on the unimproved value of the land in each case annual rates (payable quarterly) and can in addition where particular works are carried out adjacent to the property (such as for example improving roads or clearing vegetation require the payment of additional fees and charges by individual property owners).

Both local government rates and taxes and State land taxes constitute statutory charges or encumbrances on the title to real estate, meaning a vendor will be unable to complete a purchase and give good title to land sold unless on/ or prior to settlement all such land taxes, local government rates, taxes and charges are paid in full up to the date of completion.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Though there is no minimum time imposed on owners before subsequently selling the property, certain concessions are made if the property has been held in excess of 12 months.

In some cases (depending on matters such as the identity of the owner and the period for which the property has been owned), certain concessions are allowed (up to 50% of the gain otherwise taxable) to be deducted from the gain otherwise taxable and subject to relevant marginal rates of income tax.

Exemptions up to the whole of the capital gains tax otherwise payable may be allowed where a real estate asset is held by a qualifying small business for over 15 years.

## **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Generally speaking there are no Government restrictions on transfer of funds into and out of Australia for real property purposes.

Some relevant qualifications to that general principal are:

- (i) the Australian Government does from time to time impose sanctions on countries or regimes in accordance with United Nations Security Council resolutions and currently financial transactions involving transfer of funds from or to Iran in excess of \$20,000 are prohibited without prior authorisation;
- (ii) financial institutions need to ensure the Commonwealth statute seeking to eliminate money laundering and counter terrorism is complied with. As a consequence, foreign entities wishing to open accounts with Australian financial institutions will be required to go through certain identification procedures and those institutions are required to report transactions which may be in breach of those statutory requirements.

## **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Where a person enters into a lease as a tenant in addition to the interest in land created, the lease operates as a contract binding both the landlord and the tenant to observe the terms of the lease for the agreed term.

Normally it is not possible for a landlord to unilaterally terminate a lease prior to its expiry date and the transfer of title to the property will not relieve the incoming landlord of that obligation.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most Australian land is subject to zoning restrictions

By a combination of planning instruments imposed by State and Local government, only certain uses will be permitted on land located in designated zones as shown on maps and planning instruments held by those authorities.

Changes in occupation or minor features of the same operation as between incoming occupants will generally either not require approval or permit the ready obtaining of approvals for such minor changes.

Changes of use of land normally will require development approval

However a significant change of use of a building or premises within a building from one use to another will require examination and approval as to:

- (i) whether the new use is in fact permitted under the existing zoning – if not, the proposed new use will be prohibited and will not be able to be implemented unless a rezoning is effected by the relevant State Government; or
- (ii) if the zoning permits the intended use, a development approval or consent is obtained from the relevant consent authority (either local or state government) for the intended use.

**11. To understand the amount of costs involved, what costs are likely if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly:**

- Notary's costs
- Land register
- Real property transfer tax
- Advising lawyer (due diligence)
- Estate agent
- Other

Relevant additional costs of acquisition

As a checklist for a foreign investor seeking to acquire a significant (over \$1m AUD) property in Australia, the following budget items should be considered as additional costs on top of the agreed purchase price to be paid under the contract:

- (i) GST is payable by the vendor to the Australian Taxation Office. This will be required as a term of the contract to be reimbursed by the purchaser. Such GST

is generally 10% of the Dutiable Value of the property. However, there are a number of GST exemptions and GST refund entitlements which apply and accordingly prudent purchasers of real estate will seek to attract one of these entitlements when entering into a contract to purchase real estate. The amount will be required to be paid on closing/completion of the transaction;

- (ii) stamp duty and other transfer taxes or charges of between approximately 5% and 6% of the dutiable value of the interest being acquired, is payable to the relevant State government in which the property is located, unless the transaction is structured by way of acquisition of shares in company or units in a unit trust where the relevant company or trust is quoted on a recognised Australian stock exchange, in which event no such duty will be payable.

#### Adjustments on completion

In addition to the purchase price, an allowance should be made for the per diem calculation of land tax, local government rates and taxes rentals and other reimbursable outgoings payable on the property.

#### Consultants Fees

- (i) due diligence - depending upon the nature of the property being acquired, investigation and reports may be required as to the condition of the building, its engineering services, inspection of the building by reference to its registered title boundaries (survey report); and
- (ii) legal and conveyancing fees – these fees can be negotiated with an appropriate practitioner in each location and will vary with the complexity, duration and amount of time required to be spent by the legal practitioner, firstly in negotiating the contract and thereafter attending to legal matters required between exchange and completion.

#### Insurances

A prudent purchaser will normally require that improvements on the property be insured for their replacement value with a suitable insurer from the date on which the purchaser goes on risk under the contract, should loss or damage occur to those improvements by reason of an insurable event. Such insurances normally include building repair or replacement insurance, public liability and workers compensation for any employees engaged in a business acquired as part of the acquisition.

#### Disposal Costs

On disposing of Australian real estate, normally the vendor will engage a sellers agent who will, on completion of a sale effected through that agent, be entitled to a commission between 1 and 2 percent of the sale price in addition to expenses of advertising and the like.

The vendor may also be liable for goods and services tax if the property is a taxable supply but normally pursuant to the contract the amount of that GST is recovered from a purchaser by contract.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Typical costs of holding Australian real estate payable periodically are as follows:

(i) Land tax

Annual land tax where the property is used for income tax producing purposes and is not a principal place of residence or otherwise exempt; payable annually based on a return of aggregated total land value holdings held in the relevant State or Territory each year. Note the amount of land tax can be increased if certain trust structures are used for the purposes of holding the same and in some states such as Queensland, recovery of such land tax from tenants of the property is prohibited by the legislation.

(ii) Rates and charges

Local government rates and taxes payable for the provision of council services, water, sewerage and drainage and the like.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Generally foreign investors will employ the services of a managing agent to handle tasks such as finding and securing on acceptable terms tenants for the property, collecting the rents and other monies under the lease, remitting net rentals less commission charged to the owner, arranging for regular property maintenance and repair services and reporting generally as to the state and condition of the property to a foreign owner and making recommendations as to how rentals or net returns from the property might be increased over time.

Normally the rates of commission charged by those real estate agents are negotiable but are within a range of 3 to 7 percent (depending on the level of

services provided) of the rental collected and charged on a commission basis against remissions of rents and other monies to the foreign investor.

#### **IV. Foreign investors**

- 14. Would you advise foreign investors at the moment to invest in your country**
- directly in real estate?**
  - through real property funds, open or closed ones?**
  - through other clear and secure financial products?**
  - at the moment not because of the impacts of the world wide financial crisis?**

The answer to this question will depend upon the individual reasons and objectives of the Foreign Investors making an investment in Australian real estate but the following might be provided by way of general commentary on the various alternatives open.

Direct investment in real estate

This alternative will suit a foreign investor needing to physically locate its operations in Australia or to have the benefit of actual use and operation of the property.

The on costs of acquisition directly into real estate and (in particular GST and stamp duty, totaling approximately 15 to 17% in addition to the purchase price payable for the real estate) are significant disincentives to that direct acquisition.

In addition, depending upon the state of the Australian real estate market at any time, disposal of the property may take time and may be subject to market vagaries depending upon the extent to which there is market demand for a particular class of property being marketed in the location where it is situated – i.e. the investment should be regarded as illiquid and disposal at a satisfactory price may require a significant amount of time and the incurring of substantial disposal costs.

Generally speaking an acquirer of a direct interest in Australian real estate would be an entity with the interest and ability of operating the same and have a long term investment horizon, as will be sufficient to amortize the acquisition and disposal costs over the length of term that the real estate is held.

Investment indirectly through property funds, trusts or corporations

These acquisitions tend to be viewed as a corporate or trust investment. They are based on the particular yield able to be achieved by the entity in whom title is vested and who is responsible, by appointment of managers or others, to secure the best possible return from (by way of development of the property or by way of distribution of the passing yield).

Such funds (where listed on an Australian stock exchange) do have the advantage of substantially less acquisition costs and the ability to dispose of the same with greater speed and with less transaction costs than through direct property investment.

Because the nature of such invested funds more closely resemble those in listed companies or listed trusts, the share market or unit market as a whole can often have a greater effect on the pricing of those shares or units irrespective of the particular performance of the underlying real estate.

Currently, foreign investors should be aware that, in particular in the retail sector, traditional retailers in shopping centres (for example, books, recorded music, electronics and other similar businesses) are achieving significantly lesser profits and reduced ability to pay rentals because of competition from on line sources of supply. This trend is likely to continue to diminish returns available from underlying retail investments in this country and elsewhere in the world.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Foreign individuals and entities are generally speaking allowed to acquire Australian real estate subject to the following restrictions:

- (i) FIRB approval under the Foreign Acquisitions and Take Overs Act (1975);
- (ii) avoidance of particular countries with foreign exchange sanctions provisions (currently only Iran);
- (iii) achieve recognition of foreign incorporation entities under relevant Australian Corporations and Securities law.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Reference should be made to the current FIRB guidelines administered by Australian Treasury for acquisitions of Australian urban and agricultural real estate last published at <http://www.frb.gov.au>.

Where acquisitions are not exempt under those guidelines, notification and notice of non-objection will normally be required as a condition of contract.

Note that US residents have the benefit of significantly greater value thresholds of exemption under the current FIRB policies.

## **17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Identifying and evaluating real estate alternatives in Australia

Generally speaking as a law firm we would recommend our clients engage appropriately qualified and experienced real estate specialist advisors depending upon the nature of the underlying real estate, be it agricultural, office, retail, residential or other specialist form of acquisition. Generally speaking, specialist services are provided by specialist consultants in each area and we can make recommendations as to suitable consultants clients might wish to consider or interview for that purpose.

Assistance from Piper Alderman

Piper Alderman has a national team of around 40 real estate lawyers who are devoted to the unique needs of clients active in the property sector. We represent a range of local and overseas investors and developers and Australian and overseas government instrumentalities.

Our team works in close partnership with our clients to design innovative, tailored legal solutions for infrastructure, development and construction projects and advises on the full range of legal issues impacting on the sale, ownership and management of commercial, retail, residential and industrial properties.

We draw on the specialist skills and solid experience of our team members across the country to deliver high-level commercial and legal support to organisations involved in property, transport, infrastructure, construction, mixed use, energy and public access projects around Australia and across the globe.

Piper Alderman's Property and Projects division work closely with our corporate, tax and financial services lawyers to create balanced, comprehensive busi-



ness solutions for our property clients. We have a team of dedicated employment relations professionals who understand the unique dynamics of property and project workforces and are expert in navigating the complex legislative environment.

# **Austria**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Austria real estate transactions are governed by both federal law and state laws which vary from province to province. It is also important to know that all properties in Austria are formally registered in the land register:

#### **Land register**

The land register is administrated by the district courts. The land register contains information regarding the property, i.e.

- location and size of the property
- legal owners
- encumbrances on the property i.e. rights of way, rights of pipes, liens, pre-emption rights, options to repurchase, restraints on alienations.

For the transfer of ownership of a property from the seller to the buyer the transfer has to be formally registered in the land register.

#### **Contact and first negotiations**

The parties of a property transaction often meet through real estate agents, but also through the internet or newspaper advertisements. The parties usually first negotiate the main economical aspects like the price of the property and the warranties that shall be given.

#### **Formal Contract, Notarization of Signatures and Handover**

On basis of the negotiated price and warranties a lawyer or a notary is assigned to draft a contract. In Austria it is very common that the buyer chooses the lawyer/notary, because it is legal custom that the buyer has to fully pay for the lawyer's/notary's work.

The contract includes terms such as the sales price, financing terms, the condition of the property, the handover date and any warranties. The contract normally states that the buyer has to transfer the purchase price to an escrow account of the lawyer/notary after signing of the contract and after notarization of signatures by a notary public. It is the seller's duty to hand over all documents listed in the contract to the lawyer/notary which are necessary for the registration of the buyer's (unencumbered) ownership in the land register. Having received these documents, it is the duty of the lawyer/notary to forward the purchase price from the escrow account to the seller's bank- account and

to file an application with the land register for the registration of the buyer's ownership.

In most of the nine Austrian provinces the transfer of property also requires a separate approval by the provincial authorities according to the respective Land Transfer Acts of the provinces. An approval is usually required when the transaction entails transfer of agricultural or forestry land or the acquisition of property by non EU/EEA residents or entities. Obtaining such an approval normally takes two to eight weeks.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The Austrian legal system permits ownership of the whole land and ownership of parts of the land (co-ownership). A special form of the co-ownership is the condominium-ownership. It is the primary form of co-ownership in which specified parts of a piece of real estate are separately and individually owned.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The Austrian legal system permits joint ownership of real property. Physical persons and legal entities may hold property individually or jointly. Some exceptions with respect to condominium-ownership are made.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Austrian real estate law is based on the principle that the owner of the land is also the owner of the non-independent parts that are erected on it. But there are two exceptions to this rule:

- Superstructures (Superädifikat)
- Building Rights (Baurecht)

Superstructures are constructions, which are erected with the intention not to leave them on a permanent basis. The type of construction and partially

the intent of the parties are relevant for this legal structure. The erection of a superstructure needs not be registered in the land register, but the subsequent transfer of the ownership of the superstructure to a third party. Superstructures can, therefore, not always be seen by consulting the land register.

A building right is the right to erect a building on a plot of land. This right becomes existent upon registration in the land register. The right lasts between ten and 100 years. Upon expiration of the building right, the property owner must compensate the previous owner of the building right, if not agreed otherwise, with 25 per cent of the residual value of the building.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

In Austria all properties are formally registered in the land register and a buyer in good faith may basically rely on the accuracy of the information that is registered in the land register.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Real property transactions are subject to real estate transfer tax corresponding to basically 3.5 percent of the purchase price. When real property transfer tax is applicable, no additional VAT is payable. This rule does not apply when the parties choose to transfer the property with VAT (at a rate of 20%) in order to be entitled to deduct pre-tax.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

In Austria, one normally had to hold the property for 10 years calculated from the signing of the contract to avoid speculation tax that was triggered if the resale price of the property exceeded the acquisition price.

For real estate property this legal situation changed as of 1 April 2012: Basically private and business property sales are subject to the new real estate profit tax “Immobilienvertragssteuer” of 25%.

Real property which was bought after 31st March 2002 is subject to the new real estate profit tax (in case of sale) of 25% which is calculated from the difference between the sales price and the acquisition costs less an inflation allowance of 2% per year after ten years (max. 50%). This means that in case the property is sold after e.g. 35 years only 50% of gains on sale of property can be taxed with 25 % so that effectively a real estate profit tax of 12.5% has to be paid.

Real property which was bought before 1st April 2002 is subject to an effective tax-rate of 15 % or 3.5 % of the sales price (not the capital gain) depending on whether the property has been rededicated.

Exempted from taxation is the sale of private residential buildings/condominiums if the seller has used them permanently for 2 years as main residence or if within the last ten years prior to the sale the seller used them at least 5 years permanently as main residence and in both cases the seller abandons the main residence. If the sold building was constructed by the owner himself, any profits in context to the building itself are basically tax free.

## **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from Austria.

## **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In Austria, there is the general rule that the buyer of a real property has the right to terminate the lease agreement by observing the statutory notice period (Section 1120 of the Austrian Civil Code). But normally the buyer accepts the duty to take over any existing lease agreements and, therefore, the buyer is not free to terminate the existing lease agreements. If the lease agreement is, however, registered in the land register or if the Austrian Rental Act applies (in whole or in part) to the lease agreement, the buyer automatically steps into the landlord's position under the lease agreement by operation of law. Given that the Austrian Rental Act applies (at least partially) to at least 90 percent of the

lease agreements in Austria, the general rule which allows the owner to terminate leases has no particular significance. If the buyer has the right to terminate the lease agreement, the lessee has the right to demand compensation from the seller of the real property.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

An official approval by the building authorities is needed for changing the use of a building. The building authorities may approve the change of the use of a building only if the intended use is permitted according to the zoning plans. One may apply for a change of the zoning plans, but there is no statutory right to force the authorities to change such plans.

**11. To understand the amount of costs involved, what costs are likely if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly:**

- Notary's costs
  - Land register
  - Real property transfer tax
  - Advising lawyer (due diligence)
  - Estate agent
  - Others
- 
- Notarial costs: EUR 134.90 plus 20% VAT for the notarization of the first signature and EUR 67.45 plus 20% VAT for the notarization of all further signatures on the purchase agreement
  - Land register: EUR 55000 (1,1% of the purchase price) for the registration of the ownership
  - Real estate transfer tax: EUR 175000 (3.5% of the purchase price)
  - Advising lawyer: depending on the agreement with the lawyers. Usually lawyers charge by the hour (EUR 250 to EUR 450 plus 20% VAT), so that fees are dependent on the complexity of the transaction. It is also common to charge a percentage (1% to 3% plus 20% VAT) of the purchase price as a lump-sum fee, depending on the complexity and the value of the transaction.
  - Real estate agent: up to 3% of the purchase price plus 20% VAT

- Others: about EUR 100 to 300 for the approval by the provincial authorities, if required under the Land Transfer Act of the respective Province; 1.2% of the amount of a registered mortgage, as court fees for the registration in the land register;

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In Austria owners are subject to a yearly land tax (“Grundsteuer”). The tax rates are different in each municipality and range from approximately 0.2% to 1% of the (historic) value of the property (Einheitswert). The value for tax purposes is not the real value of the property, but significantly less. Therefore the actual tax rate is about 0.05% to 0.3% of the real value of the object per year as land tax.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The costs of a property manager differ from property to property and are normally calculated on basis of the rentable space of the real property and range from EUR 2.80 to EUR 4.50 per square meter and year. The costs (at least parts of it) for the property management are usually charged to the lessees as part of the general operating costs.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
  - At the moment not because of the impacts of the worldwide financial crisis**

We would definitely recommend investing in commercial and residential real estate in Austria, since the prices in Austria’s cities are relatively low compared



to other European cities. Furthermore, the interest rates are very low at the moment.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

All nine Austrian provinces have different legal restrictions for the purchase of real estate by non-EU/EEA residents or entities. These restrictions are governed by the Land Transfer Acts (state law). These Land Transfer Acts require the buyer of a real property to have a connection with Austria either by nationality (for residents) or business location and shareholders (for entities). The specific requirements for the purchase of real property however are different in each of the nine Austrian provinces. The fulfilment of these requirements by the investor needs to be checked in the course of a due diligence.

Of all nine provinces, Vienna has the most liberal rules. The purchase of real estate in Vienna by non-EU/EEA residents or entities can be effected by establishing the right company structure for the acquisition.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

This depends on several criteria, including

- A. nationality of the investor
- B. type of activity
- C. possible restriction according to zoning plan

Due to the European freedoms of services and establishment there are practically no restrictions applying to EU member state citizens that would differ from Austrian inhabitants who want to run a business. Due to numerous treaties with other countries, the same principle applies to many non-EU citizens.

Any remaining restrictions and any required approval are mostly depending on the envisaged type of business activity.

As mentioned above, zoning plans will govern the specific use of a plot of land.

**17. Could your firm assist foreign investors in:**

- **Finding interesting real estate and related valid investment products real property in Australia where required through personally known agents and other advisers**
- **Developing construction projects**
- **All legal aspects involved in these contexts**

We are capable of assisting clients in all aspects of real estate and construction projects. Please contact Johannes Lindner at:

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

#### **First step: devolution of the ownership inter partes**

A candidate buyer who wishes to buy real estate will, after negotiations documented by the exchange of offer and counter-offer, enter into a purchase contract inter partes with the seller, holding the full identification of the real estate, the price and the essential purchase conditions.

Although not necessary, it is preferable to execute the contract inter partes with the help and in front of the notary of each of the parties.

Usually the buyer pays an advance of 10% of the purchase price.

#### **Second step: devolution of the ownership vis-à-vis third parties**

After the signature of the purchase contract inter partes, the parties shall pass a notarial deed within 4 months, preferably in front of the notaries of the parties, although one notary is sufficient.

During the period of time of 4 months, the notary, or the notaries of the parties will collect and / or verify the following data in order to prepare the notarial deed:

- the exact identity of the buyer and the seller;
- the legal capacity of the seller and the buyer;
- the matrimonial property scheme of the buyer and the seller;
- the 30 years history of the ownership (title, co-ownership, easements....);
- conformity between the information provided by the seller and the information coming from the land register;
- the mortgage situation;
- the existence of lease contracts;
- taxation situation of the seller (absence of tax debts);
- conformity between the real estate and the urban legislation (ex: regularity of the building permit, the clean ground certificate, the energy certificate, no expropriation threat...).

Once all the data have been verified, the notary / notaries of the parties update the purchase contract inter partes and on this basis draw up the notarial deed.

Afterwards, the notary / notaries convene a meeting for the signature of the notarial deed. The buyer shall prepare the agreed sum for the payment of the price of the real estate, the registration fees (usually 12.5%), notarial fees and costs (around 3%) and, as the case may be, VAT for new-building (21 %). The seller prepares the de facto transfer of the real estate to the buyer (ex: remittance of the keys, closure and reopening of the water and gas meter, transfer of an existing lease agreement and the rent guaranty).

Usually, the notarial deed with respect to the purchase of the real estate is preceded by a notarial mortgage loan deed between the bank and the buyer.

After the signature of the notarial deed, the notary / notaries has / have to

- register the notarial deed in the land registry;
- register the mortgage, if any;
- deliver to the buyer his property title.

Starting from the date of the registration in the land registry, the transaction has effect vis-à-vis third parties.

The notarial deed remains in the archives of minutes of the notary of the buyer.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Apart from the full ownership of real estate, including land and constructions, as well as the classic type of the distinct ownership between land and construction, Belgian law allows the physical division of a land or construction into separate private lots.

The owner of a private lot in real estate will together with the owners of the other private lots, become co-owner of the common lots in the real estate in proportion to the value of his private lot. These common lots are the accessories that need to be owned jointly so as to avoid the private lots to be of no use or of reduced use (e.g. a stair, a parking, a garden). This type of joint ownership is therefore called forced co-ownership which lasts as long as the private lots require the use of the common accessories.

Co-ownership of common (community) lots in an apartment building is subject to a specific legal regime creating ipso iure a co-owners' association. Each private owner of an apartment will attend the meetings of the general assembly, whose role is to take administrative decisions regarding the common lots or to decide upon a collective set of internal rules. An administrator will also be ap-

pointed to perform day to day management tasks and represent the co-owners' association in all transactions, even in court.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Joint ownership or co-ownership of real estate by two or more owners (individuals or corporate bodies) on an undivided basis is possible. However, it was seen with disfavour by tradition and the legislator, and so was originally disregarded. Belgian legal doctrine has gradually established four kinds of co-ownership which have been somewhat integrated in the legal system:

1. Ordinary co-ownership: A fortuitous, unorganised and unstable kind of joint ownership of which joint inheritance constitutes the *plurimque fit*. Therefore it is essentially a temporary state.
2. Forced co-ownership: See above (private lots in real estate requiring the use of common lots or accessories).
3. Voluntary co-ownership: Finding its origin in contracts, most of its features can be customised to the parties' preferences which is why the majority of jurists believe it not to be subject to the same disadvantages as ordinary joint ownership (e.g. matrimonial or living-together-contracts).
4. Collective co-ownership: A specialised kind of co-ownership, used by entities with no legal capacity.

There does exist a common legal regime for these structures. Each owner is vested with a portion of the real estate (ex:  $\frac{1}{4}$  for A and  $\frac{3}{4}$  for B) and can dispose of his right as he pleases. Exercise of the good must however be done within the limits of the other owners' rights and important decisions concerning need to be taken unanimously. Because of the traditional legal hostility, none can be compelled to remain in co-ownership. Everyone has the right to demand its division into separate lots, or if this is impossible or extremely difficult, the right to force the public sale of the real estate and claim his proportional part of the sale price. This is not possible in forced co-ownership and its application to voluntary co-ownership is heavily disputed. The law does allow parties to form a renewable contract withholding the parties from dividing for a maximum of 5 years.

The right of "usufruit" is not a proper joint-ownership but rather a dismemberment of the attributes of full property between two parties.

The Belgian legal system has characterised property with the following three attributes:

- Abusus: The right to legally dispose of and administer real estate.
- Usus: The right to use the real estate.
- Fructus: The right to obtain the periodically created proceeds of the real estate.

In such contracts, the proprietor keeps the abusus and transfers the usus and fructus to the “usufruitier”. Both parties do only have limited command over these attributes for the duration of the contract, which cannot last longer than the usufructier’s life. The proprietor may not, for example, destroy the real estate or act to reduce its value, while the “usufruitier” will have to use the real estate in a reasonable manner. It is similar, in many regards, to a lease contract.

Like in other European countries, timesharing has become a well established practice. This implies temporary full ownership of a real estate. For example, one can be the sole proprietor for the month of July of a house while others have this full ownership during other months.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In principle the ownership of a land implies the ownership of what is under the surface of the land and of what is above the surface of the land. Therefore, the owner of the land is presumed to be the owner of the real estate erected on it.

The distinct ownership between land and constructions is however very popular, it being understood that in principle the owner of the land becomes the owner of the construction at the end of the distinct ownership.

The institution “le droit de superficie” is a temporary (maximum 50 years, but renewable) contractual horizontal partition of real estate where the land is owned by one person and the building and / or planting by another. This institution is mainly used for quarrying or for forestry activity. At the end of the agreement, the owner of the land will pay the actual value of the building to the past owner of the building.

Another institution is the emphytéose - a long-term lease contract (minimum 27 years, maximum 99 years) during which the tenant is vested with preroga-



tives of the landlord who, at the end of the lease contract, is entitled, without counterpart, to the constructions erected on the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The ownership of real estate is officially protected by its registration in the land register and in the mortgage office, which are operated by the Tax Administration, managed however by personally liable registrars.

A dispute with respect to the ownership is also registered in the land register and in the mortgage office, so that a candidate buyer (his notary) can, by means of consultation of these registers, be made aware of a pending litigation related to the real estate he wishes to acquire.

Registering merely discloses the existence of the property rights, making it opposable to third parties, and does not create such rights. Thus, a purchaser who mistakenly believes to be buying a real estate from someone who is not registered as proprietor will not be entitled to be registered as the new proprietor. The latter will have to act against the vendor in court to obtain the nullity or the resolution of the sale.

A good faith purchaser benefits from a second protection. In case of multiple sales of the same real estate, the common rule is *prior tempore, potior iure*, meaning that the first to register the sale will be protected. However, if the second purchaser is aware of the first sale at the moment of his sales agreement, even if he registers first, his registration can be challenged by the first purchaser.

These incidents remain rare as the notaries have the obligation to carefully verify the property status of the last 30 years, and the land register and the mortgage office are very reliable, as the registrars are personally accountable towards the prejudiced party.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

For the purchase of real estate a registration tax is due upon the registration in the land register.

The percentage of the tax depends on the Region where the real estate is situated:

- in the Brussels Region and in the Walloon Region, the percentage is 12.5 % of the price;
- in the Flemish Region, the percentage is 10 % of the price;

Under certain circumstances, in case of purchases of modest residences, the percentage may be reduced to 6% in the Walloon Region or 5% in the Flemish.

For sales of newly built constructions, the entire sale will be submitted to the value added tax (VAT), which is 21%. The tax is not only due on the value of the new building but also on the value of the land (before 2012 the sale of the land remained subject to registration tax).

#### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

A company generating profits from selling and buying real estate is submitted to regular company tax (a fixed tax rate, basically 33%), independently from the period of time during which the company has held the real estate.

In principle, profits from real estate transactions generated by individuals in the framework of the management of their private estate are not taxed. However, for short-term sales a capital levy is applied (tax rate varies in function of the period of the sale: 3, 5 or 8 years).

Profits from real estate transactions generated by individuals in the framework of their professional activity are taxed under the income tax legislation (progressive tax rate). If the real estate has been qualified as a fixed asset in the accounts of the individual for at least 5 years or in case of cessation of the professional activity, a fixed tax rate is applied (basically 16.5%).

#### **. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Basically there are no restrictions for the transfer of money from Belgium to another country, or from abroad to Belgium.

Attention must be called to the money laundry legislation, which focuses especially on banks, notaries, attorneys, who are under the obligation to “blow the whistle” when incoming/outgoing money is presumed not to be clean.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The sale of leased real estate does not prejudice the lease contract. The sale of the real estate implies the assignment of the lease contract from the seller to the buyer, investing the buyer in the same rights and obligations of the seller in his quality of landlord. However, the purchaser cannot be held to the obligations of the lease contract and therefore can expulse the tenant, if it has not been registered in the land register to make it opposable to third parties or if it is allowed by the lease contract itself.

Restrictions that should be taken into account depend on the type of the lease contract. Belgian legislation strongly protects commercial (retail) and residential lease contracts, as opposed to, for instance, office space and storage space lease contracts.

In case of a residential lease contract, which by law grants a 9 year title to the tenant if no agreement is found between the tenant and the landlord, the latter is entitled to terminate the lease contract before its expiration in the following situations:

- the landlord wishes himself to occupy the premises; in this case notice may be given at any moment and the notice period to be observed is 6 months,
- the landlord wishes a member of his family to occupy the premises; in this case notice may only be given 6 months before the end of the first or of the second triennium,
- the landlord wishes to proceed with works in the premises; in this case notice may given at any moment and the notice period to be observed is 6 months.

In case of commercial lease (retail, meaning premises linked to selling goods or services to the consumer), which by law grants a minimal 9 years title to the tenant, the landlord is basically not entitled to terminate the lease contract. Such a possibility must expressly have been entered into the contract and will be subject to a one-year prior notice, which may only be served before the end of the first or of the second triennium. The landlord will have to establish his own or a relative's business in the premises.

The purchaser of a real estate that is commercially leased (always understood that the lease contract has been registered in the land register) may never expulse the tenant even if that was agreed upon in the lease contract as such provision is nil and void. He may however, in addition to the above-described

procedure, terminate the contract with a one-year notice given within the three months following the acquisition. The only acceptable motives for such terminations are:

- The purchaser or one of his relatives plans to use the real estate personally.
- The purchaser wishes to remove all commercial activities from his propriety.
- The purchaser will make the building undergo works that will permanently modify the structure and which cost exceeds 3 years of rent.
- Any breach of contract by the tenant, which makes a continuation of contractual relationships impossible, or greatly diminishes the value of the building, or transforms its commercial destination.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The change of use of a building from residential use to office space and the other way around mostly requires approval (license) from the local authorities, certainly in the major cities such as Brussels.

In many circumstances the urban planning regulations do not allow any re-conversions from the residential use to the office space use or to the use for any business activity.

Therefore, before considering the purchase of real estate, the examination of the urban planning status is of major importance.

Between the landlord and the tenant the change of the destination of the leased property is mostly subject to the approval of the landlord.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial fee** = EUR 5'156.65
- **real property transfer tax** = EUR 625'000 in Brussels and Walloon Regions
- **real property transfer tax** = EUR 500'000 in Flemish Region
- **advising lawyer** = around 20 hours (EUR 150 to EUR 300/ hour)
- **estate agent** = a percentage of the price (around 10%)

**III. Costs for holding real estate**

## **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

When holding real estate the owner has to pay the yearly land tax that is a percentage of the cadastral income. The cadastral income is the hypothetical average income that the real estate provides to its owner, which for the last time has been established by the tax administration in 1975 and which is subject to yearly indexation.

The percentage of the land tax includes:

- the regional tax: 1,25% for properties situated in Brussels and Walloon Regions and 2,5% for properties situated in Flemish Region;
- the provincial tax, which is calculated in function of the amount of the regional tax and is highly volatile;
- the municipal tax, which is calculated in function of the amount of the regional tax and is highly volatile.

For instance, indexed cadastral income of a residential real estate in the amount of EUR 7'000 would give a yearly land tax of EUR 2'700 in 2009, or 40% of the cadastral income, which is mainly due to the high provincial and municipal taxes.

On top of the land tax, income taxes can be due on the effectively collected lease income, especially when the lease price is deductible as professional operating costs by the tenant.

What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

Usually the caretaker would propose the following services for around EUR 200 (VAT excl.)/ month:

- administrative and secretarial management (organisation of meetings, control of General Assembly of co-owners, reception of the correspondence to the owner);
- following up on all necessary insurance contracts;
- following up on contracts with the suppliers, cleaning services, conformity control of facilities ;
- following up on control of the concierge;
- financial management (payment of invoices; accountancy of the co-ownership) ;
- technical management (keeping in order of building facilities);

For the introduction of the applications for different permits, the caretaker would work on basis of a fixed rate that varies between EUR 300 and EUR 1200 (VAT excl.).

The legislation on co-ownership (or joint ownership, see above) imposes the appointment of a “syndic” or administrator for the management of the common parts of the real estate.

#### **IV. Foreign investors**

- 14. Would you advise foreign investors at the moment to invest in your country**
- directly in real estate?**
  - through real property funds, open or closed ones?**
  - through other clear and secure financial products?**
  - at the moment not because of the impacts of the world wide financial crisis?**

As long as real estate in Belgium, and particularly in Brussels, remains attractive with respect to other European countries and major cities, investment in real estate should be considered.

Following the worldwide financial crisis, prices of real estate have decreased, but not significantly.

- 15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Any individual and any legal entity is allowed to buy a real estate in Belgium, without any restrictions with regard to nationality, the residence or the registered office of the buyer.

However, the buyer himself must nevertheless comply with the regulations on (permanent) residence and professional activity.

- 16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

A foreign investor may buy a plot of land in Belgium. However, in order to run a business, the foreign investor shall prior to the purchase procedure enquire about the local urban planning which covers the plot of land he wishes to buy.

The areas that have been qualified as industrial areas by the urban planning are the safest ones to invest in for operating a business.

For all other sorts of areas, the procedure to get the approval to operate a business on the plot of land may prove to be very slow and expensive.

#### **17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

IUSTICA.BE offers legal assistance in all aspects of real estate projects, as the case may be with external legal professionals in tax law and administrative law.

IUSTICA.BE is member of the editorial board and / or author in RES ET JURA IMMOBILIA, a bilingual French/Flemish legal review on all aspects of real estate.

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# **Brazil I**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Brazil, whenever the purchase price is totally paid at once, the parties just sign the public deed that transfers the ownership and provides its registry in the Real Estate Registry Office. If the price is going to be paid by installments, usually the parties sign a previous contract, which can be private (an agreement between the parties) or a public deed, registered in the Real Estate Registry Office, that will preview the purchase. This contract does not give any ownership right to the purchaser, though it always has a clause determining that, in a certain period or when certain conditions are accomplished, a public deed transferring the property must be signed and registered in the local Real Estate Registry Office. Only with this registry of this deed the buyer acquires full ownership over the real property.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

It is possible that more than one person owns one property, which can be divided in ideal shares that represent which part of the property belongs to each owner.

There is no legal rule regarding the division of the land and the construction.

There is just one sort of different ownership predicted in the Brazilian Civil Code: the right of enjoyment, also known as usufruct. In this institute, the original owner of the real property gives to another person the right to use it as this person (known as usufructuary) best convenience. Therefore, an usufructuary can lease, use as home or business, construct and give any destination to the property he prefers, except for selling it, which can be performed only with the original owner's approval.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

The Brazilian Civil Code permits that more than one person owns the same property, in a system known as condominium. In this kind of joint ownership,

all owners have the same rights over the real property and can use it equally, though they can't do anything that doesn't comply with the property division. Furthermore, there are some specific rules that apply to the division of the property (if it is divisible) and its sale to third parties or to another member of the condominium, who always has preference to buy the other's member's division.

Generally, anyone, individual or legal entity, national or foreigner can own real property in Brazil. For foreigners to own rural properties, however, there are some restrictions, better explained in the answer to question number 15.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

The Brazilian legal system gives a possibility for a person to own just the building: the owner of the land can assign the surface right for another person for a certain time period. This surface right includes the right to construct and to use the building as the surface-right owner wishes, as long as he uses it only for himself. This right can also be assigned from the first assignee to a third party, but it must be clear that the assignment of the surface right by the original land owner always has a final deadline, and once it's achieved the building becomes full property of the land owner.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Brazil has a Public Registry Law (law number 6.015 from December 31st, 1973) that determines that all real properties must be registered in a Real Estate Registry Office. As it was explained in the answer to question number 1, the purchaser only acquires full ownership of the real property once the transfer is registered in this Office. For instance, if the real property is sold for two different buyers, the first one that achieves the registry achieves also full ownership rights. In this case, the other buyer will have to go to Court to get an annulment of the first registry. That's why it is highly recommendable that before concluding any real estate transaction in Brazil, the buyer must check in the Registry Office if the seller has full ownership over the real property or if it already has any purchase agreement registered.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In Brazil, the real property tax transfer is charged by municipalities. Therefore, its rate might differ from one city to another. The two biggest Brazilian cities, São Paulo and Rio de Janeiro, charges 2% over the real property market value or over the operation value (the tax is charged over the highest value between both). However, important Brazilian state capitals, such as Salvador, has a tax rate of 3%. There's no federal law establishing minimum or maximum rates for this tax.

The property seller must also pay, for income tax, 15% over the earned capital gain on the sell.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There's no difference if you sell the property 2 months or 10 years after you acquire it. The amount of taxes that must be paid over the sell will be the same. However, regarding the income tax that must be paid over the earned capital gain depending on the time that you keep the property the tax rate can be decreased.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

This repatriation can be done directly, though it's safer that seller constitutes an attorney-in-fact with powers to receive the money and provides it's transfer after the signature of the deed. If the money transfer is made directly to the seller account in a foreign country, any problems related to the transfer won't be demanded to the buyer, once the ownership right was already transferred after the signature of the deed, that it won't unilaterally terminated anymore.

### **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

According to Brazilian lease law, the buyer of a leased property has the right to terminate the lease contract. Therefore, the buyer must notify the tenant about the purchase contract, and he will have 90 days to leave the property. This right, however, is not applicable if the lease contract has a determined deadline to end and is registered in the Real Estate Registry Office.

It's important to emphasize that, for urban properties, the law imposes that, before the owner sell the property to a third part, it must offer the property to the tenant, who can buy it for the same price and conditions ( this right of the tenant is called preference right).

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The change in the use must always be approved by the municipality, and this approval will only be given if the change complies with the city law that approves the urban development plan. Depending on the use that is going to be given for the property, approvals from other public entities might be needed, such as Environmental Bodies.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - Estate agent?
  - Others?
- 
- notarial costs? This cost differs from a Brazilian State to another. In Rio de Janeiro State, this cost is about 1.000,00 EUR.
  - land register? This cost differs from a Brazilian State to another. In Rio de Janeiro State, this cost is about 1.000,00 EUR.
  - real property transfer tax? As it was explained above, the rate of this charge differs from city to city in Brazil. In the city of Rio de Janeiro, this cost would be of 100.000,00 EUR – 2% over the purchase price.

- advising lawyer (due diligence)? This cost depends on the size of the law office that will assist the acquirer, but as an average this assistance costs 2.000,00 EUR.
- estate agent? 250.000,00 EUR – generally the agent charges 5% of the price paid, but it could be negotiated.
- others? There are some Registry Real Estate offices that only registers the deed if the parties involved in the transaction shows official certificates affirming that the owner of the property has no litigation over him in local and federal Courts. Also, it is requested another official certificate affirming that there's no official decision that impose limits to the ownership rights over the property. The cost to obtain these official certificates is about 160,00 EUR.  
If the real property has an emphyteutic lease, the acquirer must pay a percentage (usually 5%) of the transaction value to the emphyteutic lessor. In the present case, the amount charged, known as laudemium, would be of 250.000 EUR.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In urban properties, the owner property must pay yearly an urban real estate tax. Once this tax is charged by municipalities, its rates differs from city to city. Furthermore, the rate might also differs inside the city, depending of which area the property is located.

For rural properties, a rural real estate tax must be paid yearly. This tax is charged by Brazilian Federal Government and its rate depends on the size of the property and which part of it is actually used by the owner.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

If the property is leased, the company which intermediates the rent is usually in charge of anything related to the property, like paying the taxes there are related to it. If the foreign investor wants to hire someone only to take care of

the property, the cost in this hiring will depend on where is the property, what is it's use and the it's seize. Usually they charge a fix monthly value.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
  - **Through real property funds, open or closed ones**
  - **Through other clear and secure financial products**
  - **At the moment not because of the impacts of the worldwide financial crisis**
- directly in real estate? It depends on which kinds of properties the investor wants to acquire. In Brazilian biggest cities, real estate has prices considerably high but there's no sign that this uprising will end in a short term (especially not before the big events that Brazil will host, like 2014 World Cup and 2016 Olympics) , so it could be profitable if the investor has a huge amount of initial capital to invest. In medium size cities, the prices are smaller but the tendency is the prices to get stable, so the profit might not be as huge as in big cities. Rural properties are always a good investment in Brazil, especially because their price is comparably small with these properties in developed countries and in view of the country's unexplored agriculture potential.
- through real property funds, open or closed ones? Recently, the real estate funds are more organized and better regulated by the Brazilian Securities Exchange Commission. There's also some tax benefits in Brazilian federal legislation over the income received from investments in Real Estate investment funds. Therefore, an investment in market-known funds are currently safer and profitable, especially if the investor considers a return in a long term.
- at the moment not because of the impacts of the world wide financial crisis? The impact of the financial crisis in Brazil was not as deep as it was in developed countries. Furthermore, the development potential of the Brazilian economy is still considerable. Therefore, investing in real estate in Brazil is still a profitable option, especially with the long term is considered.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

For rural properties, there are some restrictions for a foreign person, entity or even a Brazilian company controlled by foreigners to acquire one. These restrictions were established by the federal law number 5709, from 1971, October 07th, which was recently confirmed by a legal opinion issued by the Brazilian Federal General Counsel in 2010. These restrictions does not forbid a foreigner to acquire a rural property, though it bring some difficulties that, in some cases, cannot be overpassed.

In order to avoid these restrictions, a corporate structure could be built aiming to cover the foreign acquirers in the transaction. However, there's always a risk that foreigners are discovered and the whole transaction might be annulled.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Basically, the investor will need to registry the investment the Brazilian Central Bank to bring the money that he wants to invest in the business. This registry usually take 24 hours.

If the investor wants do invest directly in real estate, he will also have to register himself in the Brazilian Federal Revenue Department, which usually takes a week .

Finally, if it's his company that will acquire the real estate, he must constitute a proxy in Brazil to act on his behalf or take some Director to live in Brazil with a work visa.

About other official approvals for start the business, they will depend on which kind of business will be taken at the plot of land, which entity is going to run the business and where the plot of land is located.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

We could assist foreign investors in all legal aspects regarding real estate acquisitions and construction projects.

# **Brazil II**

## **Felsberg & Associados**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

The acquisition of real estate property in Brazil can be initiated with execution of a private or public purchase and sale agreement or, alternatively, such transaction can go directly to a public deed of purchase and sale.

The structure in which the parties enter into a private agreement of purchase and sale usually occurs in cases when the payment of the price is agreed in installments, with financing or, even, when there are conditions to be accomplished by the parties prior to the closing of the transaction.

Anyway, in the event of executing a private purchase and sale agreement, the execution of the public deed and its registration at the Real Estate Registry will be essential for vesting the purchaser with the formal ownership of the property.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

The Brazilian Legal System establishes, at least, three (3) different sorts of ownership by different owners over the same property, as follows:

#### **(i) Condominium (Townhouse or Apartment Complex)**

The legal structure for the Condominium allows the owners of each unit or apartment to vest ownership of a fraction (or portion) of the ground in which such Condominium is built.

The Condominium Convention will be registered at the Real Estate Registry, more specifically, at the title record of the property in which the condominium will be built. Such registration shall indicate the private area of each unit or apartment, as well as the portion of common area (such as the ground) that it is entitled to.

#### **(ii) Transfer of Title in Guarantee (“Alienação Fiduciária em Garantia”)**

The “Alienação Fiduciária” is a kind of guarantee, usually used instead of mortgage, as it is simpler and faster to recover the property in case of default on the loan agreement.

This structure implies on the division of the ownership between direct and indirect ownership, as the owner will be able to transfer the direct ownership of the property to the creditor and, at the same time, keep the indirect ownership of such property, being able to use such property during this period of time. Since the payment of the loan is fully accomplished, the full ownership of the property rolls back to the grantor.

(iii) Surface Right

The Surface Right is characterized as a division of the property rights, in which the surface of the property (building or planting) are indicated as property of the one who makes the improvements, as well as the previous owner shall be entitled of the remaining rights of the property (i.e the land).

The Surface Right is valid for a maximum period of 30 (thirty) years.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

According to the Brazilian Legal System, it is possible to have joint ownership of a real estate property. In this case, the co-owners shall have a percentage of the entire property.

In Brazil, any entity or individual is able to own a real estate property. There are restrictions, however, referring the acquisition of rural land by foreign entities or individuals.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

According to Brazilian Legal System, the ownership of a building is implied in the ownership of the land. An exception would be the surface right, in which it will be possible to separate the ownership of the improvements and the ownership of the land itself, as explained in item 02 above.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The title transfer of a property is only valid against third parties after the duly registration of the public deed of purchase and sale at the Real Estate Registry.

In case of lack of registration of the public deed of purchase and sale, the transfer of the title will not be completed. As a consequence, the acquisition with simply the private agreement will not have an erga omnes effect, meaning that it will not be enforceable against third parties.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

According to the Brazilian Legal System, it belongs to the Municipalities the jurisdiction to establish the percentage of Tax on Transfer of Real Estate (“ITBI”). ITBI is a tax imposed on the sale, purchase or assignment of real estate or related rights, provided that such transaction is not characterized as donation.

Usually, the rate varies around 4% of the purchase and sale value or the evaluation amount established by the Municipality, whatever is higher. For example, in the city of São Paulo, the rate is 2%.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There are no restrictions (civil or tax wise) in which you should hold the property for a specific period of time.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

It is possible to remit the money resulting from a transaction of selling a real estate property abroad. We should clarify, however, that the amount invested should be previously registered at Brazilian Central Bank and at the time the property in Brazil is sold, the foreign seller would remit the money abroad through an exchange agreement, also registered at Brazilian Central Bank, and

be subject to withholding tax at a rate of 15% (fifteen percent) on the capital gain deriving from such transaction. Capital gain represents the difference between the sum declared as that acquired for tax effects and that of the sale to third parties.

It should further be noted that an IOF tax payment of 0.38% on the amount involved in the exchange agreements, will be due at the time of the signing of the exchange agreement relating to the acquisition, as well as at the time of the signing of the exchange agreement for the remission of the amount resulting from the sale.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The acquisition of a leased real estate property should be effected only after the offer to the lessee of the right of first refusal, so the lessee can have the option of acquiring the property in the same terms and conditions of the transaction.

In case of refusing such offer or, even, silence to it, the termination of such lease agreement is a general rule. However, if the lease agreement foreseen an effectiveness clause and it is registered at the Real Estate Registry, and then it will not be possible to claim the termination of the lease agreement. In this case, the purchaser will be obliged to the terms and conditions of the lease as successor of the seller.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

It is possible upon official approval. Please note that, in case of condominium, the change of the use from residential to office (or inverse) will depend on approval of 100% of the co-owners.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?** EUR 8.400,00
- **land register?** EUR 8.400,00

- **real property transfer tax?** EUR 200.000,00
- **advising lawyer (due diligence )?** EUR 20.000,00
- **Estate agent?** EUR 300.000,00
- **Others?**

Please note that the estimated cost were calculated considering the exchange rate of R\$ 2,62 for each Euro.

The above mentioned costs can be altered according with location of the property, any debts or liens existing over the property, legal structure of the company in Brazil and also legal structure of the transaction.

It is possible, for example, to negotiate the rates of the tax property with the local Municipality in case of new industry, as well to negotiate the fee for the agent (broker) within such transactions.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In case of holding an urban area, the owner shall pay the Tax on Ownership of Urban Land (“IPTU”) for the local Municipality. IPTU is a municipal tax applicable on the ownership, control or possession of urban land or buildings. The calculation formula of this tax varies in each Municipality and also accordingly with the use and location of the property. In São Paulo, the IPTU corresponds to 1.2% to 1.8% of the real state’s market value assessed by the Municipality.

On the other hand, in case of holding a rural land, the owner shall pay the Property Tax for Rural Land (“ITR”). Its rate varies according to the size of the area and the proportion of its use, being the basis of such calculation the value of the property as decelerated by the owner.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

It depends on the real estate property is rural or urban, as well as the scope of the work that will be subject to hiring, the location of the property and local practices and customs.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

There is not one specific advice referring to the best legal structure involving the acquisition of a real estate property in Brazil. Such option will depend on the location, intended use of the property, the tax structure of the transaction and other factors.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

In general terms, real estate (encompassing the land and the building) can be acquired either by an individual or by a corporate entity, in both cases whether resident in Brazil or not. There are, however, some restrictions involving rural land and border zone areas, as follows:

###### **Rural Land**

According to the Brazilian Law nr. 709 of 1971 (“Law of 1971”), foreign individuals residing in Brazil, foreign companies authorized to operate in Brazil and Brazilian companies in which a majority interest is held by foreigners could acquire rural real properties larger than 3 modules of indefinite exploitation, with due regard for the restrictions mentioned bellow.

The module of indefinite exploitation is a sort of measure indicated by Brazilian Institute of Rural Settlement and Agrarian Reform (“INCRA”), varying accordingly with the region in which the property is located.

The purchase of rural land by foreign must be directly linked to development of rural agriculture, animal husbandry, industrialization or settlement. More-

over, in the event of acquisition of rural land larger than 3 modules of indefinite exploitation should be preceded by authorization of the INCRA and, and all such projects will hinge on the prior approval of the Ministry of Agrarian Development and other federal agencies (INCRA, SUDAM – Superintendence for the Development of the Amazon or SUDENE – Superintendence for the Development of the Northeast, Ministry of Industry and Commerce), depending on the specificity of the project. Please note that, Brazilian legislation also stated that the acquisition of areas that are over 100 modules of indefinite exploitation requires authorization of the National Congress.

In addition to these limitations, there were other restrictions such as: (i) the total rural land areas directly or indirectly pertaining to foreigners could not exceed one quarter of the surface of a municipality, and (ii) that foreigners of the same nationality could not be owners, in a given municipality, of more than 40% percent of the limit pointed out in the item above (equivalent to 10% of the territory of a municipality).

Based on such provision, the Binding Decision LA-1, dated August, 19,2010, of the Office of the General Counsel to the Federal Government [Advocacia Geral da União] (“LA-1 Opinion”) not only ascertains the mentioned rules, but also stated that those are based upon a broad constitutional foundation, namely in articles 172, 190 and 5 of the Federal Constitution. Moreover, the ‘Law of 1971’ states also that such restrictions are in force for the lease of rural property.

The most important consequence of the contents of the ‘Law of 1971’, which restricts the acquisition and lease of rural properties by foreigners, concerns its application to Brazilian companies in which there is the participation of foreigner individuals or companies, who hold a majority of the capital stock, participating, on whatever basis in Brazilian companies and who reside, or are headquartered, overseas.

### **Border Zone Areas**

The Border Zone is defined by the lands situated within a one hundred and fifty (150) kilometer-wide strip, parallel to the land border of national territory.

The abovementioned Decree outlines the need for prior authorization from the National Security Council for the acquisition of properties located within this area by (i) foreign individuals resident in Brazil, (ii) companies authorized to operate in Brazil, and (iii) Brazilian companies in which there is participation, on whatever basis, characterized by the holding of a majority of its capital stock by a non-resident foreign individual or foreign company headquartered overseas.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

In order to receive approval for building, it is necessary to present a project executed and registered by a qualified architect or engineer at the local Municipality and also for the environmental state department.

Once a company has been duly incorporated, the next step is to obtain all necessary registrations, permits and enrolments. The list of the same can be longer or shorter depending on the activities to be conducted. The following chart contains an idea of such registrations, permits and enrolments.

**Fiscal licences, registrations, permits and authorisations**

- Federal taxpayer registration (“CNPJ”)
- State taxpayer registration (“Inscrição Estadual”)
- Municipal taxpayer registration (“Inscrição Municipal”)
- Invoice registration

**Labour and social security licences, registrations, permits and authorisations**

- Registration with relevant employers’ union
- Registration with Accrued Severance Fund (FGTS)
- Registration with Social Security Institute (INSS)
- Registration with Labour Inspection Register
- Maintenance of employee register
- Maintenance of each employee’s individual registration file
- Enrolment with PAT (Workers Alimentation Program), if the company provides meal or meal tickets



**Operational licences, registrations, permits and authorisations**

- Sanitary operational registration with state health department
- Municipality licence for localisation and operation (“Alvará de Localização e Funcionamento”)
- Building occupancy permit
- Building permit
- Inspection certificate issued by the fire department
- Permit to operate the plant
- Registration of trademarks with the National Industrial Property Institute
- Registration of domain names with the São Paulo State Foundation for Research Assistance Registration with SISCOMEX (the Integrated Foreign Trade System)
- Registration with RADAR (which tracks the activities of foreign trade players)

It is also essential that foreign individuals and companies willing to set up a company in Brazil register their intellectual property rights (trademarks, patents, domain names, etc.) in Brazil even before the Brazilian company is incorporated. This will prevent third parties from unduly using such intellectual property.

**Environmental Licenses**

Brazilian federal legislation establishes the guidelines and criteria for environmental licensing which must be complied with in all States of the Federation. Furthermore, each State has its own legislation on environmental licensing.

In the State of São Paulo, for instance, environmental protection is incumbent upon CETESB and State Law No. 997, of 31st May 1976, regulated by State Decree No. 8,468 of 8th September 1976, establishes that any activity, project (including modification or extension thereof) or venture, whether or not involving the use of natural resources, which can be considered an actual or potential polluter, or which may impact or harm the environment in any way whatsoever, is subject to licensing by the competent environmental authority.

In the case of major civil constructions, such as the implementation of a wholesale, retail and cash & carry business, environmental impacts are predicted (deforestation of lands for the construction works, excessive solid waste

generation, noise emissions, liquid effluents generation, etc) and thus such venture is subject to a licensing procedure before the competent environmental authority.

Generally speaking, licensing requirements include: (i) an environmental diagnosis; (ii) a description of the proposed activity; and (iii) a forecast of significant environmental impacts.

Environmental licensing is processed in three separate and consecutive phases. Each phase requires a specific license issued by the competent environmental authority, in the following manner:

- Preliminary License (Licença Prévia) – this license is issued in the initial phase of the project and certifies that the activity is ecologically sound and that its location and design have been approved. It sets forth conditions that must be complied in order to implement the activity. Furthermore, it works as a condition precedent for granting the two other licenses: the Installation and Operating Licenses;
- Installation License (Licença de Instalação) – this license authorizes the beginning of the activity implementation as long as it is in compliance with all the approved environmental impact assessments and studies submitted. The issuance of this license is subject to compliance with the conditions set forth in the Preliminary License; and
- Operating License (Licença de Operação) – this license authorizes the beginning of the operation of the activity, after evidencing that all the conditions set forth in the previous licenses, as well as the guidelines contained in the approved environmental impact assessments, are being complied with.
- Certificate issued by the Municipality attesting that the venture is a Large Quantity Generator of solid waste and that it is required to give proper final destination to all the waste generated by its activities.

## **17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**

It is possible to us to indicate companies for rendering services referring to agency of real estate property and others.

- **Developing construction projects?**

It is possible to us to indicate companies for rendering services referring to the developing of projects.

– - **All legal aspects involved in these contexts?**

Felsberg and Associates can provide foreign clients services referring to all legal aspects of an acquisition of a real estate property in Brazil.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Our law firm is in position to render services in all and any business related front of the real estate property developments and acquisitions. We also may find interesting real estate products tom either develop projects or purchases with good investments returns. This may be extended also to agricultural lands and haciendas which historically have had a steady and incremental investment return.

# China

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

After the purchaser and seller enter into the purchase agreement, the parties shall submit the agreement along with other application documents to the local real estate register. If, upon preliminary review, the real estate register believes that relevant application documents basically satisfy the relevant legal or administrative requirements, the authority will issue a receipt to the parties, and the parties shall pay relevant transaction taxes and fees according to the law and regulations. The authority will finally issue the ownership certificate of the property in the name of the purchaser to the purchaser if the authority believes that the contents and form of all application documents are in conformity with relevant laws and regulations.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Land in urban area is owned by the State, and therefore individuals or entities could be only entitled to land use rights to a plot of land, while they will have the ownership of the properties or any improvements thereupon on such plot of land.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, a real property can be commonly owned by two or more entities or individuals in the form of (1) several co-ownership or (2) joint ownership. Except for certain real properties for special purposes (for example, hospital or military), there is no special restriction on the identity of the purchaser of properties.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In light of our replies to the No. 2 question above, the holder(s) of the land use rights of a plot of land is also the owner(s) of the building erected on such land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes. All properties in China are registered with the local real estate register and a good faith purchaser's right to acquire the ownership of the property will be protected after the submission of application documents are accepted by the local real estate register.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Title deed tax: 3%-5% of the purchase price. In some cities, individual purchaser of certain types of properties will be entitled to a discounted rate at 1.5% of the purchase price.

Stamp Duty: 0.05% of the purchase price.

Business Tax: 5% of the purchase price, with the exceptions as specified under the reply to Q7 below.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

As to an individual, if he/she sells a property before the fifth anniversary of his/her purchase of such property, he/she shall pay the business tax against the full sell price. If he/she sells a property after the fifth anniversary of his/her purchase of such property, he/she shall pay the business tax against the dif-

ference between the sell price and the original purchase if such property is a non-common residential property, or shall be exempted from the business tax if such property is a common residential property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, as long as the seller could provide sufficient proof documents to the local foreign exchange administration authority or its designated banks.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Pursuant to the Contract Law of the People's Republic of China, a purchase of a property shall not affect the existing lease on such property, which means that the lease contract(s) will also be binding on the new owner of the property. Further, the lessee is entitled to a first right of refusal under the same conditions with respect to the sale of the property.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Legally, it is possible to change the use of the building if the owner of the building could acquire relevant approvals from the planning authority and other competent authorities. But in practice, it is very hard to get those approvals because it will involve various approvals from different authorities at different levels.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others?

- a. Notarial Costs: Since the foreign investor needs to set up an onshore entity to purchase the property since 2006, there is no need to notarize the transaction documents.
- b. Title Deed Tax: ERU 150,000.
- c. Stamp Duty: Approximately ERU 2,500 for each party
- d. Registration fees/Transfer fees. Such fees will vary from city to city.
- e. Legal Cost: Approximately RMB 500,000.00.
- f. Estate Agent: 1% of the purchase price, subject to negotiation with the agent.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Two major types of taxes for holding a property by a company:

Urban Land Utilization Tax: Ranging from RMB 0.6 to RMB 30 depending on the location of the land;

Property Tax: 1.2% of the residual value of the property, or 12% of the rent subject to certain discount offered by local tax authority.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Except for those operational costs, you have to calculate the management fee of the professional caretaker. The caretaker usually charges the fee in form of a fixed fee monthly or annually.

### **IV. Foreign investors**

- #### **14. Would you advise foreign investors at the moment to invest in your country**
- **directly in real estate?**
  - **through real property funds, open or closed ones?**
  - **through other clear and secure financial products?**



**– at the moment not because of the impacts of the world wide financial crisis?**

Although Chinese government does not encourage foreign investment into real estate business at this stage, we still recommend that foreign investors to make direct investments in real estate area in first or second tier cities in China because the quick development of China does generate lots of real estate business opportunities. We need to review the concrete situation and expectation for investment for each client to decide which form of investment will suit such client. Investment into a China-based real property fund is not an option for the moment. However, foreign investors can invest into an offshore China-focused real property fund which focuses on investing and holding properties in China.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions, are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

According to the law, an oversea individual or a branch or representative office of an oversea entity can directly purchase property for his/her residential or its own office use. Other than that, offshore entities or individual must establish a local entity to purchase, develop and/or operate a property in China.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

As analyzed above, no foreign investor is allowed to buy land in China, instead, the foreign investor can establish a local entity to acquire the land use rights of a plot of land. For the purpose of establishing the local entity and then acquiring the land use rights and developing the land, the foreign investor shall acquire approvals from the Ministry of Commerce or its local counterparts, complete the registration with the Administration of Industry and Commerce or its local counterparts, obtain the developer license from relevant real estate administration authority and complete the filing or registration with other au-

thorities. Normally, it will take at least two to three months to go through the whole process.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes, we have a very experienced team which is capable of providing comprehensive legal assistances to foreign investors in all these aspects of real estate transactions in China.

China

# Colombia

## **Wiesner & Asociados Ltda. Abogados**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Colombia conveyance of ownership of real estate requires a public deed and registry. The public deed contains the detailed identification of the property and includes all of the terms of the agreement between the parties. The public deed is the real estate sale contract and it is issued by a notary public. Once the deed is signed by the parties, it has to be registered before the Registry Office (“Oficina de Registro de Instrumentos Públicos”) to vest ownership in the purchaser. If the public deed is not registered therein, transfer of property is not complete.

It should be noted that the standard practice between seller and purchaser is to first agree to the terms of the sale and sign a “Promise of Sale Contract”. This Promise of Sale Contract identifies the property to be conveyed, the agreed on price, the basic terms of the purchase agreement and it sets the date and place when the deed is to be signed. Hence, a promise contract creates only one obligation for the parties: the obligation to attend on the agreed upon date and place and sign the public deed, which is the true purchase agreement.

Accordingly, the promise contract is binding to the parties but it does not transfer ownership over the property. Non performance of the promise by one party gives to the other a claim of damages which are usually fixed by the promise of sale contract itself. Such is the way to enforce the terms of the Promise of Sale Contract.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Under Colombian law, buildings with multiple units, like residential apartments, condominiums or malls are subject to an ownership regime known as horizontal property. Each individual unit has its own registry at the Registry Office and property over it vests exclusively on the registered owner, who has full rights over the unit.

At the same time the owner of the unit has an undivided ideal quota or share over the communal property (like the entrance lobby, the stairs or the roof) and

every owner has a right of use over the communal property and a duty to cover the expenses. If the building which contains the units is destroyed, then all the unit owners share the property over the land, with each owner retaining the same quota it had over the communal property over the vacant land.

Joint ownership is also allowed for multi-property (multipropiedad), the legal term for time share properties in which each owner has title over a share of the property and rights to its exclusive use during a predetermined time.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, joint ownership is permitted and both individuals and legal entities, such as corporations, can acquire and hold real estate.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes, ownership of the building is implied in the ownership of the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The real estate Public Registry Office (“Oficina de Registro de Instrumentos Públicos”) of the area where the property is located is the only office authorized to make changes into the property registry. Non registered transactions are not binding on third parties.

Both the land and buildings are covered by the real estate registry and it should be noted that easements, mortgages and other events regarding real estate have to be registered therein.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

There are three relevant taxes to keep in mind: (i) the income tax withholding set at 1% of the value of the transaction or the official value of the land, whichever is higher, (ii) the registry tax which is set at 5 x 1000 of the value of the transaction and, (iii) the so called charitable tax set at 1% of the value of the transaction.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Under Colombian tax law if the property is sold within two years of its acquisition the profits of the sale are subject to income tax. If the property is sold after two years of its acquisition then it is subject to capital gains tax (“Impuesto de Ganancia Ocasional”). Although both income tax and the capital gains tax have the same rate (33% for corporations and 19% to 33% for individuals), the tax payer can claim some benefits under the income tax regime and reduce the payable amount, whereas the capital gains tax does not allow any benefit claims. Hence, if the property is sold within two years of its acquisition it is possible to reduce the tax consequences. The current tax reform bill presented by the administration of President Santos does hope to amend the capital gains tax by lowering it to 16%.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Foreign investors need to register their investments in Colombia before the Banco de la República (the Colombian central bank). When the investment is duly registered, the seller can repatriate the funds through an exchange channel. If the investment is not registered with the Banco de la República then taking the money out of Colombia may expose the seller to fines and sanctions. It should be noted that the foreign investment registry is not an exclusive requirement for foreign investments on real estate and the body of law which regulates foreign investment is different from that which regulates real estate. Once registered with the Banco de la República it is easy for a foreigner to send abroad, in hard currency, the proceeds of his real estate investment.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Termination of the lease agreement is allowed but there are certain conditions that have to be met: (i) the lease contract can be terminated only at the end of the lease term or one of its extensions, (ii) notice of the intention of terminating the lease has to be sent three months in advance of the termination date, (iii) the stated reason for termination has to be the performance of an obligation set forth by a purchase agreement and (iv) attached to the termination notice there should be a copy of a bond issued in favour of the leaseholder, valid for six months, with a value equal to six months of the lease, to ensure that the stated reason for termination is true.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Use of land is decided by local authorities (counties and cities) in accordance to their Land Use Organization Plans (“POTs” is the acronym in Spanish). The plans are approved by city councils for extended periods of time. Changing the established use of land for a plot or building requires the filing of an authorization request before the local authority. Authorizations for the change of the use of land are difficult to secure and demand time and resources.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others?

Notarial costs change every year and are established by the National Superintendence of Notaries and Registry. For 2012 a transaction with a price set at EUR 5 million it would pay EUR 13,500 (2.7/1000 of the transaction value) as notarial costs. The registry of the deed would cost EUR 75,000 (EUR 25,000 for the registry tax and EUR 50,000 for the charitable tax). If the parties are required by law to pay the income withholding tax, then such tax would amount to EUR 50,000.



The real estate agent commission can be negotiated but it would be at least equal to 3% of the transaction value if the land is considered urban and 5% if the land is considered rural. Hence for the hypothetical transaction if the land is urban, the real estate agent would charge EUR 150,000 at least, and if the property bought is considered rural at least EUR 250,000. Attorneys fees can be charged either at an hourly rate or as a flat fee encompassing all required work. For a transaction as the one proposed, the value of the fees would likely be of around US\$10,000.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Property tax is levied by local governments. The tax rate depends on multiple factors such as where the property is located and its use. The value of the property, for tax purposes, is determined by the tax payer but cannot be lower than that which is determined by the land registry (“catastro” as it called in Colombia). Since the land registry is not updated every year it is not uncommon for commercial prices to be higher than the ones used to assess the property tax. Conversely, when the land registry is updated the value of the property will have big increases.

Besides the annual land tax, properties served by public services such as water, electricity and gas may have to pay a minimum consumption charge on monthly or bimonthly basis. It also usual for local government to levy special taxes to pay for improvement works near the property such as roads and bridges. Local governments can also levy taxes over the capital gain or added value (“plusvalía”) gain by the property owner because of public works made in the immediacy of the property. The capital gain or added value tax although authorized by law has rarely been used.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Professional caretakers are commonly real estate agencies that charge for their services a monthly percentage over the lease they secure for the prop-

erty. The real estate agencies offer different services ranging from showing the property to prospective clients, to administration packages. The usual monthly percentage is set at about 8% and may increase if the owner chooses to buy certain insurance coverage offered by the insurance companies through the real estate agencies.

#### **IV. Foreign investors**

- 14. Would you advise foreign investors at the moment to invest in your country**
- directly in real estate?**
  - through real property funds, open or closed ones?**
  - through other clear and secure financial products?**
  - at the moment not because of the impacts of the world wide financial crisis?**

Yes, both directly and through real property funds.

- 15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

As a general rule any person or entity is allowed to buy property in Colombia. However, only Colombian born citizens and Colombian corporations and entities are allowed to purchase beach front properties located in the Caribbean island of San Andrés.

It is possible to incorporate a corporation with foreign shareholders that will be deemed as a Colombian entity allowing for purchases of beach front properties.

- 16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the buyer plans to build in the plot of land it will need to secure a construction license by filing a request in a local government office (“curaduría urba-

na”) and paying a tax. Blueprints are also reviewed in the licensing procedure which may take up to three (3) months.

If the building is already in place, and the plot of land is considered commercial under the zoning plan, if the plan business involves the opening of a commercial establishment the following steps have to be followed:

- Comply with zoning regulations, including noise level rules and hours of operation provisions.
- Comply with the applicable sanitary and environmental laws.
- If music is played in the establishment, then copyright licensing payments have to be paid.
- Compliance with industrial security laws (i.e. maintaining fire extinguishers, emergency exits, etc.).
- File for and renew the mercantile registry.
- Inform the local planning office the opening of the establishment within fifteen (15) days of the official opening.
- Pay local and national commerce taxes.

Besides these general requirements, there might be additional ones for particular cases such as the following:

- Hotels and other type of accommodations have to register in the National Tourism Registry.
- Medical centres, hospital, clinics and health care related offices require operating authorizations.

Most registry procedures require little effort. However, some authorizations can be demanding.

## **17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, we can provide legal assistance to a foreign investor interested in investing in real estate in Colombia.

# Cyprus

## **Ioannides Demetriou LLC, Law Offices**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

#### **Regulation**

There are six District Land Registries in the Republic of Cyprus and any land is registered at one of the six registries, according to the district in which it is located. Similarly any charge or right attached to land is only valid if registered at the corresponding District Land Registry.

Real estate transactions in the Republic of Cyprus are regulated by a nexus of statutes. At the centre of this body of legislation, is the Immovable Property Act, commonly referred to as Cap. 224.

Notaries are used to notarise the contracts of purchase which have to be duly stamped and submitted to the Registrar.

Another feature of Cyprus real estate law is the recognition and enforcement of ‘specific performance’ orders as per The Sale of Immovable Property (Specific Performance) Law of 2011. This law serves to hold both the Seller and the Buyer to their respective promises in connection with a transaction relating to land by constituting a contract of sale for land which is deposited at the District Lands Registry to be a charge on the land pending the issue of an order of specific performance in the event that either the buyer or seller refuses to proceed as outlined in the contract.

In a broader context this feature provides a very potent safeguard for the materialisation and realization of investments in real estate.

#### **Procedure**

The procedure for purchasing immovable property commences with the signing of a purchase agreement commonly drafted by an advocate or by a real estate agent. Ordinarily at this stage the Buyer has to pay the Seller a ‘reservation fee’, which is later deducted from the total cost of the purchased plot or structure however, this arrangement is not “cast in stone” and can be varied subject to the respective wishes of the parties and their final agreement. Verbal agreements to sell land have also been held to be valid. It is also the practise in many cases for the buyer and the seller to appear before the District Lands Registry and verbally state the content of their contract to sell the land. The benefit of a written agreement however is that it binds the Seller to the promise

to sell to the Buyer who has in turn given due consideration. This promise is actionable and sounds in damages for breach of contract. It must however be noted that specific enforcement of the agreement to sell and transfer land in the name of the Purchaser can only be achieved under and subject to the provisions of the Sale of Immovable Property (Specific Performance) Law (see above), which demands that a contract of sale be deposited at the District Lands Registry of the District in which the land is located.

The value of land is found on the face of the title deed but is fixed at a particular date (1.1.1980) and is therefore certainly not representative of the market value. To remedy this, the most commonly used practice is to employ the services of an independent chartered surveyor to conduct relevant evaluation and provide the parties with a report.

Summarily, the contract of sale contains clauses such as a description of the plot or structure to be purchased, the amount to be paid and method of payment, the finance institution or means which will facilitate payment, the estimated time of completion and the technical specifications (in cases of construction) and provision for payment of notary, estate agency, transfer, registration fees and taxation.

The contract of sale is subsequently notarized, sealed and submitted to the District Land Registry according to the District in which the plot or building is situated. The process of sale and transfer is complete at the time when the Land Registry issues a title deed in the name of the Buyer. It is not uncommon for a proportion of the total payment to be withheld by the Buyer pending the aforementioned issuing, thus ensuring simultaneous fulfillment of the parties' respective obligations.

### **Finance**

Cyprus law and banking practice recognise and permit purchase and simultaneous mortgaging of the purchased real estate. More than one mortgage or charge can attach to land. Mortgages and charges take priority as of the date of their Registration.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Cyprus land law recognises different kinds of title in land ownership. The Immovable Property Law (Cap.224) in conjunction with the Regulation of Roads

and Buildings Law, comprise the legal framework for the division and ownership of land into units.

Recent developments and population growth has seen this kind of ownership flourish over the past two decades. Commonly held buildings are a prime example of this, where title holders own individual units (flats or apartments) but also hold certain areas in common. Leasehold title is also valid and capable of registration in Cyprus.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Joint ownership is permitted and is indeed quite common in the Republic of Cyprus. This usually results from inheritance. Section 21 of the Immovable Property Law makes provision that joint owners own equal and indivisible shares in the land and in everything that is found thereon including structures, regardless of whom of the joint owners incurred the cost of construction. It is permitted, nevertheless, for joint owner to request that their equal share in land be divided.

Both natural and legal persons can own property with the same rights and restrictions imposed by legislation and regulation. Foreign nationals and companies, that is, non EU national and companies controlled by non EU nationals, can own real estate with the prior approval of the Council of Ministers, but are subject to restrictions as to the size of the plot.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

With the exception of ownership of units, ownership of a building is implied in the ownership of the land. As mentioned above joint owners hold everything on the land, including buildings and fixtures. Trees however such as olive trees which are capable of having a separate title deed may not be jointly owned.

It should however be noted, that there is a legal obligation to register buildings and other structures attached to land for the purposes of Immovable Property tax. A District Lands office may refuse to transfer a plot of land containing an unregistered existing structure which it known to exist.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

As aforesaid land and buildings are and should be registered with the aforementioned District Land Registries and good faith purchasers are protected with regard to this.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Transfer tax is ordinarily paid by the Buyer, is proportional to the sale value of the land and is payable at the time of transfer of real estate in the Buyer's name. For transactions up to €85.430,10 there is a 3% transfer tax, for transactions between €85.430,10 and €170.860,14 transfer tax is at 5% and finally for transactions over €170.860,14 it rises to 8%. VAT at 15% is has to also be paid on the transaction.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no minimum holding time currently in force in Cyprus and therefore short term investments are possible.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Cyprus does not have Exchange Control Rules therefore no restrictions apply with respect to repatriation of funds.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**



There is a procedure in place when the new owner of property may apply for a court order to evict the lessee so that the property can be used by the new owner. Such an order will however only be granted for re-development purposes. In such a case it is not unusual for the Court to either oblige the owner/landlord to offer a similar space to the tenant in the new development or to order the payment of compensation, up to a maximum of one year's current rental.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Ordinarily no such approval may be required. However this varies according to the proposed usage of the building in question. Residential zones include offices as well, although some restrictions as to usage may apply and approval from the city council may be required, particularly with regard to operating businesses and therefore Buyers should inquire of this.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

For a purchase price of EUR 5 million

- Notarial costs at 0.2% - €10.000,00
- Transfer tax at 8% - €400.000,00
- Advising lawyer – (excluding document drafting)
- Estate agent 4% - 5% - €200,000.00 – €250,000.00

### III. Costs for holding real estate

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Annual immovable property tax is also in force and payable in accordance with the value of land. This works out to zero tax for property valued up to €170.860,14, 0.25% for property valued between €170.860,14 and €427.150,26, 0.35% for property valued between €427.150,26 and €854.300,72 and lastly 0.4% for property valued over €854.300,72.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Normally caretakers or property management companies charge their work on a monthly basis. This amount may vary between €100 and €200 per month, depending of course on the size, value and facilities of the property. In some cases for luxury sea front accommodation the cost can be significantly higher.

### IV. Foreign investors

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Due to the impact of the financial crisis, sales of residential property have dropped in value some 25%, with commercial property remaining static over the past two years. Therefore direct investment is wiser for the foreseeable future in Cyprus.

A foreign investor should always look to invest in real estate which has a title deed.

#### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or**

**registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Foreign nationals and companies, that is non EU national and companies controlled by non EU nationals, can own real estate with some restriction as to the size of the plot and permission from the Council of Ministers is required.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

In order for a foreign investor, that is non-EU nationals and companies, to run a business in the Republic there are some eligibility criteria which have to be met with regard to firstly the foreign investing company itself and secondly to any foreign employees intended to operate in the business. These criteria are largely concentrated on transparency as well as financial and operational soundness. It should be noted that (a) ownership in land and (b) ownership of a business do not grant residence status.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Ioannides Demetriou LLC has extensive contacts and experience with landowners, developers, contractors and potential Joint Venture Partners and is happy and able to assist persons from any location wishing to invest in Cyprus real estate.

**NOTE:** It should be noted that all information given above relates to the part of Cyprus under the control and administration of the government of the Republic of Cyprus. All transactions relating to land in the occupied sector of Cyprus, the so called “Turkish Republic of Northern Cyprus“; are to be avoided as such transactions are subject to claims and legal actions by the original dispossessed Greek – Cypriot owners.

# **Czech Republic**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Transferring of the real estate is in the Czech Republic formally bound with the registration of each transfer or other disposition with the real estate into the Real Estate Cadastre.

#### **Real Estate Cadastre:**

The Real Estate Cadastre contains information regarding all real estate property (except for small structures) in the Czech Republic. The registered and publicly accessible information include:

- size of the land;
- evidence number of the land;
- manner of use of the land (arable land, pasture, orchard, built-up land etc);
- evidence number of the building;
- if the building is divided to units (flats);
- owner/s of the land, building or unit;
- exact location of the property in the cadastre map;
- encumbrances of the property;
- evidence of the titles on the basis of which changes to the registration of the property were done in the past;
- details regarding changes of ownership or other rights to the property.

All information in the Real Estate Cadastre is held in the electronic form and data are accessible to the general public via internet access (<http://nahli-zenidokn.cuzk.cz/>) free of charge. An access is possible also via Google maps application at (<http://www.katastr2.cz/>). Notaries and attorneys at law can conduct an extended search in the Cadastre which includes search of all properties owned by certain individual, details of encumbrances etc.

#### **Transfer of the property:**

The formal transfer procedure in respect of the real estate property in the Czech Republic is quite simple. The purchase agreement shall include formally perfect definition of the real estate property, expression of the will of the parties to transfer the property and the purchase price. The purchase agreement is

usually drafted by a lawyer or a notary public however parties may also draft the purchase agreement by themselves. The signatures of the parties must be officially certified which can be done by a notary, attorney, at municipal office, at post office or at any Real Estate Cadastre office.

The signed purchase agreement shall be submitted to the Real Estate Cadastre (the offices of the Real Estate Cadastre are situated in all district cities of the Czech Republic) with the application for registration of the purchaser's title. The title shall be registered by the Cadastre within thirty days however in Prague registration can take longer; on the other hand the registration in smaller towns is often completed in few days. After the registration is completed the Cadastre sends a copy of the purchase agreement with the official stamp confirming registration of the buyer's title to all parties to the agreement. The title is transferred by registration of the purchase agreement in the Real Estate Cadastre with an effect as of the date of filing the purchase agreement with the Real Estate Cadastre Office. As from the date of filing of the registration request, a priority notice is marked in the Cadastre showing the parties of the purchase agreement and the date of filing (which in case of completion of the registration will become the date of title transfer). The same rule applies also for registration of encumbrances which means any prospective buyer can check before filing the purchase agreement with the Cadastre whether there is no proceeding concerning registration of encumbrance pending.

### **Before conclusion of the Purchase Agreement:**

As noted above all agreements regarding the property transfers and encumbrances in the Czech Republic can be drafted and signed by the parties without notarial or legal professional advice and assistance safe for signatures certification. However, assistance of legal professional is usual requested by the parties and highly recommended.

The purchase price is mostly paid through notarial or attorney's escrow account on the basis of the escrow agreement signed by all parties to the transaction. Escrow agent's fee is mostly paid 50/50 by the parties. The escrow agreement is typically signed first and the purchase agreement is signed after the buyer deposits the purchase price on the escrow account in full. The purchase price is paid from the escrow either after the purchase agreement is filed with the Real Estate Cadastre Office and priority notice is marked in the Cadastre or (if the buyer insist on safer procedure) after the title registration proceeding is completed by the Cadastre.

If the purchase price is financed by a bank it usually requires a registration of its pledge over the subject of the purchase. The pledge agreement is typically signed by the vendor prior to signing of the purchase agreement and filed with the Real Estate Cadastre shortly before the purchase agreement. The loan facility is typically released by the bank after the priority notice in respect of the pledge and the priority notice in respect of the title transfer is marked in the Cadastre.

**Time period of transaction:**

The normal time period of a property deal very much depends on the size of the deal and financing used by the buyer. Apartment purchases where a buyer pays the purchase price from equity are often agreed and the purchase agreement is signed within few days. Subsequent registration of title transfer takes up to 30 days as described above. Provided a buyer uses bank financing, the parties often enter into the agreement on future purchase agreement first which gives the buyer an exclusivity – typically 30 to 60 days - to negotiate the bank financing.

It is recommendable that a buyer completes a legal due diligence before the purchase of the targeted real estate. Depending on the size of the deal the facts listed below can be checked either via on-line search in the Cadastre (only up to date information are available online) or through more time and money demanding search in the Cadastral Archive where all prior title documents can be reviewed by any prospective buyer, check with the Land Authority which deals with restitution claims (requests by former owners for returning of nationalized property), insolvency registry etc.:

- the seller holds a free and clear, valid and marketable ownership title. In order to avoid any risk of rescinding the transaction, the buyer shall verify that the seller is and his predecessors have been the valid owners of the respective real estate;
- there are no registered or unregistered or contractual mortgages, encumbrances, possession, easements and other liens on the targeted real estate. The law provides that liens and encumbrances once registered and valid as in-rem-rights, can be enforced against the new owner of the real estate if the sale transaction has been accomplished after the registration of the liens or the encumbrances with the land register;
- there are no lease agreements, no pending court restitutions, enterprise pledges, limited property rights established in favour of third parties, no injunctions or claims against the real estate and complaints before court or the competent

cadastre body (such as pending execution proceeding or insolvency proceeding).

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

There can be more owners of any property. A participation of each co-owner is registered in the Real Estate Cadastre and is freely transferable but subject to pre-emption right of other co-owners. There is a special type of ownership of spouses (the same rules applies in respect of registered partnership of persons of the same sex)..

The Czech law knows condominiums (apartments). Every single unit may get a special deed in the Real Estate Cadastre and then it is treated as an individual property which can be subject to co-ownership, transfers, encumbrances etc.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

The Czech system knows joint ownership. There can be physical or juridical persons holding a property jointly by percentages they can freely choose.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Under the Czech legal system (Civil Code) a building is not part of the land which means that any building or plot can have different owners. This legislation shall be amended by a new Civil Code with the effect from 1 January 2014 so that each building shall become a part of the land on which it is built. However this shall not apply in respect of the buildings which are already built on the land of other owners. Currently it is also discussed that the new Civil Code will be postponed.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**



All land is registered in the Real Estate Cadastre and can be transferred only via registration of the purchase agreement or other title transfer document in the Real Estate Cadastre. All constructions over 16m<sup>2</sup> of built up area are registered in the Real Estate Cadastre and can be transferred only via registration of title transfer document in the Cadastre.

Due to a complicated history of the ownership in the Czech Republic it can happen that an ownership title to real estate can be disputed though it is duly registered in the Real Estate Cadastre. In case a seller is not an owner of the Property (though his title is registered in the Real Estate Cadastre); the ownership title may not be transferred to the buyer.

Despite the fact that anyone may in good faith rely on an entry made in the Real Estate Cadastre after January 1, 1993, unless proven otherwise, there is no 100% guarantee that the records in the Real Estate Cadastre are accurate or that the registered owner of a building or land actually has a title to it. All titles are, to some extent, subject to challenge. According to the Czech law there is not possible to acquire an ownership from a person who is not a real owner though his ownership is duly registered in the Real Estate Cadastre. This happens namely in connection with the “restitution” of the ownership to original owners whose property was confiscated after the WWII (during the period 1948-1989). The problems often arise when the property was privatized in 90’ without regards to the possible rights of the original owners who were entitled to get the property back. The persons who obtained the property in privatization thus obtained the property from the non-owners and if original owners later filed their claims for restitution of the property, their ownership was duly registered.

The above risks can be excluded by executing a legal due diligence of the vendor’s title before the purchase. The new Civil Code which is expected to take effect as from 1 January 2014 shall provide for additional legal protection of any bona fide purchaser.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

The real property transfer tax has to be paid on real property transactions. The percentage rate is 3 % and it shall be paid from the higher of (i) the agreed purchase price or (ii) expert valuation of the property. The tax is payable by

the seller but the purchaser is a guarantor. The tax shall be paid within three months after the registration of a purchaser's title in the Cadastre.

There are several exemptions from the real estate transfer tax, namely transfers of the property from the state, transfer of the property to the company as a contribution in kind, transfer of the property by cooperatives to its members and first transfers of the newly built buildings.

The sale of land is subject to VAT; however only if it is a construction site for which a building permit has been issued. Buildings are subject to VAT if sold less than 3 years after completion.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Income from a sale of real estate property is subject to income tax (difference between the income and costs is taxable by 15%) but several exemptions apply. Individuals who hold the property for more than five years (two years if they used the property for their accommodation) are tax exempt.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

No problem in the Czech Republic.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In general the rule is that a purchase of a property does not break the lease contract. Lease agreements for non-residential premises signed before 2004 allow tenants to terminate the lease in the event of change of the landlord. This rule applies further in respect of all leases of the land (without signing date limitation).

Lease of flats has been highly protected in the Czech Republic however the relevant laws are being changed gradually. Still in case of so called regulated tenancy termination by a landlord is possible only in the event of breach by a tenant. Lease of flats under regulated tenancy can also be inherited which means it is very difficult for the landlord to terminate leases concluded for indefinite

period of time. As result of restricted termination options of the landlords and high consumer prices inflation after 1989, the residential rents paid under flat lease agreements signed before 1989 were very low. The legislation has therefore allowed landlords to increase the rent unilaterally after 2007 and has stipulated certain rules to achieve market rent by 31 December 2012. No rent regulation is applicable in respect of any leases signed.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Even if a change of use of a building suits to all technical and health requirements an official approval is necessary. A building authority shall issue a new using permit for a respective building, i.e. defining a new specification of the building which shall suit to all requirements. Such a procedure can take 1-3 months to complete.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence)?
  - estate agent?
  - others
- 
- **Notarial costs:** notary assistance is not necessary; costs of notarial or attorney's escrow services vary between € 1,000 to 3,000 for a transaction (plus 20% VAT).
  - **Land register:** EUR 40 plus another EUR 40 if the mortgage is also to be registered
  - **Real estate transfer tax:** EUR 150 000
  - **Advising lawyer (due diligence):** depending on the arrangement with the lawyers; normally they act with international clients on hourly rates, mostly specialized law firms have range of rates between EUR 120 – EUR 200; the time needed for the transaction depends on how the negotiation is complicated, but it should be somewhere in the region of 50 hours; plus 50-100 hours to carry out the due diligence (if requested).

- **estate agent:** between 2 to 4 % of the property price (plus 20% VAT)

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

The owner of the property has to pay the property tax annually. The tax is calculated based on the size and location of the property. The municipalities may set different multipliers. Generally the property tax is quite low in the Czech Republic and doesn't exceed 0.5% of the market value of the property even if there are the highest multipliers.

#### 13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

This differs from the property and the number of tenants. In commercial real estate you can grossly calculate about 2% of the net rent of the object per month.

### IV. Foreign investors

#### 14. Would you advise foreign investors now to invest in your country?

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

We would advice to invest in commercial properties in the Czech Republic. The prices went down (yields of 9-10% compared to 6.5-7.5% in mid 2008), mortgage rates are down under 4% p.a. and unemployment is stable at 7%.

Realistically, further development of the real estate market is because of a number of predictable and unpredictable factors hard to predict. However, due to the rapid price reduction and low mortgage rates, investing into the real estate in the Czech Republic could be a great opportunity, mainly from the long term view.

Direct investments into commercial properties are advisable if the value of the property or portfolio is €5m or more. Individual investment into residential properties may work if the value of the property/portfolio is € 500,000 or more.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions with regard to nationality or registered office of legal entities in the Czech Republic. Foreigners as well as companies registered abroad are allowed to purchase property in the Czech Republic under the same rules as Czech citizens or companies registered in the Czech Republic.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The rules for use of land are the same for Czech residents and foreigners. No special permits are needed if an investor is a foreigner.

All foreigners who want to run their businesses in the Czech Republic shall comply with the general regulation concerning foreigner's business in the Czech Republic. Investors from EU member states mostly need only to notify the authorities about their business activity in the Czech Republic and to submit an evidence of their license from the country of their registration. Investors from third countries must comply with specific requirements. In general, any investor may establish a company in the Czech Republic (the process takes ca 4 weeks but can be completed also in few hours if an investor purchases a readymade SPV) which is then treated as a Czech entity to which no restrictions apply.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, we are used to assist foreign investors in all these aspects involved.

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In England and Wales, details of registered properties are held at the Land Registry. The Land Registry holds title information relating to registered properties, including the details of the registered proprietor, the address/description of the property and details of any registered third party interests such as charges or covenants, etc. Most leasehold interests also require registration at the Land Registry. The leasehold interest may be registered under its own title number at the Land Registry if it is a lease of a term of 7 years or more or if the lease grants legal easements. The existence of a lease with a term of 3-5 years can be noted on the register of the freehold title to which is subject to that lease.

There is a move in England and Wales to ensure that any unregistered property is now registered and therefore most, if not all, transactions will attract first registration if they related to unregistered property.

In terms of buying and selling property, prospective purchasers and sellers may appoint agents or become aware of a property of interest through the internet, newspapers or other means which may simply include word of mouth. The parties would normally agree heads of terms between themselves and their agent (if applicable) setting out the basic terms of the transaction such as the price to be paid for the property and the date for which completion of the transaction is intended. Assuming that both parties have agreed on the above, then each respective party would normally instruct solicitors or conveyancers to act on their behalf in relation to the transaction.

There are four basic stages to any property transaction:

1. Pre-contract
2. Exchange
3. Pre-completion
4. Completion

#### **Pre-contract**

Under the pre-contract stage, the seller's solicitor or conveyancer drafts the contract for negotiation with the buyer's solicitor and engrosses the agreed form for signature. It is common for contracts for the sale of commercial prop-

erty to incorporate a set of conditions known as the Standard Commercial Property Conditions. Where the sale relates to residential property, the contract will normally incorporate the Standard Conditions of Sale. The sale contract itself may disapply or vary certain terms in the Standard Conditions of Sale as negotiated and agreed by the parties.

In the pre-contract stage, the buyer and his/her solicitor or conveyancer will be responsible for investigating the property. The buyer will normally find out about the physical state of the property, either through his/her own enquiries or through instructing a suitably qualified surveyor. The buyer's solicitor would normally investigate the legal title of the property and about any third party rights affecting the property. As a general rule, the buyer takes responsibility for investigation through its legal and other advisers who will prepare a report on the property for the buyer and any bank involved in the financing of the purchase.

Where a leasehold interest is being acquired, the buyer's solicitor or conveyancer would also need to advise his client of the rights and obligations that would pass on completion as well as investigating the right of the seller to grant, assign, or under-let to the buyer.

If there are any defects in title or possible potential liabilities (e.g. chancel repair liability) which the buyer or its solicitors become aware of in the course of their enquiries and searches then they may insist on the seller putting in place insurance in relation to such defects.

If the searches carried out by the buyer's solicitor bring about any issues then it is important that these are addressed at this stage before the buyer is committed to purchasing the property. Planning issues, for example, would need to be addressed pre-contract. The buyer would also require that any notices/consents under the Environmental Protection Act are identified, produced and dealt with.

## **Exchange and pre-completion**

### **Exchange**

For the contract to be valid, it must satisfy the statutory requirements contained in the Law of Property (Miscellaneous Provisions) Act 1989. When contracts are exchanged for the sale and purchase of property, the beneficial interest in the property passes to the buyer with effect from exchange provided that the contract is specifically enforceable. The legal estate in the property remains vested in the seller until completion. The seller is said, for certain purposes, to hold the legal estate on trust for the buyer pending completion. It is, however,

a special type of trust, the obligations being based on a constructive trust. Once contracts are exchanged, the buyer has an insurable interest in the property and risk in the property passes to the buyer. Exchange of contracts therefore marks the point at which the buyer should insure the property. Where a leasehold interest is being acquired, exchange would be done by way of an agreement for lease. It is not uncommon however for parties to proceed straight through to completion or to exchange and complete simultaneously.

Exchange is effectively the ‘point of no return’ for both parties who are now bound to complete the sale and purchase of the property unless there is a breach of contract by one party (in which case, the other party may have a right to repudiate the contract).

### **Pre-completion**

The buyer’s solicitor or conveyancer would carry out pre-completion searches and confirm the practical arrangements for completion with the seller’s solicitors.

If not already in an agreed form, the buyer’s solicitor or conveyancer would draft a transfer in accordance with the contract and would then send it to the seller’s solicitor or conveyancer for approval. Once in agreed form, the buyer’s conveyancer would then prepare the engrossment and arranges execution by the buyer. The buyer’s solicitor or conveyancer would arrange for the transfer to be signed in readiness for completion and would send it to the seller’s solicitor or conveyancer for execution by the seller.

Where the transaction concerns leasehold interests, it may also be necessary to obtain the consent of a head landlord or bank (where appropriate) in order for a leasehold interest to be acquired.

If the property is subject to a bank charge, then it is important for the buyer’s solicitor to obtain an undertaking from the seller’s solicitors that the charge on the title of the property would be discharged at completion using the sale proceeds and that the seller’s solicitors would procure a form of discharge from the bank who had benefited from the charge.

### **Completion (and post-completion tasks)**

#### **Completion**

On completion, the buyer’s solicitor or conveyancer would need to arrange for completion monies to be transferred to the seller, to receive the executed transfer and all the necessary title documents, and to ensure that any charges

affecting the property, which should have been discharged on completion, have indeed been discharged.

On completion, the seller's solicitor or conveyancer would need to ensure that the executed transfer/lease and all necessary title documents are handed over to the buyer's solicitor and that any charges affecting the property which should be discharged prior to completion, are discharged. The seller's solicitor or conveyancer would also need to check that completion monies from the buyer are received and that any document that needs to be executed by the buyer and handed to the seller has been received.

If the property is registered land, the legal estate remains vested in the seller until registration has been completed. Once registration has been completed, the effects of registration are backdated to the date of the application for registration. If the property is not registered land, the legal estate passes from the seller to the buyer on completion.

### **Post-completion tasks**

The buyer must file a Land Transaction Return to notify HM Revenue & Customs (HMRC) of the transaction and pay stamp duty land tax on the purchase if applicable. On receipt of the return, HMRC will issue a certificate, which must be sent to the Land Registry with any application for registration of the transaction. The amount of stamp duty land tax payable will depend on the purchase price of the property. The buyer is also responsible for registration of the transfer at the Land Registry, although in practice their solicitor or conveyancer is likely to do this. If the property is unregistered, the transfer will trigger compulsory first registration at the Land Registry.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Commonhold is a relatively new form of land ownership in England and Wales. Land can only be registered as commonhold land if it is registered land with absolute title at the Land Registry. It is not a new type of estate in land (in the sense of freehold or leasehold). It is a type of freehold interest and the essence of its creation is a further registration at the Land Registry.

Commonhold combines freehold ownership of a single property within a larger development, with membership of a company limited by guarantee (commonhold association) that owns and manages the common parts of the

development. The commonhold is managed in accordance with the commonhold community statement (CCS). Commonhold ensures that the owners of each unit (the unit-holders) within a development are themselves in control of the development, without a landlord or other party able to make decisions about how the development is run. There are no restrictions on the owner of the commonhold unit selling the whole of their interest in the commonhold. The owner of the commonhold unit can also lease that unit, subject to legislative restrictions.

Land is said to be commonhold land if each of the following apply:

- The freehold estate in the land is registered at the Land Registry as a freehold estate in commonhold land.
- The land is specified in the articles of association of a commonhold association as the land in relation to which the association is to exercise functions.
- A CCS makes provision for the rights and duties of the commonhold association and unit-holders (whether or not the CCS has come into force).

It is also possible for landowners to enter into development agreements and engage developers to carry out developments on their behalf and then for the landowner to sell the land on completion of the development and for the developer to receive a fee based partly upon the development value.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. In England there are two main types of joint ownership in property, joint tenants and tenants in common. Under a joint tenant arrangement, each individual owns the whole of the property as opposed to a share in it. When an individual dies the property passes to the surviving joint tenant automatically. This would be the case even if the deceased person has left a will, the property will still pass to the surviving tenant. In contrast, where there is ownership as tenants in common, each owner owns a separate and distinct share in the property. On the death of one of the tenants in common, their share can pass to their chosen beneficiary under a will or otherwise.

Joint tenancy is commonly adopted between married couples, as there is believed to be no advantage in defining separate shares in the property. Tenancy in common however can be used in situations between business partners, unmarried couples and even friends as it can be the desired effect for each owner

to be able to leave their share to a specific person other than the other owner of the property.

Property can be owned by individuals, companies, trusts and partnerships.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes. It is implied that the owner of land owns all of the buildings erected on it and any mineral rights below the surface of the land. It is possible for mineral rights in land to be reserved by other parties.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes. The vast majority of land in England and Wales is registered. The Land Registry maintains and develops the register of title for land and having the benefit of registration at the Land Registry gives greater security about what is owned, giving greater protection against claims of adverse possession.

Selling land that is registered can be easier as potential buyers increasingly expect land to be registered as it simplifies conveyancing, making transactions easier and with potentially less cost.

On the purchase of land that is unregistered it is essential to find out if the seller has a good root of title. This can be found in the epitome of title, which is evidence that the seller has the right to sell the land and that the land is free from any incumbrances. When unregistered land is purchased, it is likely to trigger compulsory first registration at the Land Registry.

A bona fida purchaser acting in good faith is protected in regards to anything that was not published on the registered title of the land, save for matters or third party interests which do not require registration or noting on the registered title and would be discoverable on a reasonable inspection of the property. In order to protect a purchaser as far as possible, his/her solicitor or conveyancer would make enquiries of the seller and would investigate the title to the property in order to keep the risk of future problems down.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In England, on the sale of land the purchaser has to pay Stamp Duty Land Tax (SDLT) based on the purchase price.

A guideline as to the current SDLT thresholds in relation to purchases of freehold land is below:

<b>Purchase Price</b>	<b>SDLT to pay</b>
Up to £125,000	0
Over £125,000 to £250,000	1%
Over £250,000 to £500,000	3%
Over £500,000	4%

These figures change according to government policy on taxation.

Where a leasehold interest is being purchased then the calculation for SDLT payable is much more complicated. The calculation will depend on whether the leasehold interest is one that is an assignment of an existing lease. In the case of new leases that have been granted, the calculation will also depend on the 'premium' (the lump sum paid to buy a new lease), the rent payable under the lease, and whether it's a residential or non-residential lease. Whether an SDLT return needs to be completed will depend on the length of the lease and the amount of the rent and premium.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Specific tax advice would need to be sought from a suitably qualified accountant in England and Wales although the property is likely to be subject to capital gains tax. If and when a chargeable asset is sold or gifted and that asset has increased in value, tax may be charged on the gain (profit). There may be a relief available against capital gains tax where principal private residence relief (PPR) is available. This relief would apply on the disposal of an individual's only or main residence. The relief may not be relied upon in circumstances where the principal private residence is sold regularly and where the investor does not pay capital gains tax on that disposal as it would be deemed to be a business and liable to tax. Investment properties, however, are taxed and any

income derived from investment property is taxed (subject to certain allowable deductions).

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Subject to money laundering and tax regulations there are no general restrictions on repatriation of funds.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

When a landlord transfers its reversionary freehold interest to another party, that interest is sold subject to any leasehold interests. The leases would therefore remain in force. The new landlord and the existing tenant would benefit from and be subject to the same benefits and obligations under the lease. The lease cannot be terminated unilaterally by the landlord unless the lease contains termination or break provisions to this effect.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

In order to change the use of a building from residential use to office use, a party would need to apply for planning permission. This is because there is a 'material change of use' in the premises. In England and Wales, some uses of land are considered so similar there is no need to apply for planning permission. There is a class order for a buildings use which outlines that planning permission is not always needed if the use is being changed from one use into another but are not moving between classes. The change in use from residential use to an office space involves moving between different classes, specifically Class C3 to Class B1, and as a result, an application for planning permission would need to be made.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**



- **notarial costs?**
- **land register?**
- **real property transfer tax?**
- **advising lawyer (due diligence) ?**
- **estate agent?**
- **others**

Obviously it depends on the exchange rate (from time to time) between the Euro and the Pound but:

- **Notarial costs:** It is thought that there would not be any English notarial costs although it is likely that there may be foreign notarial costs relating to the country of origin of the investor
- **Land register:** In relation to the purchase of unregistered land, the land registry fee would be around EUR 1,100
- **Real estate transfer tax:** Stamp duty land tax would amount to around EUR 200,000 (assuming that there are no available exemptions and reliefs)
- **Advising lawyer (due diligence):** This would depend on the nature of the proposed transaction and the level of work involved although it is thought that legal costs would be around EUR 25,000 – 30,000
- **Agent:** The level of costs would depend on the deal. The agent can charge up to 2% of the value of the transaction but in some instances, land agents will charge up to 15% if they had introduced the land to the purchaser.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

Business rates need to be paid by occupiers of all non-domestic/business properties. This is calculated and collected by the local council and is based on the rateable value of the property, which means the rent the property would be let for on the valuation date if it was let on the open market. The valuation date is two years before the revaluation comes in to effect, so 2010 valuations are based on 1 April 2008.

The method of valuation is worked out on the type of property:

- offices, warehouses and other industrial buildings and shops – rental valuation method

- pubs and other licensed premises – fair maintainable trade, the annual level of trade they are expected to achieve.

There are certain rate relief schemes available from central government; some are automatically applied whilst others need to be applied for.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A property managing agent can be appointed. Their charges will depend on the level of service required and the type and number of properties that they are being asked to manage.

#### **IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Obviously we are not financial advisors or investment advisors but it could be argued that this is a very good time to invest in real estate particularly where the investor is financially able to do so as property prices have fallen in England and Wales. There are also some excellent residential property portfolios that are available as well as some part built schemes. Bank sales are also worth considering in particular.

Inevitable there is no guarantee that prices will not continue to fall.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no general restrictions on foreign ownership of land. Property can be bought by private individuals or companies without necessarily needing British nationality or a registered office in England and Wales.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If anybody is buying property in the UK then they would need to comply with the same procedures as would apply to UK based investors. This may include permissions in relation to planning and building consents and environmental consents as appropriate. There would not be any additional requirements placed on the investor because of its country of origin. The approvals and consents required would depend on the proposed use of the land but the requirements would be no different than to those applicable to UK based investors.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes. We are happy to assist foreign investors in all of the above aspects should they require our assistance.

# **Finland**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Real estate transactions in Finland are governed by the Code of Real Estate (540/1995). Before a transaction is legally binding and can be registered, a sale purchase agreement signed by both parties needs to be attested by a notary.

A sale purchase agreement has to at least include information of the purpose of the transaction, identify the real estate and the parties and describe the purchase price or other form of consideration. In addition, a sale and purchase agreement usually includes terms for the transfer time of possession and ownership, a description of the condition of the land and the buildings, a list of information provided to the purchaser, payment terms, and details of possible encumbrances and mortgages.

The ownership of a real estate transfers from a seller to a buyer on the agreed date, which is often the date when the purchase price has been paid in full. It is also possible to agree different dates for the transfer of possession and ownership.

Registration is not a prerequisite for the transfer of ownership, however all changes in the ownership of a real estate have to be registered with the Land Register, held by the National Land Survey of Finland.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Finnish law does not allow direct ownership of own units or portions of improvements, nor constructions. A real estate, including the fixtures on it, is in its entirety owned by one or several natural or legal persons (discussed in detail below). Therefore, the division of the ownership of constructions into separately and individually owned units or portions is not possible.

A characteristic method of arranging ownership between several owners of land with buildings on it (e.g. large commercial buildings or apartment houses) is to do so indirectly by establishment of a real estate company (condominium). In such a case the real estate company owns the real estate and the sharehold-

ers are entitled to possess assigned flats or premises based on the shares they own.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, joint ownership is possible. Both companies and private persons may jointly own a real estate, i.e. two or more subjects together.

There are no general limitations on private persons, companies and other commercial or juridical entities for owning real estate or shares in a real estate company,

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes, in Finland a real estate is composed of an area of land and of all buildings and constructions that are located on the land. Therefore the ownership of a building is usually implied in the ownership of the particular piece of land where it is situated.

It is also possible, however, to own a building and to obtain a long-term lease (usually for 30 to 50 years) over the land from the owner, who usually is the municipality or the city. Therefore, in case of a land lease, the buildings and the land are owned by different owners. The land lease agreement must be registered in the Land Register. This registered land lease right together with ownership of the building by the lessee is close to the ownership of the real estate. The land lease right together with the building located on the leased land is usually transferable and can also be mortgaged.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

After the purchase of a real estate the buyer has to register his title with the Land Register, which is held by the local office of National Land Survey of Finland, within six (6) months of the date of purchase. A land lease agreement has to also be registered with the same authority and within the same time

frame. The register includes information of the owner of the real estate or of the land lease right and the details of the land area. It does not, however, include information of possible buildings or other constructions located on a real estate. Therefore there is no official register of buildings in Finland.

A person acting in good faith can rely on register entries, even if the entries turn out to be erroneous or inaccurate. In such case, the State is liable for financial loss caused by the erroneous information.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

A buyer of a real estate has the duty to complete the registration of title within six months from the signing date of the sale and purchase agreement as well as to pay transfer tax within the same time period. The transfer tax for a real estate is four (4) % of the purchase price.

If a real estate is owned indirectly through the shares of a real estate company, the buyer of the shares of a real estate company has the duty to pay within two (2) months from the date of the transaction. The transfer tax for the shares of a real estate company is presently one point six (1.6) % of the debt free purchase price. The tax rate and the tax basis are, however, about to change as of the beginning of the year 2013. As from 1 January 2013 the transfer tax will be 2 % of the purchase price. In the case of mutual real estate companies, the transfer tax will also be calculated from the amount of interest bearing debt of the real estate company, not only from the purchase price amount.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There are no limits in general on how long one has to have owned the property before selling it. The income tax for sales profit is 28 % (year 2010) regardless of the time of possession.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no restrictions on repatriation of funds from Finland to other countries.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The buyer of a real estate or of shares of a real estate company is not allowed to terminate any lease contracts merely due to change of ownership. The buyer (new owner) shall be bound by the lease contract in accordance with the lease contract terms, and thus the rights and obligations of the lease contract transfer to the buyer.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Changing the use of a building from residential use to office use means that the purpose of the space is actually changed. This means that an application for a building licence needs to be made to the local authorities (Rakennusvirasto) before the start of the construction. When there is a need for a major construction work, it might be necessary to apply for a deviation permit or even a new detail plan if the planned use contradicts significantly the existing land use (i.e. town plan), before commencement of the construction work.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial costs:** EUR 77,00
  - **Land register:** EUR 65,00
  - **Registration of title to a property:** EUR 65,00



- **Real property transfer tax:** In case of a sale and purchase of a real estate, the transfer tax is 5 % of the purchase price, i.e. EUR 200,000 in a EUR 5 million transaction. In case of a sale and purchase of shares of a real estate company, the transfer tax is (as from 1 January 2012 onwards) 2 %, i.e. 100,000 in a EUR 5 million transaction.
- **Advising lawyer:** As agreed but normally the fee is based on hourly rates. Specialized law firms have rates around EUR 250 – 450 per hour. The final legal cost depends on the nature of the case and the complexity of the transaction but typically it is in the range of EUR 15,000 – 25,000 in a EUR 5 million transaction.
- **Estate Agent:** Normally their fee is based on provision, which we understand to be in the range of 1-3 % of the purchase price.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

The annual real estate tax is charged from the owner and the tax per cent depends on the location of the real estate. Municipalities are allowed to choose their tax percentage with certain limits. The common tax percentage is usually between 0.65 to 1.35 % (2010). There are six different categories of real estate tax that is charged. The final tax amount greatly depends on what kind of building and especially for what purpose there are on the real estate.

#### 13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

The property maintenance management cost depends on the type of property. For an office or commercial property the maintenance management cost is usually in range of EUR 3,0 - 3,5 per square meter and for a warehouse property a usually lower. Parties usually agree the terms on case by case basis, but basically, the charge may be based on the actual accrued management costs or be fixed.

#### IV. Foreign investors

##### 14. Would you advise foreign investors now to invest in your country?

- **Directly in real estate**
  - **Through real property funds, open or closed ones**
  - **Through other clear and secure financial products**
  - **At the moment not because of the impacts of the worldwide financial crisis**
- 
- **Directly in real estate:** It is advisable to invest in real estate companies, where the allowed depreciations have already been made.
  - **Through real property funds:** Investment through real property funds plays only a minor part in Finnish markets, and all the existing ones are closed ones. The main reason for the lack of real property funds is that the expenses are quite high and there are many tax issues that apply to international investors. All together, the expenses are too high to achieve a proper profit margin.
  - **Through other clear and secure financial products:** This is a common investment form in the Finnish market. Mostly it is done through real estate companies.
  - Today, the Finnish market is showing new potential to new investments, and some international investors are showing their interest by returning.

##### 15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?

Basically, there are no restrictions to foreign individuals or foreign entities to buy a property in Finland. The only exception is the Aland Island, where also Finnish people who are not residents of the Aland Island are subject to restrictions on buying property. This remains open only to residents.

##### 16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?

When the purpose of buying a real estate or real estate company shares is to run a business, it is not subject to restrictions, except for some limitations in forest and agricultural transactions.

Under Finnish law, communes have a pre-emption right to buy the property within a three-month-period from the purchase. Areas with significance to commune development might fall under the pre-emption. Only land areas, which are larger than 5,000 square meters, (in metropolitan area this is 3,000 square meters), may fall within the pre-emption right. It is our experience that the communes use their right of pre-emption only very rarely.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes, our firm is capable in advising foreign clients in all real estate related assignments. Please contact Mr. Jari Tuomala (Partner, Real Estate) at:

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# France

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Under French law, a sale is considered completed when the seller and the purchaser have reached an agreement on the property and the price (“accord sur la chose et sur le prix”).

The real estate transaction is materialized by the following documents:

#### **1.1 Letter of intent (“Lettre d’intention”)**

As a first step, the purchaser may send a letter of intent to the seller which contains the proposed terms and conditions of the purchase. If necessary, this letter will have to be carefully drafted in order not to be qualified as an offer. The parties will then only be bound when a preliminary contract will be signed. Alternatively, the said letter could be drafted so that it constitutes a binding sale and purchase agreement as soon as it is accepted by the seller. Until the execution of the preliminary contract (or the seller’s acceptance), the seller may grant to the purchaser during a short period of time a right of exclusivity according to which the seller undertakes not to negotiate with any third-parties.

#### **1.2 Preliminary contract**

Once the parties have agreed upon the conditions of the sale, they can enter into a preliminary contract providing for the terms and conditions of the sale. Two different type of contract may be signed.

##### **Call option (“Promesse unilatérale de vente”)**

The seller commits to sell and grants the purchaser with a purchase option during a specific period of time. The purchaser is usually required to pay a deposit of 10% of the price which is not refunded if the purchaser does not exercise the option. If the option is exercised, the deposit amount is deducted from the price. On the contrary, this agreement may alternatively provide for the commitment of the purchaser to purchase the property (“Promesse unilatérale d’achat”) if the seller exercises the option to sell.

##### **Bilateral sale and purchase agreement (“promesse synallagmatique de vente” or “compromis de vente”)**

The parties are legally bound to sell and purchase subject to the fulfilment of the conditions precedent (obtaining a loan, communication of specific docu-

ments, issuance of a building permit, etc.), usually within an allotted time. Should the purchaser refuse to purchase, the seller may ask the civil court to force the purchaser to undertake its obligation. The purchaser must usually pay a deposit amounting to 10% of the price which will be either refunded should the conditions precedent are not fulfilled or deducted from the sale price.

**Withdrawal possibility (“*faculté de rétractation*”)**

In any case, the purchaser of a real estate can withdraw from its commitment to purchase within a 7-day period starting as of the reception of the preliminary contract.

**Registration**

The preliminary contract (call option or bilateral agreement) must be filed with the tax authorities within 10 days from its execution. The agreement is null if not registered within this delay.

**1.3 Deed of sale**

The intervention of a notary (usually the seller’s notary) is compulsory. The notary collects all appropriate documents with respect to the real estate. Once the option is exercised or the conditions precedent are met, the notary drafts the final agreement which reiterates the terms and conditions of the preliminary contract. Should the sale be directly executed with a notarized agreement without any preliminary contract, this draft will be sent to the purchaser at least seven days before its signing.

The notary collects the purchase price which will be deposited on his account before its transfer to the seller and organizes the signing. The notary then issues a certificate of ownership to the attention of the purchaser.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. With some specific exceptions, the legal structure of ownership of a building is called “*copropriété*”. This legal status shall apply to any building divided between unit lots comprising private and common parts, such as entrance, garden, roof, terrace, etc. Each private part (one unit or lots of units) is at the exclusive use of the joint owner (“*co-proprétaire*”). The common parts are collectively owned by the joint owners who shall bear any working expenses in proportion of the relative value of their unit or lots of units. This proportion is provided by a document called “*Etat descriptif de division*” which is registered with the Land Registry (“*Conservation des Hypothèques*”).

The terms and conditions for the use of the private and common parts of the building are provided by the Rules of joint ownership (“Règlement de copropriété”). This contractual document may only be modified by the joint owners’ meeting.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Under French law, a property can be owned either through a joint ownership or through various corporate entities.

**3.1. Joint ownership**

French law does not limit the number of persons who may purchase a property together. The property is then considered to be owned in undivided ownership (“indivision”) and each owner is entitled to dispose of its piece of property according to his will. However this form of ownership is not often used in the framework of a real estate investment.

**3.2. “Société Civile Immobilière” (“SCI”)**

The ownership of a property through an SCI is frequently used by investors. An SCI is a civil property company which activities consist in owning, managing and leasing real estates. An SCI must have a minimum of two shareholders and may be managed by one or more managers. The organisation of an SCI is formalized by its by-laws. Shareholders of an SCI do not benefit from limited liability.

**3.3. Limited company**

Limited company form is not often used for real estate transactions but may be elected for complex operations (i.e., joint-venture comprising the detention of a real estate). Several forms of limited companies exist under French law. All limited companies are subject to corporate tax.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

The French Civil Code provides for a general presumption according to which ownership of the ground involves ownership of what is above and below it. In addition, all constructions, plantings and works on or inside a piece of land are presumed made by the owner, at his expenses and belonging to him, unless the contrary is proved.

Some alternative forms of real estate may grant a property right (“droit réel”) in favor of the lessee over the property upon several conditions.

#### **4.1 Building lease (“Bail à construction”)**

The owner of a land may grant a building lease for a minimum period of 18 years and a maximum period of 99 years. The building lease provides for the granting of a real property right in favor of the lessee and is entitled to assign, mortgage or sublease the property for the duration of the lease. Per contra, the lessee commits to build constructions on the land, maintain and repair said constructions and bear any taxes and duties with respect to the property. Unless otherwise provided, the lessee shall transfer the ownership of the constructions to the lessor upon termination of the lease.

#### **4.2. Long-term lease (“Bail emphytéotique”)**

The owner of a land may also grant a long term lease for a minimum period of 18 years and a maximum period of 99 years. In such a lease, the lessee has no obligation to build constructions on the land. Like the Building lease, the lessee benefits from a real property right over the property and may assign, mortgage or sublease it. Per contra, the lessee bears any taxes and duties and shall maintain and improve the property at his own costs, providing that such improvements are transferred to the lessor at the end of the lease.

### **5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Every sale of properties is registered with the office of the Land Registry which has jurisdiction over the location of the property. The deed of sale has to be published by the notary at the Land Registry in order to be enforceable against third parties.

Under French law, the publication of a valid deed of sale confers a presumption of ownership but does not in itself constitute an unchallengeable right. Accordingly, if a third party challenges the validity of said publication, the good faith purchaser must evidence its ownership by other concordant means such as possession of the property (acquisitive prescription called “usucapion” or possession of the land above which the property is built), title of transfer of ownership, any relevant documents such as those evidencing the payment of any tax and duties related to the property, etc.

## **II. Costs for transaction**



**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Unless otherwise provided by the parties, the purchaser shall pay the transfer duties. The amount of said transfer duties shall be paid to the notary together with the amount of his fees.

The purchase of real property located in France is subject to registration duties at a rate of 5.09% (“droit de mutation”) and to a land registration fee of 0.1% (“frais de publication”) based on the purchase price. A reduced rate of 0.715% shall apply to specific cases (transfer of property achieved for less than 5 years or forward sales (“Vente en l’Etat Futur d’Achèvement”). The fixed notary’s fees amount is calculated on the basis of 0.825%.

The transfer of real property may also be subject to VAT (19.6%) upon specific conditions.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Generally, capital gains made by individuals or civil companies resulting from the purchase and the sale of a real estate are subject to a tax at a rate of 19% in the framework of the taxation of wealth. The French Tax Code provides for specific exceptions (for example: sale of the main residence or a real estate which value does not exceed EUR 15,000, property of a non-resident in France upon specific conditions, etc.).

In addition, capital gains are reduced in proportion of the duration of detention of the real estate.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Free movement of capital is one of fundamental principles of freedom under Community law. Article 63 of the “Treaty on the Functioning of the European Union” (TFEU) provides that “all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited”. According to its paragraph 2, the same rule applies to “payments”. These provisions are directly applicable in France. Therefore, the seller can

repatriate funds after the transaction to both an EU Member State and a third country.

However, there are several exceptions to limit this principle. First of all, the EU Treaty allows for a certain degree of fiscal differentiation of taxpayers according to their place of residence. But French case law seems to hold that freedom of capital movement does not allow that capital gains on real estate sales which are earned by third-country residents to be taxed more heavily than those earned by French citizens.

There are also restrictions related to prudential rules, public policy and security policy considerations (such as administrative measures and financial sanctions imposed by the European Parliament and the Council to prevent terrorism and related activities (article 75 TFEU)) but also related to general interest considerations.

In addition, Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community provides within its article 3 that “any natural person entering or leaving the Community and carrying cash of a value of EUR 10,000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation”. These provisions aim to fight against international money-laundering.

## **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Under French law, commercial as well as residential leases cannot be terminated unless specific conditions are met.

### **9.1. Residential lease**

In any case, under the French Law of 6 July 1989 on residential lease, the lessor must give to the lessee a notice of termination either by registered letter with acknowledgement of receipt or by process server within a 6-month notice period prior to the expiry date of the lease. In addition, the lessor is entitled to terminate the lease only in case of resumption of possession, sale of the property or serious grounds (such as default of payment of the rent).

### **9.2. Commercial lease**

Under the provisions of the French Commercial Code (Article L.145-1 et seq.), the lessor must give to the lessee a 6-month prior notice of termination by process server before the expiry of a triennial period. In addition, the lessor

is entitled to terminate the lease only for specific reasons (for example, if he intends to build, rebuild or raise the height of the building or to reside in the premises).

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The change of use of a residential premise must be authorised whether by the town council or by the prefecture, depending of the location of the premises. In addition, this change also requires the agreement of all the parties and must be in accordance with the rules of joint ownership (“Réglement de copropriété”).

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notary costs:** EUR 41,250 + eventual negotiation fees which are freely determined
- **land register:** EUR 5,000
- **real property transfer tax:** EUR 254,500
- **advising lawyer (due diligence):** freely determined by the parties (hourly rates)
- **estate agent:** around EUR 150,000 (in case of the minimum rate of 3%)

**III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

A property is subject to three main taxes in France besides the local rates on business premises (“contributions économiques territoriales”) which are capped at 3% of the company’s value added.

**12.1 The property ownership tax (“taxe foncière”)**

This local tax is payable on January 1st each year, by each owner (natural or legal person), irrespective of whether the premise is actually occupied or rented out.

The amount to be paid depends on the general assessment i.e., the land registry rental value which is mainly determined by reference to the size, condition and location of the property (minus some rebates if applicable). Then this general assessment is multiplied by the rates decided upon by the local authorities (local, departmental and regional councils). Therefore the amount of the tax may vary according the location of the premises. Besides, many property ownership tax exemptions exist.

### **12.2 The residence tax (“taxe d’habitation”)**

This tax is due for the entire year by the person having on January 1st of each year the premise at his disposal for occupation, providing that the property is capable of occupation and irrespective of whether it is actually occupied (e.g. secondary residence).

As for the property ownership tax, the amount of this tax varies largely as it is calculated by multiplying the general assessment (mainly based on the size, condition and location of the property) by the local rates. This tax is also subject to exemptions.

### **12.3 The wealth tax (“impôt de solidarité sur la fortune”)**

This French specificity is to be paid annually and only by individuals with personal assets reaching at least the threshold of EUR 1.300.000 on the 1st of January 2012.

According to Article 885 A of the French Tax Code, and subject to any specific regulation such as Tax Treaty on Wealth which could be enforceable, French tax residents individuals are liable for French wealth tax on their worldwide wealth (subject to some exceptions) whereas non-French tax residents individuals are subject to this tax only for their wealth located in France, except for their financial investments which are tax-free.

The assessment basis for the calculation of the tax’s amount depends of the disposable value of the taxable personal assets. Between EUR 1,300,000 and EUR 3,000,000 the rate is about 0.25% and above the rate is about 0.50%, some tax reliefs being applicable for amounts between EUR 1,300,000 and EUR 1,400,000 and between EUR 3,000,000 and EUR 3,200,000.

## **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

In general, the commission of a professional caretaker ranges between 3% and 10% (VAT excluded) depending on the value of the real estate.

#### IV. Foreign investors

- 14. Would you advise foreign investors at the moment to invest in your country**
- **directly in real estate?**
  - **through real property funds, open or closed ones?**
  - **through other clear and secure financial products?**
  - **at the moment not because of the impacts of the worldwide financial crisis?**

The French real estate market has always been attractive for foreign investors, even after the 2009 worldwide financial crisis. Indeed, France had a prudent system in terms of lending which has prevented the national market from strong structural problems. Furthermore, some important measures have been taken by the French Government to regain investor's confidence in the real estate market. Even if some of those mechanisms may disappear, such as the "Prêt à taux zero" (a no-interest loan for investment in some particular real estate) or the "Loi Scellier", which grants tax exemptions for investments in the new construction market which will end the 31th of December 2012, at the latest. The French real estate market thus remains an attractive and safe investment, especially regarding other states where the risk of burst of another real estate bubble remains present.

Concerning the question of whether to invest directly in real estate or through real property funds, the above-mentioned financial instability of certain states may incite to choose the first option as the financial viability of real property funds is much more sensitive to international financial problems. However, an investment through a hedge fund may decrease the importance of losses in case of drop of the real estate market as they may temper the drop's clash.

In conclusion, the French real estate market remains a safe investment even if the diversification of investments, including investments through clear and secure financial products may be another way to reduce the risks.

- 15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Generally speaking, foreign investors are allowed to buy property in France without restrictions.

For statistical purposes, real estate investments made in France by a non resident must be declared to the Treasury if its amount exceeds EUR 1,500,000 and to the Banque de France if its amount exceeds EUR 15,000,000. Specific real estate investments (such as rural land dedicated to wine growing) must also be declared to the Treasury.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Running a business in France for foreign individuals implies various administrative steps. EU nationals are exempted from these formalities. Non EU nationals must either obtain a temporary resident card or declare their activity at the Prefecture, depending on the location of their residence.

Specific authorisations are required for restricted, sensitive and regulated activities.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Our law firm works with important real estate groups, constructors, investors, both in the public and private real estate sector. Our practice includes counseling and assistance in case of litigation. Accordingly we may be informed of sales of real estate by them as well as by our individual clients in the framework of inheritance, divorce or any family event.

In addition, as per our rules of professional conduct of the Paris Bar, lawyers are from now entitled to act as real estate agents, assisting their clients for the research of properties and the negotiation and drafting of the related contracts.

The intervention of a lawyer also presents many advantages, such as the application of our professional rules which guarantee confidentiality during the negotiation's steps and the guarantee of the representation of client's funds via our professional accounts on which the funds are transferred.

We also assist our clients for all legal aspects of construction projects (bid invitation, legal advice, negotiation and drafting of the contracts and subcontracts, etc.).

# Germany

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Germany, real estate transactions are governed by state law. In order to understand the German law in this field, it is important to see that all properties in Germany are formally registered in land registers:

#### **Land register**

Land registers are in most areas administrated by the local courts. The land register contains information regarding all private law aspects of the property, i.e.

- size of the property,
- if it is open area or landed property,
- where exactly it is located according to special field cards that authorities in Germany provide for,
- who the owner is and
- what encumbrances are on the property, e.g. rights of way, rights of pipes and very important land charges as securities for loans.

In order to transfer ownership of a property from the seller to the buyer the transfer has to be formally entranced into the land register. This entry of transfer of title is constitutive for getting the ownership. Communication with the land register is held by notaries who in Germany are specialized lawyers in this field of law. In some areas of Germany they act only as notary, in other areas like for example in Berlin some lawyers get the privilege to act as lawyer and as notary. The notaries draft the contracts for property transactions.

#### **Contact and first negotiations**

The parties of a property transaction may meet through contacts within networks, internet or newspaper advertisements published by the owner himself or often through real estate agents. The parties usually first negotiate the main economical aspects like the price of the property or the warranties that shall be given by the seller to the buyer. The latter may vary highly depending e.g. on the age or stage of the property and its site.

### **Notarisation and transaction of the deal**

Then the parties give this information to a chosen notary. In most areas of Germany the buyer has the unwritten right to choose the notary, because in most areas of Germany it is legal custom that the buyer has to fully pay for the notary's work. The notary has to take care of the interests of both parties. He drafts a purchase contract and this contract rules everything with respect to the deal:

- The payment of the purchase price normally has to be arranged for, after
  - i) a so called priority notice (“Eigentumsvormerkung”) is entered in the land register which gives the buyer security that he will become the owner if he complies with the notarial contract, and
  - ii) all other formal aspects of the deal that have to be taken care of and checked by the notary are fulfilled with few exemptions in particular of the tax clearance certificate (“Unbedenklichkeitsbescheinigung”) with respect to the payment of real property transfer tax.
- After payment of the full purchase price the buyer gets the possession of the property and all benefits and costs of it.
- After payment of the real property transfer tax, the notary organizes the formal transfer of title to the buyer.
- In many cases buyer needs to finance a big part of the purchase price and usually banks lend the money to these customers and in return ask for land charges to be placed on the property their clients intend to buy. Therefore the notaries include in the purchase contract corresponding clauses that allow the buyer to place one or more land charges for financing the purchase price on the related property. On the other side the notary has to provide security to the seller that the land charge is only valid against him after receiving the full purchase price according to the notarial purchase contract. In more complicated cases where the seller still has more than one loan (secured by land charges for the benefit of several banks) to amortize when signing the deal, the notaries often open trust accounts to which the buyer pays the money. The notary then checks with seller's banks how much has to be paid to them in order to get the land charges deleted. The notary then organizes the payments to the banks and the seller.

### **Time period for transaction**

The normal time period of a property deal from the notarial signing of the contract to the formal transfer of title usually takes about 5 months, prior transfer of possession needs mostly only two month if not payet into an escrot ac-

count of the notary to get this possession transfer more quickly. About six weeks after the notarial signing the buyer in general has to provide for payment. The tax authorities need about 3 months to get the real property tax bill placed. After payment of the latter, the notary gets a formal information by the tax authorities, the so called tax clearance certificate (“Unbedenklichkeitsbescheinigung”) that is necessary for applying for the formal transfer of title.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes, in Germany we know the “normal” property of land which includes usually by law the ownership of any buildings erected on the concerned land (see further two questions below). You can check in the land register - notaries online -, who the owner is and if there is a building on the property. Furthermore, the German law knows condominiums. Every single condominium gets a special deed in the land register and you can see on the name of the land register if the object is “only” a condominium or if the whole land is owned by a specific person.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, the German system knows joint ownership. There can be couples or friends or almost all kinds of companies holding property alone or jointly by percentages they can freely choose. Foreigners and foreign companies are allowed to directly have ownership in all real estate in Germany.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes, in Germany usually the owner of the land owns all buildings erected on it. This may differ in cases where the land is for example divided into condominiums or if there is a so called hereditary building right (“Erbbaurecht”). This can be checked easily by having a look into the land register. The hereditary building right (“Erbbaurecht”) is the right to have a (whole) building in

ownership on the land that is in ownership of another natural person or company. We see this hereditary building right in Germany often in areas where the big churches, i.e the Roman catholic and the evangeilic church, own land. The churches often do not sell the land to people but give hereditary rights to have a building on the property for example for 50 or 100 or even more years. The hereditary building right is entranced formally in the land register and the land register opens a further land register for the hereditary building right since this is handled like a property, which means that it can be used as security for land charges on this right and so on.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes, as mentioned above almost all (some property in ownership of the state has not to be registered) properties in Germany are registered in the land register that is organized by in real estate matters special educated persons ("Rechtspfleger") and good faith into the correctness of the civil rights entranced in the land register (not to the size and use of the buildings erected on it) is protected. If the land register was false and a land charge was deleted by mistake and the buyer buys it on first sight "free" of charges, he is protected in his good faith (sec. 892 German Civil Code). The bank in the given example would have a claim against the Federal Land in Germany where the court of the land register is located for the damages suffered because of the false land register.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Real property transfer tax has to be paid on real property transactions and in most areas of Germany the percentage of this tax is 4.5 or 5 percent of the purchase price, in Berlin it amounts to 5 percent. According to tax rules in general, when real property transfer tax is applicable no further turnover tax (at the moment 19%) is due in parallel. This rule does not apply when both, seller and buyer, are companies or business persons and the seller waives the right of buying the property without turnover tax. This waiver can be good for the seller for example if he had paid pretax for erecting a building on this land

in recent years. Then he can count up the part of the turnover tax against his pretax. The buyer can count up the turnover tax against his pretaxes as well so that he has often no negative result out of this tax aspect. Though this requests that the buyer has pretaxes in Germany which foreign investors usually only have if the building is or will be rented to entities or business persons who have to pay turnover tax on the rents. These tax aspects need to be checked before the purchase contract will be notarized.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

In Germany, one normally has to hold the property for 10 years calculated from the notarial purchase contract to avoid speculation tax that can occur, if the selling price (incl. costs) of the property is higher then the purchase price has been. If speculation tax is applicable, the amount depends on the income tax rate of the seller of the property. Foreign investors should check possible further tax aspects of their home country in this respect.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

In Germany no problem.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

We have the rule that the purchase of a property does not break the lease contract (sec 566 German Civil Code), means the purchaser by law enters into the lease contract and normally the commercial lease contract cannot be terminated prior to the contractual term neither by the new owner nor by the lessee. For example, if the commercial lease has a term of ten years and the purchase takes place after one year the purchaser cannot terminate the lease for an earlier date then 10 years after start of the lease term. This is different when you acquire property in a sale by court order or from the insolvency administrator in insolvency cases. In these cases the purchaser has a special right to terminate the lease contract (“Sonderkündigungsrecht”sec. 57a Compulsory Auction of

Immovable Property Act (“Zwangsversteigerungsgesetz”) and sec 111 Insolvency Act (“Insolvenzordnung”).

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

You have to check precisely for every purchase case separately. Two aspects have to be taken into account:

5. if the building permit allows the intended use of the purchaser and
6. if in the area in question the local authorities have set a development freeze (“Veränderungssperre”). Local authorities do this sometimes in areas with to little residential property.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?**
  - **land register?**
  - **real property transfer tax?**
  - **advising lawyer (due diligence) ?**
  - **estate agent?**
  - **others**
- 
- **Notarial costs:** About EUR 25,000 plus 19% turnover tax for German entities, normally no turnover tax for foreign entities; if financed for example with a land charge amounting to EUR 4 million further costs of about EUR 6,100 occur plus VAT depending as outlined before
  - **Land register:** About EUR 12,500; if financed for example with a land charge amounting to EUR 4 million further costs of about EUR 6,100
  - **Real estate transfer tax:** EUR 225,000 (4,5%) or in some areas EUR 250.000 (5%)
  - **advising lawyer (due diligence):** depending on the agreement with the lawyers; normally they act with international clients on hourly rates, mostly specialized law firms have ranges of rates between EUR 250 up to EUR 450; legal assistance from day one of the deal until transfer of title would take about 50 hours plus time of a due diligence, if a due diligence is requested by the client.

- **estate agent:** between 4 and 6 % net of the purchase price depending on the market situation and the specific plot of land; VAT (19%) for German entities, normally no turnover tax for foreign entities

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

In Germany you have to pay land tax (“Grundsteuer”) as owner of property, the rates are different depending from the area where the object is located. Three factors are relevant for the costs:

- i) First you have to check the rateable value of the object (“Einheitswert”),
- ii) then multiply this amount with the base value for tax purposes (“Steuermessbetrag”) and
- iii) multiply this amount with the multiplier ruled by the local authorities (“Hebesatz”).

For example in Berlin the base value for tax purposes is 0.0035 and the multiplier is 810%. The rateable value for tax purposes is not the real value, but much less, because it is a calculated value the object had in the year 1964 for objects in western parts of Germany and the year 1935 for objects in the former GDR. If the rateable value would be EUR 900,000 the outcome would be EUR 25,515 per year. You have to calculate depending on the kind of property and the area about 0.3 to 0.4% of the real value of the object per year.

#### 13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

This differs from the property and the number of tenants. In commercial real estate you can grossly calculate about 2% of the net rent of the object per month.

### IV. Foreign investors

#### 14. Would you advise foreign investors now to invest in your country? – Directly in real estate

- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Prices for commercial and non commercial real estate in Germany have gone up within the last two years for about 15% in average in good locations even more. Nevertheless we think that this is no bog blow, sometimes perhaps a bit, but compared to other countries like France, Netherlands, Belgium or Great Britain you will still have good value in the German market that is very stable and we do not see panic on a longer view. Therefore I would advice to invest in commercial (and non commercial) real estate in Germany in very good or upcoming areas.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions in Germany. You can buy property as private or business person or as an entity with no seat or branch office in Germany.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

It differs, depending if the investor is from

- i) a EU member state or
- ii) a country Germany has conventions in this respect with like US or Canada or
- iii) if the investor is from a country where no convention is applicable.

In cases (i) and (ii) the official approvals are practically no big deal, in case (iii) one has to check precisely what is needed.



**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes, we would be pleased to assist foreign investors in all these aspects involved. The other German member firms of Legalink would be pleased to assist as well.

# **Hong Kong**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Hong Kong, real estate transactions are governed by the Conveyancing and Property Ordinance (Cap. 219, referred to as “CPO”) supplemented by common law. Property transactions in Hong Kong may be divided and classified into three main stages, namely (A) the Provisional Agreement Stage, (B) the Formal Sale and Purchase Agreement Stage and (C) the Assignment and Completion Stage.

#### **(A) Provisional Agreement Stage**

The sale and purchase of properties in Hong Kong are generally commenced through meetings with and engagement of real estate agencies, who will conduct preliminary searches through the Land Registry for the property particulars and prepare a binding Provisional Agreement which contains simple and standard terms for the vendor and the purchaser to sign when they have agreed to the sale and purchase of a particular property.

In practice, it is common that (1) an initial deposit of about 5% of the purchase price is paid by the purchaser to the vendor on the signing of the Provisional Agreement and (2) liquidated damages in an amount equivalent to the initial deposit is payable by the party in default to the innocent party in the event of any breach or default of the Provisional Agreement or (3) in some cases, without such liquidated damages clause which allows the innocent party to compel the defaulting party to complete the sale in addition to any claim for damages.

A commission of 1% of the purchase price will normally be charged by the real estate agencies and paid by each party. The defaulting party will normally have to bear the costs of the estate agent’s commission on behalf of the innocent party.

#### **(B) Formal Sale and Purchase Agreement Stage**

Both the vendor and the purchaser will engage their respective lawyers to proceed with the property transaction after the signing of the Provisional Agreement. The vendor’s solicitors will prepare the Formal Sale and Purchase

Agreement with detailed terms and conditions reflecting the terms in the Provisional Agreement for the purchaser's solicitors' review and comments..

The vendor and the purchaser will usually but not necessarily enter into the Formal Sale and Purchase Agreement within 14 days after signing of the Provisional Agreement. A further deposit will be paid by the purchaser, making up a cumulative total of 10% of the purchase price (taking into account the initial deposit). In some cases where the parties agree, the vendor's solicitor may act as stakeholder whereby he holds the 10% deposit for the vendor until the conditions of the stakeholdings are fulfilled, usually, upon proof that the balance of the purchase price is sufficient to discharge the mortgage (if any).

In relation to the purchase of a residential property, the purchaser's solicitors will arrange stamping of the provisional agreement and/or Formal Sale and Purchase Agreement with the Stamping Office at the Inland Revenue Department and registration of the same with the Land Registry within 30 days after signing for the protection of the purchaser.

In relation to the purchase of a non-residential property, stamp duty is not payable on the Formal Sale and Purchase Agreement. However, the purchaser's solicitor will arrange registration of the Formal Sale and Purchase Agreement directly with the Land Registry within 30 days after signing for the protection of the purchaser.

### **(C) Assignment and Completion Stage**

After the Formal Sale and Purchase Agreement Stage, the vendor's solicitors will provide the title deeds and documents to the purchaser's solicitors, who will then carry out due diligence on the title. It is common practice in Hong Kong that any questions and requisitions concerning the vendor's title should be raised within 7 working days after date of receipt of the title deeds, save and except that requisitions going to the root of the title can be raised at any time before completion.

The vendor's solicitors must answer the title requisitions honestly and allow sufficient time for the purchaser to consider the answers. Once the purchaser's solicitors consider that the requisitions have been properly answered and the vendor is able to give good title to the subject property, they will prepare the Assignment and conduct pre-completion land searches to ascertain the status of the subject property.

On Completion, the purchaser will obtain vacant possession of the subject property (if the property is being sold with vacant possession) and the vendor

and the purchaser will sign and execute the Assignment to effect the transfer of title from the vendor to the purchaser.

Within 30 days after signing of the Assignment, the purchaser's solicitors will arrange stamping of the Assignment with the Stamping Office at the Inland Revenue Department and registration of the Assignment with the Land Registry for the protection of the purchaser.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

After the return of the sovereignty on 1 July 1997, all land in Hong Kong is owned by the Hong Kong Government, which is part of the People's Republic of China. All land in Hong Kong is leasehold land other than the land on which an Anglican church, St. John's Cathedral is situated.

Land in Hong Kong is designated with lot numbers and the Hong Kong Government previously granted land for private leaseholding by way of a government lease. A government lease is a lease from the government that grants the leasehold land to the purchaser.

Since government leases are no longer issued, land is granted by way of conditions of sale, exchange or grant ("Government Grant"). A Condition of sale is a contract whereby once the conditions have been complied with, a government lease is deemed to be issued pursuant to section 14 of the CPO. ("Government Lease")

Subject to the terms of the Government Lease (issued by virtue of the operation of section 14 of the CPO), every leaseholder of land is at liberty to deal with his or her leasehold interest in the lot granted by the Government, including (1) the selling or disposal of his or her interest in the lot, (2) dividing and sectioning the lot into smaller segments and selling off parts of them or (3) sub-dividing the lot by constructing and building structures over the lot and assigning all or part of the sub-divided units or flats (in case of multi-storey building) to different purchasers. The owner has the exclusive right of occupation and possession of the erections or structures on the lot.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, the legal system in Hong Kong allows co-ownership of real property in the form of (1) joint tenants or (2) tenants-in-common.

Pursuant to the CPO, where the estate or interest in land vests in 2 or more persons under an instrument or a will, it shall be presumed that (unless the contrary intention is expressed in that instrument or will), the tenancy vests in those persons as tenants-in-common rather than as joint tenants.

### **Joint Tenants**

Real property may be held in the form of joint tenants whereby each joint tenant has an identical interest in terms of the extent, nature and duration with respect to the whole and every part of the real property. There is a right of survivorship in which the interest of the deceased joint tenant will automatically pass to and vest in the survivor(s).

### **Tenants-in-common**

Tenants-in-common jointly own the undivided shares of a property as a whole. However, each the tenants-in-common may own the property in a ratio determined by them i.e. either in equal shares or of different proportions.

Co-ownership by way of tenants-in-common differ materially from joint tenants because there is no automatic right of survivorship. However, a tenant-in-common's interest in the property will be part of his or her estate and can pass either under a will or upon his or her intestacy.

### **Owner of Real Property**

In Hong Kong, a company is capable of acquiring and holding real property in co-ownership in the same manner as if it were a natural person pursuant to the CPO.

#### **4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Given the fact that virtually all land in Hong Kong is leasehold, land is not owned by the “owners” but leased to the owners only. The ownership of a building is not implied in the “ownership” of the land. However, the Deed of Mutual Covenant (a deed between the co-owners of the building governing the use of the building and land) usually provides that the owner of the undivided share of the land will have the exclusive right to use and occupy the unit relat-

ing to that undivided share. Also, the ownership of a building will not necessarily imply the ownership of the land as it is possible to have different owners of the land and the building erected on it.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Hong Kong has a voluntary land registration system that is governed by the Land Registration Ordinance (Cap. 128, referred to as “LRO”). For the purposes of land registration, interests in land may be classified either as registrable (i.e. capable of being reduced into writing) or unregistrable (i.e. incapable of being reduced into writing).

Registrable interests such as deeds, conveyances, instruments in writing and judgments affecting real property in Hong Kong may be registered with the Land Registry and such registration (1) renders any registrable but unregistered interest unenforceable against any subsequent bona fide purchasers or mortgagees for valuable consideration and (2) precludes a registering party from being affected by any actual or constructive notice of a prior registrable but unregistered interest. The land registration system in Hong Kong therefore functions to (1) protect the priority of registrable and registered interest, (2) facilitate title tracing and checking and (3) giving notice of the registrable and registered interest to subsequent purchasers and mortgagees.

In relation to unregistrable interests in land, such as any unwritten equities creating interests in land arising out of constructive trust (e.g. interest of a wife in the real property arising out of promise or the husband and wife relationship) or resulting trust (e.g. interest of Party X in the real property arising out of contributions of purchase money or mortgage repayment by Party X in relation to the real property purchased by Party Y), both the CPO (in respect of the writing requirement) and the LRO (in respect of the registration requirement) have no application. The position regarding the priority of these unregistrable interest will revert back to the Common Law doctrine of notice in which case, priority may be given to those unwritten equity interests over a subsequent registered interest if the subsequent purchasers or mortgagees take notice of such equity interest when they acquire the interest in land.

Moreover, LRO expressly precludes the registration requirement for any short-term tenancy not exceeding 3 years and without any option to renew for another term.

In essence, the land registration system in Hong Kong offers protection and priority to a bona fide purchaser for valuable consideration against any registrable but unregistered interest in land, but he or she should always ascertain whether there is any unregistrable interest or short term tenancy affecting the property which may take priority over his or her interest in the property.

## II. Costs for transaction

### 6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?

Real property transactions in Hong Kong are subject to stamp duty pursuant to the Stamp Duty Ordinance (Cap. 117). Stamp duty will be imposed on both the agreement and assignment of real property (for non-residential properties, stamp duty is chargeable only on the assignment for the transfer).

For properties not exceeding HK\$2,000,000, the stamp duty payable is only HK\$100; for property consideration exceeding HK\$2,000,000, the stamp duty payable is on a sliding scale as follows:-

<b>Purchase Consideration of the Subject Property</b>	<b>Stamp Duty Payable</b>
(a) where the amount or value of the consideration does not exceed \$2,000,000	(a) \$100
(b) where the amount or value of the consideration exceeds \$2,000,000 but does not exceed \$2,351,760	(b) \$100 plus 10% of the amount by which the amount or value of the consideration exceeds \$2,000,000
(c) where the amount or value of the consideration exceeds \$2,351,760 but does not exceed \$3,000,000	(c) 1.5% of the amount or value of the consideration
(d) where the amount or value of the consideration exceeds \$3,000,000 but does not exceed \$3,290,320	(d) \$45,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$3,000,000
(e) where the amount or value of the consideration exceeds \$3,290,320 but does not exceed \$4,000,000	(e) 2.25% of the amount or value of the consideration



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|---|---|
| (f) where the amount or value of the consideration exceeds \$4,000,000 but does not exceed \$4,428,570 and the instrument is certified in accordance with section 29 at \$4428570 | (f) \$90,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$4,000,000   |
| (g) where the amount or value of the consideration exceeds \$4,428,570 but does not exceed \$6,000,000  | (g) 3% of the amount or value of the consideration  |
| (h) where the amount or value of the consideration exceeds \$6,000,000 but does not exceed \$6,720,000  | (h) \$180,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$6,000,000  |
| (i) where the amount or value of the consideration exceeds \$6,720,000 but does not exceed \$20,000,000   | (i) 3.75% of the amount or value of the consideration   |
| (j) where the amount or value of the consideration exceeds \$20,000,000 but does not exceed \$21,739,120  | (j) \$750,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$20,000,000 |
| (k) in any other case   | (k) 4.25% of the amount or value of the consideration   |

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

The Inland Revenue Department will charge profits tax on any persons, including corporations, partnerships and bodies of persons who derive profits through carrying trade, profession or business in Hong Kong. It is a question of fact as to whether a business is being carried on as a result of any sale and purchase of real property in Hong Kong, in which case some of the relevant factors that will be taken into account are as follows:

- (a) the time or length of ownership of the property;
- (b) the use of the property;
- (c) the financial situation of the purchaser when the property was purchased;
- (d) whether a mortgage was taken out;
- (e) whether the property was leased; and

- (f) all other circumstantial factors to ascertain whether the intention of the purchase of the property was for long-term investment or for business.

In the event that any sale and purchase of real property by any persons including corporations would be deemed or regarded by the Inland Revenue Department as carrying on a real estate business in Hong Kong, the profits tax rate presently applicable is 16.5% for corporations and 15% for unincorporated businesses including partnership and sole proprietors.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Subject to the anti-money laundering policies and regulations in Hong Kong, there are no restrictions on repatriation of funds from Hong Kong and a seller is free to remit monies from a property transaction in whole or in part overseas.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

A lease creates an interest in land and in the event that there is an existing tenancy in respect of the real property, a purchaser will have to purchase the real property subject to the lease interest. It is advisable for a purchaser to ascertain if the vendor is able to deliver the subject property with vacant possession free from any lease and tenancy.

To terminate the existing tenancy, the purchaser will have to seek recourse to the termination provisions of the lease (such as early termination) and subject to the terms of the lease, the purchaser may be able to effect early termination of the tenancy.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

In Hong Kong, the nature and use of a building is closely related to the type of land granted by the Government. The conditions of sale, grant or exchange in relation to a plot of land usually contains restrictive covenants governing the usage of the land such as residential, commercial, industrial or hotel use. Variations or modifications of the Conditions of sale, grant or exchange will be

subject to the approval of the Lands Department and payment of a substantial premium.

In relation to individual flats or units in a multi-storey building, such usage is governed by the “Deed of Mutual Covenant” and shall be the same as that stipulated in the Conditions of sale, grant or exchange. Any changes to the Deed of Mutual Covenant are subject to the approval of all the owners of a particular building.

Given the fact that any variations or modifications in the usage shall be (a) approved by the Lands Department, (b) subject to the payment of land premium and (c) approved by all owners of the building, a change of usage of a building in Hong Kong is really difficult if not impossible.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

1. **Notarial Cost** – If the signing and execution of all agreements, Assignment and the relevant documents are in Hong Kong, no notarial cost is necessary.
2. **Land Registration Cost** – Depending on the nature of the documents and the number of documents to be registered, the land registration fee per document for a normal sale and purchase can range from HK\$210.00 to HK\$2,000.00.
3. **Stamp Duty** – Approximately HK\$2,130,000 (Please refer to “II Costs for Transaction”)
4. **Legal Cost** – Approximately HK\$30,000 to HK\$70,000, but costs are quoted on a case-by-case basis.
5. **Estate Agent** – Approximately HK\$500,000, being 1% of the purchase price.
6. **Mortgage (if necessary)** – Approximately HK\$10,000 to HK\$30,000, but costs are quoted on a case-by-case basis
7. **Disbursements** – Approximately HK\$2,000 (such as photocopying charges and subject to individual circumstances).

**III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Government rent and rates are chargeable on real estate property at an amount of 3% and 5% respectively, based on the rateable value which is the estimated annual rental value of the subject property at a designated valuation reference date, assuming that the property was then vacant and for lease.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A foreign investor planning to engage a professional manager or agent to manage a purchased property will have to pay for the fees and expenses incurred by the manager or agent in relation to their services of (a) finding suitable tenant(s), (b) arranging the signing and entering into a formal tenancy agreement between the tenant(s) and the foreign investor and (c) collecting rentals from the tenant(s) for and on behalf of the foreign investor.

Such manager or agent may charge half or even a full month's rental as their service fees for finding suitable tenant(s) and arranging the tenancy agreement. The fees for rental collection may be charged by way of a percentage over the monthly rental value according to the following scale:

<b>Rental per month</b>	<b>Fees of the manager or agent (as a percentage of the rent per month)</b>
HK\$ 15,000	5.5% (with a minimum charge of HK\$500)
HK\$15,001 – HK\$25,000	5%
HK\$25,001 – HK\$30,000	4.5%
HK\$35,001 - HK\$45,000	4%
HK\$45,001 - HK\$55,000	3.5%
HK\$55,001 or above	3%

**14. Would you advise foreign investors now to invest in your country?  
– Directly in real estate**

- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Hong Kong is one of the most expensive real estate markets by world standards, which can be a result of the scarcity of land, the housing shortage and having a population of 7 million.

However, it is useful to note that Hong Kong has been ranked as the world's freest economy for the 16th consecutive year according to the 2010 Index of Economic Freedom, jointly published by The Heritage Foundation and The Wall Street Journal. The Index covers over 180 countries across 10 specific freedoms including trade freedom, business freedom, investment freedom and property rights. Hong Kong scored a total of 89.7 out of a possible 100 points putting the city in first place.

Investing in real estate in Hong Kong is purely a commercial decision that requires taking into account a number of factors and considerations such as how familiar the foreign investor is to (a) the real estate market in Hong Kong and (b) the fluctuations and risks in interest rates and foreign exchange rates.

Interest rates are relatively low at the moment, which has attracted more buyers into the real estate market. In respect of foreign exchange rates, the Hong Kong dollar maintains a fixed exchange rate with the U.S. dollar in which interest rates and currency fluctuation follows the trend in the United States, creating a relatively stable currency platform.

It may be an opportune time for foreign investors to invest directly in real estate in Hong Kong due to the current low interest rates, which make it relatively affordable to finance a mortgage.

In addition, the Hong Kong Government currently operates a capital investment entry scheme whereby foreigners who make a capital investment of HK\$6.5 million may gain residency in Hong Kong. As there are numerous people in mainland China who would like to gain residency in Hong Kong, this scheme has led to many mainland Chinese investing in the Hong Kong property market and in effect, causing the price of property to rise.

Other clear and secure financial products include investing in stocks of various property developers. The stock prices of property developers depend largely on the price at which the land was auctioned, whether the land was successfully auctioned and whether purchasers are willing to buy the constructed property (which in turn depends on interest rates and the economy in general). As mentioned above, the interest rate is low and property developers in general

have been turning in good profits. Investing in stocks of listed property developers is another avenue of investing in the property market in Hong Kong.

In respect of real property funds, foreign investors may wish to explore the option of investing in real estate investment trusts (REITs), which are listed trusts.

Link REIT was the first REIT listed on the Hong Kong Stock Exchange with assets of around US \$3.3 billion. Link REIT includes 180 properties, consisting of mainly shopping malls and car park facilities.

REITs work by investing in income-producing real estate assets and using the income derived to provide a return to its unit holders. By purchasing a unit in a REIT, it allows investors to share in the risks as well as the benefits of owning the real estate assets held by the REIT.

Investing in REITs is relatively secure as they have a stable income and tend to give generous dividends, which makes them a very attractive investment alternative.

Although there was a global economic slowdown during 2008, Hong Kong has upheld its status as Asia's second largest destination for foreign direct investment after mainland China, attracting over US\$60 billion in 2008 according to the World Investment Report 2010. This in itself can provide foreign investors with the added confidence when investing in Hong Kong reflecting the fact that it is a popular hub for investment amongst foreign investors.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no such restrictions and any individual person, corporation or foreign entity that has a recognized legal status and capacity may purchase property in Hong Kong.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Government Leases usually contain restrictions as to the use that the land may be put. In the event that a leaseholder wishes to use the land for a specific

purpose that does not comply with the lease conditions, an application for a lease modification should be made to the Lands Department in order to vary the conditions under the Government Lease. A lease modification is a variation of the conditions of the Government Lease in respect of the property, including the permitting of a change of use.

The Lands Department may also refer the application to other relevant departments for approval, including the Planning Department, Building Department and Fire Services Department. Each application will be considered on a case-by-case basis together with the relevant circumstances.

If the Lands Department approves of the application for the lease modification, then the modification will be reflected by way of a Deed of Variation or letter of modification.

In addition, the leaseholder will be required to pay a premium reflecting the enhanced value of the property. It may also be the case that additional conditions relating to the new use of the property are imposed.

The application for a lease modification normally takes at least 6 months to obtain approval.

In the event that the purchaser intends to build a building on the land, he will have to engage surveyors and architects to draw a building plan. That building plan must comply with the plot to volume ratio specified in the Government Lease. The plot to volume ratio specifies the floor area that can be built upon a specified piece of land. This ratio is a method used by the Hong Kong government to regulate the height of the buildings and the usable space of the buildings. As land becomes more scarce in Hong Kong, developers are more inclined to maximize the usable space by maximizing the use of the plot of land. Therefore, apart from complying with the plot to volume ratio of the land. The Planning Department must also approve the building plan. This is to ensure the building is suitable from a city planning perspective. The building plan must also be approved by the Lands Department, the Building Department and the Fire Services Department. The Fire Services Department will ensure that the fire escape paths in the building plan is useable, safe and effective.

Upon approval of the building plan, a certificate of approval will be issued.

A multi-story building will be notionally divided into a number of undivided shares representing the units intending to be created from the block of flats. This is usually done by the purchaser's solicitors by creating a Deed of Mutual Covenant, which specifies the number of shares allocated to various units or areas of the building. This Deed of Mutual Covenant must be submitted to the Lands Department and Planning Department for approval.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes, we would be pleased to assist foreign investors in all these aspects. We may do so in conjunction with our associate firm “Boase, Cohen & Collins”.



Hong Kong

# Hungary

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

After signing of the purchase agreement, the agreement is filed with the land registry immediately and it is also automatically forwarded to the tax authority. Filing with the land registry has the effect that any later requests for registration of rights or facts on the same property will be ranked behind the purchase agreement, thus the purchaser who filed first is protected. At the signing of the purchase agreement, up to the parties' decision, a collateral is usually also provided, most often a 10 - 15% earnest [foglaló] by the purchaser. If the purchaser breaches the agreement, it loses the earnest. If the breach is committed by the seller, it shall repay twice the sum of the earnest. After the signing, the parties have time to prepare the transfer of title, thus to vacate the property, free it from encumbrances (e.g. mortgage) and to collect the remaining installments of the purchase price. The transfer of the (last installment of the) purchase price, transfer of possession of the property and transfer of the seller's declaration of consent for the registration of the purchaser's ownership title takes place generally simultaneously. Finally, the purchaser files the seller's declaration of consent with the land registry, and once the land registry issues its registering decision, the purchaser will be registered as owner of the real property as of the date of filing the declaration of consent, along with the application form for the registration of the new owner's title.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

The Hungarian legal system permits joint ownership of real estates, therefore multiple entities can be owners of the same real property to different proportions.

Besides this, it is possible that land and the building erected on that are owned by different owners. In that latter case, the building forms a separate real estate, the owner of the building may use the land to the extent necessary and has a pre-emption right over the land, while the owner of the land has a pre-emption

right over the building. These rights are attached to the ownership of the land / building, and not the person of the owner.

In Hungary, condominiums may also be founded in buildings where at least two, independent units for residential or non-residential purposes exist, or are technically eligible to be divided. In this case, technically separated parts pass into the private and separated ownership of the condominium owners, while land, structural parts and equipments of the building form joint property of the owners.

Although less popular, there also exist so-called “residential cooperative societies” [lakásszövetkezet], where the structural parts, equipments are not in joint ownership, but owned by the cooperative society (a legal person), in which all or some of the flat owners are members.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Two or more persons may be owners of the same real property by specific shares. Joint ownership of real property does not mean that the real property is either physically or legally divided, although, the joint owners may agree on the division of the use of the property. Each of the joint owners is entitled to use the property and to alienate or encumber its share, but the other owners have a pre-emption right (with identical terms) if one of them wishes to sell its share to a third party. If one of the joint owners deceases (dissolves), its share is inherited by its heirs (acquired by its successor) and the shares of the other joint owners remains unchanged.

Generally, all entities that are subjects of the law (natural persons, legal persons, and the two kinds of business associations without legal personality) can be owner of a real property.

Nevertheless, there are certain limitations on the acquisition of real property, in case the real property is qualified as agricultural land or if the purchaser is a foreign entity.

Acquisition of agricultural land:

- Domestic citizens may not acquire more than 3 sq kms of agricultural land.
- Domestic legal persons may not acquire any agricultural land in Hungary. The State and local governments are fully exempt from this limitation and churches and mortgage banks enjoy a specific partial exemption.

- Foreign citizens and foreign legal persons may not acquire any agricultural land in Hungary. Citizens of EU Member States, EEA Member States, and citizens of other states who enjoy the same rights as EU citizens as a result of an international treaty enjoy an exemption if they meet certain conditions. (Mainly that they have lived and pursued agricultural activity in Hungary for minimum three years before the acquisition.)

Acquisition of non-agricultural real properties by foreign entities:

- If the foreign entity is a citizen / legal person from a state that is not a Member of the EU, a Member of the EEA or a state whose citizens/entities receive the same treatment as EU citizens, the acquisition shall be authorized by the competent administrative office. The authority decides on the basis whether the acquisition would violate public interest or a local government's interest. This does not apply to foreign individual entrepreneurs, if the real property is necessary for their business activity.
- Citizens of EU Member States and legal persons registered in such states may acquire ownership of a non-agricultural real property under the same rules as domestic citizens, i.e. without any authorization.

The above limitations do not only apply to purchase, but to gift and swap transactions as well. Notwithstanding the above, it is not prohibited to own a real property, the ownership of which is against the above restrictions, in case the ownership title was lawfully acquired, prior to the effective date of the above prohibitions.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Pursuant to Section 97 of the Hungarian Civil Code, ownership of the building belongs to the owner of the land, based on the principle of *aedificium solo cedit*. Nevertheless, when a new building is built on a land, the constructing party and the owner of the land may agree that the constructing party will become the owner of the land. (Please see the response to the second question in Part I above.) Nevertheless, it is not possible to separate a building from a land when the building already exists.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

In Hungary, a national land registry contains all real properties, including the condominium apartments and buildings detached from land. The land registry contains features of the real properties (e.g. location, topographical lot no., address, size, agricultural/zoning classification), and rights and facts established on the property (e.g. ownership, usufruct, mortgages, encumbrances, pipeline rights, pre-emption and option rights). Registration requests filed with the land registry office are also indicated, in the form of ‘marginal notes’. The land registry is authentic towards all acquirers in good-faith in respect of the rights and facts registered (but not the features of the property or the personal data of the persons registered). If someone has acquired a right on a real property in good faith based on the land registry, it is protected against claims based on the invalidity of the previous registry entry. Nevertheless, a lawsuit for the deletion of the newly acquired and registered right may be initiated if a previous registry entry was invalid. If the deletion claim is filed against the person who acquired the right directly by an invalid transaction, the deadline for filing the claim is the deadline for filing a claim for declaration of invalidity of the transaction. If the deletion claim is filed against someone who acquired in good faith based on the invalid registry entry, it shall be filed within three years from the invalid registration. Only those persons are entitled to file this claim whose registered right is violated by the contested registration entry (the previous owner, e.g.).

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In case of a purchase of a real property in Hungary, the purchaser shall pay an acquisition duty. The duty is payable within 30 days from the notification of the tax authority, and its rate is:

- 4% after the part of the real property’s full value that does not exceed HUF 1,000 million (approx. EUR 3.5 million),
- 2% after the part of the value that exceeds HUF 1,000 million, but the total amount payable may not exceed HUF 200 million.

This duty also applies the purchaser does not directly purchase the real property, but a share in a company that directly or indirectly holds real property. Different rates apply to the acquisition of a housing property.

In case of residential properties (flats, etc.), the duty rate is different:

- it is 2% after the part of the real property's full value that does not exceed HUF 4 million (approx. EUR 14,000),
- it is 4% after the part of the value that exceeds HUF 4 million.

If only partial ownership of the residential property is acquired, than the 2% rate limit shall be applied to such proportion of HUF 4 million as the partial ownership relates to the full.

The seller of a real property shall also pay tax after the transaction.

If the seller is a natural person, it shall pay personal income tax if there is an income for the real property. Income shall be calculated as follows: the value for which the property was acquired in the past, investments (renovation, e.g.) and the duty paid in the past shall be deducted from the purchase price. The rate of the income tax is 16 % of the calculated income; nevertheless it decreases with time, as explained in the answer to the next question.

If the seller is a company which is subject to corporate income tax, the purchase price of the real property belongs to revenue of the company. The income tax rate for companies is 19%, nevertheless a preferential 10% rate applies to the first HUF 500 million (approx. EUR 1.75 million).

If not the real property itself is sold, but a share in a company more than 75% of the assets of which are Hungarian real properties, the person alienating the share shall also pay tax, if it is a tax subject of a foreign country with which Hungary has no conventions against double taxation. This rule was adopted to stop the practice that valuable real properties were sold through special purpose companies without paying tax. The rate of the tax is 19%, and it has to be paid by the person alienating the share, not the company. The tax base is the income received from the alienation, i.e. the difference between the price received and the costs incurred in acquiring and keeping the share. The rule does not apply to publicly listed companies, but it applies to income received through capital decrease in the company.

Between business parties, the purchase of a real property may also be subject to Value Added Tax (VAT). Whether VAT is payable, depends on many factors, including the type of the property and the legal status of the parties. In certain cases, the taxpayer may decide whether it wishes to pay (and deduct) VAT, or not. In certain cases, it is not the seller, but the purchaser who shall pay the VAT. The rate of VAT is 25% of the purchase price.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

In case of natural person sellers paying personal income tax, tax is payable if there is a positive difference between the sale price of the real property and the cost of its acquisition (including investments). In both cases, the longer the period is between the purchase and the sale is, the smaller the tax rate is. The tax rate reaches 0% in the 15th year, but in case of housing properties, in the 5th year.

No such tax rules exist for companies.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

In Hungary, there are currently no restrictions on moving foreign currency in and out of the country.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

If the lease is for an undetermined period, the purchaser may terminate the lease, and also require the seller to terminate the lease contract and have the lessee move out. Based on the law, the deadline for leaving the property is 15 days, unless otherwise provided by the lease agreement. In case of flat rent, the deadline shall be the end of the month, but cannot be less than 15 days.

In case of a lease for a fixed period, the purchaser is not entitled to terminate the lease, unless the purchaser was misled by the lessee in respect of the existence or significant terms of the lease agreement.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Yes, it is possible to change the use of a building or a part of it. If the change of use does not affect the structure or the face of the building, no approval is necessary, the applicant shall only notify the construction division of the local municipality. If the structure or the face is affected (thus the change also necessitates construction works) a request for construction permit shall be filed with the same authority.



**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

**– notarial costs?**

In Hungary, attorneys-at-law are entitled to draft and countersign real property sale and purchase agreements. Therefore, there is no need for a notary public. If the parties nevertheless stick to have the sale and purchase agreement in a notarial deed, the fee would be around HUF 780,000 (approx. EUR 2,750), unless the case is more complicated.

**– land register?**

The land registry registration fee is HUF 6,600,- (approx. EUR 23,-) for each real property. Registration of a mortgage (if necessary) costs HUF 12,600,- (approx. EUR 44,-). If several rights are registered to the same real estate in the same proceeding, the fees are not accumulated, only the highest fee shall be paid. If there are different registration proceedings, the fees must be paid in each proceeding. The number of sellers or buyers does not affect the amount of the costs. In addition, if the parties are corporate entities, a signature specimen and a certified company registry extract is required for the procedure for each of them. These costs are: HUF 3,000,- (approx. EUR 10.5,-) for a company registry extract, and HUF 1,000,- (approx. EUR 3.5,-) for each notarial signature specimen of the corporate representatives.

**– real property transfer tax?**

The duty payable by the purchaser is HUF 48 Million (approx. EUR 168,000) if no exemptions and allowances apply, and there is only one property. If there are more real properties, each with an individual price less than HUF 1,000 Million, the full amount of the duty is HUF 56 Million (approx. EUR 196,000).

If VAT is payable after the transaction, its amount is EUR 1.35 million, calculated with the 27% rate.

**– advising lawyer (due diligence )?**

A real property transaction with a few parties and a few real properties would cost in our practice EUR 5,000-7,000,- or 1-3% of the value of the transaction. If the transaction is more complicated (e.g. there is mortgage on the property, corporate changes or public administrative procedures must be conducted) the costs may rise.

– **estate agent?**

Estate agent costs are generally between 2-5% of the real property, plus 27% VAT.

– **others?**

No other costs have to be incurred by the parties in a simple case.

## **II. Costs for holding real estate**

### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

The person which is the owner of the real property as at 1st January of the year in question, shall pay a yearly building tax or a yearly land tax. The tax is payable to the local municipality and its rate is also determined by each local municipality on its own. The law only determines the highest rate of the tax, but the local municipalities are likely to apply the highest rate.

In case of buildings, the maximum rate of the building tax is HUF 1.100/sqm (approx. EUR 3.85/sqm) or 3.6% of the fair market value of the property. The local municipality is entitled to decide which calculation method shall be applicable.

In case of real properties within the city border of a local municipality (i.e. close to the inhabited area), land tax is payable if construction is possible on the property. Similarly to the building tax rate, two calculation methods exist: HUF 200/sqm (EUR 0.7/sqm) or 3% of the fair market value. Again, the local municipality is entitled to choose the method.

Local municipalities decide on the tax rate and the calculation methods in their local municipality decrees.

### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

These costs largely depend on the type of the property (e.g. residential, office, industrial, etc.) and the services required. Professional caretakers offer a wide variety of services in Hungary.

According to the general practice of a significant market participant, costs of employing the personnel has to be paid, and besides this, they apply a so-called “open-book” invoicing structure, where the invoices received from the service providers (repairmen) are forwarded to the owner of the property with an additional 8-10% handling fee. Typically, property owners need for their office building 1-2 persons who check the maintenance status and tasks of the building 2 or 3 times a week.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors at the moment to invest in your country**

- directly in real estate?**
- through real property funds, open or closed ones?**
- through other clear and secure financial products?**
- at the moment not because of the impacts of the world wide financial crisis?**

In Hungary, the properties are still relatively cheap, compared to Austria, Germany, Italy, France or other western European countries. Considering other Central European countries, the prices are still on a fair level. Property prices have not or not significantly went down due to the effects of the financial crisis. In the last four years, many owners chose not to sell, but wait until they can achieve a better price, for the market seems rather to be stagnating. In spite of that, and because of the favourable price level we would definitely recommend to invest in real estate, either directly or through real property funds.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Please see the answer to the third question of Section I above. Of course, where purchase by domestic legal persons is not restricted (non-agricultural property) it is possible to create a Hungarian company for the purchase of the real estate.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The kinds and time frames of official approvals vary greatly and depend on the intended business activity. It is also an important question whether the foreign investor is registered (and if necessary, licensed) in an EU Member State.

If the foreign investor is not registered in an EU Member State, it may pursue business activities in Hungary in the following forms:

- by way of a branch office or a representative office;
- by way of a Hungarian company of which it is an owner/shareholder;
- provision cross-border services, if permitted by a Hungarian law or an international treaty.

A representative office does not possess legal personality. Foundation of a branch office or of a company generally takes a month, but a simple limited liability company can be registered within 3-4 business days, if “default” clauses are acceptable for the investor.

Investors registered in EU Member States may provide cross-border services as prescribed by Directive 2006/123/EC on services on the internal market.

Otherwise, the investor needs to acquire the same permits as domestic entities have to.

The general deadline for the issuance of a building permit is two months. Architectural and technical planning documentation must be attached, in accordance with the detailed statutory regulation. If an environmental permit is required, that shall also be attached.

If the investor wishes to pursue industrial activity on the plot, it shall be examined whether the activity requires a permit or a notification in respect of the plot. The relevant industrial activities (which may be harmful for health, cause fire danger, extreme noise or smoke, etc.) are listed in a Government Decree. Certain activities only have to be notified to the local municipality, others require a permit from the same. The permit is attached to the plot, not the owner. The deadline for the proceeding is at least 30 days, but it may be extended by 30 days. The plot will be registered in a local public register.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Our law-firm has a wide and long-standing practice in advising foreign investors on matters related to commercial real estate. Our practice embraces sale and purchase of real estate, collateral agreements, zoning agreements with local municipalities, administrative procedures related to plot formation and zoning requirements, all kinds of construction permits, matters related to archaeological excavations on real properties, expropriation for investment purposes and obtaining all kinds of permits and approvals for construction, use, re-classification or the operation of a business in the energy sectors, project finances, M&A transactions and many other fields of business. For this reason, we would be pleased to assist foreign investors in all these aspects involved.

# India

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

The following aspects need to be remembered to understand the ensuing response to this question:

- (i) India has a federal structure and is constituted of 28 States and 7 Union Territories.
- (ii) The Constitution of India prescribes certain matters which are in the exclusive domain of the Central legislature or the Indian Parliament, some which are in the exclusive domain of the State legislature and some which are in the concurrent list i.e. within the domain of both the Centre and the State.
- (iii) Land, registration of instruments and laws relating to stamp duty payable on instruments evidencing land transactions are all matters in the concurrent list while rates of stamp duty and recording of data with respect to agricultural land is in the State list.
- (iv) All instruments or documents by which rights in immovable property are transferred are compulsorily registrable with the concerned Sub-Registrar in whose jurisdiction the property is located, under the Indian Registration Act, 1908. All such instruments also require stamp duty under the Indian Stamp Act, 1899 at rates prescribed in the said Act which is normally a percentage of the consideration i.e. in the case of a sale it is a percentage of the sale consideration, in the case of a lease it is a percentage of the annual rent, and in the case of a mortgage it is a percentage of the amount secured. A document which is compulsorily registerable and is not registered, has no effect. If no stamp duty is paid on a document that attracts stamp duty, it is not admissible in evidence before a court or any quasi-judicial authority. Such document is also liable to be impounded by the court or authority before whom it is filed or tendered, with liberty in such court or authority to levy penalty of upto ten times the duty payable, and the parties responsible for payment of stamp duty are also liable to criminal prosecution.
- (v) The law relating to transfer of immovable property is enshrined in the Transfer of Property Act, 1882, the law relating to registration or recording of instruments including those relating to immovable property is enshrined in the Indian Registration Act, 1908 and the law relating to stamp duty payable on

instruments is enshrined in the Indian Stamp Act, 1899 which are enactments made by the Centre/Indian Parliament and adopted, with or without modification by the legislature of each State.

- (vi) Essentially, in every State, there are three broad categories of land:
  - (a) Freehold, which means that the owner is the absolute owner and free to transfer or deal with it without seeking any prior approval.
  - (b) Leasehold, which is land granted by the Centre or State Government to the owner under a grant or a perpetual lease (which is generally upto 99 years) or under the terms of a special grant in the case of land which is compulsorily acquired by the Government and handed over to a grantee for a particular purpose, such as for setting-up an industry. Each grant has its terms and conditions through which the Government controls not only the manner and conditions under which the land can be transferred but also the use to which it can be put.
  - (c) Special category land, which is held by charities and religious bodies as endowment, defence establishments and such like, which are governed by special statutory and other law and rules applicable to such institutions, and could either be freehold or leasehold.
  - (d) In each of the above three categories there could generally be the following types of land:
    - Agricultural (generally free-hold); and
    - Urban, which for the purpose of this discussion can be residential, commercial or industrial or otherwise non-agricultural.
- (vii) Agricultural land in every State is generally governed by special statutes predominantly designed to protect the small farmer and which seek to protect against fragmentation of cultivable land and the consolidation of large tracts in the hands of a few by prescribing a ceiling on industrial land holdings, the recording of ownership and transfers (both inter-vivos and testamentary), crop yields and related data, as well as the establishment of judicial and quasi-judicial forums for redress of grievances.
- (viii) Urban land, in most urban agglomerations, is subject matter of planned development. In other words, the State supervises the development of urban land through development-plans and master plan which are issued and monitored through State agencies with statutory sanction from State legislature. A master plan of a particular city would divide the city into zones and prescribe the use to which land in each zone can be put, areas to be dedicated to roads and services, areas to be maintained as green areas, areas to be maintained for utilities



like banks, schools, hospitals, etc and areas to be exclusively used for industrial purposes and so on.

- (ix) Title to land is a complex issue especially in the case of inherited title. The law of inheritance is in the nature of “family law” and differs from community to community i.e. the Muslim law of inheritance is vastly different from the Hindu law of inheritance. In some cases and specifically in the case of Hindus which constitute the majority in India, the law is codified in so far as concerns intestate succession. For testate succession i.e. matters governing Wills etc. there is a Central law known as the Indian Succession Act, 1925 which, inter-alia deals with interpretation of Wills, probates and letters of administration, etc. with some provisions dealing separately with Hindus, Muslims, Christians, Buddhists, etc.
- (x) In view of the above, a real estate transaction in India is very property specific in as much as, two properties in the same town could be governed by a completely different set of norms, rules, laws and issues relating to title.
- (xi) Any property transaction therefore could typically go through the following stages:-
  - a) A pre-contract Stage I: in which the purchaser would make preliminary enquiries on the exact location of the property, seek preliminary information on whether the property is freehold or leasehold or governed by any statutory or other conditions restricting transfer, the expected market value, a prima facie view on title, and if vacant land, the extent to which construction is permissible under applicable building bye-laws and if constructed a prima facie view on whether the construction was permissible at the time it took place and whether there were any deviations from the sanctions and approvals that were granted for such construction. Most of this is achieved either through a property agent or from a desk-top diligence of a photocopied set of the title documents and the site-plan and building plan of the property which are made available to a purchaser by the property agent or the seller himself.
  - b) A pre-contract Stage-II: in which, having made the preliminary decision to go ahead with the possible transaction on the basis of what was learnt during the previous stage, the purchaser would essentially carry out a check on title and encumbrance at the office of the concerned Sub-Registrar in whose offices, under the Indian Registration Act, each transfer of the property in the title sequence and each encumbrance that was created through a registered instrument is recorded. In a more detailed due-diligence, the purchaser will also endeavour to verify the validity of construction that

may exist on the land by going through the files relating to the property at the office of the authority entrusted with granting building permits and would also conduct a study of the applicable master plan (in case of only urban property) to verify the use to which the property was allowed to be put. For agricultural property he would carry out a scrutiny of all recordings in the office of the concerned authorities where such record is maintained with a view to establish title, encumbrance, mutation and possession and a study of the local laws to determine whether there is any restriction on transfer.

The above due diligence exercise is sometimes carried out as a pre-closing condition to a binding or a non-binding document that is signed after the pre-contract Stage-1, which could be either in the nature of a binding agreement for sale or a non-binding term-sheet depending on how the transaction is negotiated. During this stage also, the purchaser takes advice on how to best structure the transaction, the predominant consideration being to either enter into a deferred sale i.e. subject to pre-closing conditions or in case of freehold property that is freely transferable, to go directly for the transfer in one-time deal.

- c) Contract Stage-1: subject to satisfaction with the outcome of the due-diligence exercise and the commercials being agreed between the buyer and the seller, the transaction takes place either in one step or in two steps. In a one step transaction, which is possible for a freehold property, it is open to the parties to agree for the seller to execute and sign a sale deed or a conveyance for the said property in favour of the purchaser and to register the same with the concerned Sub-Registrar without any prior agreement, term sheet etc. In a two step transaction, when either the purchaser needs time to liquidate assets to generate the funds to pay the seller or the seller needs time to vacate the property, parties generally enter into a binding agreement for sale which is essentially an agreement where seller promises to sell the property to the purchaser who agrees to purchase the same for a specific consideration, and pays the seller an upfront advance or part sale consideration and promises to pay the balance within a specified time limit which is the essence of the contract. Under Indian law this is an enforceable agreement. In other words if the seller reneges on his commitment to sell in spite of the purchaser being ready with the money, the purchaser can go to court and ask for a decree of specific enforcement forcing the seller to transfer the property as agreed. In such cases damages is not considered adequate remedy.

- d) Contract Stage-2: Assuming there is no dispute under the agreement for sale and all pre-closing conditions are satisfied, the transaction is consummated on or before the due date by the seller executing a sale deed or conveyance in favour of the purchaser and granting the purchaser physical possession of the property against which the purchaser pays the seller the balance sale consideration. By law this document needs to be registered with the concerned Sub-Registrar for which both the seller and the purchaser have to personally present themselves before the Sub-Registrar and admit their signatures. The documents also requires stamp duty which is payable at a rate which is a percentage of the sale consideration and differs from State to State in the range of 4 to 8 percent of the sale consideration.
- (xii) In a leasehold property, the terms of the grant or the perpetual lease normally contain a provision governing the mode of transferring leasehold rights further. A standard condition is that no transfers will be permitted for part of the property and even for transferring the full property, prior permission of the paramount lessor would have to be obtained and which may be granted with or without condition. In some cases the paramount lessor reserves the right of pre-emption as a first option to purchase the property at the intended value. For a transaction of sale of leasehold property therefore the transaction is necessarily split into two stages, the first being an agreement for sale with pre-closing conditions including the obligation on the seller to obtain the requisite sale permission from the paramount lessor (the Government) and then closure by a sale deed or a conveyance for transfer of the leasehold rights.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Although Indian law recognizes that the owner of the land and the owner of the building on the land could be different, instances of this are rare. Generally the land and structures thereon are owned by the same entity. The Indian law also recognizes sale of different units in a multi-storeyed building by its owners and in most States the sale of an apartment or unit in a multi-storeyed building or condominium includes, by law, a proportionate indivisible share in the land and therefore each time a unit is transferred or sold the original owner's share in the land get diluted. Most States in India have statutes that govern the transfer of units/apartments in multi-storeyed buildings, management of such complexes and the maintenance of facilities therein, rights of individual apart-

ment/unit owners inter-se and the setting up of maintenance organizations. In some States where there is a predominance of “leasehold land” i.e. whether land is granted to the owner by the State Government or any of its agencies, there is still some ambiguity in the manner apartments/units in a multi-storeyed building constructed on such land are to be transferred in view of either the absence of a law governing the same or an ambiguity in the existing law.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Under the Indian legal system, joint ownership or co-ownership of property is recognized as a “tenancy-in-common” and not as “joint tenancy” sometimes recognized by English law. A co-owner holds a share in property in accordance with his share of contribution in the purchase price. If such share cannot be determined or there is no evidence as to the manner in which the purchase consideration has been shared, the law will presume “equal ownership”. In other words in a property owned by two owners where there is no evidence of how the consideration was shared, each will be presumed to have a 50% undivided share. This has statutory sanction under the Transfer of Property Act, 1882.

All juristic persons and entities can own immovable property. These include individuals, Companies incorporated under the Companies Act 1956, registered partnership firms, statutory bodies and institutions, societies (both co-operative and others) under their respective statutes, Trusts etc.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In India, except in unusual circumstances where it is possible for the owner of the building and for the owner of the land to be two different persons, generally the ownership of the land presumes the ownership of all structures and buildings on the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Section 17 of the Indian Registration Act, 1908 requires compulsory registration of all documents or instruments evidencing transfer of rights in immovable property. Once the instrument or document is registered, it becomes a public document and is open to inspection in accordance with the rules. Every district in every State in India has a Registrar of Assurances with Sub-Registrars for different parts of the district and are statutory appointments under the Indian Registration Act 1908. Transfers of immovable property must be registered with the Sub-Registrar having territorial jurisdiction over the area in which the property is situated. Registration requires personal appearance of all signatories (including witnesses) before the concerned Sub-Registrar and to identify themselves and admit their signatures and affirm that the instrument has been executed of their own free will. Every Sub-Registrar's office maintains an index of registered documents and a copy of the document itself to facilitate public inspection. Registration fee is payable for every registration and differs from State to State. In some States it is a fixed fee depending on the nature of the document and in some States it is a small percentage of the specified consideration of the instrument. Purchasers can depend on the entries in the maintained records of the Sub-Registrar. However, there are some crucial questions for which an intending purchaser has to independently seek answers and secure himself and for which records of the Sub-Registrar are not enough:

- (i) Whether the seller has priorly entered into an unregistered arrangement for the property with someone else and is concealing this from the purchaser?
- (ii) Whether there is any pending litigation involving the property which the seller has not disclosed. There is no central data base for such litigation?
- (iii) Whether the seller has created an equitable mortgage i.e. by deposit of title deeds? Because there is no instrument evidencing transfer of rights in property in an equitable mortgage, this fact does not show-up in the records of the Sub-Registrar and precaution needs to be taken to ensure that the original title deed is in the possession of the seller which an indication that no equitable mortgage has been created.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Generally, in every State in India a document or instrument by which rights in immovable property are transferred attracts the following:

- (i) Stamp duty (including municipal tax) which is a percentage of the sale consideration and differs from State to State in the range of 4% to 9%. In some States there is a discount of approx. 2% if the purchaser is a female and there are exemptions in some cases where the seller or the transferor is the Central Government or State Government.
- (ii) Registration charges, which in most States are fixed and nominal and in some States are a small percentage of sale consideration, say 1% .  
Having said this while the above are in the nature of duties and charges, there is an element of direct taxes for the seller in every transaction of sale of immovable property which is discussed in response to question 7 below.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Under the Indian Income Tax Act, 1961 (Act), generally, the profit or gain arising from the transfer of a capital asset arrived at in the manner provided under the Act is subject to tax. In other words, for a seller of immovable property, the difference between sale price and the seller's original acquisition cost plus the cost of improvement thereto (indexed further for inflation according to a prescribed formula) is taxable under the head 'capital gains'. If the property has been held by the seller for less than thirty six months the gain/profit (also known as "short-term capital gain") is taxed at the same rate as the seller's taxable income, and for a property held for more than thirty six months ("long-term capital gain") is taxed at a lesser rate. For a domestic company the rate for taxing such income (short-term capital gain) in India is 32.445% and the prescribed rate for taxing a long term capital gain is 21.63%. In India, the announcement of the fiscal policy is an annual event, and therefore rates for taxing income, long term capital gain etc. are prescribed through the relevant provisions of the Finance Act passed by the Indian parliament annually and accordingly may vary from year to year. The fiscal policy also prescribes exemptions from long-term capital gain by providing gateways for investment in tax saving modes. For example, in the case of individuals, it is possible to deploy the gain in a residential property under construction or purchasing a residential property for personal residence to avail of such exemption.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Outflow of foreign exchange from India is undertaken in terms of ability provided under the relevant provisions of the Foreign Exchange Management Act 1999 and the Regulations made thereunder (FEMA Regulations).

If the seller is a resident Indian he is not allowed to repatriate the sale proceeds outside India unless he seeks prior permission from the Reserve Bank of India for which he has to make out a case under the relevant FEMA Regulations, or in certain cases where he is covered under any general permission granted by the Reserve Bank of India for repatriation for specific prescribed purposes and that too upto a certain amount in each fiscal year depending on the purpose.

If the seller is a non-resident Indian who sells property owned by him in India there are a separate set of rules governing repatriation of the sale proceeds which also take into account the source of funds through which such seller originally acquired the property.

Foreign nationals of non-Indian origin resident outside India can acquire or transfer immovable property in India, on lease, not exceeding five years without the prior permission of the Reserve Bank.

Foreigners are not allowed to buy immovable property in India except with prior permission of the Reserve Bank of India which, for purely residential or commercial property, is rarely granted. Foreigners are however allowed to invest 100% in construction development projects in the real estate sector subject to the projects having a minimum size, adhering to the minimum capitalization requirements which are based on the extent of foreign equity, and lock in period of three years etc. in accordance with the Foreign Direct Investment Policy announced by the Government of India from time to time.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Purchasing a property which is already let out to someone else is a common occurrence. There are two types of tenancies. One in which eviction of the tenant is protected by statute under Rent Control legislation which exists in most States. In such a case, and notwithstanding the terms of the lease, the landlord has to approach a special tribunal constituted under the Rent Control legislation for eviction of the tenant and must bring his case within one of the grounds prescribed in the statute for eviction like non-payment of rent, unauthorized subletting, unauthorized construction by the tenant, landlord requiring

the premises for his own bonafide requirements etc. For a landlord, to evict a protected tenant through court is long and tedious process. However, some tenancies are outside the purview of Rent Control legislation and the common yardstick that determines whether the tenancy is protected or outside the purview of such protection is the monthly rent being paid by the tenant. In some States tenants paying more than a specified amount of rent per month are not protected by Rent Control legislation and in such cases, the contract of lease determines the relationship between such tenant and the landlord. Therefore, while purchasing a rented property, the first thing to examine would be whether the tenant is protected by statute or by the terms of the lease. In the former the said tenancy is treated as a serious encumbrance which ultimately would have effect on the sale price. In the latter, the terms of the lease have to be seen to ascertain whether and under what circumstances the lease is prematurely terminable by the landlord or the tenure of the lease to determine the vulnerability of the tenant and therefore the discount, if any, that the purchaser will expect on the sale price.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Once the building is constructed and put to use, it is almost impossible for the owner to get the designated use changed to an alternative use. This is relevant only in urban areas where there is planned development governed by applicable master plan/zonal plan, which is mostly the case in India.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )?
- estate agent?
- others?

We have already said earlier that foreigners who are not resident in India are not allowed to buy property in India or deal in real estate unless they seek prior



permission of the Reserve Bank of India but are however allowed to invest in developing real estate in India subject to conditions of minimum capitalization, project size, etc. Hypothetically, if a foreigner with prior permission of the Reserve Bank of India is to buy a property worth EUR 5 million, the standard direct cost on the sale transaction would be approximately as follows:

- Stamp duty (inclusive of municipal tax): 4 to 8% of EUR 5 million
- Registration charges which can go upto 1% of EUR 5 million.
- Estate agent: 0.5% to 2% of EUR 5 million subject to negotiation.
- Legal cost if involved in the transaction from inception (including due diligence) and if handled by a law firm like ours: in the range of 35,000 to 45,000 Euros at a conversion rate of Rs. 68:1 euro.

We may add that in purchasing leasehold property there could be additional charges that are payable to the paramount lessor as a pre-condition to the grant of sale promotion which is payable according to a prescribed formula in the lease or document of grant, and differs from case to case.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

For holding urban property the only possible recurring charges would be property tax which is levied by the local municipality or council and which is calculated in accordance with the formula which is either based on the rental value of the property if the same is actually rented, or on a deemed rental value if it is self occupied and which is calculated in accordance with the formula linked to the cost of land and the cost of construction, and in some States based on the open area, covered area and the age of the structure, and really has no nexus to market value. The others are minimum electricity and water charges that would be payable even if the property is vacant and there is no consumption of electricity and water but there are electricity and water connections in the property.

In agricultural property (which foreigners are not allowed to buy in India under any circumstances) there is annual land revenue or cess which differs from State to State.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

There is no organized system in India for appointing professional caretakers. In some high value residential and commercial complexes (which means multi-storeyed buildings, with residential or commercial apartments and facilities of parking, swimming pool, recreation etc.) and gated communities, multi-national real estate firms like C.B. Richard Ellis do undertake caretaker responsibility for the whole development under contract but not for individual units. In individual owned properties, the only recourse is to hire a professional security agency for rotational security services. Security agency guards can also be asked to pay electricity, water and gas bills and to report any damage to the property.

**14. Would you advise foreign investors at the moment to invest in your country**

- **directly in real estate?**
- **through real property funds, open or closed ones?**
- **through other clear and secure financial products?**
- **at the moment not because of the impacts of the world wide financial crisis?**

“Investment in real estate” can have two meanings in the Indian context. It could mean buying immovable property in India with a view to speculation on capital appreciation. For foreigners not resident in India, this activity i.e. buying and selling real estate in India is not permitted. It could also mean investment in real estate development. Under the Foreign Direct Investment Policy of India foreigners are permitted to invest in real estate development. In other words foreigners can either through wholly owned subsidiaries established in India or directly in joint ventures with Indian entities undertake projects for development of real estate and establishing housing, commercial, industrial or other complexes of a minimum project size and by adhering to minimum capitalization requirement which are based on extent of foreign equity, and with a lock-in period of three years amongst other terms prescribed in the said policy. For a foreign investor, it is always worthwhile to invest in a real estate construction development projects in India although we recommend that he does so in investing with an Indian property owner who has a FDI compliant project which is ready to start having received necessary permissions and approvals

which is what normally takes time and sometimes leads to indefinite delays in the commencement of the project. For this the foreign investor will have to carryout a detailed due-diligence of project approvals and title to the land, although his entry cost will be higher than investing in a green-field project on its own, which could also be susceptible to delays on account of procuring change in land use and other approvals necessary for the purpose of undertaking construction /development of the project. At the moment, and because of the complexity of land laws, zoning regulations and uncertainty on the time-frame of project approvals, we will not advise a foreign investor to undertake a grass-root project completely on its own and commencing from the first stage of scouting for the requisite land.

In relation to investment through real property funds (open or closed ones), although not many options are available, the SEBI (the market regulator) has put in place The SEBI (Alternative Investment Funds) Regulations, 2012 (AIF Regulations) on 21st May, 2012 and has required all Alternative Investment Funds (AIF) whether operating as Private Equity Funds, Real Estate Funds, Hedge Funds, etc. to register with the SEBI. The AIF Regulations provide that the AIF may raise funds from any investor whether Indian, foreign or non-resident Indians by way of issue of units. The AIF Regulations also provide that existing schemes will be allowed to complete their agreed tenure and such funds shall not raise any fresh monies other than commitments already made till registration is granted under the AIF Regulations. In view of this investment in financial products issued by SEBI registered AIF could be considered after having gone through the terms and conditions of such products.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Foreigners, not resident in India, are not allowed to purchase immovable property in India except with prior permission of the Reserve Bank of India. Foreigners resident in India and holding only tourist visas are also not allowed to buy immovable property in India and have to fulfill conditions to establish their residence status (other than mere period of stay) to be allowed to purchase immovable property without prior permission of the Reserve Bank of India. A company incorporated in India and wholly owned by foreign shareholders

is not allowed to engage in the activity of buying and selling of real estate. For an Indian there are no such restrictions. Property can be bought by an Indian individually or by a company having Indian shareholders or by registered partnership firms of Indian partners or LLPs comprised of Indian partners or Indian trusts, etc. An Indian company having foreign shareholders can also purchase real estate to pursue its objects for which foreign investment is otherwise permitted under the FDI Policy of the Government of India (as stated hereafter). It may also be mentioned that citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan are not allowed to purchase immovable property in India even if they are resident in India without prior permission of Reserve Bank of India.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

As already mentioned there is no direct ability available to a foreign investor to buy a plot of land in its name to run a business in India. For this, firstly he must organize his presence in India for undertaking a line of business in which foreign investment is permissible under the FDI Policy (as discussed later) and this could be done through an Indian company incorporated under the Indian Companies Act, 1956. Such a company could raise share capital from foreigners to the extent FDI is permissible under the FDI Policy for that line of business. For undertaking its business, such a company could purchase real estate to set up its manufacturing unit/ offices and for this it will not require any approval for the purchase of land/ building. There will however be requirement for such a company to obtain operational business licenses and registration depending upon the line of activity to be pursued and it is extremely difficult for us to list the number of operating permissions and approvals that would be required to set up a business or the time frame unless we know the nature of business and especially if it is a retail, services or a manufacturing business. India's Foreign Direct Investment Policy (FDI Policy) prohibits foreign investment in certain kind of businesses, allows investment in certain kind of business with prior approval, sets sectoral caps of investment for foreign investment in certain kind of business and allows 100% investment without prior approval in certain kinds of business. On the operational front and depending on the size of the project permissions and approvals are needed which could include industrial licenses, environment clearances, registration for undertaking imports/

exports including with direct and indirect tax authorities apart from setting-up permissions such as building permits, electricity load sanctions, etc.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**

Yes. Our firm has a robust real estate practice team and with eight offices in different parts of the country, the firm's spread and reach in this practice area is considerable and it is well known in the real estate market in India. In assignments involving foreign investment in the real estate sector, the real estate team works in tandem with partners who specialize in regulatory issues and structures related thereto to provide complete solutions under one roof.

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Under the Indonesian law, the State controls all lands. The management of land affairs, such as land tenures and titles, is administered by the State through the National Land Agency (Badan Pertanahan Nasional or “BPN”). Meanwhile, land/real property sale and purchase transaction can only be registered with BPN after it has been recorded in a deed drawn up by an authorized Land Conveyancing Officer (Pejabat Pembuat Akta Tanah or “PPAT”).

Under the Indonesian law, PPAT is the only official authorised to prepare and draw the authentic deed for the land/property transaction. In most cases, only a notary public is eligible to become a PPAT but in some regions where there is no practicing notary available, a PPAT office could be held by the Head of Municipality (“Camat”) and/or a qualified retired (non-active) BPN official.

The common procedure of real estate transaction in Indonesia is as follows:

1. Initially, the relevant parties (i.e., the seller and the buyer) must deliver all documents required for the transaction (e.g., original land certificate, identification of the parties) to the PPAT.
2. The PPAT will then verify the status of land/property with BPN. As the PPAT will be responsible to examine the validity and completion of requirements for the sale and purchase transaction, the PPAT needs to ensure that the seller is the true holder of the land/property pursuant to the records maintained by BPN.
3. Once the PPAT is satisfied with his/her findings and all required supporting documents have been submitted and/or produced, the parties may accordingly enter into a Sale and Purchase of Land Deed (Akta Jual Beli Tanah or “AJB”), whereby the seller transfers the title of the property to the buyer and the buyer makes full payment for the property to the seller.

The AJB is a standard prescribed form agreement for the purposes of sale and purchase of property. Once the parties enter into the AJB, it is acknowledged that:

- (i) the property is free from any legal constraints that may affect its title to be transferred to the buyer (e.g., mortgage, judicial claim); and

(ii) the payment for the price of the property has been settled by the buyer in full and complete manner (there is no more due and outstanding payment with regard to the purchase price of the property).

In circumstances where the property is not yet transferrable (e.g., still in development stage, still under mortgage) or the buyer wishes to pay for the purchase price in installments, the relevant parties usually enter into a preliminary arrangement commonly known as a Preliminary Binding Sale and Purchase Agreement (Perjanjian Pengikatan Jual Beli or “PPJB”) to record the intentions of the parties in relation with the sale and purchase of the property (whether in the form of a privately drawn deed or notarial deed), prior to entering into the AJB.

Different from the AJB which has a strict and standard form and provisions, the relevant parties may agree upon a wide range of conditions and arrangements before the AJB. For example, the parties may agree to arrange: (i) the removal of any mortgage attached to the property; or (ii) the payment to be made in staged installments, prior to the AJB.

4. Before the execution of the AJB, the buyer must pay, in full, the land and buildings acquisition tax (Bea Perolehan Hak atas Tanah dan Bangunan or “BPHTB”) and the seller must pay, in full, the income tax gained from the sale proceeds.
5. The execution of the AJB by the parties before the PPAT must be witnessed by at least 2 individuals. The PPAT is required to submit the AJB to BPN, for the purpose of registration of the new title holder, no later than 7 business days since the execution date and to notify, in writing, the said submission to the parties.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Indonesian law recognizes the principle of horizontal separation of ownership, whereby the ownership of the land is separated from the ownership of the building erected upon it; however, to date, there has not been any form of legal acknowledgment given on the building ownership status (i.e., building ownership certificate).

In the case of condominium, however, a person who owns a condominium will be issued a “Right to Own Strata Title Unit” title (Hak Milik atas Satuan Rumah Susun or “HMSRS”) for his/her condominium unit. The HMSRS is



attached to the ownership of the common land on which the condominium building constructed.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

There is no restriction under the Indonesian law on joint ownership of the property, as long as each of the parties is eligible to hold (“own”) such title of ownership.

Eligibility for property ownership depends on the land title where the property “sits”, being:

1. Right of Ownership (“Hak Milik”)

Hak Milik is the strongest title that may be held on land and it is perpetual and hereditary in nature. It can only be owned by Indonesian citizens (individuals) and certain legal entities determined by the Government (e.g., social and religious institutions). Other Indonesian legal entities and foreign citizens cannot own land under Hak Milik.

2. Right to Build (Hak Guna Bangunan or “HGB”)

HGB is granted basically to establish and construct (buildings) on land for a period of, theoretically, at the most 30 years, which may be extended for another 20 years and renewed for another 30 years (in total, 80 years). It may be granted to Indonesian citizens and Indonesian legal entities established under Indonesian law and domiciled in Indonesia, including Indonesian companies established under the foreign investment law (“PMA Companies”).

3. Right to Cultivate (Hak Guna Usaha or “HGU”)

HGU is the right to cultivate land, which is normally granted to land for cultivation, plantation and husbandry activities. The period of HGU title is for 35 years and may be extended for another 25 years at the most and renewed for another 35 years (in total, 95 years). It may be granted to Indonesian citizens or Indonesian legal entities, which are domiciled in Indonesia, including PMA Companies.

4. Right to Use (Hak Pakai or “HP”)

HP title can be owned for a maximum period of 25 years and may be extended for another maximum period of 20 years (in total, 45 years).

HP may be owned by:

- a. Indonesian citizens;
- b. foreigners residing in Indonesia;

- c. legal entities established according to the Indonesian law and domiciled in Indonesia, including PMA Companies;
  - d. foreign legal entities with a representative in Indonesia;
  - e. departments, non-departmental government bodies and regional Government;
  - f. representatives of foreign countries and representatives of international organizations; or
  - g. religious and social institutions.
5. Right to Manage (Hak Pengelolaan or “HPL”)
- HPL is a title granted over State land only to State-owned companies and governmental agencies normally for an unlimited term, to be managed by the holder of HPL with the authority to grant another land title on top of the HPL land to third parties.
6. Right to Lease (“Hak Sewa”)
- Hak Sewa is a land title that gives its holder a right to construct a building on top of other people’s land, upon payment of a rent.
- Hak Sewa may be granted to:
- a. Indonesian citizen;
  - b. foreign individual domiciled in Indonesia;
  - c. Indonesian legal entity, including PMA Companies; and
  - d. foreign entity having representatives in Indonesia
7. HMSRS

HMSRS may be granted to individuals or legal entities that fulfil the requirements as the holder of the title to the common land as mentioned in point 1 to 6 above.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

As a recognition of horizontal separation of ownership, it is possible to have different owners for the building and the land where that building is constructed.

However, while the legal evidence for the land ownership is clear (i.e., land title certificate), the certification of building ownership status has not been recognized yet. In practice, the building ownership is usually acknowledged and identified in the Building Construction Permit (Izin Mendirikan Bangunan or “IMB”). Although the IMB is basically a form of license to erect and establish

a building, the holder of IMB would generally be considered as the building owner.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes, the land registration by BPN is carried out in order to give a legal certainty of the land status (including ownership) and protection to the holder of the right of the land. However, as mentioned above there is no established building registration yet.

It has always been a recognized principle under Indonesian law that a party entering into a transaction with a good faith will be protected and it applies to a land transaction and registration as well.

Further, the prevailing laws specifically provide a protection for a good faith purchaser who has legally acquired and occupied the property by setting a five years' statute of limitation (starting from the date of issuance of certificate of title) for a third party to file a claim over the property.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

1. Income Tax: The regulations have different treatment in respect of an individual and a company, as follows:
  - (a) if the seller is an individual, any gain resulting from the sale of real property is subject to 5% income tax, which calculation is based on the purchase price.
  - (b) if the seller is a company, 5% income tax shall be applicable if the purchase price and the size of the building exceeds the limit determined by the Minister of Finance.
2. Real Property Registration Duty: The rate of real property registration duty is 5% of the purchase price. The buyer must settle the payment of registration duty at the same time of the signing of the sale and purchase agreement before the PPAT.

In the event the purchase price as stated in the sale and purchase agreement is less than the purchase price of the property based on the latest tax valuation

thereof (as indicated in the land and building invoice issued by the Land Office), the latter shall apply in calculating the applicable Income Tax and Real Property Transfer Tax.

3. Value Added Tax (“VAT”): In case the seller of a property is a taxable entrepreneur under the prevailing tax regulation and/or in real estate business, the VAT at the rate of 10% of the purchase price shall apply.

VAT on Luxurious Goods: In case the seller of a property is a taxable entrepreneur under the prevailing tax regulation and the size of the property exceeds the limit determined by the Minister of Finance, the VAT on Luxurious Goods at the rate of 20% of the purchase price shall apply. Please note that this type of tax shall only be applicable one time. Therefore, a buyer should carefully check the history of the relevant property to confirm whether the VAT on Luxurious Goods has been paid.

- 7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no legal requirement in Indonesia to hold the property for certain period. Therefore, one can buy and sell property on a short term basis or at any time. In general, any gains resulting from the sale of real property is subject to the income tax, regardless of the period of holding the property.

In common practice of a commercial building or apartment business, however, the developer usually imposes limitation as to the period and how many times the commercial building and/or apartment can be sold to other third party. This is usually employed by the developer to avoid any speculation.

- 8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

In general, there is no restriction on this arrangement, but there would be some reporting obligations and/or declaration need to be made if the amount involves foreign exchange exceeding certain threshold.

- 9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The Indonesian Civil Code stipulates that the sale of the property does not terminate the lease.

This means, if the property owner (or the lessor) sells the rental property, the lease does not end or terminate, but rather, the buyer of the property becomes the new property owner or the new landlord. In this respect, the buyer should honor the existing lease agreement.

An exception, however, applies when the lessee and lessor has expressly agreed, in the initial lease agreement, that any sale or transfer of the property shall terminate the lease.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Every region in Indonesia has its own zoning area pursuant to the spatial layout applicable to that particular area. In general, the spatial layout divides the area into several zones designated for a specific purpose, e.g., residential purpose, tourism purpose, commercial purpose, combination of the foregoing, etc.

If a property owner intends to change the use of a residential building into an office space, the owner is required to amend the building permit, provided that the amendment is in line with the then-current zoning rules.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

1. **Notarial Cost:** Subject to the location of the property, the Notary would normally charge 1% of the purchase price.

2. **Land Register:** The cost shall be calculated based on the following formula:  
(1% x Value of Land) + IDR50,000

The notarial cost above shall include the cost for registering the land with the Land Registry Office.

3. **Real Property Registration Duty:** 1. The rate of real property registration duty is 5% of the result price of the purchase price minus reduction factors. These reduction factors vary depending on the region in Indonesia.

The Notary will require the buyer to provide the evidence of payment of the real property transfer tax before the Notary proceeds with the registration of the land title/certificate.

4. **Advising Lawyer (Due Dilligence):** In general, a law firm specializes in commercial property will charge a legal fees of approximately US\$8,000 to US\$10,000 for this type of transaction, plus hours spent to conduct legal due dilligence (as requested). For a land due diligence, the legal fees vary from USD8,000 to USD15,000. Please note that the fees may change or vary according to the complexity of the transaction, the location of the property and the parties involved.
5. **Estate Agent:** Subject to the location of the property and the proposed purchase price of the property, the rate for an estate agent varies from 2% to 3% of the purchase price.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

In Indonesia, there are several tax charges for maintaining the ownership of the land/property:

1. Land and Building Tax (*Pajak Bumi dan Bangunan* or “PBB”):

PBB is paid annually and the rate is:

$0.5\% \times \text{NJKP Factor} \times (\text{NJOP} - \text{reduction factor})$

Whereby:

NJKP is Taxable Sale Value, and the NJKP Factor is 40% for NJOP above IDR1,000,000,000 (one billion Rupiah) and 20% for NJOP below that amount;

NJOP is Base Taxable Sale Value; and

The reduction factor may vary in every region in Indonesia.

2. Extension or Renewal of Land Title (in the form of HGB, HGU and HP):

In case the extension or renewal of land title is necessary during the ownership of the land, the owner must submit the extension or renewal application to the BPN and pay the renewal cost based on the following formula:

$$(2\% \times \text{Value of Land}) + \text{IDR}100,000$$

In addition to the above, in case the owner intends to rent the property to other third party, in return for a rental charges, the owner is also subject to the Income Tax with regard to the rental charges the owner receives (from the lessee).

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

In Indonesia, a professional caretaker usually cooperates with the property developer for the property management and maintenance services. The services charge for professional caretaker depends on the type of service and the service package and in the form of a fixed fee per month or year.

#### **IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

We would usually suggest for foreign investor who wishes to invest in property by way of a property management structure.

The above option is, by far, the most suitable investment option for foreign investor because, under the current regulations, a foreigner investor (whether individual or legal entity) is still prohibited to have a direct ownership over a land, while a foreign investment company (i.e., a company with foreign participation and established under the framework of Indonesian Investment Law) is also prohibited, from a conservative approach, to engage in lease/leasing/rental activities.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

The restrictions to foreign investors in property sector (as we have briefly explained in Section 1 above) apply to all foreign investors, regardless of the nationality or registered office of the legal entities (except for HP title as mentioned above).

Foreign investor should not arrange for a local entity to hold ownership on its behalf, because Indonesia does not recognize the concept of beneficial ownership. Therefore, the one that will be acknowledged as the legal and registered owner of the land title is the local entity.

As also indicated in our advice above, one way to get around these restrictions is to arrange the business through a property management structure.

If this is the case, the foreign investor should establish the so-called PMA Company in Indonesia, which will allow such PMA Company to hold land title and/or own the property. However, it is important to note that a PMA Company cannot be established to only hold land title and property without having business activities. As a PMA Company, it must have its activities and is intended and expected to generate income from its business activities.

As mentioned above, based on the prevailing investment regulations, the most suitable business activities for the said PMA Company is to engage in “property management services” to manage either its own property or third party’s property by entering into a property management services agreement.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Please refer to Section 1 of this Questionnaire for further details regarding restriction to foreigner in holding several land titles.

Even if the foreigner intends to have a direct ownership over the land to run a business, the foreigner may only do so through a PMA Company.

For establishing a foreign investment company (PMA Company), a foreign investor must, first, apply for and obtain an investment approval or registration from the Investment Coordinating Board (Badan Koordinasi Penanaman



Modal) by submitting the required application and the relevant supporting documents. Provided that the documents are complete and in good order, the approval may be available within 1 week. After an approval from BKPM, there are various corporate permits that required to be obtained by a company (e.g., approval from the Minister of Law and Human Rights, registration with the relevant Tax Office and Company Registrar Office, etc). The normal time estimation for setting up a PMA in Indonesia is 6 (six) to 8 (eight) weeks after the submission of the complete application to BKPM.

As for obtaining the relevant land title, in general, an application must be made to and must be registered with the BPN. There is no certainty as to when the BPN could issue a land title certificate but 2 (two) to 3 (three) months' period would be a realistic estimate.

There are other specific building permits that must also be obtained, e.g., IMB, building utilization permit, location permit etc. The timeline for obtaining the relevant building permit depends on various elements, amongst other things, building location, building purpose, and size of the building. For example, in Jakarta, IMB in respect of a non-residential building having more than 8 floors will be, theoretically, issued within 40 days as of the building retribution fee is paid by the applicant.

#### **17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, our Firm is in the position to assist foreign investors in every aspect as mentioned above.

#### **Regulatory update:**

The Government has recently promulgated the Law No. 2 of 2012 on the Land Procurement for Public Interest Development, which law has been further implemented by the President Regulation No. 71 of 2012 on the Implementation of the Land Procurement for Public Interest Development (“Land Procurement Law”).

The Land Procurement Law sets legal basis for acquisition of land for the purposes of building infrastructures and public facilities alike, such as hospital, airport and low cost housing which, in the past, have proven to be a very exhaustive process due to the conflict and compensation issues with land owners.

In this regard, the Land Procurement Law provides a clear mechanism for filing objections related to the determination of location and compensation issues. Objections in relation to the location must be filed in the Administrative Court, while objections regarding compensation are submitted to the District Court.

Another highlight in the real estate regulatory regime is the promulgation of the Law No. 20 of 2011 on Condominium (“Condominium Law”), as a replacement of the old Law No. 16 of 1985. The Condominium Law provides general provisions on the development, control, ownership, use, and management of a condominium. However, the Condominium Law has yet to provide any new/special provision regarding condominium ownership by foreigners.

Indonesia

# Italy

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Once a property for purchase has been identified, be it through a broker or a personal or professional contact, the parties usually enter into negotiations in respect of the terms of the transaction. Negotiations can be carried out directly by the parties with or without professional assistance. It is not uncommon for the parties to be assisted by legal counsel in this phase.

Irrespective of the way in which the negotiations are conducted, it is recommended that a notary be involved from the beginning to verify title and other formalities concerning the property. Under Italian law, the final Deed of Sale must be in written form. Furthermore, it must take the form of a notarial deed for registration in the Land Registry. A notary cannot execute a Deed of Sale unless the property is formally in order, including the payment of the taxes and amnesties for building-code violations. Unless otherwise agreed between the parties, the purchaser usually chooses and pays the notary.

The Preliminary Purchase and Sale Agreement (“PPSA”) may or may not provide for a period for the purchaser to carry out due diligence on the property (depending on whether such due diligence has been terminated beforehand) and the Agreement may be made conditional upon the satisfactory results of the due diligence.

The PPSA can take the form of a Private Deed or of a Deed signed before a notary, which is the rule in larger transactions. A notarized PPSA can either be registered in the Land Registry or not. A registered PPSA gives formal notice to third parties of the existence of a contract in respect of the property.

The PPSA will indicate, among others, the sales price, the payment terms and the term for executing the notarial Deed of Sale. The signing of a PPSA almost invariably involves the payment of a down-payment, usually in the order of 20% of the sales price. The down-payment is non-refundable except as specifically provided in the PPSA (e.g., failure to meet conditions precedent). If the purchaser fails, without a good reason, to execute the final Deed of Sale the down-payment is forfeited; if, on the other hand, the seller is in breach, a penalty equal to twice the amount of the down-payment is due.

In 2005, a law was introduced which protects the purchaser of a property intended for future building. The law provides that, should the seller execute a PPSA with reference to such a property, he must give the purchaser a guarantee (issued by a bank or by an insurance company) for the down-payment received.

If the notary has not been involved at the negotiation stage, it is necessary that he be brought in at latest after the signing of the PPSA as he is responsible for verifying title and the conformity of the property from a cadastral and building regulation point of view. The parties must be present personally or by proxy at the execution of the Deed of Sale. Any proxies or powers of attorney given in respect of this Deed must also be notarized, and if coming from outside Italy, legalized by Apostille or by the Italian Consulate.

Once a Deed of Sale has been executed, it will be registered by the notary both for tax and for Land Registry purposes, which normally takes a few days.

Title passes upon signature of the Deed of Sale but will be opposable to third parties only upon registration at the Land Registry.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

On condition that the object of the transaction can be clearly identified in the Land Registry, a purchase and sale of the whole land and construction or of a single unit or of a lot of unit is possible. Furthermore, depending on the regulations in force, it may be possible to divide a plot of land into various parcels or group together smaller parcels into a larger one. The same is applicable to residential units. These procedures, which should be carried-out before any formal undertaking of the parties (although their accomplishment may be a condition precedent contained in a PPSA) require formal permits from the local authorities which usually require time and expense.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Under Italian law, property can be owned jointly by two or more parties. Any individual with legal capacity and any legal entity (e.g., corporations, certain associations, etc.) can be the owner of title of real estate.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Unless otherwise specified in the Deed of Sale, the ownership of a building implies the ownership of the land on which it stands or of a larger plot if that is the case. It is, however, fully possible for the ownership of the land and of the building to be split.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes to both questions.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

If the Seller is an individual, the sale of real property is subject to a registration tax of 7% and a hypo-cadastral tax of 3%, both calculated on the value of the transaction. If the Seller is a corporation: (i) for commercial real estate, the sale is subject of VAT, currently 21% (in some cases, depending on the characteristics of the building and from the works done by the company, reduced to 10%), and hypo-cadastral tax of 4%; (ii) for residential real estate, the sale is subject to a registration tax of 7% and a hypo-cadastral tax of 3%, unless the seller is the builder: in this case, the sale is subject of VAT, currently of 21% (in some cases, depending on the characteristics of the building and from the works done by the company, reduced to 10%) and a hypo-cadastral tax of 4%; (iii) for the residential real estate, where the seller is an individual who actually wants transfers his main residence in the property, the sale is subject to a registration tax of 3% (or VAT 4%) and a hypo-cadastral tax of € 168,00.

Unless otherwise agreed, these taxes are for the account of the purchaser. Only the VAT cannot be shifted to the seller, not even in case of a specific agreement between the parties.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

The owner can sell the property whenever he wants. However the gains realized on the sale of buildings or agricultural lands are taxed if the property has been owned or has been built for less than five years, because the resale within a shorter term is deemed speculative. In this case, the gains must be inserted in the individual income tax return of the seller, and it is taxed in virtue of the progressive rate applicable to his total income. In Italy, for an individual, the minimum rate is 23%: therefore it is always convenient to ask the notary who stipulates the Deed of sale for the application of alternative tax, which is 20%.

In addition, gains realized on the sale of land for construction are always taxed, without exceptions.

In the case of a company, the gains are always taxed (whatever the nature of the property) of 27,55% (IRES) and of 4% (IRAP); if the property was owned for more than 3 years, taxation may be distributed over 5 years.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes. If the seller is considered tax resident in Italy he must however file a special document (RW) for the fiscal monitoring of assets abroad. Obviously, the transfer must be made by authorized intermediaries (i.e. banks).

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Purchase of leased property does not give the new owner the right to terminate the lease contract in existence, provided that the lease contract has been stipulated before the sale and the lease contract has a certified date.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**



Any modification of the land or building use requires official approval, which will in turn depend on the zoning regulations in force.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- Notarial costs and fees including land register: € 21.000,00.
  - Real property transfer taxes:
    - a) if seller is an individual € 500.000,00;
    - b) if seller is the company that constructed the building, from € 700.000,00 to € 1.250.000,00;
    - c) if seller is a real estate company € 500.000,00.
  - Advising lawyer (due diligence) € 50.000,00.
  - Estate agent € 100.000,00 (2%).

These costs may vary depending on the complexity of the matter, etc..

### **III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

All real property in Italy is considered to be income producing, whether this be real or virtual. The typical example of “real” income are rental payments. A property is considered to produce virtual income when it is not instrumental in producing real income. Such virtual or cadastral income is a factor of a statutory (or cadastral) value of the property, which is updated every few years based on the real estate market. Both real and virtual income are taxed at normal income tax rates for individuals or corporations.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

It depends on the type of property and on the type of work that the professional caretaker has to do; for example, if the property is rented, the fee for the caretaker is usually calculated on 5% of the monthly rentals.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

A foreign investor today can invest in Italian real estate through any vehicle which best meets the investor's financial or operational needs. Currently, the real estate market is extremely favorable for investors, since the prices have fallen significantly.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no particular restrictions on ownership of real estate in Italy.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the land being purchased is already zoned for the type of business in which the investor intends to engage, no particular official approvals are required. If this is not the case, the investor will need to request a land-use change which, depending on the situation, can take from three to eighteen months or even longer.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

We can assist foreign investors in all of these aspects.

# Japan

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

#### (1) Negotiation of Purchase and Sale

Parties to a potential purchase and sale of the real property in Japan are often introduced to each other through real property agents (however, Japanese law does not REQUIRE the involvement of real property agents), and such agents may arrange and negotiate on behalf of parties the purchase and sale.

Generally no prior governmental approval is required as to a purchase and sale of real property. An exception is for specific types of real property, for example, agricultural lands, in which case the parties to purchase and sale are required to notify in advance the relevant governmental authority and obtain its prior approval.

Sometimes a letter of intent to purchase (kaitsuke shomei) from the potential purchaser is prepared and submitted to the seller, which expresses the intention to purchase, the suggested purchase price and the conditions of purchase offered by the potential purchaser. However, this letter of intent may be normally considered as a non-binding document and merely an expression of intention of the potential purchaser, and the seller may choose at its discretion to accept or reject.

#### (2) Execution of Purchase and Sale Agreement

Generally there is no statutory designated form and/or contents for the purchase and sale agreement. Most Japanese local companies are not familiar with the clauses used in the Anglo/US-style documentation, such as those relating to conditions precedent and representations and warranties. That means that the usual Japanese purchase and sale agreement of real property among small local companies and/or individuals does not contain such provisions and instead contains a quite simple defect liability clause. However, the documentation for transactions for large office buildings and commercial facilities involving reputable asset management companies and major banks often contains such clauses.

#### (3) Closing

Ownership of real property is legally assigned and transferred only in accordance with mutual agreement of purchase and sale and there is no other action to effectuate the purchase and sale. However, as mentioned below, for the purpose of perfection and assertion of transfer of ownership of the real property against third parties, the registration of ownership is required with the

applicable official registrar. Upon the closing of purchase and sale of the real property, a judicial scrivener is often retained to register transfer of ownership of the relevant real property. In principle, the seller and the purchaser jointly apply for such registration. Also, common practice is for the seller to deliver all documents necessary for such registration (including the power of attorney in connection with the application for registration submitted by seller) in advance to the judicial scrivener retained by purchaser, and upon confirmation of payment of purchase price, the judicial scrivener files such registration with the registrar for the benefit of seller and purchaser.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Ownership of the land and building in Japan are legally separate and independent of each other in principle. Owners may sell, hypothecate or make any other disposition to, the ownership of the land and the building built on such land separately on different date and to different persons.

Condominium ownership (kubun shoyu-ken) is permitted and often used in case of apartment buildings. Right of site (shikichi-ken) is basically attached to the relevant condominium ownership, and it is not possible to sell such right separately from condominium ownership unless otherwise permitted in the association charters (kanri kiyaku).

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Joint ownership (kyo-yu) of the real properties is allowed and there is no restriction under the Japanese Civil Code on who may be the owner or joint owner of real properties. That means that individuals, corporate entities, incorporated associations and incorporated foundations may be such owners.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

As mentioned the paragraph 2 above, the ownership of the land and the building is separate and independent and so it may be possible for the owner of the land to be different from the owner of the building built on such land. No statutory presumption relationship between the ownership of the land and the building is provided in the Japanese Civil Law.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The information set forth in the registration of real property does not always protect the third party and so depending on the nature of the transaction and relevant real property, it may be prudent to conduct further research to confirm the property boundaries and to confirm the manner in which the seller acquired that real property. In case that a real property purchase and sale agreement between a seller and a purchaser becomes null and void, that purchaser will no longer be the owner of that real property even if that purchaser has completed the registration of the real property. Note also that a good faith third party who purchases the real property from such purchaser would, save for certain exceptions under the Japanese Civil Code, not be recognized as the owner of the real property even if such good faith third party has completed the registration of the real property.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Upon transfer of the real property, (i) the registration tax and (ii) the acquisition tax are normally imposed upon the purchaser. In addition, (iii) the national consumption tax and local consumption tax are added to the purchase price of the building, and (iv) in case of preparation and execution of an agreement, the stamp duty is imposed upon such preparation and execution of the agreement.

**(i) Registration Tax**

Registration tax is generally equal to 2% of the assessed price of the real property, but would be 1.5% of such price for any registration for transfer of the real property registered by March 31, 2013.

The assessed price of the real property is determined by the price registered in the fixed asset tax rolls (not the purchase price described in the purchase and

sale agreement). Please note that the price of the real property in the fixed asset tax rolls is often quite different from the purchase price in the transaction.

There are some mitigation measures regarding the registration tax stipulated in the relevant laws and regulations. For example, the tax rate could be lower if the acquisition vehicle is a tokutei mokuteki kaisha (a special purpose company for the asset securitization).

(ii) Acquisition Tax

Acquisition tax is generally equal to 4% of the assessed price of the real property, but would be 3% of such price for any transfer of the real property registered by March 31, 2015. In principle, the assessed price of the real estate is determined by the price registered in the fixed asset tax rolls.

(iii) Consumption Tax

National Consumption Tax: 4% of the purchase price of the building  
 Local Consumption Tax: 1% of the purchase price of the building

(iv) Stamp Duty

The amount of the stamp duty imposed on the purchase and sale agreement of real property depends on the purchase price described in the purchase and sale agreement. The basic chart and special taxation chart concerning stamp duty for real property purchase and sale agreement are as follows;

**Basic Stamp Duty Chart**

<b>Purchase Price described in PSA</b>		<b>Stamp Duty Amount</b>
no purchase price description		JPY 200
less than JPY 10,000		N/A
JPY 10,000 or more	JPY 100,000 or less	JPY 200
more than JPY 100,000	JPY 500,000 or less	JPY 400
more than JPY 500,000	JPY 1,000,000 or less	JPY 1,000
more than JPY 1,000,000	JPY 5,000,000 or less	JPY 2,000
more than JPY 5,000,000	JPY 10,000,000 or less	JPY 10,000
more than JPY 10,000,000	JPY 50,000,000 or less	JPY 20,000
more than JPY 50,000,000	JPY 100,000,000 or less	JPY 60,000
more than JPY 100,000,000	JPY 500,000,000 or less	JPY 100,000
more than JPY 500,000,000	JPY 1,000,000,000 or less	JPY 200,000



Japan

more than JPY 1,000,000,000	JPY 5,000,000,000 or less	JPY 400,000
more than JPY 5,000,000,000		JPY 600,000

**Special Taxation Stamp Duty Chart**

Notwithstanding the foregoing chart, stamp duty imposed upon the real property purchase and sale agreement executed by March 31, 2013 and in which the purchase price is more than JPY 10,000,000 is as follows;

<b>Purchase Price described in PSA</b>		<b>Stamp Duty Amount</b>
mor than JPY 10,000,000	JPY 50,000,000 or less	JPY 15,000
more than JPY 50,000,000	JPY 100,000,000 or less	JPY 45,000
more than JPY 100,000,000	JPY 500,000,000 or less	JPY 80,000
more than JPY 500,000,000	JPY 1,000,000,000 or less	JPY 180,000
more than JPY 1,000,000,000	JPY 5,000,000,000 or less	JPY 360,000
more than JPY 5,000,000,000		JPY 540,000

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Real property held for less than five (5) years is, when then sold, subject to a 30% income tax and 9% residential tax upon the taxable income, while taxation for on taxable income on dispositions of property held for five (5) or more years is includes a 15% income tax and a 5% residential tax.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Sellers may obtain and/or remit the purchase price from or to any location inside or outside Japan. In case of remittance out of Japan from a Japan resident to a non-resident, that resident shall afterward file with the authority concerned through the Bank of Japan a report concerning such remittance.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The purchaser of the real property, in principle, shall have the right to claim against the lessee of the real property for termination of the lease and evacuation of the premises. However, in case that the lessee has completed the perfection of the lease right, the purchaser may not claim for such termination and evacuation.

The perfection of the lease right is basically registration of the leasing right on the relevant real property, and, as a major exception under the Act on Land and Building Leases, (i) in connection with the land lease, even if the land lease right is not registered, when the land lessee possesses registered buildings on the land, the land lease right may be asserted against a third party, and (ii) in connection with the building lease, even if the building lease is not registered, at the time the buildings are delivered to the building lessee, the building lease shall subsequently become effective in respect to the person who has acquired ownership of the said buildings.

Assuming that the land lease or the building lease is protected through the said measures against the owner of the real property, in case of sale and purchase of the real property, the title as the lessor under the relevant lease shall be automatically succeeded to the purchaser upon transfer of the real property.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Subject to the Building Standards Act and the regulations of the relevant local government, the governmental approval (including the relevant fire and defense management agency) is necessary to change the use of a building. In case that the building is located in a certain regulatory area such as under the City Planning Act, the change of the use of such building might not be allowed.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?

- **advising lawyer (due diligence )?**
- **estate agent?**
- **others?**

Assuming JPY 100 to the euro exchange rate, a purchase price of JPY 500,000,000 and also assuming the assessed price of the real property is close to the purchase price.

- notarial costs

The notarial cost for the notary public to prepare and certify the real property purchase and sale agreement is as follows;

<b>DOUBLE of Purchase Price described in PSA</b>	<b>Notarial Cost Amount</b>
JPY 1,000,000 or less	JPY 5,000
more than JPY 1,00,000 JPY 2,000,000 or less	JPY 7,000
more than JPY 2,000,000 JPY 5,000,000 or less	JPY 11,000
more than JPY 5,000,000 JPY 10,000,000 or less	JPY 17,000
more than JPY 10,000,000 JPY 30,000,000 or less	JPY 23,000
more than JPY 30,000,000 JPY 50,000,000 or less	JPY 29,000
more than JPY 50,000,000 JPY 100,000,000 or less	JPY 43,000
more than JPY 100,000,000 JPY 300,000,000 or less	JPY 43,000 plus JPY 13,000 for each additional purchase price of JPY50,000,000
more than JPY 300,000,000 JPY 1,00,000,000 or less	JPY 95,000 plus JPY 11,000 for each additional purchase price of JPY50,000,000
more than JPY 1,000,000,000	PY 249,000 plus JPY 8,000 for each additional purchase price of JPY50,000,000

In this case the notarial cost would be JPY 249,000.

Please note that a notary public is not necessarily required to be retained to prepare and execute the real property purchase and sale agreements in Japan.

– land register?

In this case the registration tax would be 1.5% of the assessed price of the real property and the amount would be JPY 7,500,000.

– real property transfer tax

In this case the acquisition tax would be 3% of the assessed price of the real property and the amount would be JPY 15,000,000.

– advising lawyer (due diligence)

It is difficult to predict with any certainty just what the amount of legal fees would be for a Japanese real property transaction. In that connection, the size of the relevant property or the amount of the purchase price would not necessarily be dispositive. As a general matter however, any due diligence would usually include reviewing (i) the registration summary with confirmation whether mortgage, lien or any other encumbrance is created upon the real property, (ii) any tenant lease agreement, (iii) any agreements to be succeeded by the purchaser, and (iv) any other existing or contemplated financial arrangements to acquire or hold the relevant real estate. Lawyers would also usually prepare and draft the relevant transaction documents such as the purchase and sale agreement, the MoU for purchase, and the MoU for succession of the agreements including the tenant lease.

– estate agent?

Fee for the real property agent upon purchase and sale of the real property shall be within the amount calculated in accordance with the following formula in case of more than JPY 4,000,000 of the purchase price; (Purchase price in the purchase and sale agreement (excluding tax) \* 3% + JPY 60,000) \* 1.05

In this case the fee for the real property agent would be up to JPY 15,813,000.

– others

The national consumption tax and the local consumption tax as mentioned above are imposed upon the purchase price of the building.

In addition, fee and expense for the judicial scrivener shall be considered. The amount depends on the relevant judicial scrivener, the scope of judicial scrivener's services (including preparation of the documents necessary for registration, attendance upon the settlement, business trip for confirmation of the real property) and the assessed price of the real property.

### III. Costs for holding real estate

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

(i) The fixed property tax is imposed upon the owner of the real property on annual basis. In addition, and (ii) the city planning tax is imposed upon the owner of the real property which is located in a certain area subject to the City Planning Act.

(i) Fixed Property Tax

Fixed property tax is generally equal to 1.4% of the assessed price of the real property, but in certain circumstances can be as high as 2.1%. The tax rate of the fixed property tax varies and is determined by the relevant local government where the real property is located.

(ii) City Planning Tax

City planning tax is generally equal to 0.3% of the assessed price of the real property. However, the tax rate of the fixed property tax can vary and is determined by the relevant local government where the real property is located.

(iii) Other Tax

In case that the owner of the real property obtains any income including rent and capital gain from that real property, the income tax (individuals) or the corporate tax (legal entity) will be imposed upon such income.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Such costs depend on the fee level requested by the appointed property manager and/or building manager. The property manager normally prepares reports and budgets and conducts traditional property management activities such as tenant leasing and management. Property management fees in Japan are sometimes equal to 3.0% to 5.0% of the gross annual rent on the real property. It may also be necessary to pay the expenses and capital expenditures for operating the real property.

#### **IV. Foreign investors**

- 14. Would you advise foreign investors at the moment to invest in your country**
- directly in real estate?**
  - through real property funds, open or closed ones?**
  - through other clear and secure financial products?**
  - at the moment not because of the impacts of the world wide financial crisis?**

There are many structures and forms by which a foreign investor could acquire real property in Japan, such as through direct ownership, partnerships, investment vehicles, or trusts. The choice of structure is often driven by tax considerations.

- 15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Any individual person and/or legal entity may purchase the real properties in Japan regardless of nationality and/or establishment of legal entity or registered office in Japan. However, please note that an ex-post report concerning acquisition of the real property in Japan to the authority concerned through the Bank of Japan pursuant to the Foreign Exchange and Foreign Trade Control Act may be required for non-residents in case of acquisition of real property in Japan.

- 16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Nationality in itself would not trigger any official approval requirements except in certain cases where the relevant real property is agricultural lands, military reservations, cultural sites, woodland (as water sources) or similar properties deemed to be of significant national interest.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Anderson Mori & Tomotsune is expert in all areas of Japanese real-estate-related legal practice and routinely acts for sellers, buyers, financiers, and project sponsors, and developers in real estate matters as well as for landowners and management companies in hospitality matters. More information can be found on our homepage at:

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# **Korea**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

#### **1. Execution of Sale and Purchase Agreement**

In entering into a real estate transaction, real estate brokers are not required to be retained under Korean law. However, in Korea real estate brokers are involved in most real estate transactions in general, in which cases, and an insurance security is often purchased to cover defects that may arise with the property.

There is no specific provision regulating terms of real estate sale and transfer agreements under Korean law. However, a prior report or approval should be made with/from the government for real estate sale and purchase agreements for transactions that include land specifically designated for special uses such as development of restricted areas and/or agricultural use areas. In the event an agreement is entered into without having made such report or obtained such required approval, such agreement would be void.

A detailed description of the real estate being transferred can be confirmed by the real estate registry of the property, which is publicly accessible information. For a more accurate and complete information on the property, however, a visit to the actual site may be conducted.

#### **2. Payment of Purchase Price**

Parties to real estate sale and purchase agreements may agree on the payment methods for purchase price of real estate being transferred. In practice, such payment for the purchase price is customarily made in three installments, initial payment, interim payment and final payment. The amount of the purchase price is negotiated and agreed between the purchaser and the seller based on the market price and consultation with the real estate broker.

The purchaser's obligation to pay the purchase price and the seller's obligation to deliver the real estate and the title therefor are to be performed simultaneously. Accordingly, unless the parties otherwise agree, in the event a seller fails to perform his/her obligation to deliver the property and the title therefor, the delay in the purchaser's payment of the purchase price shall not result in default by the purchaser. In practice, parties generally agree to have the pur-

chaser make the full payment for the purchase price prior to the transfer of the property.

### 3. Transfer of Title

Together with the necessary documents to affect the transfer of title of the property, a seller is obligated to deliver and transfer the property as agreed under a real estate sale and purchase agreement. As mentioned above, such delivery obligation is to be performed simultaneously with the purchaser's obligation to make the full payment of the purchase price.

In order to transfer the title of real estate, a registration for the ownership transfer must be made. Unless such registration is made, the ownership transfer is not completed except for some cases provided under law. In registering the ownership transfer, in principle, a purchaser and a seller must apply for registration of such transfer at the registrar. However, in practice, a seller delivers the necessary documents for the registration of the ownership transfer to a purchaser with a power of attorney authorizing the purchaser to make the registration on the seller's behalf and the purchaser makes the application for the registration to the registrar. Once the application for the registration of ownership transfer is made, the transfer becomes effective on the date of the filing of the application. In the event the seller fails to perform its obligation to transfer the title (deliver the necessary documents to affect the transfer), a purchaser may bring a court action and the winning judgment therefrom may be used to show the seller's intention to apply for the registration of ownership transfer.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. As further explained below, rights over land and building are separate from each other in principle. Accordingly, owners of land and buildings may be different parties except where there is strata ownership in one building pursuant to the Act on the Ownership and Management of Aggregate Buildings. For a land on which a building with strata ownership stands, use right over the proportional area of the land for a portion of the building owned under strata ownership is combined together with the respective portion of the building for conveyance.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. Joint ownership is permitted in Korea. Joint ownership may be between or among person(s), associations, companies, and non-corporate associations.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

There may be two different owners of the land and the building erected on it in Korea as ownership over the building and the land are separate. In case the land and the building erected on it have two different owners, surface right in-law, which is right granted to the building owners regardless of the intention of the land owner, over the land may be granted to the building owner, if certain conditions are satisfied. However, if such conditions are not satisfied and surface right in-law cannot be granted, the building owner must acquire the use right over the land from the land owner. If the building owner fails to acquire such use right, the land owner may claim for removal of the building against the building owner.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

In order to acquire ownership over real estate, registration of the ownership is required, however, this does not protect a bonafide purchaser of the real estate who relied on the real estate registration. Even when an ownership is registered, in the event a defect on the registration of the ownership transfer exists (such as cancellation or termination of the real estate sale and purchase agreement), the registered owner would not be recognized as the owner of the property and any purchaser(s) of the property from the registered owner thereafter would also not have ownership over the property in such case. In this regard, although the ownership would not be recognized under law in such case, however, the bonafide purchaser may be protected under the Civil Code which prohibits bringing a claim against a bonafide third party on the basis of

cancellation and/or termination of an agreement, in which case the ownership of the bonafide purchaser would remain valid and effective.

## II. Costs for transaction

### 6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?

Taxes that are imposed in connection with a purchase of real property include registration tax, educational tax, acquisition tax and special tax for rural development. The registration tax and education tax are imposed in connection with registration of the transfer. Different rates are applied for residential and commercial buildings and land as follows, which may also differ depending on a case by case basis. In case a company acquires land for non-business use, for extravagant (vacation home and luxurious entertainment purposes) use and/or that is located within the Seoul Metropolitan areas, the registration tax and the acquisition tax may be increased up to three to five times the general rate.

#### 1. Residential Building

Registration tax	1% of purchase price
Educational tax	20% of the registration tax
Acquisition tax	1% of the purchase price

Tax in total: 2.2% of the purchase price (for an area exceeding 85 m<sup>2</sup>, additional 0.4% applies)

#### 2. Commercial Building

Registration tax	2% of purchase price
Educational tax	20% of the registration tax
Acquisition tax	1% of the purchase price
Special tax for rural development	10% of the acquisition tax

Tax in total: 4.6%

3. Land

Registration tax	2% of purchase price (in case of a purchase by a company incorporated within five years, three times this rate applies)
Educational tax	20% of the registration tax
Acquisition tax	1% of the purchase price
Special tax for rural development	10% of the acquisition tax

Tax in total: 4.6% (in case of a company, 8.3%)

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Higher capital gains tax rate applies to sales of real estate with short holding periods. For a holding period not exceeding one year, 50% capital gains tax applies and 40% capital gains tax applies for a holding period exceeding one year and not exceeding two years to the difference in the purchase price and the sale price. In this regard, for ownership of one residence per family unit for three or more years (holding period of three or more years and residing period of two or more years for Seoul Metropolitan areas), there is no capital gains tax imposed.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes. When a foreigner remits funds into Korea, a report must be filed with a foreign exchanges bank. In case of repatriation of funds outside Korea, a report must also be made to the bank or the governmental authority and the evidentiary documents filed for the remittance of funds into Korea must be presented.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

A new owner may claim evacuation from the real property to the lessee based on his ownership and the lessee may not object to such claim of the new owner

based on the existing lease agreement (however, since the existing lease agreement is between the lessee and the old owner, the new owner, who is not a party to the agreement, may not cause such lease agreement to be terminated), unless the lessee's right is a registered right. In the event that the lease is registered in the real estate registry, the lessee may enforce the lease against third parties other than the existing owner. There are exceptions to the new owner's right to claim for evacuation against small business owners and residents under the Commercial Building Lease Protection Act and the Housing Lease Protection Act, respectively. Based on the statutes, in the event the rent does not exceed certain amount, the lessees are protected from such right of the new owner. For leases that are governed by these statutes, in the event the lessor transfers the real estate to a third party, the purchaser is deemed to have succeeded the lease, does not have right to claim for evacuation and is unable to terminate the lease until its expiry. Whether a certain lease is subject to such statutes cannot be confirmed by the real estate registry and must be confirmed by the local government offices.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Governmental approval must be procured in order to change the use of real estate.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- **notarial costs:** Notarial fee costs 0.15% of the contract price, not to exceed KRW 3 million in total. As for a property costing EUR 5 million, the notarial fee would be approximately KRW 11,250,000 (KRW 7.5 billion\*0.15%). Since

the fee cannot exceed KRW 3 million, the notarial fee for this property would be KRW 3 million.

- **land register:** Land registration fee includes a certificate stamp fee of KRW 14,000 and a stamp duty of KRW 350,000. In addition, when purchasing real estate, a housing bond must be obtained. The cost of bond differs depending on the location and other details of the real estate, however, in general, it costs approximately 0.5% of the purchase price. Accordingly, in this case, it would be approximately KRW 37,500,000 (KRW 7.5 billion \*0.15%).
- **real property transfer tax:** For a purchase by an individual, as mentioned above, tax of 4.6% of the purchase price would apply (increased in case of a corporate party). In this case, the transfer tax would be KRW 345 million (KRW 7.5 billion\*4.6%).
- **advising lawyer (due diligence):** The attorney fees and due diligence period would vary depending on the complexity of the deal. In general, attorney fees range from KRW 200,000 to KRW 700,000 per hour of service by one attorney.
- **estate agent:** Real estate broker fees cannot exceed 0.9% of the purchase price (excluding VAT) in Korea. Although this amount does not include VAT, real estate brokers in general include VAT in its fee quotations. Up to the permitted amount, it is up to the parties to negotiate and agree. In this case, parties may agree on the broker fee not to exceed KRW 67,500,000.
- **others:** In practice, a paralegal may prepare the necessary Korean documents and applies for the registration of the transfer. The paralegal fee for the real estate registration is approximately KRW 3,400,000.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

Property tax for holding real estate is imposed on a yearly basis. Property tax is a regional government tax imposed by the offices of the city, *ghun/gu* where the property is located. The standard rates and calculation methods for the property tax are explained in the following. Please note that the regional government may change the standard rates for the property taxes within a certain range.

## 1. Standard of Assessment

In order to calculate property tax the standard of assessment must be first calculated as follows:

- (i) houses and land: 50% of the published price for houses and 60% of individually published price pursuant to the Public Notice of Values and Appraisal of Real Estate Act (annual increase by 5% for houses from 2008 and for land from 2006)
- (ii) buildings: 60% of the standard market price determined and published by the mayor/governor/chief of gu office (annual increase by 5% from 2006)

## 2. Calculation Method of Property Tax

### (i) Land

For purpose of calculating property tax on land, standard of assessments for land owned by the taxpayer in the relevant jurisdiction are combined except for certain properties subject to individual taxation. In addition, accessory land to buildings and land designated by the presidential decree are combined separately for property tax purpose.

General lands to be combined	KRW 50 million and below	KRW 100 million and below	Exceeding KRW 100 million
	K* 0.002	K*0.003 - KRW 50,000	K*0.005 - KRW 250,000
Other lands to be separately combined	KRW 200 million and below	KRW 1 billion and below	Exceeding KRW 1 billion
	K* 0.002	K*0.003 - KRW 200,000	K*0.004 - KRW 1,200,000
Lands subject to individual taxation	Field, paddy field, orchard, ranch, forest lands	Golf course and luxurious entertainment land	Other land
	K* 0.0007	K*0.04	K* 0.002

K: Sum of standard of assessment amounts



## (ii) Houses and Buildings

**Houses**

Vacation homes	K*0.04		
General Houses	KRW 40 million and below	KRW 100 million and below	Exceeding KRW 100 million
	K*0.0015	K*0.003 - KRW 60,000	K*0.005 - KRW 260,000

**Building**

Golf course, luxurious entertainment	K*0.04
Factory buildings	K*0.005
Others	K*0.0025

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

It is up to the professional caretaker and the foreign investor to agree on the terms of the agreement. We include the fee schedule charged by some of the major real estate trust companies for their service:

Type A service: management service (management of the tenants, building and ownership)

Type B Service: management of ownership in the building registry

<b>Value of the trusted company</b>	<b>Type A</b>	<b>Type B</b>
KRW 100 million and below	10/1000 per year	30/10,000 per year
KRW 500 million and below	8/1000 per year	15/10,000 per year
KRW 1 billion and below	7/1000 per year	13/10,000 per year
Exceeding 1 billion	6/1000 per year	10/10,000 per year
Minimum fee	KRW 300,000 per year	KRW 100,000 per year

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Given the current unstable economic conditions in Korea, it is difficult to predict and advise on the issues raised.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

In general any individual person and legal entity may purchase real property in Korea regardless of his/her/its nationality and/or existence of a Korea branch office.

##### **16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

A foreigner and a foreign company may purchase land in Korea, as long as a report is made with the government authority after the purchase. There is no requirement to obtain approval prior to the purchase. Accordingly, no additional effort or time would be required for a foreign purchaser of land, except that in case the foreigner or the foreign company does not have a registration number, such foreigner or the foreign company must obtain a number for real estate registration from the court. Exceptions to this are when the land being purchased is in the military defense area, cultural artifact protection area and other areas designated by statutes, in which case prior permit must be obtained from the government. Also, in case a foreign country prohibits Korean nationals from purchasing land in that country, persons with nationality of such foreign country may be prohibited from purchasing land in Korea based on reciprocity.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes, we frequently assist foreign investors in all these aspects of real estate transactions in Korea.

# **Luxembourg**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Luxembourg, the conclusion of a real estate transaction usually gives rise to the signing of two consecutive agreements, a preliminary contract and a notarized deed.

#### **1.1. Preliminary contract**

In Luxembourg, the principle of contractual freedom also governs the real estate field.

As a consequence, as soon as an offer to sale has been accepted by a buyer, or an offer to purchase has been accepted by the seller, and it can be considered that, pursuant to this acceptance the parties have agreed on the object of the deal and on a price, there is a fully binding contract under Luxembourg law between the concerned parties and this contract can be enforced by the courts, if requested.

The parties should therefore draft such preliminary contract with great care. In this respect, it is important for the parties to check the followings points:

- the real estate has to be clearly described and well identified, notably by referring to the reference number of the piece of land with the competent administrative service of the state in this matter, the « Cadastre »,
- it is advised that the preliminary contract contains a reservation of title clause which is deemed to apply until the signature of the notarized deed or until the payment of the purchase price. Indeed, in the absence of such clause, the property would be transferred to the buyer at the date of signature of the preliminary contract and the buyer will bear the potential damage risks of the property since that date,
- condition precedent clauses allowing the buyer to back out of the deal if its bank refuses to give him the loan are also commonly inserted in Luxembourg preliminary contracts.

In accordance with Luxembourg law, preliminary contracts also have to be registered with the land registration administration (Administration de l'Enregistrement) within three months following their signature (10 days for the real estate professionals).

## 1.2. Notarized deed

In addition to the registration of the preliminary contract with the land registration administration, any devolution of real estate ownership has, in order to be valid towards third parties, to be transferred in the records of the mortgage registry in accordance with Luxembourg law.

As only some specific deeds, including mainly notarized deeds, can be transferred in the records of the mortgage registry, the seller and the buyer will have to sign a notarized deed and to have it transferred in the records of the mortgage registry by one or more Luxembourg notaries. In this context, the notary will make some researches, notably on the following points, in order to draft the notarized deed:

- the identity of the buyer and of the seller,
- the quality of owner of the seller,
- information coming from the land register,
- the mortgage situation,

Once all these information have been collected, the notarized deed will be drafted by incorporating the terms of the preliminary contract as well as the results of the researches.

Usually, a notarized mortgage loan deed between the buyer and his bank is signed together with the notarized sale deed.

The notarized sale deed will then be signed by the buyer, the seller and the notary and the funds relating to the real estate transaction will be paid through the notary.

At this point, the notary delivers to the buyer his ownership title, registers the notarized deed with the land registration administration (Administration de l'Enregistrement) and transfers it in the records of the mortgage registry.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Luxembourg legal system permit different sorts of ownership and recognizes mainly the followings rights on immovable properties:

- the full ownership of real estate properties,
- the co-ownership or joint ownership, which relates to a real estate property as a whole, or to the parts owned in common by the unit owners in a building,
- the rights in rem in immovable property which are mainly:

- the “droit d’emphythéose” (right of possession on a real estate property – see the definition under point 4. below),
- the “droit d’habitation”(user right on residential building for the beneficiary and its family),
- the “droit d’usufruit”(ownership by a person – the bare owner - of a real estate property of which another person enjoys the usufruct until the end of its life - the life tenant),
- the “droit de superficie”(distinct right of ownership between the land and the construction - see the definition under point 4. below).

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

In Luxembourg, any individual or companies with legal personality can be owner or co-owner of real property and Luxembourg law permits mainly two types of joint ownership:

- the classical joint ownership where each co-owner has his own title and interest to a share in the property though it is held undivided. Such joint ownership requires the agreement of all co-owners. Indeed, each co-owner is allowed to induce the partition of the relevant real estate at any time, by selling its part to others co-owners or by forcing them to sell the relevant real estate,
- the joint ownership relating to the parts owned in common by the unit owners in a building, which is organized by the amended law of 16 may 1975 regarding the co-ownership status on buildings.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Luxembourg, the principle is that, in accordance with article 552 of the Luxembourg Civil Code, ownership of the ground involves ownership of what is above and below it.

Article 553 of the Luxembourg Civil Code also provides for a rebuttable presumption that all constructions, plantings and works on or inside a piece of land are deemed to be made by the owner, at his expenses and belonging to him.

As this presumption is rebuttable, it can be provided by contract that some construction built in a plot of land do not (fully) belong to the owner of such plot of land.

There are other exceptions to this principle such as

- the “droit d’emphytéose” which is a long-term lease agreement on real estate property (between 27 and 99 years – minimum 50 years if the real estate is deemed to be used as an accommodation),
- the “droit de superficie” which is an agreement where the owner of the land grants a right to the beneficiary (the “superficiaire”) to build constructions on the land during a maximal term of 99 years, these constructions remaining the property of the beneficiary. At the expiration date, the ownership of these constructions is transferred to the owner of the land, who shall reimburse to the superficiaire the buildings at their current value at the expiration date.

## **5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

As explained under point 1.2. above, each transfer of real estate property has, in order to be valid towards third parties, to be transferred in the records of the mortgage registry.

In this context, it must be noted that, if the transfer of ownership between the buyer and the seller occurs at the date of signature of the preliminary contract (or at the date provided in this respect by the preliminary contract), transfer date towards third parties corresponds to the transfer of the notarized deed in the records of the mortgage registry.

As a consequence, if a seller sells the same real estate property to two different buyers, the buyer who first has his notarized deed transferred in the records of the mortgage registry shall be considered as the new owner of the relevant real estate property, and thus even if the other purchaser is a good faith purchaser.

However, if a deed registered in the records of the mortgage registry by a good faith purchaser is to be declared void by a court for any reason (the land registrar is not allowed to check the validity of the deeds he receives), it will be considered that the transfer of ownership between the seller and the purchaser never occurred and such purchaser will not be able to use the relevant registration as an evidence of his ownership.



## II. Costs for transaction

### 6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?

The transfer of real estate in Luxembourg is subject to the following taxes and registration fees:

- 6.1. Taxation of the incomes arising from the sale of a real estate property:
  - taxation of capital gains for individuals: between 20,28% et 41,34% of the capital gain,
  - taxation of capital gains for legal entities: 28,80% of the capital gain,
- 6.2. Registration fees and recording charges in relation to the transfer of a real estate property:
  - registration fees (other than on the territory of the City of Luxembourg) : 6% of the purchase price (private use), 7,2% of the purchase price (intention to resale),
  - registration fees on the territory of the City of Luxembourg (commercial use) : 9% of the purchase price (private use), 10,8% of the purchase price (intention to resale)
  - recording charges: 1% of the purchase price.

### 7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?

In Luxembourg, it is not a problem to buy and sell property on a short term basis but some tax exemption or preferential tax rates depend on the holding time of the relevant real estate property.

For instance, capital gains arising from the sale by individuals of their habitual residence for more than five years are tax exempted.

Taxation on capital gains made by individuals also changes in relation to the holding time of the relevant property as follows:

- between 20,28% et 20,67% of the capital gain, if the property is held for more than two years,
- between 40,56% et 41,34% of the capital gain, if the property is held for less than two years.

Finally, individual purchaser of a real estate property could benefit from a tax credit up to EUR 20.000,00.- (EUR 40.000,00.- if the real estate property is purchased by two persons) under the following conditions :

- the purchaser has to live in the residence built or to be build on the relevant real estate property within two years from the purchase in case of an existing building, and within four years from the purchase in case of a piece of land,
- the purchaser has to use the relevant real estate property as its usual residence during 2 years.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Under Luxembourg law, the seller is in principle free to transfer his money from Luxembourg to another country without any restriction.

There might be some limitations or indirect obstacles to this principle, mainly in the fields of taxation (i.e.: when a part of the benefits from the sale is withheld for tax reasons,...), prudential supervision (i.e.: when the seller, which is subject to the supervision of a public authority – for instance, a professional of the financial sector) can not transfer the entire selling price out of Luxembourg in order to maintain a minimum capital base in Luxembourg,...), fight against money laundering and public policy considerations (provisions relating to the non-execution of a transaction when there is a money laundering suspicion,...).

### **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In Luxembourg, the following restrictions have to be taken into account when selling real estate, which is already leased to one or more persons.

Indeed, Luxembourg law is highly protective for tenants, especially in matter of residential leases.

In this respect please note that an existing rental contract bearing a definite date (i.e.: a rental contract which is duly registered with the land registration administration (Administration de l'Enregistrement) in accordance with Luxembourg law) will be binding upon the purchaser of the leased property and that the fact that the purchaser bought the relevant property in order to live there is not a sufficient ground for an early termination of such lease.

It is the same for commercial rental contract bearing a definite date (i.e.: a rental contract which is duly registered with the land registration administration (Administration de l'Enregistrement) in accordance with Luxembourg law) with the exception that the initial tenant and the lessee can provide in the contract that the lease could be terminated when specific circumstances occur, for instance when the tenant or the new owner need the rented real estate in order to exercise its own commercial activity.

As a consequence, the buyer will have to comply with the provisions of recorded rental contract and with the Luxembourg law provisions which apply to such contract in order to be able to force the tenants out.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use of each area of the territory is specified by the municipal authorities of each municipality in a general development plan ("Plan d'Aménagement Général").

In order to change the use of a building, the owner has to:

- check if the contemplated new use of the building comply with the provisions of the general development plan which apply to the relevant area,
- obtain an authorization, or a new building permit in case the contemplated new use will require the transformation of the existing building, from the mayor of the relevant municipality (in this context, the competent authority will check if the contemplated new use comply with the provisions of the general development plan) ,
- if the relevant building is usually leased for residential use, an additional authorization from the municipal council is requested in order to change its use into offices.

Please note that if the contemplated new use does not comply with the provisions of the general development plan, the owner will need to ask the municipality to amend this general development plan. The municipality rarely accepts to amend the general development plan as such amendment requires complicated and time consuming proceedings.

Finally, please note that a breach of the Luxembourg provisions regarding general development plan or building permits and authorizations could lead to fines between EUR 251 and EUR 125,000 and/or prison sentences of 8 days to 2 months.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others?

The costs exposed by a foreign investor for buying an existing building in Luxembourg are mainly as follows:

- notarial costs: more or less EUR 4.100,00.-,
- land register: between EUR 350.000,00.- and EUR 590.000,00.- (registration and recording),
- advising lawyer (due diligence ): to be determined by the parties (Generally between EUR 250,00.- and EUR 400,00.- per hour),
- estate agent: more or less EUR 172.500,00.- (To be determined by the parties. In accordance with Luxembourg law, no more than 3% of the purchase price + VAT),

### **III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

When holding real estate, the owner (individual or corporate body) has to pay the yearly real estate tax which is a percentage of the unit value of the real estate established by the tax administration.

Such real estate tax is calculated as follows: (basis of assessment X unit value) X tax rate

The basis of assessment is of 10% for the pieces of land which are not built for more than two years, and averages out between 0,7% and 1,5% in the other cases.

The tax rate depends on the use of the relevant property, i.e.: 250% for a residential house, 750% for commercial buildings

As an example, the real estate tax for a residential house situated in the city of Luxembourg with a unit value established at EUR 4.500,00.- will be of:  $(4.500 \times 1\%) \times 250\% = \text{EUR } 112,50.-$ .

In addition to the real estate tax, limited liability companies are subject to a wealth tax of 0,5% of the value of their real estate less the debts in relation to the acquisition of these real estates.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

It must be noted that the legislation of co-ownership imposes the appointment of a “Syndic” for the management of the common parts of the real estate.

As the fees to be charged by a Luxembourg caretaker are freely agreed between the parties and depend on the services to be provided by such caretaker, it is not possible to give an estimate of such fees.

**IV. Foreign investors**

**14. Would you advise foreign investors at the moment to invest in your country**

- **directly in real estate?**
- **through real property funds, open or closed ones?**
- **through other clear and secure financial products?**
- **at the moment not because of the impacts of the world wide financial crisis?**

The way to invest in real estate property in Luxembourg depends on the quality and needs of the relevant investor. Where appropriate, investors can invest directly in real estate or through investments vehicles, financial products or Luxembourg companies.

In this context, please note that Luxembourg Companies are often used by professional, institutional or private investors for acquiring real estate in Luxembourg or abroad.

Indeed, within the framework of double tax treaties, Luxembourg exempts the income derived from real estate situated abroad. The investor(s) incorporate(s) a Luxembourg company (generally set up in the form of a public limited company or a private limited company) which acquires the real estate abroad.

Luxembourg companies, when receiving real estate incomes, are then taxable on the ground of the country in which the real estate is situated under deduction of the costs associated to the management of the real estate. The profits of this management are then taxable in that country but fully tax exempted in Luxembourg.

The investor(s) wishing to acquire real estate abroad often consider favorably the incorporation of such a Luxembourg company for many legal and fiscal reasons among which :

- Flexible but secure company laws;
- access to tax treaties;
- exemption of real estate income realized abroad;
- exemption of withholding taxes paid by Luxembourg companies to a financial institution or to other structures;
- access to the Mother Subsidiary Directive facilitating distribution from/to Luxembourg (subject to conditions);
- access to the “Interest” directive allowing advantages to intra-group financing or with ad hoc entities;
- absence of taxation on capital gains on share invested in real estate companies;

Furthermore, Luxembourg offers to investors a wide range of investments or tax saving schemes.

With regard to real estate in Luxembourg, and in particularly around the city of Luxembourg, it must also be noted that the prices of real estate remain stable despite the worldwide financial crisis. As an example, the average price by square meter for apartments in Luxembourg was of EUR 3,971.- in the year 2011 and was of EUR 4,013.- in the first quarter of 2012.

As a consequence, Luxembourg remains a very attractive place to invest in real estate.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

To the extent that the real estate transaction complies with Luxembourg law provisions, notably in matter of fight against money laundering, any individual

person and legal entity is allowed to invest in real estate without any restriction on nationality or registered office of legal entities.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Foreign investors do not need any official approval to buy a plot of land in Luxembourg.

However, in order to be authorized to run a business in Luxembourg, foreign investors need to obtain the following approval, respectively to follow the following proceedings:

In order to be authorized to stay and to work in Luxembourg for more than three months, Nationals from EU countries or from countries assimilated to EU countries have to make a registration statement certificate at the administration communale [local authority offices] in the place where they intend to live.

Nationals from non-EU country have to obtain a residence permit allowing them to stay in Luxembourg for more than three months and to work in Luxembourg as self-employed persons.

In order to obtain such permit, non-EU foreigners:

- must have a visa or a valid passport,
- should apply for a temporary residence permit as self-employed person, from the immigration ministry before your arrival in Luxembourg,
- shall fill in an arrival certificate at the administration communale [local authority offices] in the place where they will live within three days of their arrival,
- shall apply for a residence permit as self-employed person from the immigration ministry within three months of their arrival.

Please note also that the exercise of commercial activities in Luxembourg (as the activities of property developer, real estate agent, professional caretaker,...) is subject in any case to the prior authorization of the Ministry of Middle Classes. The obtaining of such authorization could take several months depending on the type of commercial activity to be exercised.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Our firm is able to assist foreign investors in finding real estate and developing construction projects in Luxembourg.

In this context, we offer a global service, notably in matter of real estate and construction law, and we would be delighted to assist foreign investors in all aspects of their real estate projects.

In this respect, our clients can also benefit from our network of notaries, real estate experts, and caretakers.

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# Malaysia

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## **1. How does the Malaysian legal system work?**

- i. The supreme law of Malaysia is the Federal Constitution. Under the constitution, the legislative powers are divided between the Federal Parliament and the various state legislative assemblies. Most matters are within the powers of the Federal Parliament to legislate. Only a limited number of matters (e.g. religion) are within the powers of the states to legislate.
- ii. A dual system of law is provided in the Constitution, in that in certain matters relating to the affairs of Muslims in Malaysia are governed by syaria law and fall within the purview of Syariah Courts. Other than this exception, all laws passed by the Federal Parliament and state legislatures apply to all persons in Malaysia and fall within the purview of the secular High Courts.
- iii. Because Sabah and Sarawak joined the Federation of Malaysia at a later stage, there are some written laws which applicable only in those states. Certain written laws applicable to states in Peninsula Malaysia, such as the National Land Code, would not apply to Sabah and Sarawak (as they each have their own land codes.) However, most Federal Acts (e.g. Companies Act 1965) would apply in all states of Malaysia.

## **2. What are the Acts/laws applicable to or binding on development company in carrying out construction work in Federal Territory of Kuala Lumpur?**

The following are the written laws applicable to development company in the Federal Territory of Kuala Lumpur:

- (a) National Land Code 1965;
- (b) Strata Titles Act 1985;
- (c) Housing Development (Control and Licensing) Act 1966;
- (d) Town and Country Planning Act 1976;
- (e) Building and Common Property (Maintenance and Management) Act 2007;
- (f) Street, Drainage and Building Act 1974;
- (g) Uniform Building By-Laws, 1984; and
- (h) Federal Territory (Planning) Act 1982.

## **3. Is land matter within the purview of the Federal Constitution or State Authority? How is State land alienated to any person in Malaysia?**

- i. Each State (and each Federal Territory) in Malaysia has power to deal with land matters within its boundaries.
- ii. Alienation of land within each State (or Territory) is carried out by its respective State Authority in accordance with the powers granted under the National Land Code.
- iii. The power to decide which, when and how land is to be alienated lies with the State Authority. However, the administrative aspect of the alienation will be carried out by the land office having jurisdiction over the area where the alienated land is located.
- iv. If the State Authority has selected an area of land for alienation, the State Authority may direct the alienated land be sold by tender. The State Authority may give notice in a newspaper of the tender of the alienated land.
- v. Alternatively, any person who is interested in acquiring land from the State may apply to the State Authority for alienation of the land, and propose the price and other terms for the acquisition of the land. It is then up to the State Authority to consider whether or not to accept the proposal.

**4. Apart from the State land being alienated to a person by the State Authority, how can a person own a land/property in Malaysia?**

- i. A person can either purchase a property directly from the developer company or through a sub-sale transaction.

**5. When a State land is alienated by the State Authority to a person, will the person own the land in perpetuity?**

- i. There are no fixed rules governing whether land to be alienated is to in perpetuity or for a term of years. Each State Authority has discretion on this.
- ii. If any land alienated by a State Authority is put up for tender, the tenure of the land (whether in perpetuity or for a term of years) and other information regarding the alienated land would be disclosed. Where the alienated land is put up for tender, the tenure of the land is already determined. A bidder would not be able to apply for change in the tenure of the land.
- iii. There are only two types of alienated land in West Malaysia: (1) a land held in perpetuity and (2) a land for a term of 99 years (which is called a “State lease” under the National Land Code). An owner of the land held in perpetuity will not have to return the land to the State. However, the owner of a State lease is

required to return the land to the State upon the expiry of the tenure of the State lease.

**6. Is there any legal method available in Malaysia to land owners of State lease so that the land owners are not required to return the State lease to the State Authority upon the expiry of the tenure of the State lease?**

Prior to the expiry of the tenure of the State lease, the owner could surrender the State lease back to the State Authority and apply for re-alienation of the same land back to the owner. It is then up to the State Authority to consider the application and whether or not to approve the realienation and the conditions to be imposed (if any) on the realienation.

**7. Can a land owner deal with his land alienated by the State Authority at his absolute discretion or the use of land is subject to the condition or restriction imposed by the State Authority?**

The State Authority may impose a condition or restriction on a land which is held in perpetuity or State lease. For example, the State Authority may impose on the issue document of title to the land/property that any transfer, lease of charge of the land is subject to the approval of the State Authority. If the land owner breaches any condition to which the alienated land is for the time being subject or fails to pay the rates (land tax) to the State Authority in accordance with the provisions of the National Land Code 1965, the State Authority may forfeit the land.

**8. How does a land owner have a good title to the alienated land/property?**

- i. In West Malaysia, land dealings are governed by the National Land Code. (In Sabah and Sarawak, land dealings there are also governed by their respective land acts.) Under the National Land Code, a person does not get an indefeasible interest in land until the interest is registered in accordance with the Code. Legal ownership is only recognised by law upon registration. However, this does not affect the contractual rights of a purchaser against the seller.
- ii. Until completion of registration, a purchaser of land would have only contractual right against the vendor. However, it is the usual conveyancing practice for a purchaser of land to place a caveat on the land pending completion of the sale. A caveat gives notice to third parties that there is a sale pending comple-

tion and the purchaser has an interest in the land. This gives a level of protection to the purchaser.

- iii. However, if a separate document of title to the property has not been issued yet, the transaction of sale and purchase will be completed by way of an assignment of the existing contract of sale from the seller to the buyer. This is typical in a subsale of condominium by an existing purchaser to a new purchaser where separate strata title may not have been issued at the time of subsale. Completion of the subsale would be by way of a deed of assignment of the original contract of sale between the developer and the existing purchaser/seller. The developer would be notified by the subpurchaser of the assignment, and under the requirements of the Housing Development Act, the developer would have to recognise the assignment and treat the subpurchaser as if he was the original purchaser under the original sale and purchase agreement.
- iv. This is only the case until the issuance of strata title. After that, the seller and buyer could buy and sell without using assignment.

### **9. Is the interest of the land owner conclusive and indefeasible upon him/her being registered as the registered owner?**

- i. Generally, the title or interest of any person or body for the time being registered as proprietor of any land under the National Land Code is conclusive evidence of his ownership and is indefeasible.
- ii. However, there are certain exceptions: if the registered title or interest of the person is obtained by way of fraud, forgery or misrepresentation, it may be defeated by the person who had been defrauded. Thus, if a person purchased a piece of land from a person who falsely claimed to be the registered proprietor/seller of the land, the buyer's registration, even if he was a genuine buyer and had no notice of the fraud may be defeated by the original registered proprietor who had been defrauded. It would therefore be prudent on a genuine buyer to carry out adequate vetting of the identity of the seller.
- iii. However, if the genuine buyer who got his interest registered subsequently sells it to another genuine buyer without notice of the fraud, the subsequent buyer who got his interest registered would not be defeated by the original registered proprietor. This concept developed under Malaysian case law is called the doctrine of "deferred indefeasibility".
- iv. In Malaysia, the Registrar will determine whether the instruments presented for registration are fit for registration. If the Registrar discovers any formal or clerical defect to the instrument or the documents accompanying the instru-

ment are not in order, the Registrar will suspend registration. However, the role of the Registrar is purely administrative. Other than ensuring all the requirements of the National Land Code for effecting a transfer is complied with, he is not bound to determine whether the transfer is tainted by fraud.

#### **10. How much time is required to register a Memorandum of Transfer?**

A typical procedure for transfer and registration of land are as follows:

- i. The transferor (seller) and transferee (purchaser) will execute the memorandum of transfer (“MOT”) in the form prescribed by the National Land Code, and would have to be attested (usually by a qualified solicitor).
- ii. The purchaser’s solicitors would then submit the MOT to the stamp office for adjudication, to assess the stamp duty payable on the MOT. The stamp office will issue an assessment notice for stamp duty payable on the MOT. It usually takes about two (2) weeks for the stamp office to issue the assessment notice.
- iii. The purchaser is statutorily required to pay the stamp duty on the MOT within 30 days from the date of notice of assessment.
- iv. After the purchaser has paid the stamp duty on the MOT, the MOT can be presented at the relevant land registry/land office for registration.
- v. Depending on the State and the land office/registry, it would take between 6 to 12 months to finalise the registration for condominiums and 1 to 3 months for landed properties (Some places are more efficient than others.) But although the finalisation of the registration may take some time, the effective date of registration will be the date the MOT is presented by the purchaser’s solicitors to the relevant land registry/office for registration (i.e. confirmation of registration may take time but once confirmed the date of registration is taken as the date of presentation).

#### **11. Pending registration of the MOT, how can the interest of a land owner be protected?**

- i. As mentioned earlier, a purchaser may enter a private caveat on the land pending completion of registration of transfer.
- ii. A caveat gives notice to third parties that there is a sale pending completion and the purchaser has an interest in the land. The caveat stops any attempted further dealings with the land to be carried after the caveat has been entered.

- iii. So a purchaser is normally advised to place a caveat as soon as he has placed a deposit with the seller to buy the land and has signed the contract of sale and purchase.
- iv. A private caveat is valid for 6 years from the date of presentation.

## **12. What is the role of a solicitor in conveyancing and registration of land in Malaysia?**

A solicitor's typical role in conveyancing and registration of land in Malaysia is as follows:

- (a) prepare the Memorandum of Transfer;
- (b) attest the execution of the transferor and transferee;
- (c) attend to the stamping of the Memorandum of Transfer ; and
- (d) present the Memorandum of Transfer at the relevant land office/land registry for registration.

## **13. What are the requirements need to be complied with by foreign purchasers when purchasing properties in Malaysia?**

- i. The Guideline on the Acquisition of Properties vary from time to time.
- ii. The current applicable Guideline on the Acquisition of Properties states that if an acquirer who is not of Bumiputera interest, namely one who is not a:-
  - a. Bumiputera individual; and/or;
  - b. Buniputera institution and trust agency; and/or
  - c. local company or local institution whereby the parties stated in item (a) and/or (b) hold more than 50% of the voting rights in the local company or local institution, who has:-
    - (aa) made a direct acquisition of a non residential property valued at RM20 million and above, resulting in the dilution in the ownership of property held by Bumiputera interest or government agency or both; or
    - (bb) made an indirect acquisition of a non residential property by acquiring the shares of a company (which owns the property) owned by Bumiputera interest or government agency or both, which the property owned by the company forms more than 50% of the total assets of the company and is valued more than RM20 million and by acquiring the shares of the company, it results in a change of control of the company owned by Bumiputera interest or government agency or both, then the acquirer is required



to obtain the approval of the Economic Planning Unit, Prime Minister's Department.

- iii. A foreigner is only entitled to purchase a property which is valued more than Ringgit Malaysia Five Hundred Thousand (RM500,000.00) in Malaysia.
- iv. Pursuant to Section 433B of the National Land Code 1965, save and except for a property which is under the category of "industry", a foreigner is required to obtain the consent of the State Authority to purchase a property in Malaysia.

**14. How does Malaysian government promote or encourage the purchase of properties by foreigners in Malaysia?**

- i. Malaysian government launches My Second Home Program ("MM2H") to foreigners who are interested in investing/purchasing properties in Malaysia.
- ii. Once the MM2H Visa Permit is granted, it allows a foreigner to:-
  - a. hold the 10 year Social Visit Pass with multiple entry;
  - b. stay as long as the foreigner wishes and leaves Malaysia anytime as the pleases; and
  - c. the MM2H Visa Permit is renewable after it has lapsed in 10 years.

**15. What are the requirements to be complied with by foreigners in respect of the application for My Second Home Program?**

My Second Home Program Requirements:-

Criteria for application

- 1. A valid Medical Insurance in Malaysia
- 2. A Certified Medical Report from a local doctor / specialist.
- 3. Meeting the Financial Requirements below:

**Financial requirements after April 1st 2006**

(Applicants whether single or with spouse)

Below 50 years old	50 years old and above
Fixed Deposit *	Choose :
Of RM300,000.00	Fixed Deposit
(Or USD82,000-00)	RM150,000.00 (or USD41,000-00)
	OR
	Current monthly off-shore income
	Of RM10,000-00 (or USD2,750-00)

**Withdrawal of fixed deposit** (After a minimum of one year)

For approved expenses relating to house purchase, education for children in Malaysia and medical purposes.

Withdraw up to	Withdraw up to
RM240,000-00	RM90,000-00
(or USD65,000-00)	(or USD25,000-00)

**Must maintain minimum fixed deposit balance**

(For subsequent duration of stay under this Programme)

RM60,000-00	RM60,000-00
(or USD16,000-00)	(or USD16,000-00)

Note : Successful applicants are required to open their fixed deposits in Ringgit Malaysia (RMY).



# **Mexico**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In accordance with Mexican law, if a real estate purchase and sale agreement exceeds an amount of approximately USD \$1620.00 the agreement needs to be formalized before Mexican Public Notary. In such case, before the formalization is done, the Public Notary shall verify the following:

- (i) that the seller is the owner of the property;
- (ii) the absence of any liens on the property, by obtaining a certificate of no lien and encumbrances from the Public Registry of Property. If the property is mortgaged, the lien will follow the property, and therefore, the new owner may have the risk of forfeiting such property if the seller defaults on payment obligations;
- (iii) the existence of any easements on the property, either by law, or by agreement between seller and his neighbours;
- (iv) that the land involved is not considered “agrarian property” (ejido), If the land is classified as agrarian, it must be transformed into “private property;”
- (v) the status of administrative permits such as “water concessions,” or “Federal Maritime Zone Concessions;”
- (vi) the existence/non-existence of toxic traces in the soil;
- (vii) that the use regulations allow the use intended for the property;
- (viii) that the seller has paid the Real Estate Property Tax and water fees for the previous five years;
- (ix) if the real estate is part of a condominium, verify the internal rules and payment of quotas; and also
- (x) payment of the corresponding taxes. Buyer pays the Acquisition of Real Estate Property Tax (“Impuesto de Adquisición de Inmuebles”) and Seller pays Income Tax (“Impuesto Sobre la Renta”).

Once the transaction is formalized before the Public Notary, the transaction requires to be registered before the Public Registry of Real Estate Property of the state where the property is located.

Please note that since Mexico is a Federation, real estate property acquisitions are mainly governed by the State Civil Code and local regulations.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes, the Mexican legal system does also allow for full ownership, co-ownership and condominium regime system

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, Mexican legal system does allow for joint ownership (co-propiedad). This is very common, for example, within the condominium regime where common areas are held jointly.

Different entities could be owner of real property such as: the state, private persons, corporations, limited liability companies, civil associations and trusts (fideicomisos).

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Although the Mexican Legal system does not explicitly regulate the distinction between land and construction ownership, it allows in practice for the distinction of those two types of ownership. However, if the owner of the construction is unable to prove its property title, the construction would automatically be considered as an accessory to the land and therefore, would be deemed as attached to the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes, the real property has to be registered in the Public Registry of Real Estate Property. In terms of real estate property, the title owner has priority over the good faith possessor. Even if there is a presumption of good faith in favour of the possessor, he or she needs to prove “original possession”. In said registry

it is recorded the successive owners of each piece of land and its transfers, as well as all lien and encumbrances, in its case.

## II. Costs for transaction

### 6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?

#### – Real Estate Acquisition Tax:

Real Estate Acquisition Tax is a State tax which may vary from State to State, calculated at a variable rate that goes from 1 to 3.7 of the value of the property, for example the rate of this tax in Mexico City is of 2%.

The tax must be paid whether the acquisition is carried out through, for example, a purchase and sale agreement, donation, trust, merger of companies, split-off, or payment in kind.

#### – Value-Added Tax:

No VAT is triggered on the sale of land used for any purpose and on constructions used for residential purposes.

VAT shall be paid by the purchaser of structures or constructions used for commercial or industrial activities at the rate of 16 percent of the amount of the transaction. In case parts of the constructions are used for residential purposes, VAT will not be paid on such parts.

Mexican notaries issuing transfer documents will request a qualified appraisal for tax purposes. Usually, he will obtain certificates of no encumbrance from the Public Property Registry and certificates by tax authorities evidencing that real estate taxes are duly paid.

The final deed shall be registered before the Public Property Registry for the transfer to be valid against third parties.

The proceeds from the sale of real estate in Mexico are considered to be Mexican-source income. There are two methods to pay the tax on the transaction. The first is through a withholding by the purchaser of an amount equal to 25 percent of the amount obtained without deductions. In the second scenario, the non-resident seller must appoint a representative resident in Mexico, who shall notify the person authenticating the public instrument (notary, judge and broker) of any deductions to which the taxpayer is entitled. The person authenticating the public instrument will file the tax return within 15 days following

the date of signature of the instrument, and in such case, a 30 percent tax rate for year 2010 will be applicable to the profit.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no restriction in buying and selling a real estate property within a short interval of time. However in order to be exempted from paying income tax derived from the sale of a residential unit, it is necessary to prove that the seller has been living in the property since the date of acquisition or at least in the past 5 years prior to the sale and that the value of such property does not exceed 6,6 Million pesos (\$536,000.00 USD).

The general rule is that every time a real estate property is transferred, the owner must pay the corresponding Income Tax. There are certain exceptions, where once every 5 years, an individual may be exempt to pay the Income Tax when transferring the property, if and when said individual shows to the notary public handling the operation, enough utility bills that evidence that the property has been used for housing. In the event of a foreign individual, in order to be exempt, must prove its migratory quality as permanent resident, and to prove that has lived continuously in such property. (i.e. if a foreigner, being a permanent resident, buys a house and after 8 months decides to sell it and proves that such property has been inhabited by him, he could benefit from this exemption, but in order to be exempt again, he must wait five years). Foreign entities will never be subject to this exemption.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There is neither exchange control nor rules related to funds repatriation in Mexico, therefore no limitation regarding the repatriation of funds. The notary will only verify that the funds do not have an illicit origin.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**



The minimum term for the lease of farming or residential real estate properties is at least of one year.

For industrial or commercial lease there is no limitation, therefore the term and termination conditions must be in accordance with what was agreed by the parties.

Please note that in case the owner decides selling the property, the lessee enjoys a pre-emptive right of 30 days to acquire the property under the same conditions of the sale to be carried out by the owner.

Seller will have to give notice, as established by the corresponding Civil Code, of the intention to sell the property, for the lessees to be able to exercise their preemptive rights; and (ii) the terms and conditions of the lease agreements will be valid, independently of the fact the property had been sold.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The person willing to change the use of a building is required to get a permit from the municipality. The municipality's urban development plan has to allow this type of change of use. This authorization will be granted taking into consideration zoning restrictions, and there will be occasions that said authorization shall not be granted.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )
- estate agent?
- others

- (i) notarial costs and expenses: \$225,000.00 Mx. pesos
- (ii) land register: \$13,772.00 Mx. pesos;
- (iii) Acquisition of Real Estate Property Tax: \$3'867,153.00 Mx. pesos
- (iv) Income Tax: will be calculated depending on depreciation factors;
- (v) Value Added Tax: 16% based solely on the construction value;

- (vi) miscellaneous expenses: \$250,000.00 Mx. Pesos, which includes appraisal, certificate of no lien and encumbrances, no debts of water and Property Tax, zoning, etc.; and
- (vii) estate agent: approximately between 3 to 5%.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Municipal law governs the yearly imposition of real estate property, which could vary between 1 and 1.5% of the value of the property. This value is determined by the value of the property when purchased, or reassessed by the municipality whenever it considers appropriate in accordance with factors such as inflation or urban improvements.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

As an indication, the minimum wage in Mexico varies between 1630 and 1710 MXN a month, which is about 120-130 USD a month. A caretaker's wage could widely vary according to factors such as: market value of the zone, responsibilities of the caretaker, if the caretaker's housing is included in the contract, etc.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Yes, investing in Mexico could be a very profitable venture. If the residential sector recently went through a slight decrease, other types of investment such

as touristic real estate and commercial and industrial leasing have been particularly profitable.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Foreigners may acquire real estate in Mexico, as long as they obtain a Permit issued by the Mexican Ministry of Foreign Affairs waiving the protection of his or her home government.

The Mexican Constitution establishes a “restricted zone” (100 kilometers wide from the borders and 50 kilometers wide from the coastal shores) in which direct foreign ownership is prohibited. However, Foreign Investment Law authorizes foreign participation in a Mexican company owning real estate within the restricted zone for non-residential purposes and requires only a notification to the Ministry of Foreign Affairs; if for residential purposes, title of the real estate must be held through a trust by a trustee, which must be a Mexican bank. Approval of the Ministry of Foreign Affairs is required. Long term leases of real estate are no longer prohibited.

Although foreigners may not acquire direct ownership in the prohibited zone they can acquire other rights over real estate in the following cases:

- a) A Mexican company with foreign investment up to 100 percent may directly acquire property within this zone to perform non-residential activities, i.e., industrial, commercial or tourism activities. The acquisition must be registered with the Ministry of Foreign Affairs.
- b) If the real estate is for residential purposes, foreign individuals or companies and Mexican companies with 100 percent foreign capital stock may acquire the rights of use and benefit from the real estate through a trust executed with a Mexican bank. The duration of the trust may be 50 years, and the term may be extended upon request of any person having an interest in the property.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Construction and development project are regulated by local authorities. It is therefore necessary to review the laws of each State, depending on where is located the said project to be developed.

A development may be planned either in an inner city or in a tourist resort in the seashore. The rules regarding foreign ownership are different in each particular case. Some of the regular authorizations required are as follows:

- a) Group Construction License.- in order to develop projects of construction, as well as developments including offices, stores, industries and services.
- b) License for the Use of Land.- Pursuant to the Municipal Urban Development Program, it is necessary to obtain a license for the use of land. Such document authorizes the use to be given to the property.
- c) Environmental Impact Authorization.- Pursuant to the Environmental Law, it is necessary to obtain an Environmental Impact Authorization. It is necessary to file an Environmental Impact Manifest which will serve as a basis to prepare the Environmental Impact Evaluation. The evaluation is the procedure through which the authorities evaluate the effects of the development project on the land and natural resources, in order to avoid damages to the environment.
- d) Use Limitations.- The deed of condominium must include the limitations to the use to be granted to each component of the project. Such limitations must be consistent with the corresponding Municipal Development Program.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, our firm could definitely assist foreign investors in Mexico. We have several clients that are real estate developers and/or sellers of undeveloped land for the purpose of real estate development. There are several programs created by the Mexican government for medium or low income housing and therefore opportunities for rent or sale of this type of projects

Mexico

# **The Netherlands**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In The Netherlands, parties to a prospective sale of real estate will usually with the assistance of real estate agents or lawyers (in most instances advocaten) negotiate the terms of agreements of purchase and sale. In cases where parties are fully in agreement or close to it, they may turn to a civil law notary instead. A civil law notary is by training a lawyer, holding a public appointment. His duty is to render advice and draft contracts on basis of impartiality. Purchase and sale agreements will contain representations and warranties. For straightforward transactions standard forms for representations and warranties are in common use. Additionally, the relevant sections of the Netherlands Civil Code will be applicable. It is to be noted that in the case of a sale of commercial real estate, agreements will be binding even if only made verbally. Foreign investors may in the early stages of negotiations wish to stipulate that no agreement comes about unless and until made in writing in order to ensure that they have an opportunity to negotiate the representations and warranties they want to have.

Purchase and sale agreements will usually contain conditions precedent and a scheduled date for delivery. Title is transferred by the signing of an instrument of delivery (a deed of conveyance) and the entering of the same in the national land register (Kadaster). The instrument of delivery must be signed in the presence of a civil law notary, officiating in his capacity. It is almost invariably agreed that prior to the date scheduled for delivery, the purchase sum is paid into the client account of the civil law notary. Upon the signing of the instrument and checking whether the real estate is clear from liens and encumbrances, the civil law notary will deposit the instrument of delivery with the registrar of the land register and pay out the purchase sum to the seller. Usually, it is agreed that at delivery current rents (if applicable) and costs are settled on a pro rata basis relating to the proportion of relevant time periods lapsed. If there are no commercial reasons for agreeing a longer period (such as a condition precedent relating to obtaining the required finance) parties will agree periods varying from one month to three months between the agreement for purchase and sale and the instrument of delivery.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

The normal position is that the ownership of land comprises the ownership of the surface, the buildings and the works forming a permanent part of the land. For the owners of land it is possible to create rights in rem on their land such as the right of leasehold (emphyteusis), the right of superficies and apartment rights and pass these on to third parties. Such rights give control to the surface, the land and the works to the extent provided in the deed pursuant to which such rights were created. Such rights can be transferred to third parties separate from the ownership of the land from which they are derived. Any remaining rights would remain with the registered owner. The creation and delivery of rights of leasehold, superficies and apartment rights must be registered in the national land register. Such registration is a constitutive element for the creation or delivery of such right in rem.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, the legal system of The Netherlands permits joint ownership of real estate. Natural persons and legal persons can be owners of real estate. This would include foreign legal persons. Unlimited partnerships would not qualify as registered owners: one or more managing partners would be registered.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In The Netherlands, the ownership of a building is implied in the ownership of the land except where any of the rights in rem discussed above has or have been created. The existence of such rights would appear from the national land register.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**



In The Netherlands, all land is registered in the national land register (Kadaster) referred to above. As title to ownership and rights in rem may only be transferred by registering the same on the land register, the land register is very accurate. There is a very limited number of title defects, which would not appear from the registration. A good faith purchaser would not be protected with regard to such defects which, as implied, hardly ever occur. Title insurance is not available. A purchaser would rely on the normally rather thorough title search performed by the civil law notary. Defects, if any, would in the course of time lose effect through prescription.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

There is a national transfer tax amounting to 6% of the assessed value of the real estate concerned. There is a limited number of exemptions. Worth mentioning are the exemption in case of a subsequent transfer within six months (temporarily 36 months) from a transfer already taxed (except to the extent the purchase price of the second transaction is in excess of the purchase price of the first transaction) and, subject to stringent restrictions, the sale of plots on which construction is yet to take place. In the latter cases VAT at, currently, a rate of 19% would be payable. Such VAT may during the course of construction, be set off against the VAT payable on construction costs. The sale of the shares of companies which qualify as real estate companies is also subject to the 6% transfer tax.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

It is generally not a problem to buy and sell property on a short term basis. Taxwise, a sale within the first ten years from delivery may be unattractive in the case of sale of plots used for construction if the aforementioned exemption from transfer tax was used.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

In The Netherlands, there are no restrictions on transfer of capital to foreign countries.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Leases pursuant to a tenancy agreement (i.e. a contract, the most common type of lease) cannot be terminated with effect any earlier than the agreed term or any agreed option to extend. In the case of residential premises it is for the owner very difficult to terminate the lease upon termination of the agreed term. In the case of certain types of commercial real estate (primarily shops) the owner may only effectively terminate if and when its interests in terminating the lease override the interests of the tenant. In the cases of all other commercial real estate such as plants and offices, the tenant may upon the expiration of the agreed term at best rely on a grace period for eviction of three years at most, normally less. Leasehold rights are rights in rem and can therefore not be terminated unilaterally prior to the term stated in the instrument of creation of the same.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Whether the use of a building from residential use to office space is allowed depends on the municipal zoning restrictions applicable to the area in which the real estate is situated. Exemptions from the current zoning restrictions may usually be obtained if a change of use conforms to future public plans for the area. If and when the residential real estate is held as a leasehold right, the owner of the remaining interest in the land would have to agree to a change of use –and would usually make this agreement subject to an increase of the retribution payable for the leasehold.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?

- **real property transfer tax?**
  - **advising lawyer (due diligence )?**
  - **estate agent?**
  - **others**
- 
- Notarial fees are normally paid by the purchaser who will have the privilege to choose the notary to be employed. The fees will depend on the agreement made by the purchaser with the notary. The fees will in most instances amount to about 3/4% of the purchase price.
  - Costs of entry in the land register depend on the assessed value of the land. These costs are slightly in excess of nominal amounts.
  - Transfer tax normally amounts to 6% of the assessed value. See above.
  - The fees of advising lawyers are calculated on basis of agreement with their clients. Such fees would in most cases be based on time spent and the agreed rate. Due diligence would in most cases be included in the notarial services.
  - The fees of the real estate agent also depend on the agreement with the client. Often, a success fee is agreed, stating a percentage (ranging from 1% to 1,5%) of the purchase price.
  - VAT ( currently 21%) is charged on most fees and costs.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In The Netherlands, a real estate holding tax is charged by the municipality in which the real estate is located. The municipality will charge a percentage of the assessed value of the real estate. The percentage differs from municipality to municipality, 0,1% of the assessed value of the real estate being a typical percentage.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Professional caretakers will often charge on basis of the value of the property or on basis of rental income. Some will charge on basis of time spent. Charges may range from 4,5% (shops) to 6% (residential) of the rental income.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**
  
- Most foreign investors have the choice between investing directly or through companies depend on tax considerations. It will primarily depend on the country of origin of the investor whether a foreign or a Dutch vehicle is used.
- There is a number of real estate funds which invest in Dutch real estate. The choice depends on the foreign investor's strategy.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions with respect to nationality or registered office of foreign investors.

##### **16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

It depends on the type of business concerned whether local permits are required to run such business. In the case of EU nationals and nationals from treaty countries requirements may not discriminate and can in most instances easily be obtained. In the case of nationals from other countries it would depend on the type of business concerned.

##### **17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**
  
- We can make introductions to real estate agents personally known to us. We can also make introductions to valuation experts who can double-check any value assessed.
- We can assist with developing construction projects.
- We can assist with all legal aspects of planning and with negotiating agreements. Due diligence as to title (other than introductory searches) and the responsibility for transfer of title are in The Netherlands in the hands of civil law notaries. We have good working relationships with many civil law notaries and tax planners in Amsterdam and around the country.

# Norway

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Real estates is sold either directly by the formal owner or indirectly as sale of the shares or parts in a single purpose company which again is the formal owner of the real estate.

All real estate in Norway is listed in a registry administered by the state. The purchaser must be formally registered in the registry to obtain protection against the seller's creditors, third parties acting in good faith etc. The key in a direct real estate transaction is therefore the formal registration of the transfer of ownership. There are some formalities necessary before the transfer will be registered. These formalities vary according to the type of real estate, the size of the property etc.

The parties can decide how they will handle the process. Normally the seller or the parties in common appoints a lawyer or a real estate broker to handle the formalities and to secure the financial interests of parties and the mortgagors.

If the sale is an indirect transaction the procedure will be more like the procedures for sale of businesses or companies.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The formal construction of owning a unit is common for apartments but also possible for commercial properties. The owner of such a unit will basically have the same rights for his unit as an owner of the real estate.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Joint ownership is permitted and there are no particular restrictions on this. The owner can be two or more persons together or companies etc.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

The owner of the land is considered to be owner of the building as well. There are some modifications construed i.a. as leasing contracts.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes, all real estates are registered. A purchaser in good faith will in general be protected against encumbrances or liens not formally registered.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

The tax is 2.5% of the purchase price in a direct transaction. If the transaction is done as sale of shares or parts there will be no such tax.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

The answer depends on the sort of real estate. For housing for personal use (homes and holiday homes) there are some requirements. For commercial properties there are no such requirements.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Normally this will be no problem.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**



The lease contracts can only be terminated if the contract opens for such termination.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

You will need approval from various authorities.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )?
- estate agent?
- others

The answer to this will depend upon the estate in question. The tax is 2.5 % (EUR 125.000). The estate agent, if any, is normally paid by seller. Legal costs for buyer will normally be in the range EUR 5.000 to EUR 20.000.

### **III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

The land tax is not implemented fully in Norway. This has to be considered for each estate individually.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Normally a caretaker will charge a fee in the area 1-4 % of the rent.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate**
- Through real property funds, open or closed ones**
- Through other clear and secure financial products**
- At the moment not because of the impacts of the worldwide financial crisis**

In general investments in real estate have been successful if the investment is on a long term basis. The Norwegian economy is strong and we are not hit by the financial crisis.

We have no particular advice regarding how to invest. That depends on the client, the target and the seller.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are some restrictions. Normally it is possible to find acceptable models for foreign owners unless the estate is a farm.

##### **16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

It differs depending on the sort of land, the sort of business and if the investor is from an EU country.

##### **17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

The answer is yes to all bullet points. We do a lot of such work. We have currently 16 lawyers dedicated to real estate and construction matters, and also have specialists within tax and VAT matters related to real estate and construction.

# **Panama**

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## **I. Procedure of a real estate transaction**

- 1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Panama, real estate transactions are governed by the Civil Code, Commercial Code and a group of regulations as special laws, executive decrees and resolutions regarding the subject matter. In our country, the signing of the purchase agreement has to be recorded in the Public Registry Office for the transaction to be effective. Payment is usually made when the recording takes place, via a payment letter from a bank, or the funds that a third party has held in escrow.

- 2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The Panamanian legal system permits different sorts of ownership.

- 3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. Our legal system permits joint ownership of real property and it can be by two or more natural persons or a juridical person as a corporation, an LLC, A Private Interest Foundation or other type of entity recognized by the law.

- 4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Panama this depends if it is a horizontal property or not. If it is horizontal property, the original title of the land where the construction is erected passes to all of the co-owners in the established percentage of participation in the Condominium Regulations. Said original title will retain ownership of the common areas in the building. The owners of the different units of the building

have property titles for each one of them and the ownership becomes effective since the moment of the recording of the title in the Public Registry.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes. As mentioned above, the ownership of a land has to be duly recorded in the Public Registry as a formality to achieve the effectiveness of it. Since the moment of the recording, the owner of the land is protected regarding his rights on the land. A good faith purchaser is also protected, but a due diligence must be done before purchasing a land, to verify that everything is in order and that the land, or other type of real property – is indeed free of encumbrances or any other kind of limitation.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In Panama, real property transfer tax has to be paid and the percentage is 2% of the purchase price. Also a 3% of the purchase price has to be paid in concept of capital gains. Plus, the registry rights and the notarial rights have to be included in the expenses.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

In Panama there is no limitation. You can buy a property and sell it after a short period of time without incurring in extra taxes.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Panama does not impose a limitation to the transfer of funds. If funds are transferred to a Head Office, other taxes could apply.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In Panama, the general rule is that the term of the lease contract has to be respected; in other words, the purchase of a property does not break the lease contract. In the case of commercial real estate, it might be probable that the lease contract is recorded in the Public Registry, so the terms of the contract will be enforceable to new owners and third parties and that's why it is so important to make the preliminary investigations before purchasing a real estate.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The first thing that has to be taken in account is the zoning. In Panama, there are areas where is not permitted to build or establish commercial activities because they are completely residential. Also, this could be subject of public hearings in order to evaluate the diverse opinions of people.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial costs:** these costs will vary depending on the length of the deed.
  - **Land registry:** About US\$16,500.00
  - **Real estate transfer tax:** if the purchase price is EUR 5 Million, the real estate transfer tax is US\$130,000.00.
  - **Advising lawyer (due diligence):** this will depend on the agreement but it could be between 1% and 2% of the purchase price.
  - **Real Estate agent:** 5% of the net purchase price.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In Panama, you have to pay property tax on real estate and the amount will depend on the registered price of the property, which typically remains the same year after year except when there are government ordered appraisals which do not take place ordinarily. These percentages vary from 1.75% to 2.10%. As a manner of incentive to construction and purchase of real estate, there is an exemption in new horizontal properties, where the first 20 years are exempt of this tax. In the case of transfer of ownership, the percentage is 2% of the purchase price. Any sale within said 20 year period will cause property on the aggregate of the original amount.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A foreign investor might require an administrator, who would charge between 6% and 8% of the gross rental income, under regular conditions.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate**
- Through real property funds, open or closed ones**
- Through other clear and secure financial products**
- At the moment not because of the impacts of the worldwide financial crisis**

We would advise to invest directly in real estate and through real property funds. Although it is no guarantee towards the future, in Panama the worldwide financial crisis has not impacted severely. Our banking system has remained strong and the real estate investments are still a good source of profit.

Panama has traditionally seen high quality construction in both commercial and residential development, and it continues nowadays with an important influx of foreign investment in the sector.



**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Individual persons and legal entities are allowed to buy property in Panama. The only restriction regarding the nationality is that foreigners cannot buy any land or property in less than 10 kilometres from the border with the other countries next to ours.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

First, the ownership has to be recorded at the Public Registry in order to become effective. The official approvals will depend on what the business will be oriented to. Most of the approvals are managed by The Ministry of Commerce and Industries and the principal requirement that has to be completed is the issuance of a notice of operation.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, our law firm, ROSAS Y ROSAS, can assist investors in all of the above mentioned aspects as in fact our real estate practice regularly involves similar issues. Contact persons for questions on commercial real property and other real estate issues:

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# Peru

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Peru real estate transactions are governed by private law. The Peruvian Civil Code is the applicable law that governs the relationship between owner and seller. Private parties, both buyer and seller, negotiate commercial aspects of the transaction, such as price of the real estate or the warranties that shall be given by the seller to the buyer. Acceptance to a firm offer constitutes the agreement, which seals transfer of real estate to the buyer. For certainty and better right, Sales Agreements (the “Agreement”) is drafted in writing, notarized into public deed, and filed before the Local Real estate Property Register, where the property is located.

The Agreement contains every aspect of the prior negotiations that among others include the following: **(i)** sales price, **(ii)** financing terms, **(iii)** condition of the property, **(iv)** when the buyer gets the full possession of the property and all the benefits and costs of it.

### **2. Does your legal system permit different sort of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The Peruvian legal system acknowledges different sort of ownerships. The “regular” property of land usually includes by law ownership of constructions built on the concerned land, as well as underground. The owner has the right to constitute single rights per units, or even rights of the underground, to the benefit of third parties.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The Peruvian legal system acknowledges joint ownership. More than one person (individuals or entities) can jointly own a property as co-owners. In case of joint ownership of real estate property, the Peruvian Civil Code estab-

lishes the presumption that all shares of the property are equal unless proven otherwise. Domiciled or non-domiciled entities can own real estate in Peru, provided property is not located within the 50 kilometres of country borders.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

According to the Peruvian Law the ownership of the land includes the ownership of the constructions built upon it. However, the owner of the land may constitute different single rights over the building, to the benefit of different owners.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

In Peru, registration of real estate property is not mandatory but highly recommended. However, every registered title before Local Real estate Property Register is considered public information and, hence, presumed to be known by all Peruvian citizens. Therefore, in order to protect the owner from third parties and good faith purchasers, it is highly recommended to register the property in the Local Real estate Property Register and every single right upon it. The exception is mortgages over property, for which property (and the mortgage title) has to be registered.

## **II. Costs for Transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

According to Peruvian Law real estate property transfers are subject to “Income Taxation“ and Alcabala. The rates of the first tax in question vary depending if the seller is a natural person or a corporation that domiciles in Peru, or a natural person or a corporation that domiciles out of the country.

If the seller is a natural person that domiciles in the country a 6.25% rate is applicable over 80% of the gross income obtained because of the property transfer. If the seller is a natural person or corporation that has its residence

out the country a 30% rate will be applicable over the gross income obtained because of the property transfer.

The acabala is calculated according to the following equation: transfer price minus S/. 36,000 multiplied by 3% of the transfer price.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

The Peruvian tax law regarding this matter does not establish the specific obligation of holding the property for a certain term. Nevertheless, if a natural person domiciled in the country transfers more than two times a property in less than one year the income taxation rate would change from the 6.25% rate explained above to a 30% rate.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes. In Peru there is no restriction regarding this matter. Therefore the seller is able to transfer the money obtained due to the property transfer out of the country once the deal takes place.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The Peruvian Civil Code establishes that the buyer must respect the lease contract only if it is recorded in the Local Real estate Property Register. In this case, once the buyer becomes the new owner of the property it becomes the new landlord as well, assuming all the rights and obligations the previous owner of the property had due to the lease agreement.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

This must be check for every purchase case separately taking into account the following two aspects: **(1)** if the building permit allows the intended use of

the purchaser and (2) if local authorities have establish certain restrictions for example for commercial establishments in areas of residential property.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial Costs.**- The costs vary depending of the Notary Public and the amount of the property transaction. In the city of Lima the notarial costs for the transfer of a property for an amount of 5 Million Euros would be approximately S/. 10,000.
  - **Land Register.**- S/. 3,600.
  - **Real estate Property Transfer Tax.**-
  - **Income Tax**
    - If the seller is a natural person that domiciles in the country S/. 897,500.00.
    - If the seller is a natural person or corporation that has its residence out the country an amount of S/. 5,385,000.00.
  - **Alcabala**
    - S/. 537,420.
  - **Advising Lawyer (due diligence).**- Depending on the terms convened with the lawyers.

**III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Real estate owners are oblige to pay a Real estate Tax each year, as well a periodic payment for the services rendered by the municipality where their property is locate.

The real estate tax rate depends on the current value of the property. If the property value goes from S/. 0 to S/. 54,000 the rate is 0.2%; from S/. 54,001 to S/. 216,000, the rate is 0.6%; and from S/. 216,001 and beyond the rate is 1%. The real estate tax must be calculated in an accumulative way.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Peruvian law does not establish any special conditions for this service. In that case, the hiring of a caretaker of the property and their economic conditions must be regulated in a recruitment agreement.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

We would advise foreign investors to invest in commercial as well as non commercial real estate property in Peru since currently the country experiments a huge financial growth and the prices on the real estate property market flow and can adapt to the investors demands. This means investors can find real estate prices that adapt to their interests depending on the area of the property and its location. Furthermore interest rates for financing are average at the moment. We would advise foreign investor to invest directly in real estate or in open or closed property funds only if they know the management and if they are very transparent with respect to the costs involved.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

The Peruvian law establishes equal treatment for national and foreign investment. However, the Peruvian Constitution forbids foreign investors to purchase property within the 50 kilometers of the country border. Property in Peru can be owned by any individual or legal entity regardless it has no local branch office in the country.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The official approvals and local permits vary depending on the type of business the foreign investor would like to run in the country.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, Estudio Grau would be pleased to assist foreign investors in all the aspects involving the analysis and evaluation of profitable investment products in real property, the developing of construction projects and all the legal aspects involved. Furthermore, Estudio Grau can advise buyers with the sale decision process by means of GIS Real Estate, a client-tailored product aimed at providing a fast and timely decision making in relation to legal, geographical, social, and environmental information regarding any of the property units located at the focused area.



Peru

# **Poland**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Poland real estate transactions are governed mainly by the Civil Code dated 23 April 1964. In some circumstances the Property Management Act dated 21 August 1997 may also find a use. Rulings of the Supreme Court and other courts are used for the interpretation of ambiguous regulations. Although it is worth to know them, their importance in a particular case is rather limited. The Civil Code regulates all essential aspects of real estate transactions including the definition of real estate, acquisition and transfer of title, easements, usufruct, perpetual usufruct, mortgage, lease and tenancy.

Properties are held either in freehold (permanent unrestricted ownership) or in perpetual usufruct. The perpetual usufruct is established by the state treasury (government) or municipalities for a defined period of time from 40 up to 99 years. Perpetual usufruct is generally treated in the same way as freehold. Given the similarities, this chapter describes freehold and only refers to perpetual usufruct if there are substantial differences.

#### **Land and mortgage register and land register**

The basis for evaluation of the legal status of real estate is the land and mortgage register (Polish: księga wieczysta). The land and mortgage registers are conducted by district courts. The principle of the said register is that one can trust the entries contained therein (description and exceptions please see answer to question 5). An entry of a right evidenced in the register is presumed to be reflecting actual legal status and a right which has been deleted from the register is deemed non-existent.

The land and mortgage register contains four sections providing information on real estate:

- 1) real estate description and location, including buildings erected on the real estate;
- 2) title holder;
- 3) property rights, easements, information on registered claims and rights arising out of an agreement, administrative decision or court ruling; and
- 4) registered mortgages.

The information from the land and mortgage register is publically available. Anyone who has a legal interest (in a broad understanding) can review the documents upon which the entries were made into the register (for example sale agreements, land division decisions, easement agreements, etc). In addition, no one may plead ignorance of entries in a land and mortgage register, nor of applications which have been noted therein.

The information regarding real estate are also provided in the land registers (Polish: rejestr gruntów) maintained by the municipal authorities. The land registers provide for information on description and localization of the real estate and are provided with relevant maps. The information in land registers are usually the most up-dated.

### **Ownership transfer of real estate**

Once the parties agreed on conditions of the real estate transfer, it is advisable that the parties enter into a preliminary agreement (in the form of a notarial deed) binding both parties. For its effectiveness, the preliminary agreement shall contain all essentialia negoti of the transaction such as, inter alia, the designation of the real estate, purchase price; as well as representations and warranties to be inserted into the (final) sale agreement. Please note that, the preliminary agreement may be registered in the land and mortgage register. Such registration serves to inform everybody about the mutual transfer rights and obligations of parties in connection with the future real estate disposal. Note that the transfer of ownership of the property is subject to the execution of a final transfer agreement.

The transfer of real estate requires a written agreement in the form of a notarial deed, otherwise it will be invalid. This rule applies to all types of real estate conveyance. In practice, the sale agreement is often executed in the performance of the preliminary sale agreement upon fulfilment or waiver of conditions stipulated therein.

The final agreement shall contain the following:

- description of the parties;
- description of the object of sale including the land and mortgage register maintained for the property and entries therein;
- price or its calculation method, payment dates and mechanism;
- representation and warranties (such as corporate approvals, encumbrances on the property, third-party rights, environmental and hazardous soil contamination, compliance with building regulations, taxes, lease agreements or other agreements, litigation, technical standards, etc); and

- motion to the relevant district court to register the new owner into the land and mortgage register.

In general, the sale agreement also indicates the status of the property according to the local zoning plan (or lack thereof) and according to the land register. Please consider that these representations are stipulated by the contracting parties and are not mandatory, thus they may be either extended or restricted.

There are no customary rules regarding the advance payment amount or the payment. The parties are free to determine their settlement mechanism, the most common being a direct payment at closing or within few days. Nevertheless, payment via an escrow account, in instalments, direct payment of the seller's creditors or secured creditors (against mortgage release) are also often stipulated in the sale agreements. For obvious reasons, in the case of a share deal the representations and warranties shall be accordingly extended.

To be opposable towards third parties, the transfer needs to be entered into the land and mortgage register. In case of freehold, the ownership transfer occurs upon the sole execution of ownership transfer agreement. Note that in case of perpetual usufruct the title to the real estate is transferred upon entering of the new perpetual usufructuary into the mentioned register (the constitutive effect of the registration).

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

The ownership of a real estate always regards the whole real estate. Polish law does not provide possibility to be the owner of a part of the real estate. If a person co-owns a real estate it always co-owns the entire real estate (indivisibly).

The general rule is that a building erected on a real estate is part of this real estate. Therefore, a building cannot be a separate object of ownership or other real rights (e.g. mortgage) (exceptions please see answer to question 4).

Polish law provides for possibility to be the owner of an independent unit (premises) in a building. Such unit may be subject to separate ownership. In case where in the area of one building there is at least one separately owned unit, a condominium comes into existence (details please see answer to question 4).

Note that it is also possible to acquire the right to use a building or residential unit for a specified time each year (timeshare). The purchaser shall be a natural

person entering into the agreement outside the scope of the business he or she conducts.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Polish legal regulation provide for possibility of a joint ownership (co-ownership) of real estate (Polish: *współwłasność*), which means that several entities may indivisibly co-own one real estate. The joint ownership shall also apply to ownership of a unit (premises).

Note that in Poland we distinguish two types of co-ownership: fractional and joint co-ownership. Joint co-ownership is regulated by provisions of an act from which it stems (eg. the Family law in case of spouses' co-ownership of a given real estate). However, most of real properties are objects of fractional co-ownership regulated by the Civil Code.

The entities who can be owners of real property are natural person, legal persons, as well as other entities, who upon specific provisions of law are capable of acquiring rights and assuming obligations (e.g. partnerships). Polish regulations provide also that the State treasury and municipalities may be owners of real estate.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

The general rule is that buildings and everything attached to the land are part of the real estate (*superficies solo cedit*). Therefore, the ownership of the land results in the ownership of all the things permanently attached to it. This means that a building erected on a real estate cannot be subject of a separate ownership. Polish law does not provide for building right.

The first exception of the abovementioned rule is that a unit (premises) within a building may be subject to a separate ownership. In such case, the owner of the building and the owner of the unit within the building are joint owners of the land the building stands on and common parts of the building (e.g. external walls, staircases, foundations).

The other exception of the abovementioned rule is that in case of the perpetual usufruct, the owner of the land is the State or municipality and the person who

erects the building on the land is the owner of the building. The ownership of a building is a right attached to perpetual usufruct. It cannot be transferred without the transfer of the perpetual usufruct right. In addition, after the perpetual usufruct expires, the ownership of the building is transferred by operation of law to the owner of the land (*superficies solo cedit*).

Please note that the perpetual usufructuary is entitled to sell this right together with the ownership of the building.

The information regarding the legal title to real property is indicated in land and mortgage register (please see answer to question 1).

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Real estate are registered in the land and mortgage register. The land and mortgage register provides for information on the land and on the buildings erected on the land. Information regarding land and/or buildings are also provided in the land register (*rejestr gruntów*) (please see answer to question 1).

Rights entered into the land and mortgage register benefit from presumption of conformity with actual legal status. In case the buyer enters into the agreement with a person indicated in the land and mortgage register as owner/perpetual usufructuary, the buyer benefits from the abovementioned presumption, i.e. it is protected in the scope of having executed the transfer agreement with the legitimate person. The buyer of the real estate does not benefit from the presumption if it is in bad faith, that is in cases: (i) the buyer knows that the information disclosed in the land and mortgage register are inaccurate with the actual legal status of the real estate or (ii) the buyer could easily find out such inaccuracy (e.g. by investigating the documents kept in the land and mortgage register (please see answer to question 1)).

The information provided in land register (*rejestr gruntów*) do not benefit from the presumption of conformity with legal state.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

The transfer of real estate is subject to either civil law transaction tax or VAT.

Civil law transaction tax is for the individual buyers of real estate. The transaction tax (PCC) is at a 2 per cent rate and is calculated on the transaction value.

In case the legal entity purchases property it is obliged to pay VAT. The general VAT rate is of 23 per cent. Furthermore, for the seller of a real estate such transaction may result in the obligation to pay personal income tax (in general 18 per cent or 32 per cent) or corporate income tax (flat rate of 19 per cent) depending on the gain arising from the closed transaction.

Note that, the change of the ownership must be registered in the land and mortgage (cost PLN 200 irrespective of the transaction value) and in the land register (free of charge).

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is a tax exemption for natural persons with regard to possession of real estate for a specific period of time. The tax exemption regards the payment of personal income tax resulting from the sale of a real estate. In case prior the sale (i) a natural person bought the real estate for private (non-business) purposes and (ii) held the real estate for a period of five years after the end of the year the purchase was executed, such sale shall be free from personal income tax.

In case the natural person sells the real estate (dedicated for personal, non-business use) in the term of five years after the end of year in which its purchase has been executed, such sale shall be subject to personal income tax.

The abovementioned regulations do not apply to persons or entities acquiring real estate in connection to their business activity.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

As long as transactions are conducted with non-residents of Poland but who are from other EU Member States, the OECD country or a country from the European Economic Area, no exchange control mechanisms is applicable. All deals with such entities may be freely transacted. There are also some exemp-



tions concerning entities from countries with whom Poland entered into a tax treaty. Entities from other countries (so-called: third parties) in certain limited circumstances must apply to the National Bank of Poland for an individual foreign exchange permit.

Nonetheless, as regards the repatriation of profit, after payment of corporate income tax and, if applicable, of the dividend tax, it is free from any limitation. Thus, domestic and foreign investors are treated equally.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The legal rule is that the lease prevails over a sale. Therefore, if a real estate is transferred, all leases are transferred to the new owner by operation of law.

In case the real estate is sold during the lease, the buyer of the premises may terminate the lease agreement. The buyer is entitled to terminate the agreement upon a notice, regardless of the fact whether the lease agreement is concluded for definite or indefinite period of time. The same applies to tenancy agreements.

In case of lease agreements termination periods are as follows:

- (1) if it is a lease other than a lease of a unit (premises) and:
  - rent is payable at intervals longer than one month, the agreement may be terminated with three months' notice no later than at the end of a calendar quarter;
  - rent is payable on a monthly basis – with one month's notice at the end of a calendar month;
  - rent is payable at shorter intervals – with three days' notice;
  - rent is payable daily – with one day's notice
- (2) if it is a lease of a unit (premises) and rent is payable monthly – the agreement may be terminated not later than with three months' notice at the end of a calendar month.

In case of tenancy agreements:

- (1) if it is a tenancy of agricultural land – the agreement may be terminated with one year's notice at the end of the tenancy year;
- (2) if it is other tenancy it can be terminated with six months' notice before the end of the tenancy year.

Note that the buyer shall not be entitled to terminate the lease in case the following prerequisites are fulfilled: (i) the lease was concluded for a definite

period of time (ii) the lease was concluded in a written form with certified date and (iii) the object of lease was handed over to the lessee.

The written form with certified date means a formal confirmation of the date of legal action undertaken by the parties. In practice: stamp with date by a public notary or by administrative authorities.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

It is possible to change the use of the building from residential to office space. The change of the use of the building requires the consent of relevant administration authorities.

In case the use of the building is to be changed to workplace, the building must meet the requirements resulting from several provisions regarding the workplace i.a. work safety and hygiene or fire protection provisions. The authorities may impose additional obligations regarding adaptation of the building. The procedure before the authorities may take 1-3 months.

The common practice in Poland is that lease or tenancy agreements provide limitations or prohibition to change the destination of the premises by the lessee/tenant. In addition, any modifications of the premises usually require the consent of the lessor or landlord.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

In case the real estate price is EUR 5 Million (assuming that 1 EUR equals 4,3682)

- notary fees = PLN 10,000 (approx. EUR 2,292);
- VAT for notary's services = PLN 2,300 (approx. EUR 526);
- Land and mortgage register = PLN 200 (approx. EUR 46);

- real property transfer tax – dependable: 2% of PCC for natural persons = PLN 436,820.00 (approx. EUR 100,000) or 23 % of VAT = PLN 5,023,430 (approx. EUR 1,150,000);
- advising lawyer: hourly rate EUR 120 – 350, approx. up to 2-3 % of the real estate price;
- estate agent: 1.5% - 4.5% value of the real estate price.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Ownership of real estate is subject to real estate tax. The tax amount is calculated with respect to the surface of the real estate and/or the building or the premises. The tax rate is established by municipal authorities and cannot exceed the threshold indicated by provisions of law (at this moment e.g.: for grounds - PLN 0.8 (EUR 0.2)/1 sq. m., for real estate to conduct business on – PLN 21.05 (EUR 5.20)/1 sq. m.). The tax rate is established on the basis of the real estate value, its localization and even type of business activity conducted on it. The real estate tax is calculated annually and is paid in quarter instalments.

In case the real estate is used upon a perpetual usufruct, the perpetual usufructuary is obliged to pay the annual perpetual usufruct fee calculated as a percentage of the real estate market value. The percentage is dependant from the destination of real estate and varies from 0.3 to 3 per cent.

In addition, the usufructuary is obliged to pay the real estate tax resulting from the building erected on the ground he possesses (if any).

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The costs of caretaking of the purchased property vary and are dependant of the commercial destination of the property and number of leases and/or tenancies. Commercial real estate caretaking is usually calculated as 2% of monthly rents but can reach even 5%.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

At this time the investments in Poland may be made through any vehicle investors require. It is possible to invest through a direct purchase, an investment fund or a SPV.

The most common and practical vehicle to invest in real estate in Poland is establishment of a Polish SPV in the form provided by the Polish Code of Commercial Companies (i.e. capital companies or partnerships). Polish legal provisions do not provide for specific rules regarding the legal form in connection with business performed by foreign entities.

According to the Polish Code of Commercial Companies there are two types of capital companies: the limited liability company and the joint-stock company. The Code also provides for four types of partnerships:

- the general partnership;
- the professional partnership (irrelevant for investment processes);
- the limited partnership; and
- the limited joint-stock partnership.

Note that capital companies, as well as the limited partnership and the limited joint-stock partnership in which the general partner is a capital company, provide for ultimate shield for its owners from their liability towards third parties. At this moment, the limited liability company is the most common form of investment vehicle.

The financial crisis had a significant impact on a Polish real estate market. Although in 2011 signs of recovery could be noticed across most sectors of real estate market, it is however prudent to be cautious. Poland real estate market depends hugely on a situation in other EU countries.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

As a general rule, the acquisition by a foreigner (individual, company, partnership) of a real property or more than 50 per cent of shares or voting rights in a company owning a real property located in Poland requires permit from the Minister of Internal Affairs. This requirement does not apply to foreigners from member states of the European Economic Area (EEA) and Switzerland, except for the acquisition of agricultural or forestry real estate or more than 50 per cent of the shares or voting rights of companies holding such a property. The obligation to obtain permission with regard to agricultural or forestry real estate will end on 1st May, 2016.

Please note that EEA entities (which also means Polish entities) are not obliged to obtain the consent for acquisition of real estate.

According to interpretation of Polish Ministry of Internal Affairs, the entity established in the territory of the EEA country is considered as the EEA entity, regardless of the place of origin of the share capital holders and/or funds.

Thus, the entity established in a EEA country (including Poland) is not obliged to obtain the consent for purchase of the real estate in Poland, even in situation when 100% of the share capital is owned by a foreign (non-EEA) investor.

The application for the permit from the Minister of Internal Affairs is subject to a fee of PLN 1,570 (approx. EUR 360).

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

For obtaining the consent on purchase of the real estate please see answer to question 15 above.

The obligations of an investor are different with regard to investors from EU and EEA and non-EU/non-EEA investors.

The EU/EEA investors may commence business activity without any official consents or notifications, however, submitting of evidence of their registration abroad is usually required. Non –EU/Non - EEA investors may conduct business activity by branches or agencies established in Poland. As such, they require the registration in the National Court Register.

Please note that regardless of place of origin, investors may establish a Polish entity to conduct business activity, on the basis of the Polish provisions of law (please see answer to question 14).

In order to commence a specific business activity in Poland, the foreign investor would have to comply with all the administrative procedures as required

by domestic investors depending on the envisaged business activity (i.a. building procedures for erection of buildings, workplace procedures, permits and consents for specific activities e.g. transport, banking services, alcohol sale, as required by specified provisions of law).

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

We assist clients in all real estate and construction projects at every stage of the transaction and development. Our firm helps clients throughout each project phase and manage all detailed aspects of transactions. Our real estate practice encompasses all aspects of commercial real estate, foreign investors, individual investors, institutional investors.

Contact person within our office for questions of real estate is:  
Radosław Biedecki – Partner (rbiedecki@blegal.pl).

Poland

# Portugal

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

The transaction of a real estate in Portugal usually begins with the execution of a purchase and sale promissory agreement detailing the conditions of the sale, according to which the owner promise to sell the property, and the buyer promises to buy it, under an agreed price and within an agreed period. This agreement usually involves the payment of a deposit, formally called “sinal”. As a rule, if the buyer fails to complete the agreement, he will lose the deposit; if the owner fails to complete the sale, he must repay twice the amount of the deposit.

Until recently the transfer of property had to be executed through a public deed and the property would transfer from seller to buyer with the execution of such buyer.

Since the 1st January 2009, with the real estate simplification and dematerialization of registration acts made through enactment of decree law no. 116/2008, the transfer of real state may be executed by private document, provided the signatures are certified by a lawyer, chamber of commerce and industry, public notary, registration services or para-legal.

However it is still frequent – not to say the rule – to use the previous mandatory procedure of transfer of property by means of a public deed at a notary.

On completion of the above notarial act the transfer of the property has to be registered at the land registry office. This registration is not legally mandatory but strongly advisable as the registration is the only act which confers an *erga omnes* (opposable to third parties) effect to the capacity as owner.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. In Portugal it is possible to own the whole land or only a fraction of the land (plot) or building (autonomous unit), if the land / building is subject to an allotment permit / horizontal property regime.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, joint ownership is accepted by Portuguese jurisdiction. Either single or legal persons, Portuguese or foreign may be owner of real property in Portugal.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes, in Portugal it is possible to have a different owner for the land and the building: the first is the *nu-proprietário* and the second the *superficiário*.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Land and buildings property are subject to public registration before the land registry office. A purchaser is protected if the acquisition is the first to be registered.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

All parties should be Portuguese taxpayers.

Purchaser will be subject to the following taxes:

**Municipal Property Transfer tax (IMT):**

Paid in the local tax office nearest to the property. The amount to be paid is related in terms of percentage by levels of the cost of the property being purchased. In limited cases the buyer will be exempt from paying this tax.

<b>Value of Property</b>	<b>Percentage Applied</b>	<b>Deducted Value</b>
Up to € 90.418	1%	€ 0,00
From € 90.418 to € 123.682	2%	€ 904,18

## Portugal

From € 123.682 to € 168.638	5%	€ 4.614,64
From € 168.638 to € 281.030	7%	€ 7.987,40
From € 281.030 to € 538.978	8%	€ 10.797,70
More than € 538.978	6%	€ 0,00

### **Stamp tax:**

A property purchase is subjected to a Stamp Duty of 0,8% of, as a rule, the declared value.

### **Municipal property tax (IMI)**

Every year the owner of any property is subject to pay an annual municipal property tax. This charge is due by the owner of the property at 31 December of each year. If the tax amount exceeds € 250,00 then it will be divided into two equal payments, the first for payment in April, and the second, for payment in September.

The IMI rates are variable from municipality to municipality and are revised each year.

### **Value added tax (IVA)**

Transfer of property does not attract VAT, although in certain cases the seller may waive the exemption if the buyer uses, in whole or in part, the building for taxed activities.

On the side of the Seller the sale can attract plus value in certain circumstances.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

No. You can sell the property whenever you want.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes as a rule and at least from the perspective of sale of a real estate.

### **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The transfer of a property does not entitle the new owner to terminate any lease contracts in force. The acquirer only succeeds in the previous owner rights and obligations. Also, the tenant has a pre-emption right in the transfer of property leased for more than 3 years.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Amendments to the use license are accepted, being however subject to city council authorisation. For buildings built before 13<sup>th</sup> August 1951 no license is needed on the perspective of the real estate (e.g., an industry might still need official approval).

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial costs:** approximately € 2.000,00.
  - **Land Register:** approximately € 2.000,00
  - **Real estate transfer tax:** around 6% of the cost of the property, as referred in the table referred in II above.
  - **advising lawyer: (due diligence and contractual negotiation):** from € 150,0 to € 200,0 per hour of work
  - **estate agent:** between 2% and 5%

**III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

As referred, the only yearly land tax applicable after transfer of ownership is the Municipal property tax (IMI).

This charge is due by the owner of the property at 31 December of each year. If the amount exceeds €250,00 then it will be divided into two equal amounts, the first for payment in April, and the second, for payment in September. The IMI rates are variable from council to council and reviewed annually.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Caretakers are not that usual in Portugal. At least 1% of the value of the property is considered as annual remuneration plus an hourly fee if applicable.

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**
  
- **directly in real estate:** Yes
- **through real property funds, open or closed ones:** Yes
- **through other clear and secure financial products:** Leasing (financial contract) is an interesting option for companies
- **at the moment not because of the impacts of the world wide financial crisis:** As a result of the global crisis, real estate prices have dropped to very attractive prices in most of the country (although less in Lisbon), being therefore an opportunity for investors. The banks also have a significant number of houses available for sale.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no such restrictions to buy property in Portugal, although investing through certain off-shores or equivalent may imply an accrual at the tax rates.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

To run a business in Portugal it is as a rule mandatory to incorporate a branch – when the foreign investor is a company – or a company – when the foreign investor is a company or an individual.

The official approvals required depend on the type of business, which may differ from very simple – commercial shop –, to complex – restaurant -, difficult – hotels and finally intricately – bank or financial institutions.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Yes, we would be pleased to assist foreign investors once the standard procedure of conflict check is satisfactorily concluded.

For any further information please contact Nuno Moura Roldão, partner of real estate department at:

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# **Russia**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

The seller and the buyer enter into the real estate purchase agreement by drawing up a separate single document in written form. Written form of the real estate purchase agreement is an essential element for making a real estate transaction valid in Russia.

The parties to the agreement shall set forth precise details of the real estate, including information about the location of the real estate or stipulate whether it is a part of the real estate facility (the details shall correspond with official documents of state authorities responsible for record keeping and inventory). Should these details be absent in the agreement, it is believed that parties did not agree upon the property to be conveyed and, hence the purchase agreement will be invalid.

Real property is to be handed over under the transfer deed signed by the parties (transfer may be also effected after the transaction).

Once the purchase agreement is signed, the buyer files an application with a state registry of rights. An application shall be filed alongside with a number of documents, which sometime may be rather cumbersome and time-consuming to collect.

Transfer of ownership in the real property is to be registered within 30 days (general rule) from the date of application. Property in the real estate vests to the buyer from the moment of the state registration.

It should be noted that, in light of adoption of proposed significant amendments to the Civil Code of the Russian Federation<sup>1</sup>, the said procedure for entering into the agreement may be modified. For instance, it is highly likely that a new requirement to the form of the transaction will be set — notarial certification of the transactions where one of the parties is an individual. Besides, not only buyer might be obliged to file the application to the state registry of rights, but all the parties of the transaction except for the cases when the transaction is certified by notary public.

<sup>1</sup> The stage of consideration of the draft federal law: as of October 2012, the draft amendments to the Civil Code of the Russian Federation have been prepared for the second reading in the State Duma of the Federal Assembly of the Russian Federation.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Russian legal system allows for both ownership of the whole land/construction and of one unit/units. However, the notion of condominium was removed from Russian legal system (with the adoption of Housing Code of the RF). Still there are some categories similar to condominium, but they are known only to housing area (for instance, “householder society”).

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Russian legal system permits joint ownership, where two or more entities take ownership in the real property, thus the real property may not be parted without modification of its particular purpose. Joint ownership in the real property can be created by law and by the agreement of the parties.

There are two types of joint ownership in the real property:

1. Participatory share ownership (equity in the ownership can be determined) (*«долевая собственность»*).
2. Joint ownership without determination of the equities (*«совместная собственность»*).

It shall be noted that equity in the real estate property is not a separate physical object (room, premises or square meters), but a fractional number – part of the right to the real property.

Joint ownership without determination of the equities exceptionally created in case of: property of the spouses; farming enterprise; non-for-profit household.

Real estate can be owned by the Russian Federation, subjects of the Russian Federation and local authorities, individuals and legal entities.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Russia when the buyer takes ownership in the building, simultaneously he/she becomes entitled to the land on which the building is erected and also to the plot that is necessary for utilization of the building. But the entitlement

means that the buyer automatically receives easement to the land and not the ownership. In case the seller is a proprietor of the plot, ownership in the plot automatically transfers to the buyer upon purchase of the building.

It is possible to have different owners of the land and the building, provided that the owner of the plot has consented to the bargain. The consent is not essential if the conditions of plot utilization are not in conflict with law or contract provisions. When purchasing the building the buyer acquires the same right of enjoyment of the land as the seller had.

In light of the amendments to be introduced into the Civil Code of the Russian Federation, the land plot and the building (or structure, or construction still being erected) situated thereon and owned by one person, will not just follow each other but, rather, will be most possibly recognized as one and the same object and will be considered for the purposes of civil turnover as one item of real estate (para. 4 Article 287 of the RF Civil Code, para. 3 Article 297 of the RF Civil Code as a draft law on making amendments to the RF Civil Code).

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

All real estate and transactions therewith are subject to state registration. The property right to the land and/or the building evolve only from the moment of its state registration. Any encumbrances and charges to the land shall be registered in the real estate registry as well. Hence any unauthorised entries into the registry are not permitted without prior consent of the land owner.

It should be also noted that in the context of the suggested amendments to the Civil Code of the Russian Federation, in the event of a dispute regarding the real estate or the rights thereto the involved interested party will be entitled to make a relevant entry into the state registry on presence of “objections” or “presence of a dispute”.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In the course of a real estate purchase no taxes and charges are to be born by the Buyers, except for VAT (amount of which is usually included by the

Seller in the total value of the real property). In the meantime, the Sellers are to cover:

1. VAT (legal entities and sole proprietor) – 18% of total value of the transaction (this is an indirect tax and paid by the Buyer but through the Seller);
2. Income tax (legal entities) – 20 % of the income for the corresponding fiscal period that amounts to 1 year;
3. Individual income tax (individuals) – 13 % (for tax residents) of the income for the corresponding fiscal period that amounts to 1 year (30 % - for tax non-residents).

Real property transfer tax is not known to the legal system of Russia, but it possibly has something to do with the state duty for registration of right transfer (that is 15 000 Rubles or approximately 350 EUR regardless of the value of the transaction).

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Although it is not a problem to buy and sell property on a short term basis, the buyer will incur losses connected with charges for state registration (15 000 Rubles or approximately 350 EUR per each registration of right transfer). Furthermore, individuals may receive income tax deductions when selling real estate which they owned for less than 3 years (up to 1 000 000 Rubles (when selling residential real estate, land plots) or approximately 24 900 EUR and up to 250 000 Rubles or approximately 6 250 EUR (when selling other property)) or deduct the expenses actually incurred and confirmed by him/her in a documentary form and related to gaining income, from their taxable income. When the real estate was in ownership for more than 3 years, individuals are entitled to refund of total value of the purchase agreement. Legal entities have a right to deduct the actually incurred expenses, which were confirmed in a documentary form, from their gains.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, international investors enjoy the full range of guaranties, including the right to repatriate the funds.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Lease agreements are not repudiated or amended with the shift of the ownership in the real estate. A new buyer may terminate them only with the consent of the lessees.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

It is permitted to change the use of a building from residential use to office spaces provided that official approval was given. If the seller has an ownership in the whole building, said approval can be rather smoothly obtained, but still the process is quite expensive and durable. If the seller owns one unit (premises) in the building, it will be much more complicated and subject to a number of conditions. For instance, one of the requirements to be met is the possibility to organise the separate entrance. And it is not worth saying that it is next to impossible to change the use of the premises if they are not on the first floor and no separate entrance is available.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

In case of direct investments in the real estate (real estate purchase agreement):

- notarial costs – 0 EUR
- land register – approx. 350 EUR (15 000 Rubles)
- real property transfer tax – 0 EUR
- advising lawyer (due diligence) - unlimited

- **estate agent** - unlimited
- **Others** – 0 EUR

Bearing in mind the planned amendments to the Civil Code of the Russian Federation, in particular, regarding the requirement for notarial form of certain transactions with real estate, some additional (and, possibly, significant) expenses for such notarial certification may be necessary.

In case of purchase of participatory interest in Limited Liability Company:

- **notarial costs** – approx. 250 EUR (10 000 Rubles), approx. 25 000 EUR (0,5 % of the total value of the contract)
- **land register** – 0 EUR
- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – 0 EUR

In case of acquisition of stock in joint-stock company, which keeps a registry of shareholders:

- **notarial costs** – 0 EUR
- **land register** – 0 EUR
- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – 0 EUR

Acquisition of shares in Joint-stock company, where a separate legal entity is responsible for keeping a registry of shareholders (“registrar”):

- **notarial costs** – 0 EUR
- **land register** – 0 EUR
- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – costs connected with the services of registrar.

### III. Costs for holding real estate

12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

Individuals and legal entities are levied with property tax and land tax. Land tax is determined by local authorities and shall not exceed 0,3 % of the cadastral value of an agricultural land, the residential accommodation land and the land with the engineering facilities intended for the public utilities sector, as well as the land for gardening, fruit and vegetables growing or cattle breeding and 1,5 % of the cadastral value of other lands (the size of the precise tax rate applicable to that tax is determined by the regulatory acts of the representative bodies of municipalities within the said limits). Company property tax is determined by constituent entities of the Russian Federation and shall not exceed 2,2 % of the average annual value of the property (the size of the precise tax rate applicable to that tax is fixed in each constituent entity of the Russian Federation by the law of the respective constituent entity of the Russian Federation within the said limits).

It should be mentioned that in the longer run it is planned to make a number of amendments into the Russian regulation of the real estate taxation. For example, two separate taxes on land and other real estate items may be superseded by a single tax. High are the chances that the size of such single tax and/or the procedure for calculation thereof may be changed. But it is hard to say at present what precise changes will take place.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

We have to admit that the market of professional caretakers over the real property is not widely-spread in Russia and has not received yet the same recognition as it has in western countries. Analytics proclaim, that the reasons for such a creeping development of the institute of professional caretaker in Russia are as follows:

- Insufficient number of companies which offer such services;
- Low quality of the services of the professional caretakers;
- Owners of real property are reluctant to hand over their estate to the other company;
- Lack of information on the market.

Nevertheless, professional caretakers are present (“Property Management Company”, “Noble Gibbons”, “Hines”). The charges of the managing company amount to 5 % of the basic rental payments. It shall be noted that execution

of some operations (for example, maintenance of fire safety) require license to be obtained by the professional caretaker.

The most common situation for Russia is an establishment by the foreign investor of the own managing company over the real property.

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

I would recommend investing in real property through purchasing of stock and participatory interests in joint-stock and limited liability companies, accordingly.

Generally this is a cost-cutting for the transaction: an avoidance of income tax and state duty for registration of right transfer.

The situation was changed one year ago for limited liability companies. There was an introduction into the Russian legislation according to which purchase of participatory interests is to be notarized (consequently, additional expenses are to be incurred). But still, except for the notarial costs, no further costs are involved.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Foreign individuals and legal entities are granted with *national regime*. There are no general restrictions for purchase of real property in Russia subject to several exceptions. For example, foreign entity may not take ownership of the agricultural lands and lands of the boarder territory.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**



Efforts of investor greatly depend on the form of business he/she would chose for establishment of economic presence in Russia (costs are above given). Official approvals for foreigners are the same as for Russian citizens and legal entities. It may differ in case of foreign investments in companies which have the strategic meaning for defence of Russia. Generally, foreign investors are dowered with the same conditions for purchasing of plot of land.

Here we should point out that on 22 August 2012 the Protocol dated 16 December 2011 “On the Accession of the Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization dated 15 April 1994”<sup>2</sup> (hereinafter “Protocol”) came into effect. In compliance with Russia’s commitments under the Schedule of Specific Commitments on Services, List of Article II MFN Exemptions (Annex to the Protocol) it is stipulated, in particular, that foreign ownership is prohibited for agricultural land and border territories and may be limited for other types of land. This provision matches with current Russian legislation. However, in light of Russia’s accession to the WTO it is quite likely or, at least, may not be excluded that there will be other changes or restrictions in this sphere that under WTO rules Russia could withdraw at any time.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

We will be pleased to assist and consult foreign investors on all legal aspects involved in these contexts.

<sup>2</sup> This Protocol was ratified by the Federal Law dated 21 July 2012 No. 126-FZ “On Ratification of the Protocol on the Accession of the Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization dated 15 April 1994”

# Singapore

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

All the answers in this questionnaire have been limited to commercial and where applicable industrial real property, and do not include residential real property.

In Singapore, for commercial property, the buyer and seller would usually negotiate the commercial terms of the sale and purchase through their real estate brokers or agents. The real estate agent usually provides a standard form of an Option to Purchase (“OTP”) to be entered into by the parties. The OTP is issued by the seller in exchange for an option fee of 1% of the purchase price (“the Option Money”) provided by the buyer.

The buyer is given a deadline (which is usually 2 weeks from the date of the OTP) within which he has to exercise the OTP, failing which the Option Money will be forfeited by the seller. The buyer exercises the OTP by signing the "Acceptance Copy" in the OTP and delivering the same together with the deposit of 5% or 10% of the purchase price, less the Option Money (“Balance Deposit”) to the seller’s solicitors who are authorised to hold the Balance Deposit as stakeholders pending completion (“Legal Completion”) in special conveyancing accounts held in Appointed Banks of the seller’s solicitors or with the Singapore Academy of Law. See the example 1 below.

The OTP usually states amongst others, the purchase price, deadline for exercise of the OTP, any conditions to exercise of the OTP, warranties on the property (if any), (the practice is for the buyer to inspect and buy the property on a “as is where is basis”), conditions under which the buyer can rescind the contract and the completion date. Further, the OTP will also state that it is subject to “THE SINGAPORE LAW SOCIETY’S CONDITIONS OF SALE 1999 or 2012” insofar as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the special conditions in the OTP. In the event of any inconsistency, the OTP terms shall prevail.

The OTP must also be stamped within 14 days from the date of exercise of the OTP (for existing property, if exercised in Singapore) or date of the sale & purchase aAgreement (for development cases).

See Part II below on Costs For Transaction for more details. Completion date is usually between 8-12 weeks from the date of exercise of the OTP. See example 1 below for a summary of the general steps and procedures.

**Example 1**

- Price of property: S\$1,000,000
- Option money: S\$10,000 (being 1%) paid in exchange for the OTP dated 1.1.2012
- Balance payable: S\$40,000 OR \$90,000 (being balance 4% OR 9%) paid when Option is exercised (no later than 14.1.2010)
- Stamp fees to be paid on the OTP (\*within 14 days from 14.1.2012 i.e. by 28.1.2012) – put asterisk re 30days if signed outside of spore
- Balance purchase price payable: S\$950,000 OR S\$900,000 (being the balance 95% OR 90%) to be paid on completion (being 8 – 12 weeks from 14.1.2012). \*Stamp fees to be paid within 30 days if the OTP is exercised outside of Singapore

Except for large or complex transactions, frequently, the parties engage solicitors only after the buyer has obtained the signed OTP from the seller after his payment of the Option Money. However, it is advisable that the parties engage solicitors to review and advise on the terms of the OTP before they exercise the OTP. This is because once the OTP is exercised, a binding contract is constituted (unless the OTP provides otherwise).

After the OTP has been exercised till legal completion, the solicitor for the buyer will carry out various checks on the property via “legal requisitions”. These are requests sent to various government bodies, being Rapid Transit Systems, Street Works, Water Reclamation Network Department (Sewerage), Building and Construction Authority, Environment Health Department, Inland Revenue Authority of Singapore (Property Tax), Urban Redevelopment Authority (Chief Planner), Central Building Planning Unit (Drainage). The solicitor will also apply for a Road Line Plan to check if there are any lines of road/tunnel reserves on the property.

The buyer’s solicitor will also carry out bankruptcy / winding-up searches on the seller and liaise with the seller’s solicitor prior to completion to ensure that all discharge of mortgage documents have been executed by the bank or finance company, obtain evidence of payment of all outgoing liabilities (eg. property tax and maintenance contributions or land rent till completion date.)

Legal completion takes place when the legal title passes to the buyer (and with it usually possession as well unless provided otherwise). If property is tenanted, the seller’s set of signed Tenancy Agreement and Certificate of Stamp

Duty has to be given to the buyer on completion. This is assuming the property is sold subject to tenancy.

The solicitor for the buyer will advise on and effect various formalities such as the execution by the buyer, stamping and filing of the instrument of transfer and mortgage (if any) with the Singapore Land Authority, various filings with the property tax department of the Inland Revenue Authority of Singapore and sending notices to the Management

Corporation of the development or Jurong Town Corporation (whichever is applicable), to the Tenant (if the property is tenanted) and the Land Office (for leasehold properties only) informing the change of ownership.

### **Additional matters**

If the seller has a mortgage over the property, this has to be discharged on completion. If the buyer has taken financing to assist in the purchase of the property, there will be additional documents and requirements in relation to these aspects.

Furthermore, certain types of commercial property are ultimately owned by a government authority, the 3 main ones in Singapore being Jurong Town Corporation (JTC), Housing Development Board (HDB) and Urban Redevelopment Authority (URA). These authorities own the reversionary title on certain property but grant long term leases which are registrable interests in land (Eg. JTC has various plots of land zoned for different types of industrial uses and typically sells leases of 30 years with an option for a further 30 years). Sale of such industrial property is subject to the consent of the relevant authority and the seller and buyer have to comply with certain conditions such as environmental baseline studies and decontamination works for certain types of JTC properties.

## **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

There are 2 systems of effecting transfer of an interest in land in Singapore: (A) Common law system of conveyancing; and (B) Transfer by registration under the Land Titles Act (LTA) and Land Titles (Strata) Act. Currently, most land in Singapore is registered under System B. The LTA was passed to provide a simplified system of registration of titles to land while the latter Act was passed to facilitate the subdivision of land to comprise one or more strata units

(eg. office units, flat units) to provide conclusive titles to subdivided lots in a building and to facilitate the disposition of their titles.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Real property can be owned jointly as joint tenants or as tenants-in-common, the distinction being that the former (joint tenants) creates a presumption that the rule of survivorship will apply unless otherwise rebutted.

Real property can be owned by corporations or individuals of legal age and capacity. However, note that there are restrictions on foreign ownership of certain types of residential properties, but this is not within the purview of this questionnaire.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Generally, the definition of land includes the buildings and fixtures on that land. However, this is subject to a very limited exception in relation to Malay stilt houses (which would not apply to commercial property) and the modification in recent times to allow for strata title. Such a clearly defined parcel of airspace (i.e. strata title) can also be separately owned and registered as land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Most land in Singapore these days are registered under the Land Titles Act (LTA) and Land Titles (Strata) Act. The Singapore Land Authority (SLA) maintains a Land Register in which instruments and dealings which affect LTA land must be registered. Save for certain exceptions, any person who becomes a registered proprietor of registered land will hold that land free of encumbrances, liens etc except those that are registered or are the subject of notification in the Land Register, giving such owner indefeasible title to the property.

A purchaser (in good faith and for valuable consideration) of property from a previously registered proprietor (whose indefeasible title may be challenged) may claim the benefit of indefeasibility.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Stamp duty is payable by the buyer of real property. It is calculated in the following manner:

- On the first S\$180,000            1%
- On the next S\$180,000        2%
- On the remainder                3%

Stamp duty is payable within 14 days from the date of exercise of the OTP (for existing property) or date of the sale & purchase agreement (for development cases). If the document is signed overseas, stamp duty is payable within 30 days of receipt of the document in Singapore.

If there are other instruments related to the property, such as a lease-back or if there is financing required and there is a mortgage, then such lease and mortgage are also subject to stamp duty at different rates.

Stamp duty is payable on the mortgage and is calculated as follows:-

Every S\$1,000 of the loan or part thereof - S\$4 (Maximum duty payable is S\$500)

i.e. if the stamp duty computed is more than S\$500, the duty payable is still S\$500 because the duty on the mortgage is capped at the maximum amount of S\$500.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no capital gains tax in Singapore. However, if a person is trading in property (ie does not hold the property for a sufficient period of time and/ or buys and sells property frequently ), whatever gains on the disposal of the property will be subject to tax. If the person is tax resident in Singapore, he will pay tax at the rate based on his taxable income and in the case of a company, the company's tax rate. A non-resident individual who is a prop-

erty trader will also be subject to payment of a 20 % withholding tax and a non-resident company will be subject to payment of a withholding tax at the prevailing corporate tax rate which is currently 17% .

There is also a further stamp duty imposed on seller selling a residential property within 3 years from its purchase, but these relate to residential properties only.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Save for any applicable withholding tax (see above), there are no legal restrictions in Singapore on repatriation of funds out of Singapore.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In a sale/purchase of a property, the seller and buyer must agree on whether the sale is with vacant possession or not. If there is an existing lease and the property is sold with vacant possession, it is the seller's obligation to terminate the lease before completion of the sale. However, if the property is sold with tenancy, then the buyer buys the property subject to the tenancy. The buyer is invariably bound by the terms of the lease and any termination must be carried out in accordance with the lease terms. In Singapore, many leases are for a fixed term; therefore, in general, neither the landlord nor tenant is able to terminate the lease.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use of a building depends on the permitted use as regulated by the Master Plan of the Urban Redevelopment Authority (URA). A change of use requires the URA's prior written consent and may be subject to conditions and payment of fees. There are cases of change of office space to residential use, however, we are not aware of any change of use of a building from residential to office space. It seems unusual that URA would allow such change of use.



**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

Based on a purchase price of EUR 5 Million (approx. S\$10,000,000) of an existing commercial property and taking a bank loan to assist in the purchase:

Legal fees in acting for (i) the buyer (as purchaser and borrower) ranges from \$10,000 onwards depending on (i) the complexity of the transaction and (ii) the type of the commercial property, eg.* JTC properties would definitely bring about a higher fee	S\$10,000 onwards*
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Disbursements (eg. Title search, legal requisitions, litigation searches, photocopying charges & incidentals)	approx. S\$1,400 onwards*
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*(Amounts above are exclusive of 7% goods & service tax(GST) which is payable)*

**Stamp fees on OTP (3% of the purchase price - \$5400) (to be paid within 14 days from date of exercise of OTP)	S\$294,600
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**Stamp fees on Mortgage	S\$500
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**Registration fees on caveats (buyer & bank's), transfer and mortgage	approx. S\$270
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\*\* (All stamp and registration fees do not attract GST)

1. Estate agent's fees – usually paid by the seller. Estate agents usually charge 1% of the sale price (plus GST if agent is GST registered)
2. Others – If the buyer is taking a loan, he is required to pay legal fees of the bank's/mortgagees' solicitors.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Commercial properties are subject to property tax. Property tax is assessed based on a percentage of the annual value of the property. Currently the tax rate is 10% of the annual value per year regardless of whether the property is let, vacant or for own use. However, if the commercial property has been vacant for at least 30 days or a calendar month, the owner may be exempted from property tax if it meets the following conditions:

- (a) the property is intended for letting but could not be let despite making reasonable efforts to let it out at fair market; or
- (b) the property is presently undergoing repairs to make it fit for occupation (where repairs do not include renovations, fitting out, alterations, improvements and additions).

Partial exemption may also be granted if some parts of the existing commercial building, or the commercial property to be built, is used exclusively as a place for public religious worship, public schools, charitable purposes, and purposes conducive to the development of Singapore.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Management agents charge different rates. Rates also depend on various factors such as the number of properties managed, how many of the properties are leased or are vacant, the state and condition of the properties and where applicable the building where the properties are comprised in. Agents charge monthly fees ranging from S\$200 to S\$700 per property to S\$6,000 for a small building of 13 storeys (excluding the costs of onsite supervisor/technician and property manager).

Owners of commercial property will also need to factor in costs of insuring the property.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

In spite of the muted global economy the property market continues to be a vibrant one. The scarcity of land, growing population, increasing influx of foreigners and foreign companies, political stability and the opening of two integrated resorts/casinos have fuelled the demand for property, especially residential properties. Some people prefer to invest in real estate investment trusts as these are tradeable and therefore more liquid and enjoy certain tax benefits and usually a higher yield than yield from rental of real property.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions on foreign ownership (individual or foreign) in relation to commercial properties. As mentioned previously, there are restrictions in relation to residential properties. There are no restrictions on the organisation of a domestic entity, provided it takes the form of an entity that can hold property in its own name. For instance, partnerships and limited partnerships are recognised entities for carrying on business but are not separate legal entities, and the partners will have to hold the property in their names.

##### **16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The purchase of the land is subject to the matters discussed above.

The carrying on of a business in Singapore is regulated separately. The foreign investor will have to set up a chosen business vehicle (eg company, partnership, branch, limited liability partnership) in order to carry on a business in Singapore. There may also be other regulatory approvals, licences or registrations required depending on the type of business be carried on.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

We will be able to assist in all legal aspects of an acquisition / sale of real estate or a construction project. Where necessary, we can refer the foreign investor to advisors or real estate agents who can assist.

Singapore

## **Slovakia**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Real estate transaction starts with an offer to purchase or sell a real estate. The offer does not have any prescribed form, which means that it can be either oral or written. Once the offer is accepted or a counteroffer is presented and accepted, conditions of the contract are negotiated. The purchase contract has to be in a written form with the signature of the seller verified by the notary. . Recently introduced legislation created an option that the contract is made entirely by an attorney at law, who prepares the contract, verifies the identity of the parties and their representatives and also assesses whether the contract is in accordance with law and good manners. The attorney at law is personally responsible for any damage that could occur due to his/her authorisation of the contract (for example the identity was not verified or the contract did not become valid). Prior to the authorisation of the contract, attorney at law has to prove to the parties that he/she has professional liability insurance. After the contract is validly signed, the first stage of the transfer is completed.

Cadastral registry was created in Slovakia to register ownership of real estates. The reason is to ensure that the status of the real estate in the registry is in accordance with the actual status. The second stage of the purchase of the real estate starts with filing the petition for the entry of ownership to the Cadastral registry. The Cadastral registry reviews the purchase contract and the petition, and decides whether to approve or reject it. When the Cadastral registry approves the petition and issues an affirmative decision, the formal ownership vests in the purchaser.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Our legal system permits ownership of a sole unit (condominium) and under this system creates joint ownership of common areas and built up areas in the apartment building.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Any legal person can become an owner of real estate (excluding specific types of property that can be only in ownership of the state and restrictions regarding the agricultural soil) and our legal system permits joint ownership. Slovak legal system recognizes two types of joint ownership, co-ownership and joint ownership of spouses (only between husband and wife).

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Our legal system is not based on the principle “superficies solo cedit” since 1951, which means that our legal system considers buildings and the land as two separate subjects. It creates the possibility that the land will have different owner than the building built on the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

All real estate is registered in the Cadastral registry. The ownership of real estate is acquired by its entry to the Cadastral registry. Good faith purchaser is not protected on the basis of the incorrect data published in the Cadastral registry. Property can be transferred only by a legal owner.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Transfer of the real estate is not subject to any transfer tax. The purchase of real estate is subject to taxation (20 % VAT) only when it is purchased from the developer (first purchase of the given real estate).



**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Profit from the purchase of a real estate is subject to taxation (19 % income tax) except when the owner (natural person and also legal entity) owns a real estate for at least 5 years.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no restrictions in relation to the repatriation of funds.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The change of ownership does not terminate the existing lease contract. The purchaser becomes a party of the lease contract ex lege. Lessee is allowed to terminate the lease contract consequently.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The change of use of a building is subject to the authorisation from a local authority.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs:** EUR 100
- **land register:** EUR 350
- **real property transfer tax:** does not apply
- **advising lawyer (due diligence):** depends on the size and difficulty of due diligence and legal advisory aprx. EUR 10,000
- **estate agent:** 2 % – EUR 100,000 (negotiable)
- **others**

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

The owners of real estate are obliged to pay local real estate tax yearly. The rates reflect the location and the size of the real estate.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The costs differ according to location of the property and the property itself, but for commercial property around Bratislava the property management rates are about 8 – 10 % of the monthly gross rent.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Due to the financial crisis the prices in real estate market have been gradually falling in past couple of years. This trend is almost stabilized at the moment, although the prices and number of transactions in the real estate sector are not increasing yet. Nevertheless, the current perspective remains positive, especially for the investors aiming for investment in low-cost and mid-cost properties, due to the fact that potential offer highly exceeds the demand what constitutes favourable conditions for price negotiations.

#### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions concerning the purchase of real estate. The only restrictions are for persons outside the European Union purchasing agricultural soil outside of the built up area of towns.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The only restrictions for the purchase of land are for agricultural soil as mentioned above. Otherwise there are no further restrictions related to foreign investors starting a business. If an investor plans to change the character and usage of the plot of land, the permits of competent authorities may be required. An establishment of a company may take anywhere from 15 days and longer depending on the subject of the business.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

We are permanently supporting foreign investors in all of the above mentioned areas. You can contact us at:

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# Spain

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Before any formal transfer begins, it is highly advisable to take some initial checks relating the property's current legal, tax/economic and town-planning situation: Legal information is normally obtained from the Land Registry (by requesting excerpts relating current liens and charges; Tax/Economic information may be obtained from the Town Hall and from the "ownership association" ("comunidad de propietarios"), if any, as under Spanish Law, who acquires a property is liable for the amounts owed to the ownership association and the payment of local property tax; and Town Planning information, may be obtained by requesting from the Seller or the Town Hall the Activity License/First Occupation License ("Licencia de Actividad/Licencia de Primera Ocupación") for commercial/housing purposes.

Formal procedure of a real estate transaction in Spain normally begins with a private purchase and sale promissory agreement ("contrato de arras") detailing the conditions of the sale which the parties have agreed during negotiation. According to this agreement, the owner promises to sell the designated property and the buyer promises to buy it at an agreed price and within the agreed period. This agreement usually involves the payment of a deposit or a percentage of the price. As a rule, if the buyer fails to complete the purchase and/or payment terms, he will lose this deposit; on the other side, if the owner fails to complete the sale, he must repay twice the amount of the deposit (or as agreed).

Despite parties may commit to sale and purchase under the terms of a private agreement between them, Spanish legal system requires mandatorily the execution of a public deed to transfer the property. Further to the execution of the public deed, in order to be a completely valid, effective and legal transaction, though not compulsory (only required for mortgages), it is highly advisable and virtually necessary to register the transfer or property before the Land Registry. Registration is essential to prove the title held over the property against third parties.

The execution of the public deed -or engrossment of private purchase agreement as a public deed- is drawn up by the Notary Public and executed in front

of him as he is legally required to review and judge the legal capacity of the parties to enter into the transaction. Once executed, last requirement before its registration is the clearance of all taxes related to the transaction Please see question 6 for further details).

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. In Spain there are different ways to own property: it is possible to own the whole piece of land or only a fraction of the land (plot) after segregating the land.

It is also possible to own the building without owning the land where it was built, if the land / building is subject to an allotment permit / horizontal property regime.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Joint ownership is permitted. Under the Spanish Horizontal Property Law, buildings with more than one owner have common spaces which are property of all owners.

As explained above, certain entities like trusts, unknown to Spanish Law, may have serious problems to formalize their property, as their registration as owners in the Land Registry is not permitted. Aside from this, practically all legal entities may own real property.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes. Under the right of accession (art. 358 et sq. of the Spanish Civil Code), a building is owned by the owner of the land unless otherwise proven. If the building was built by another party, such third party has the right to a compensation for the necessary expenses or, alternatively, the owner of the land can ask such third party to buy the land.

Surface rights may be granted over a plot to build and develop. In this case, plot and buildings would have different owners, but once the Surface rights expire, all that is built over the plot will revert to the owner of the plot.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The Land Registry, with delegations at every Spanish region, is the formal registry where title over property is protected. Legal principle *Prior tempore potior iure* (“First registered has the better right”) grants protection to the registered over any other transaction which is not.

The Good faith purchaser who acquires a property from the person who appears in the Registry with the faculty to transfer, shall be maintained in acquisition, once registered his right, no matter the right of the transferee is lately annulled or resolved (Article 34 of the Spanish Mortgage Law).

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Several taxes are involved in a Commercial Real Estate transaction.

- Value Added Tax –VAT: (“Impuesto sobre el Valor Añadido –IVA”): The supply, leasing or letting of Commercial Real Estate or of a building for first occupation is subject to Spanish VAT. Second and further supplies of a building or of parts thereof are exempt from VAT. However, in so far as commercial real estate is basically aimed at developing business activities and most buyers of this kind of real estate also qualify as taxable person for VAT purposes as they are generally dedicated to the development of business activities, said buyers by waiving to the tax exemption, are allowed to exercise a right of option for taxation under VAT for these supplies, leasing and letting of commercial property. By way of this mechanism, buyers are entitled to deduct and to obtain reimbursement of the VAT paid with the property acquisition provided that statutory requirements are complied with. Should these requirements fail, transaction would be subject to Property Transfer Tax. Finally, the building activity is also subject to VAT. There are two different applicable VAT rates

depending on the nature of the transaction: (i) VAT related to building activities is 8%, and; (ii) VAT related to the transfer of property is 18%.

- The Property Transfer Tax (“Impuesto sobre Transmisiones Patrimoniales –ITP”): This tax is imposed, among other acts, over the second and subsequent transfers of property. When dealing with Commercial Real Estate Transfers, this tax is rather unusual as buyer generally exercise the right of option for taxation under VAT. If requirements under VAT regulations fail, the transfer of the property will then be subject to this tax. The tax rate is different depending on each Spanish region and calculated (percentage) according to the purchase price that appears in the Public Deed of transfer. Percentages applied by the different Spanish regions move between 6% and 8%.
- Public Document Tax (“Actos Jurídicos Documentados –AJD”): This tax is applied to the execution of agreements or rights when they are granted as notarial, trade and/or administrative documents in Spanish territory (or abroad if they have legal or economic effects in Spain). Rates applied depend as well on the Spanish region it is executed and on the final Tax applied to the transaction (VAT or Property Transfer Tax). When VAT is applied to the transfer of property, the rates of this tax move between 1% and 2% of the purchase price.
- Tax on the Increase in Value of Urban Land (“Impuesto sobre Incremento del Valor de los Terrenos de Naturaleza Urbana-IVTNU”): This is a local tax which is levied on the implicit value increase that urban land gains by time elapse, therefore, this tax is calculated considering the time passed since the last transaction -exceeding of one year-. The taxable amount is based on the property cadastral value (not the sale and purchase price) of the land and the effective rate increases from 3,7% to 3% depending on the property holding period.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

No, there is not a legal minimum period in which you are obliged to hold a property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There is no restriction to the repatriation of funds. However, in the case of transfers of real property situated in Spanish territory by taxpayers without



a permanent establishment in our Country, the purchaser shall be obliged to withhold and pay to the Tax Authorities 3%, or make the appropriate payment on account of the agreed consideration, as payment on account of Non-resident Income Tax imposed on the capital gain obtained from the sale of the property. If the amount withheld exceeds the effective tax due, the non-resident tax payer is entitled to claim reimburse of such excess.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The tenant has pre-emption right over the leased property unless expressly waived. Once this is cleared, property may be sold to any other third party. The buyer may not terminate the lease agreements currently in force as the transfer of a property means that the acquirer succeeds in all of the previous owner's rights and obligations. According to the Spanish Urban Leasing Act ("Ley de Arrendamientos Urbanos"), lease agreements in force can only be terminated without cost when the property is going to be used to live by its owner or its family.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Every property has a use license indicating if it is for residential or commercial use. This license may be changed or amended by approval of the Town Hall (according to the Urban Plan and the individual features of the property) and by approval of the "ownership association" ("comunidad de propietarios"), if the building has more owners. In practice it is quite difficult to change residential space to commercial as the amount of commercial space in residential areas, buildings and/or plots is limited.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?** Notary Public's costs will be around EUR 2,500-3,500.
- **land register?** Inscription of the transfer of Property before the relevant Land Registry may be around EUR 2,000-3,000.

- **real property transfer tax?** EUR 300.000 (6%) 400.000 (8%)
- **Value Added Tax:** EUR 900.000
- **Public Document Tax when transaction is subject to VAT:** EUR (50.000 (1%) 10.000 (2%))
- **advising lawyer (due diligence )?** EUR 3,000-6,000, depending on the type of property. Due diligence over the land subject to zoning regulations would be more costly as this is a complex area of the law.
- **estate agent?** Estate agent usual rate is 5% of the transaction value.
- **others?**

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

- Property Tax (“Impuesto sobre Bienes Inmuebles –IBI”) is a yearly paid tax, managed by the Town Halls and calculated using the property cadaster value estimated by the Cadastral Office (Dependent of the Ministry of Economy/Tax Authority). The effective tax rates vary from each Town Hall as they are entitled to fix their own final rates within the range from 0,4% to 1,1% of the cadastral value.
- Special Tax on Property of Non-Resident Entities. Foreign entities holding real estate which do not fall within the following categories shall pay this annual tax. The taxable consideration is 3% of the real property cadastral value. Foreign entities exempt from this tax are: i) international public Institutions and foreign States, ii) entities entitled to apply a double tax treaty entered into with Spain containing information exchange clause, provided that the final individuals direct or indirectly holding the share capital of such entity are also resident in a country with a double tax treaty entered into with Spain containing information exchange clause, iii) foreign entities carrying out economic activities (other than mere holding or leasing of immovable property) in Spain on a regular basis; iv) listed companies and v) non-profit organizations recognized by countries with a double tax treaty entered into with Spain.
- Wealth Tax (“Impuesto sobre el Patrimonio”). Under certain circumstances when the commercial real estate cannot be regarded as engaged in business or economic activities for the purposes of the Wealth Tax, this fiscal charge is imposed annually on individuals holding property in Spain. The effective

tax rate varies depending on the value of the estate wielded by the individual in Spain. The tax is only applicable to individuals, not to entities holding the commercial property.

- Local Taxes for public services such as i.e. garbage collection; right of use of public property, etc. are generally payable annually. Considerations and prices vary from each Town Hall where the property is located. These local taxes are payable by the real estate owner.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

These fees have to be negotiated on a case per case basis.

**IV. Foreign investors**

**14. Would you advise foreign investors at the moment to invest in your country?**

- **directly in real estate?** Worldwide financial crisis has stroked hard in Spain because of Spanish real estate bubble. As a consequence, prices have gone down 30% average so far and analysts believe they will drop even lower (60%). It is an excellent time to invest directly in real estate. Even more, Spanish Banks are overloaded of properties and need to get rid of them to clean their balance sheets.
- **through real property funds, open or closed ones?** This kind of funds is not very active in Spain at the moment. Rather than through funds, real estate investments may be interesting by choosing selected and attractive targets, individually.
- **through other clear and secure financial products?** Current economic situation seems to have understood that Spain does not offer this kind of products at the moment. However, large multinational corporations based in Spain but with great activity overseas are having an excellent performance and keep growing each year (banking, telecommunications, energy).
- **at the moment not because of the impacts of the worldwide financial crisis?** As said, even Spain has been severely hit by worldwide financial crisis; there are several targets which seem exciting investment opportunities, and precisely real state may be top of the value-for-money investments as the prices are fall-

ing. Current situation invites to invest in real estate transactions in many different ways (Sale-and-lease-backs, leasing and sub-leasing, etc.).

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Spain has no restrictions to investment in this sense; all the same, investments from financial havens will be subject to notification to Spanish Authorities (previous to purchase). When completing transaction, current anti money-laundering regulations requires the Notary Public to identify and record every individual person holder of more than 25% of the legal entity party of the transaction (including all individuals' holders of the legal entities which hold the company, and so on).

Just to mention that the trusts, as legal entities, are not recognized under Spanish law. In this sense it is advisable to use other corporate figures to invest (especially in real estate as Land Registry would not register transaction or property as the trusts are unknown to the Registrar).

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

To invest in Spain, and operate in general, foreign companies need to obtain a Spanish Tax Id. No. ("NIF"), needed to operate in Spain. This number may be obtained by filing a standard form before the Tax Authority and provisional number –valid to operate- is obtained in a short term (several days). Definitive number is issued within a month.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?** Our firm knows personally several estate agents and advisors and works closely with them. These agents and advisors

are well-known top-tier real estate firms who now the market and may advise when and where great opportunities can be found.

- **Developing construction projects?** Yes, we have advised numerous clients throughout the entire real estate development process.
- **All legal aspects involved in these contexts?** Our law firm has advised in a great number of successful real estate transactions in all legal aspects including the drafting of all kind of property transfer agreements, finance of the transaction, tax issues, administrative requirements and registration of the transaction.

## Sweden

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Sweden, it is common to conclude the purchase of a real property by using dual purchase documents. The first document is the purchase contract (Sw: Köpekontrakt), by which the parties agree on terms and conditions of the sale. The second document is the bill of sale (Sw: Köpebrev), by which the seller acknowledges the receipt of the purchase price. A binding agreement regarding the sale of a property can however also be concluded by a purchase contract only.

The sale and purchase of real property is subject to a number of formal, legal, requirements. In order to be legally binding, the contract must a) include details regarding the property, b) include a statement that the property is transferred from the seller to the purchaser, c) state the purchase price and d) be signed by the seller and the purchaser. Contracts which do not fulfill these requirements are invalid.

In order to obtain registration of the transfer of ownership (see below) the seller's signature must be witnessed by two persons.

The ownership of a real property transfers to the purchaser on the date agreed upon by the parties, in most cases upon the payment of the purchase price (when the bill of sale is issued by the seller).

After conclusion of the contract, or if the purchase has been made conditional upon the payment of the purchase price, the issue of the bill of sale, the buyer is required to apply for registration of ownership (Sw: lagfart) to the property with the land registry. The application for such registration has to be made within three months of the date of the transfer. By registering the transfer of ownership with the land registration authority, the purchaser is e.g. entitled to take out new mortgages in the property. It should be noted however that the registration is not a prerequisite for the transfer of ownership to the property.

Commercial real estate transactions in Sweden are, for tax reasons, normally made by way of share transfers, where the seller transfers the property to a wholly owned subsidiary (at tax value) and then sells the shares in the company to the buyer. There is no transfer tax on the sale of shares in a company which owns real property.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

As a general rule, ownership of land (real estate) is undivided under Swedish law. This means that the owner, or owners, owns the entire property including buildings, utilities, fences and other facilities erected for permanent use on the property. It is not possible to own a unit or units of the property. It is however possible to sell a part of the property. In such cases property formation, by which the relevant area is made into a new and separate unit of property, must take place within six months of the sale.

A form of divided ownership of real property is common in co-operative housing associations where the association owns the real property and the shareholders own a right to inhabit a certain part of the building or property unit, e.g. a flat or house. A share in a co-operative housing association, including the right to the flat or part of the property unit, can be sold more or less freely on the market.

A divided ownership of properties in commercial relations can be arranged by the establishment of a real estate company. In such companies the real estate company owns the property unit or units and the shareholders can divide the rights of use to specific parts of the property between them in a shareholder's agreement.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. There are no restrictions as to what kind of entities that can own real property.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes, ownership of a building is implied in the ownership of the land. As a general rule, a building is seen as a part of the real property and the owner of the property owns the building including all its fixtures. However, in some cases the ownership of the real property and a building on it can be divided



between different owners. If e.g. a tenant to a land lease erects a building, the ownership of the building belongs to the tenant, and not the owner of the real property.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

All real property is registered in the land registry. Buildings are sometimes registered, but this is not mandatory. Apart from details of ownership of the real property, the land register also contains information about mortgages, easements etc. A good faith purchaser is protected if the seller was registered as the owner of the property in the land register.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

For legal entities the transfer tax amounts to 4.25 percent of the highest of the property value and the tax assessment value. For physical persons and cooperative housing associations, the transfer tax amounts to the 1.5 percent. If new mortgages are taken out in the real property (in connection with the sale or otherwise), there is a mortgage tax of 2 percent of the mortgage amount. As stated above, real estate transactions involving commercial properties are normally made by way of share transfers and there is no transfer tax payable in connection with the change of ownership of the shares.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

The capital gains tax for physical persons is 22 percent and is charged if the property is sold at a profit. For companies, the gain is taxed as in the same way as other income in the business. The general tax rate for companies is 26.3 percent. Tax advice needs to be sought in each individual case. There is no specific time that you have to hold the property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes. There are no rules on repatriation of funds.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

As a general rule, a lease is valid against the purchaser of a real property and the purchaser is not entitled to terminate or change the terms and conditions of the lease.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use of a real property and a building is, with some exceptions, regulated by the detailed development plan in each municipality. A change of use from residential use to office space must in most cases be approved by a building permit (even if the building is not rebuilt). If it's not possible to obtain a permanent building permit, e.g. because the altered use is not in line with the detailed development plan, a temporary building permit may be obtained for a maximum of five years.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others?
- 
- Notarial costs: Not applicable
  - Land register: Administrative fee of SEK 825

- Real property transfer tax: EUR 212,500 if the buyer is a legal entity, or EUR 75,000 if the buyer is a physical person.
- Advising lawyer (due diligence): Due diligence costs normally amount to EUR 10,000-20,000 for a real property in this range.
- Estate agent: Estate agents work on a commission basis and are normally employed by the seller. The commission usually ranges from 1-3 percent of the purchase price.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In brief, there are two kinds of yearly taxes on real property in Sweden. The basis of taxation is in both cases the tax assessment value of the property, which is determined by the tax authority.

Owners of residential houses pay a yearly municipal property charge which amounts to the lower of SEK 6 825 or 0.75 percent of the tax assessment value.

On undeveloped land, blocks of rental flats, industrial and commercial properties, a yearly state property tax is charged with 0.4 to 1 percent (depending on the type of building) of the tax assessment value.

It is the person or entity that owns the property on 1 January during the income year who is obligated to pay the municipal property charge or tax for the entire year, even if the property has changed hands. If a real property is transferred during a income year, the contract should therefore contain provisions to the effect that the seller is obliged to compensate the seller for the tax as of the transfer date.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A caretaker normally charges by the hour. Fees vary depending on the type of services required and where the property is situated in the country.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors at the moment to invest in your country**

- directly in real estate?**
- through real property funds, open or closed ones?**
- through other clear and secure financial products?**
- at the moment not because of the impacts of the world wide financial crisis?**

The property market in Sweden is rather stable compared to other countries in Europe. In general, it is more of a buyer's market now compared to the situation a couple of years ago. Sweden has managed to handle the financial crisis better than many countries in Europe and as a consequence the level of vacancies in commercial properties has not risen dramatically due to the financial situation. Since transaction costs for buying properties in Sweden are low compared to other markets, investing in real estate directly is an attractive option. At the moment, we see many European and international real estate funds investing in Sweden. In addition, there are many listed real estate companies doing well.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no general restrictions on foreign ownership of land. Properties can be bought by legal entities or private persons without the involvement of any domestic entity.

##### **16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The official approvals and permits required depend on the intended use of the property. There are no restrictions or special requirements depending on

nationality. Foreign investors are subject to the same rules as any Swedish entity/person. Normally, the company would need to register for taxes, social security charges and VAT with the tax authority. Depending on what type of business that will be conducted, building and/or environmental permits may be required.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes, we are able to assist foreign investors in all the above aspects. Please contact Nicklas Hansen at:

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Switzerland real estate transactions are mainly governed by federal law, but also cantonal law and communal law may have an impact. The sorts of real estate (land, building right, condominium rights) as well as the real estate purchase contract are regulated in federal law.

#### **Land register**

All real estate properties in Switzerland are formally registered in the land register. The land register is administrated by the communal or district administration at the location of the property. In the land register the following information is contained:

- location, exact description and size of the property
- legal owner(s)
- liens and encumbrances such as mortgages, rights of way, tenants or living rights, rights of pipes, liens, pre-emption rights, options to repurchase, etc.

Any transfer of ownership needs an entry in the land register. The registration in the land register therefore is a constitutional prerequisite for acquiring and owning real estate property.

#### **Contact negotiations and notarization**

Real estate transactions are promoted by internet portals, real estate agents or through advertisements. The parties of a real estate property transaction enter into contract negotiations, often after a reservation agreement with a small down payment has been concluded. Although any contract on real estate transactions must, in order to be valid, formally be notarized by a notary public, this reservation contract may, if correctly drafted, become valid without notarization. After the parties have agreed on the draft contract containing all essentialia negotii (exact description of the property, price and way of payment, representations and warranties, etc.), for which often attorneys act as advisors, the final contract will be set up for signature before the notary public.

#### **Formal Contract, Notarisation of Signatures and Closing**

On the basis of the negotiated final draft the parties (or their representatives) appear before the notary public and execute the contract by public notarized deed. In some Swiss Cantons, the notaries are public officials, being part of the

communal administration. In other Cantons, also attorneys in private practise (holding a notary admission) can act as notary public.

After execution of the purchase contract before the notary public, the parties must fulfil the contract by paying the purchase price and transfer of ownership to the buyer (Closing). The Closing often is done immediately after the execution of the contract before the notary public. The transfer of ownership requires a notification to the land registrar of the executed notarized contract together with the request by the seller that the acquirer be registered in the land register. The payment of the purchase price can be made through the notary's client account, but often is regulated separately without involvement of the notary. However, in order to secure potential property gain tax implied on the seller (for which the property remains being a collateral) the buyer is well advised to ask that a portion of his purchase price is set aside at the notary in order to meet the tax dues of the seller. After the registration of the buyer in the land register is made, the ownership in the property has been transferred and the transaction is completed.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The Swiss legal system permits ownership of (i) the whole land including all construction on it, of (ii) only the land or only the building as well as of (iii) a right in a specific condominium. A condominium is a specific form of co-ownership of immovable property that gives the co-owner an exclusive right to make sole use of specific parts of the building and design the interior design of such parts.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. Any natural person or legal entity can own real estate property in Switzerland. In case of more than one owner, the ownership can be either joint ownership (the rights of each joint owner attach to the whole object) or co-ownership (where several persons own a share in an object which is physically undivided).



**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Swiss real estate law is based on the principle that the owner of the land also has ownership of all its constituent parts. If no explicit exception applies, the ownership includes the land and all buildings erected on it.

The exception is a specific sort servitude, the building right. It is an easement entitling a third party to erect or maintain a construction above or below ground on a land. This building right is transferable and may, if permanent and distinct, be entered in the land register as immovable property. The formation and sale of a building right is quite often seen when the land is owned by a public body. The building right may last a 100 years. Upon expiration of the building right, any existing construction reverts on the land owner and becomes an integral part of his or her parcel of land. If not otherwise agreed in a public deed the landowner must pay adequate compensation for the buildings.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Although there is no federal real estate property transfer tax any more in Switzerland, all Cantons – other than the Cantons Zurich and Schwyz – do have real estate property transfer taxes. Subject of such cantonal real estate property transfer taxes is usually the buyer. The tax rates are in the majority of the Cantons between 1 and 3% of the tax base, i.e. the purchase price, the market value or the official value of the real estate property.

Most of the Cantons do also have a real estate property gain tax. Object of this tax is the net profit of the seller between acquisition and sales price, whereby improvements can be deducted. The gains tax is to be paid by the seller, however, the sold property serves as collateral. Depending on whether the seller

is a natural person or a legal entity and whether the corresponding real estate property is part of the business assets or gets traded commercially, some Cantons also tax property gain with the ordinary income and profit tax. The tax rates are depending on the profit and the duration of holding the corresponding real estate property. As an example, a Zurich based property gain of net CHF 1 Million would be taxed at approx. 28% after 10 years of ownership.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

As described above, the tax rates for the real estate property gain tax are depending on the duration of holding real estate property, i.e. the property profit tax is at its maximum if a sale occurs within a short term since the property has been acquired. Except the Canton of Solothurn, all other Cantons have such higher tax rates on short term profits for avoiding speculation. On the other hand the Cantons have reduced the tax rates of the real estate property profit tax if a sale occurs after a long period since the property has been acquired.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, of course.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In case of an acquisition of real estate the lease contracts are transferred to the new owner(s). However, the new owner may terminate the lease contract with effect as of the next legal date (i.e. normally by the end of March or the end of September), if he claims urgent own use of himself or close relatives.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

This depends on the zone in which the property lies. The zoning documentation is available from the Community. In a purely residential zone, an office use will most probably not be accepted. In mixed residential zones where residential and business use is allowed, there is no specific approval necessary. In other cases, an exception from the strict use and/or an amendment of the zoning regulation must be requested.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?

This is strongly dependant on where the property is located, because Swiss federalism also allows the Cantons and Communities to determine the fees, taxes and dues related to real estate transactions. The amount of due diligence and advice necessary is widely dependant on the complexity of the transaction. For a residential property as described above investigation of the building substance, of the zoning laws and prospective development (e.g. concerning threat to loose a great view to the lake and the mountains), and some legal advice on contractual issues such as representations and warranties seem necessary. If the object is an investment building with leases, a financial due diligence comes on top. Additionally, an environmental due diligence may become necessary, in particular if the property lies within the register of potential environmental risks. Finally, a buyer might want to get an expertise of the value. The numbers below are rough estimations reflecting the situation in the Canton of Zurich.

- notarial costs: CHF 7'200.-;
- land registration costs: CHF 10'810.-;
- real property transfer tax: there is no real property transfer tax in the Canton of Zurich;
- advisors fees: legal fees approx. CHF 5'000 to CHF 30'000 (billed at hourly rates of e.g. CHF 400);
- estate agent: normally 2-4 % of the transaction value;

- others: for a property valuation expertise CHF 1'500 to CHF 5'000; for an architects inspection CHF 3'000 to CHF 10'000; for an environmental investigation CHF 15'000 to 30'000.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

There is no general separate tax implied on real estate property in Switzerland. For residents fully subject to Swiss taxation, the value of the real estate is part of the assets and will be taxed at very low asset tax rates (referring to the example above, the yearly asset tax for a building and land of a value of EUR 5 Million would be in Zurich CHF 36'176.50). If a person is not domiciled at the place of the property, the Canton will tax in the same manner the property as an asset lying within that Canton.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

This depends on the exact tasks and amount of work involved: part time would normally be charged per hour; an average monthly salary of a caretaker in Switzerland is about CHF 5'500.-

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Yes, subject to compliance with the federal act on the acquisition of real estate by persons abroad. Swiss real estate property in all forms is quite attractive and – depending on the object and the location – regarded as a good long time investment.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

The federal act on the acquisition of real estate by persons abroad (although revised and milder than before) still provides for certain restrictions of an acquisition of land by persons abroad. Independent whether the buyer is a natural person or legal entity, certain transactions require an approval of the Canton. No such approval is necessary if the real property serves (i) as permanent operation place for a trade, fabrication or other commercial business, (ii) a natural person as his or her main residence at his or her lawful and factual place of domicile, or (iii) further specific exceptions apply.

The notion “person abroad” covers all natural persons of foreign nationality except nationals of the European Union or of the European Economic Area with domicile in Switzerland or other foreign nationals having the right to take domicile in Switzerland. Legal entities are considered persons abroad if seated abroad or controlled by persons abroad.

An approval can be obtained upon formal request based on various reasons, including (but not limited) if the property serves as capital investment of an insurance or pension fund, in zones where a cantonal contingent for holiday apartments allow for it, or in case of a secondary domicile of a natural person where this person carries on an extraordinary close relationship. Legal advice for an acquisition of real estate by persons abroad is indispensable. The procedure may need 2 to 4 months.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

As stated above, if the real estate serves as permanent operation place for a trade, fabrication or other commercial business, no approval under the federal act on the acquisition of real estate by persons abroad is necessary. However, the acquisition will only be possible after a formal decision is obtained that the conditions for this exception are given, i.e. no approval is necessary. This requires a formal request for which legal advice is indispensable. The decision may take 1 to 2 months after submission.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes. We regularly advise clients in offering or searching interesting real estate projects in Switzerland as well as in the preparation and execution of real estate transactions. If an interested foreign investor looks for such objects, an introduction to personally known agents and advisors can be arranged. Our firm is regularly engaged in real estate project developments, including of industrial complexes, by providing legal advice on public and private construction laws and regulations, zoning, and all legal aspects of financing, contracting and due diligence.

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## **Thailand**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Thailand, the buyer and seller first negotiate and agree on the commercial terms of sale, either on their own or through the use of real estate agents or brokers acting as their representatives. A contract is usually drafted by the seller's lawyer. Before reviewing the legal terms, buyers conduct due diligence on the land to uncover any legal issues, most often with the assistance of local lawyers. If the due diligence results are satisfactory, the parties continue to negotiate the legal terms. The contract includes terms such as the sales price, the deposit amount, the condition of the property, any warranties, and the closing date. The buyer usually pays the deposit amount on the date that the contract is signed.

The parties usually effectuate the closing together at the local Land Department. At the Land Department, the seller signs the deed transfer to the buyer in front of a Land Department officer. The officer will help arrange for the transfer registration at the same time. Very often a buyer will pay the remaining balance to the seller with a cashier check. The use of an escrow agent is not customary unless the transaction amount is extremely high. Once the transfer has been registered on the same day, the buyer leaves the Land Department with the updated original title deed showing his name as the current owner.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. When the construction on the land has been registered as a condominium building, a separate title deed is issued for each condominium unit. These condominium units are separately and individually owned.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The legal system of Thailand allows joint ownership of real estate by two or more natural persons or juristic persons such as corporations.

All the co-owners own equal fractional interests in the real property asset.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes. The ownership of a building is implied in the ownership of the land. It is, however, possible to separate the ownership of the land from that of the building erected on it through specific registration scheme at the Land Department.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes. The land and the building (if the ownership of the building is separate from that of the land) are registered in a formal register. A good faith purchaser for value is protected under the law.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

There are transfer fee, specific business tax, and withholding income tax. Transfer fee corresponds to 2% of the official assessed value of the land. Seller's specific business tax equals to 3.3% of the declared purchase price of the land. Seller's withholding income tax is also collected at the Land Department and corresponds to 1% of either the official assessed value of the land or the declared purchase price of the land, whichever is higher. The official assessed value of the land is usually significantly lower than the actual declared purchase price – sometimes as much as four times lower.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no problem to buy and sell property on a short term basis. Many investors practice this short term sale to benefit from a short term profit. It is also

not uncommon for some investors, after having signed a land or condominium sale contract but before the closing date, to find a subsequent buyer and request the seller to transfer the land or condominium directly to the subsequent buyer. This quick sale helps avoid having to pay the taxes involved in the transfer twice.

There is also, however, a tax reason to hold the property for a longer period. The longer the holding period, the more the “Specific Business Tax” may be reduced through the expense deduction from the taxable base. For each year that the owner holds the property, the expense deduction percentage increases by a fixed number.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Whether the seller may transfer his money out of Thailand depends on where the money originates from. If the money originates locally through local investment, then the transfer will be restricted unless there is a legal reason supported by appropriate documentation. If the money originates overseas and was transferred into the country for investment purposes, the money may be transferred out of Thailand without so much difficulty after the investment stops. A foreign buyer usually declares the money being transferred into Thailand as capital investment or loan so that the money may be transferred out after the land is sold.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

When a landlord transfers its interest in leased property to a third party, the lease remains in force and effect, and the new landlord and the tenant generally have the same rights and obligations with respect to each other as did the prior landlord and tenant. The new landlord cannot terminate the lease while the lease is still in effect unless the lease contract allows such termination or the lease agreement with a lease period longer than 3 years has not been registered.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Yes. Change of the use of a building is allowed as long as the zoning at the time of change permits the new use. Official approval is required.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?**
  - **land register?**
  - **real property transfer tax?**
  - **advising lawyer (due diligence )?**
  - **estate agent?**
- 
- **notarial costs:** There are no notarial costs as the service of a notary public is not required in a land transaction.
  - **land register:** None.
  - **real property transfer tax:** The Specific Business Tax is 3.3% of the declared purchase price. If the declared purchase price is the actual purchase price of EUR 5 million, then the Specific Business Tax will be EUR 165,000.  
The transfer fee (2%) is calculated based on the official assessed value of the land, which is usually significantly lower than the purchase price.  
The withholding income tax (1%) is calculated based on either the official assessed value of the land or the declared purchase price, whichever is higher. Assuming the declared purchase price is higher, 1% withholding income tax corresponds to EUR 50,000. The official assessed values are kept at the local Land Department office.
  - **advising lawyer (due diligence ):** Real estate lawyers may charge approximately EUR 4,000 or higher, depending on the complexity of the transactions involved, to perform the due diligence, draft the land sale and purchase contract, and facilitate the transfer registration.
  - **estate agent:** If real estate agents are involved, seller’s agents charge approximately 3-5% of the sales price while buyer’s agents may charge EUR 20,000 – 50,000 of flat fee.

### III. Costs for holding real estate

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

There is a property tax on real estate in Thailand, which is usually levied by local municipalities. The property tax is charged only if there is construction on the land. The property tax is 12.5% of the “annual fee,” which is calculated differently depending on whether the property is rented out. If the property is rented out, the “annual fee” is the annual rental. If the owner operates his own business without renting out the property, a government official will estimate the “annual fee” based on the size, location, type and purpose of the property.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The costs for a professional caretaker for a real property vary greatly depending on what services are needed. Assuming the professional caretaker’s duties include paying property tax and utility fees on the owner’s behalf, renting out the property, and maintaining the property, the annual service fee might be EUR 1,500 approximately.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Yes. Despite the world financial crisis and the political situation in Thailand, the property prices are not dropping. It is not common for property prices in Thailand to fluctuate widely. Instead, as the world economy slows down, the property prices in Thailand still increase but at a slower rate than they would under normal conditions. Compared to the uncertain property market in some other countries, real estate is an attractive investment in Thailand. In fact, most local investors almost always include some form of real estate in their portfolio, whether residential, commercial, or industrial. In addition, even if there is restriction against foreign ownership of land, open real property funds may be 100% foreign owned.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

In Thailand, foreign ownership of land is generally prohibited. Thus, non-Thai citizens may not legally be the registered owner of the land. However, they may lease a land in long term and own the construction built on the land. In addition, non-Thai citizens may buy and own condominium units as individuals.

If a foreign buyer already has a stake in an operating company in Thailand that is considered a Thai juristic entity under Thai law (at least 51% owned by Thai individual or company), the foreign buyer may have his company invest in a plot of land. Such a land transaction must be carefully structured in a legal way. As there are restrictions against using a Thai nominee to hold a land or equity in the land on behalf of a foreign investor, potential foreign buyers should consult an attorney on a case by case basis before investing in a land through this scheme to avoid violating Thai law.

Alternatively, some foreign buyers choose to lease a land in long term while opting to own any building on the land. There is no restriction against foreign ownership of the structure built on a land. The maximum legal lease term is, however, limited to 30 years for residential lease and 50 years for commercial lease. Many foreign buyers circumvent this limit by adding an option to renew the land lease multiple times in the sale contract. Nevertheless, there are nuances and details in the transaction that may affect the enforceability of such an option. Thus, potential foreign buyers should consult an attorney on a case by case basis before deciding whether an option like this is appropriate for a particular transaction.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Foreign investors may avoid the restriction regarding foreign ownership of land by applying for the Board of Investment privileges. There are over 150 categories of business operations that qualify for such privileges. One of the most important privileges is the privilege to have 100% foreign ownership of land on which the business will operate. The amount of time to get approved

and notified after submitting all the required documents is approximately 60 days. The process may take up to 110 days if the investment is larger than approximately EUR 2,000,000.

Not all businesses qualify for the Board of Investment privileges. Thus, to own a plot of land in order to run a business, a foreign investor needs Thai business partners to form a business entity that will be considered a Thai juristic person under Thai law. This usually means the foreign investor will have to become a minority shareholder in number of shares. The corporate structure, however, may be shaped so that the foreign investor has control of the company. It only takes 1 day to form a company after all the required documents have been submitted. The main time variable usually depends on how quickly the foreign and Thai investors can agree on the corporate terms and the required documents may be assembled.

#### **17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes. Our office can assist clients in finding interesting real estate. We can also assist clients with all aspects of real estate transactions and construction projects. Please contact us at:

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

The typical real estate transaction involves the execution of the following documentation:

- Preliminary Agreement (“Boleto de Reserva”);
- Promise to Purchase Agreement (“Compromiso de Compraventa”);
- Sale and Purchase Agreement (“Compraventa”).

#### **Preliminary Agreement (“Boleto de Reserva”)**

The purchase procedure normally starts with the execution of a preliminary agreement, by which the parties agree the basic terms and conditions of the transaction (object, price, terms, penalties, etc.) and the term within the parties should execute the Sale and Purchase agreement (or the Promise to Purchase Agreement, depending on how the transaction is structured).

The buyer shall deposit with its notary an amount equal to 10 % of the purchase price as deposit (guarantee).

This agreement is non registrable and in case of breach the parties are entitled to claim penalties and damages, but not specific performance.

#### **Promise to Purchase Agreement (“Compromiso de Compraventa”)**

When the transaction cannot be structured as a cash payment transaction (due to need of payment in installments, or delayed delivery of possession, etc.) it is typical to execute this kind of Promise to Purchase Agreement. This agreement is registered with the Real Property Register and in case of breach by seller provides buyer with the possibility to claim for specific performance. Additionally, any lien (ie mortgage, attachment, etc.) generated post registration at the Real Property Register does not affect the property.

The agreement should provide for the execution of a Sale and Purchase Agreement once the conditions precedents are met.

This document needs to be executed either as a public deed by a Notary Public or as a private document with signatures certified by Public Notary and protocolized by Public Notary.

#### **Sale and Purchase Agreement (“Compraventa”)**

The procedure ends with the execution of a public deed by a Notary Public containing the Sale and Purchase Agreement. Title over the property is transferred once this deed is executed.

This document is registered with the Real Property Register and is effective before third parties upon registration.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Our legal system permits different sorts of ownership, as follows:

- (a) Traditional ownership, by which the same owner owns the land and the buildings constructed on top of such land.
- (b) Surface right's ("Derecho de Superficie") by which a party owns the land and a different party owns the constructions built on top of such land
- (c) Co-Proprietorship – a piece of land or building is divided in lots or apartments, with different owners, but sharing common areas.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes, our legal system permits joint ownership of real property, either of contractual origin (2 or more individuals or entities buy a property) or inheritance origin (the land is inherited by several heirs).

In general terms both individuals and entities, either commercial (corporations, etc.) or civil (civil associations, religious entities, etc.) can own land.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

The general rule is that the owner of the land is the owner of the constructions built on top of such land.

However, there is an exception for such rule named surface right's ("Derecho de Superficie") by which a party owns the land and a different party the constructions built on top of such land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Sale and Purchase Agreements are registered at the Real property Register.

Additionally, our law provides that certain contracts and acts in respect of real properties are to be registered at the Real Property Register, in order to be opposable to the legal owner, ie: expropriations, mortgages, attachments, liens, leases, etc.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

The taxes involved in a real property transaction are as follows:

- (a) Sales tax – 2 % by seller and 2 % by buyer, calculated over the fiscal value of the property.
- (b) Income tax – 12 % in case of physical persons and 25 % in case of companies, calculated over the difference between sale value and revaluated cost.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

No problem.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes. There are no restrictions at all.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

If the lease is registered at the Real Property Register, the purchaser shall respect the lease until termination. In case of not registered lease or leases which contain a clause permitting the sale of the property, the buyer may start judicial actions in order to regain possession of the property.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

It depends on the zoning regime where the building is located.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?** 3 % of purchase price plus 22 % VAT (however, this is negotiable)
- **land register?** Not material
- **real property transfer tax?** 2 % buyer, 2 % seller, calculated over fiscal value
- **advising lawyer (due diligence)?** Included in notarial costs
- **estate agent?** 3 % of purchase price plus 22 % VAT (however, this is negotiable)
- **others?** No

**III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

The main taxes are: Capital tax (in the case of corporation it amounts to 1.5 % of purchase value; in the case of physical persons it depends on the value of the property as it may be exempted), Municipal tax, and other minor charges (Sewage tax, domiciliary tax, etc.)

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The caretaker would probably charge a fixed fee, depending on the value and destiny of the property.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors at the moment to invest in your country**

- **directly in real estate?** Yes
- **through real property funds, open or closed ones?** Depends on buyer strategy and needs
- **through other clear and secure financial products?** Depends on buyer strategy and needs
- **at the moment not because of the impacts of the world wide financial crisis?**

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Nationals and foreigners (residents or not) have exactly the same legal treatment at the time of purchasing real property.

A comment must be made in connection to the ownership or exploitation of rural real property, as certain restrictions apply in this respect.

Act 18.092 dated January 7, 2007 -as amended by Act 18.172 dated August 31, 2007- establishes the general principle regarding the restrictions on rural land acquisition in Uruguay (hereinafter Act 18.092)

According to Act 18.092, rural land can only be owned, and agricultural activities performed, by identified individuals or by entities belonging to identified individuals. The general idea underlying these provisions is that it should be clear who the individuals owning or working on the land are.

As a consequence, a corporation or any other entity with bearer shares is not entitled, in principle, to own rural land or carry out agricultural activities.

Notwithstanding, Act 18.092 establishes that the Executive Power is entitled to grant authorizations to own rural land and/or conduct agricultural activities to any corporation with bearer shares, trust, branch of a foreign company and/or fund, etc; based on: i) the number of individuals and/or entities owning the

company, fund, etc; and ii) the special nature of the entity, if according to said special nature it is not possible for it to be owned exclusively by individuals.

Pursuant to said faculty, Decree 225/07 has established that authorizations to own rural land and/or carry out agricultural activities may be granted by the Executive Power:

- a) To corporations whose capital stock is owned by: i) pension funds described in Act 17.613; ii) public entities; iii) companies whose paid-in capital has involved public offering of said titles pursuant to Stock Exchange Houses proceedings assuring competitiveness and transparency, at the Executive Power's sole discretion; iv) Trustees for Trusts described in Act 17.703 and Administrators for Funds described in Act 16.774; v) companies and/or entities incorporated abroad whose paid-in capital has involved public offering of said titles pursuant to Stock Exchange Houses proceedings assuring competitiveness and transparency, at the Executive Power's sole discretion
- b) To any corporation, trust, fund, branch of a foreign company with bearer shares in case the activity to be performed by these entities can be deemed to be in the best interest of the development of the country from a production perspective.

The authorizations granted are limited to the relevant pieces of land described in the requests. Any time new pieces of land needed to be acquired and/or used for agricultural activity by any of these entities, new authorizations should be requested.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The same kind of restrictions and approvals apply to both nationals and foreigners.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers? Yes**
- **Developing construction projects? Yes**
- **All legal aspects involved in these contexts? Yes**

Uruguay

## **USA – California**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws which vary from jurisdiction to jurisdiction. What follows is a general description of real property transactions in the United States based loosely upon the laws of California. While it accurately describes the parameters of a real estate transaction almost anywhere in the United States, local laws and practices will impact the specifics of any given transaction.

The buyer and seller, often through the use of real estate agents or brokers acting as their representatives, first negotiate and agree on the terms of the sale. A contract is drafted, often by one of the real estate agents, for the buyer and seller to sign. The contract includes terms such as the sales price, financing terms, the condition of the property, and any warranties. The contract often states a date for the “closing” to occur, which is the actual transfer of ownership. To effectuate the closing, the buyer and seller usually enter into a 3-way contract with an “escrow” company, which facilitates the exchange of money and the property deed (the official document that indicates ownership). At the closing, the seller signs the deed and has it notarized by a notary public, then transfers the deed to the buyer. The buyer must then record the deed by filing it with the local County Registrar-Recorder, or similar official depending upon the state in which the property is located. The date of the closing is normally also the date when possession of the property is transferred, although the contract can specify a different date when possession transfers. The transfer of possession of a house, condominium, or building is usually accomplished by handing over the keys. The contract can also specify which party pays for what closing costs. After the closing, the escrow period ends and the transfer of ownership completed. The state of the title to the property at closing is typically insured by “title insurance” issued by a company for which the escrow company acts as agent.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The legal system of the United States permits ownership of the whole land or ownership of only one or more portions of the land. A “condominium” is the primary form of ownership in which specified parts of a piece of real estate, often called “units,” are separately and individually owned.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The legal system of California permits joint ownership of real property by two or more persons, corporations, partnerships or trustees. There are various forms of joint ownership, some of which allow an owner’s interest to pass to his or her heirs upon death (“right of survivorship”). The main forms of co-ownership are: (1) Community or Marital Property (spouse’s co-ownership over marital property which typically passes to surviving spouse upon death); (2) Joint Tenancy (co-owners of equal interest in entire property with right of survivorship); or (3) Tenancy in Common (co-owners have right of survivorship and can own unequal fractional interests).

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Unless otherwise specified, ownership of the land includes ownership of the buildings and other improvements upon the land, as well as the mineral rights below the surface. It is possible, however, to separate ownership of the land from the improvements or minerals.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Property deeds, as well as mortgages and other documents effecting title to real estate, are typically recorded in the County Registrar Recorder’s office in order to protect the owner from losing title to a subsequent good faith purchaser (or, “bona fide purchaser”) who purchases the property without notice of the current owner’s title to it.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Property taxes and transfer taxes vary greatly depending upon the locality. In California, property taxes are levied and paid annually according to the value of the property as of the date it was acquired or the date of completion of any new construction. Currently, the maximum annual tax on real property is limited to one percent of the market value (“base”) of the property at the time the property was sold, plus a maximum of two percent for annual inflation. When the property is sold, the tax can increase because it will then be based on the new market value. Also, upon sale of real property in California, local governments can impose a transfer tax at the rate of \$0.55 for each \$500.00 of the selling price.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Gains realized on the sale of real property are taxed at a person’s ordinary income tax rate if the property is held for less than a year. If the property is held for more than a year, then gains are taxed at a preferential rate which is currently 15%

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States.

### **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

When a landlord transfers its interest in leased property to a third party, the lease remains in force and effect, and the new landlord and the tenant generally have the same rights and obligations with respect to each other as did the prior

landlord and tenant. The new landlord cannot terminate the lease while the lease is still in effect unless the lease contract allows such termination.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities and counties divide their jurisdictions into land use districts, or “zones.” Within each zone a specific set of rules control the use of land. There are often zones for single-family residences, multi-family dwellings, commercial uses, industrial activities, open space or agriculture and, sometimes, mixed uses. If a property owner desires to use property in a manner not permitted under the applicable zoning rules, the owner may seek a variance or conditional use permit, or seek to amend the zoning rules.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- Others

Notary public charges in California are usually less than \$20.00 U.S. Dollars, or EUR 15,80. As of May 2010, the fee to record real property records can vary from county to county but is approximately \$20.00 U.S. Dollars, or EUR 15,80. In California, local governments can impose a transfer tax at the rate of \$0.55 for each \$500.00 of the selling price, which means the transfer tax for a purchase price of EUR 5 million can be up to approximately \$7,000.00 or EUR 5530. Real estate attorneys typically charge by the hour, so the fees are a function of the complexity of the transaction, but will typically average \$10,000 to \$15,000 in a transaction of this size, EUR 11.860, for a real estate transfer. Real estate agents charge approximately 5 percent of the sales price, which is approximately \$316,216.00 U.S. Dollars, or EUR 250.000, to be divided evenly between the buyer’s agent and the seller’s agent. Title insurance premiums are

approximately 0.1% of the purchase price and escrow fees are approximately 0.075% of the purchase price.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

There is a property tax on real estate in the United States, which is usually levied by local governments at the county level. The forms and rates of the property taxes vary between jurisdictions. There is a property tax in California, which has to be paid yearly. Currently, the maximum annual tax on real property is limited to one percent of the market value (“base”) of the property at the time the property was sold, plus a maximum of two percent for annual inflation. There may also be special assessment taxes, which are levied for the cost of specific local improvements such as streets, sewers, irrigation, and drainage. Special assessments may be due periodically to improvement districts or be levied only once by the city or county for a particular work or improvement.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

When you hire a property management company, the service can range from showing your property to an all-in-one package. An ongoing monthly fee charged to the owner to the property manager can vary from 3% to over 15%, usually 8% to 10%, of the monthly gross rent.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Due to the effects of the recent financial crisis, real estate prices have fallen in many parts of the United States, sometimes dramatically so. Recently, prices

have stabilized and some early signs of a recovery can be seen. It is, therefore, probably a good time to buy real estate in the United States through any of the investment mechanisms described above.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-resident aliens is subject to certain special taxation rules. In generally, however, it is not difficult for foreign investors to purchase property in the United States.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or conditional use permit, or seek to amend the zoning rules, to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought and other factors, but takes approximately six months. The investor will also need to register the business with the Secretary of State and obtain a seller's permit and business license from the city in which the business will operate, which can take anywhere from a few days to several months depending on the locality and other factors. Just as importantly, if a foreign investor is seeking citizenship in the United States, the EB-5 visa program offers a path to citizenship for non-citizens able to invest \$1,000,000 in a business in the United States.

- 17. Could your firm assist foreign investors in**
- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
  - Developing construction projects?**
  - All legal aspects involved in these contexts?**

Yes. Our office is capable of assisting clients in all aspects of real estate and construction projects. Please contact Peter Lindborg or Irina Drill at:

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws which vary from jurisdiction to jurisdiction. Following is a general description of commercial real property transactions in the United States based loosely upon laws of the District of Columbia. While the following accurately describes the parameters of a real estate transaction in the United States, generally, local laws and practices will impact the specifics of any given transaction.

The buyer and seller, often through the use of real estate agents or brokers acting as their representatives, first negotiate and agree on the terms of the sale which is typically evidenced by a letter of intent. In the commercial context, a contract (known as the purchase and sale agreement) is drafted and negotiated by legal counsel to the parties for the parties to sign. The contract includes terms such as the sales price, financing terms, the condition of the property, conditions to closing, covenants, representations and warranties. The contract will also set forth the level of due diligence to be performed by the buyer.

After a purchase and sale agreement is executed, the next steps are determined by the terms of the purchase and sale agreement. The typical process is that the buyer will have a period of time during which the buyer can perform due diligence on the property. Due diligence typically consists of reviewing the title and survey for the property, reviewing environmental reports, determining the zoning status of the property, and reviewing existing leases and contracts affecting the property. Due diligence may include additional investigations and rarely is there a limitation on buyer's due diligence. The scope of the due diligence is negotiated in the purchase and sale agreement. The purchase and sale agreement will also specify a closing date as well as the location of the closing. Closing typically takes place at the title company's offices and the title company acts as escrow agent for all money and documents. The seller and buyer may show up in person to execute documents, but this is not typical. Money is wired directly to the title company and the documents are couriered to the title company. Once the title company confirms receipt of all of the documents and the money, as well as satisfaction of all of the closing conditions set forth in the

purchase and sale agreement and instruction letters from buyer's and seller's counsel, respectively, the real estate transaction closes and the deed is released from escrow for recordation. The deed is not recorded until after the real estate transaction closes.

After the closing, the escrow period ends and the transfer of ownership is complete. The state of the title to the property at closing is typically insured by title insurance, which is issued by a title insurance company. During the due diligence period, legal counsel to buyer will negotiate the form of title insurance policy to be issued at the closing to the buyer.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

The District of Columbia allows the joint ownership of real property through the use of tenancies in common, joint tenancies, joint tenancy with right to survivorship and tenancies of the entirety. In addition to individuals, the following entities can also own real property in the District of Columbia: Limited Liability Companies, Limited Partnerships, General Partnerships, and Corporations.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

The District of Columbia allows the joint ownership of real property through the use of tenancies in common, joint tenancies and tenancies of the entirety. In addition to individuals, the following entities can also own real property in the District of Columbia: Limited Liability Companies, Limited Partnerships, General Partnerships, and Corporations.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In the District of Columbia it is possible for the ownership of the land to be separate from the ownership of the building(s) located on the land. One example of a structure where the ownership of the land and the building(s) located on the land are different is a condominium structure in which the land

is designated as a common element and owned in by a condominium association, while any buildings on the land is a separate condominium unit that is individually owned. Another example of a structure where the ownership of the land and the building(s) located on the land are different is a property where the land is ground leased. When the land has been ground leased, during the term of the lease the building(s) on the land are owned by the tenant, while the land is owned by the ground lessor.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The general rule in the District of Columbia is that “when 2 or more deeds of the same property are made to bona fide purchasers for value without notice, the deed or deeds which are first recorded according to law shall be preferred.” However, the question of whether or not the purchaser who records first is protected depends on the specific facts of the matter, specifically, whether the purchaser had notice of the other claim or deed even if such claim or deed is unrecorded.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Below are the typical taxes paid in connection with the purchase of commercial real estate in the District of Columbia:

Deed Recordation Tax:	1.45% of the greater of (i) the consideration, and (ii) fair market value of the property.
Deed Transfer Tax:	1.45% of the greater of (i) the consideration, and (ii) fair market value of the property.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no required hold period for real property in the District of Columbia. An owner can sell property at any time. In times when real estate values are

rising, it is not uncommon for a purchaser to “flip” the property and resell the property the same day the purchaser acquires the property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States. There are U.S. tax implications for the foreign investor to consider including the Foreign Investment in Real Property Tax Act (commonly known as FIRPTA). FIRPTA is a United States tax provision that imposes income tax on foreign persons disposing of United States real property interests. Tax is imposed at regular tax rates for the type of taxpayer on the amount of gain considered recognized. Buyers of real property interests are required to withhold tax on payment for the property. Withholding may be reduced from the standard 10% to an amount that will cover the tax liability, upon application in advance of sale to the Internal Revenue Service. FIRPTA overrides most nonrecognition provisions as well as those remaining tax treaties that provide exemption from tax for such gains. A foreign investor should consult with a U.S. tax attorney specializing in investment in U.S. real property.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In DC, a buyer of real property does not have the right to terminate existing leases unless the transfer is through a foreclosure by a lender that has a priority position or where the lease has been subordinated. If the existing leases are commercial leases, then the owner of the property must wait for the existing lease to expire or the owner may terminate the lease after a tenant default. However, in the District of Columbia if the existing lease of the property is residential, then the owner must wait until the tenant moves out of the property. Residential leases in the District of Columbia are essentially life estates for the life of the tenant and the tenant can only be removed through a judicial process for nonpayment of rent. Also, in District of Columbia if the existing leases are residential, the residential tenants have a right of first refusal to purchase the property by matching the purchase price of a third party purchase contract.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities and counties divide their jurisdictions into land use districts, or “zones.” Within each zone a specific set of rules control the use of land. There are often zones for single-family residences, multi-family dwellings, commercial uses, industrial activities, open space or agriculture and, sometimes, mixed uses. If a property owner desires to use property in a manner not permitted under the applicable zoning ordinances, the owner may seek a variance or conditional use permit, or seek to amend the zoning rules. Property in the District of Columbia is zoned for specific uses and the owner can not change a permitted use without governmental approval. Buyers must also be wary of covenants, conditions and restrictions (CC&R’s) which commonly restrict property. Such CC&R’s are private restrictions placed on the property which are enforced by private rights of action.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- Others

Recording Charges:	Estimated to be \$34 - A deed is typically three (3) pages and the recording charge is \$20 for the first page and \$7 for each additional page. If there is a deed of trust securing financing, then the recording charges for the deed of trust need to be paid as well.
Deed Recordation Tax:	\$72,500 – 1.45% of the greater of (i) the consideration, and (ii) fair market value of the property.
Deed Transfer Tax:	\$72,500 – 1.45% of the greater of (i) the consideration, and (ii) fair market value of the property.
Title Insurance:	Estimated to be \$23,750 – Title insurance rates are negotiated in the District of Columbia and vary from transaction to transaction based upon the relationship between the purchaser and the title company, as well as the coverage purchased.
Notarial Costs:	Estimated to be \$0 – Notaries are typically provided by the title company or attorneys involved in the transaction and the title company and attorneys do not charge for this service.
Attorneys' Fees:	Estimated to be \$20,000 – Attorneys' fees vary greatly from transaction to transaction depending on the complexity and amount of due diligence.
Real Estate Agent Fees:	Estimated to be \$300,000 – If there is only one (1) broker, then the fee is typically 4-5% of the purchase price. If there are two (2) brokers (i.e. the seller and purchaser have their own broker), then the seller's broker typically gets a fee of 3% of the purchase price and the purchaser's broker typically gets a fee of 3%.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

There is a property tax on real estate in the United States, which is usually levied at the local level. Real property taxes are paid on an annual basis. The

real property tax is based on the assessed value of the property (as determined by the District of Columbia). The real property tax rate depends on the use of the property and generally varies on an annual basis. Examples of the 2010 real property tax rates are:

Vacant Commercial Property: \$10.00 per every \$100 of assessed value  
Apartment Buildings: \$0.85 per every \$100 of assessed value  
Commercial Property: \$1.65 per every \$100 of assessed value of the first \$3,000,000 of assessed value, and \$1.85 per every \$100 of assessed value thereafter

In addition to the real property tax, a property owner may have to pay additional annual fees, such as business improvement district fees or CC&R assessments. The existence of these fees depends on a property location and the requirement to pay the fees is usually recorded in the real estate records. Proper due diligence before purchasing any parcel of real property is necessary to determine the annual taxes and fees applicable to a specific parcel of real property.

There may also be special assessment taxes, which are levied for the cost of specific local improvements such as streets, sewers, irrigation, and drainage. Special assessments may be due periodically to improvement districts or be levied only once by the city or county for a particular work or improvement.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Property management fees in the District of Columbia are negotiable but they are typically 4% of the income from the property plus the property manager's out-of-pocket expenses. If the property manager does work in addition to managing the property, such as overseeing and coordinating tenant construction work, there is usually a separate construction management fee of 3% for such activities.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate
- Through real property funds, open or closed ones
- Through other clear and secure financial products

– **At the moment not because of the impacts of the worldwide financial crisis**

The District of Columbia is the Capital of the United States and the amount of real estate in the District of Columbia is limited thereby making the District of Columbia attractive to foreign investors. The decision to invest in property is best determined by the foreign investor with the advice of a reputable commercial real estate broker and real estate investment advisor.

Foreign investors are free to invest directly in real estate or indirectly through open real property funds, closed real property funds, and other clear and secure financial products. The most appropriate vehicle for investment varies from real estate project to project and a foreign investor should consult a local attorney, a U.S. tax attorney specializing in foreign investment in real estate and an accountant to determine the best investment structure for a given project.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-residential aliens is subject to certain special taxation rules. In general, however, it is not difficult for foreign investors to purchase property in the United States, although careful tax planning is critical.

Individuals, domestic entities, and foreign entities are all permitted to own real estate in the District of Columbia; however, foreign entities must qualify to do business in the District of Columbia before acquiring real property in the District of Columbia. Corporations, limited liability companies, limited partnerships and general partnerships are all appropriate entities for owning real estate in the District of Columbia.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or



conditional use permit, or seek to amend the zoning rules, to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought and other factors, but takes approximately six months. The investor will also need to register the business with the Secretary of State and obtain a seller's permit and business license from the city in which the business will operate, which can take anywhere from a few days to several months depending on the locality and other factors. The approvals and licenses needed to run a business vary depending on the type of business the investor intends to conduct in the District of Columbia. The time frame for obtaining the necessary approvals also varies depending on the nature of business.

Under a provision of the immigration law aimed at creating jobs (generally referred to as the EB-5 visa program), if a foreign national makes an investment of \$500,000 or \$1,000,000 (depending on the unemployment rate at the location of the investment) and the investment will create 10 new jobs, then the investor could be qualified to obtain lawful permanent residence status in the United States. A foreign investor should consult with an immigration attorney to ensure that the investment qualifies for the EB-5 immigrant visa program.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Patton Boggs real estate group devises innovative and sophisticated approaches to achieve practical and cost-effective results for clients. We provide counsel on all aspects of real estate business, striving to always put our clients in the best position to conduct business and take advantage of new opportunities

Patton Boggs broad national real estate practice gives us valuable experience with virtually every kind of commercial real estate activity – whether on a local, regional or national basis – including all phases of commercial real estate development, project and infrastructure development, investment, finance, restructuring and workouts

Patton Boggs represents investors (foreign and domestic), banks and other institutional lenders, owners and developers in the complete range of real estate matters, including:

- Real property acquisition, disposition and operation;
- Development and construction; Mediation, arbitration and litigation;
- Zoning and land use planning;
- Financing;
- Restructuring, workouts, foreclosures, bankruptcy and creditors' rights
- Transactional tax planning
- Leasing

We understand the intense time pressures that are often involved in real estate transactions and that many deals will not close unless they are promptly negotiated and documented.

If we may be of assistance, we invite you to contact:

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws which vary from jurisdiction to jurisdiction. Following is a general description of commercial real property transactions in the United States based upon laws of the state of Texas. While the following accurately describes the parameters of a real estate transaction in the United States, generally, local laws and practices will impact the specifics of any given transaction.

The buyer and seller, often through the use of real estate agents or brokers acting as their representatives, first negotiate and agree on the terms of the sale, which is typically evidenced by a letter of intent. In the commercial context, a contract (known as the purchase and sale agreement) is drafted and negotiated by legal counsel to the parties for the parties to sign. The contract includes terms such as the sales price, financing terms, the condition of the property, conditions to closing, covenants, representations and warranties. The contract will also set forth the level of due diligence to be performed by the buyer.

After a purchase and sale agreement is executed, the next steps are determined by the terms of the purchase and sale agreement. The typical process is that the buyer will have a period of time during which the buyer can perform due diligence on the property. Due diligence typically consists of reviewing the title and survey for the property, reviewing environmental reports, determining the zoning status of the property, and reviewing existing leases and contracts affecting the property. Due diligence may include additional investigations and rarely is there a limitation on buyer's due diligence. The scope of the due diligence is negotiated in the purchase and sale agreement. The purchase and sale agreement will also specify a closing date as well as the location of the closing. Closing typically takes place at the title company's offices and the title company acts as escrow agent for all money and documents. The seller and buyer may show up in person to execute documents, but this is not typical. Money is wired directly to the title company and the documents are couriered to the title company. Once the title company confirms receipt of all of the documents and the money, as well as satisfaction of all of the closing conditions set forth in the purchase and sale agreement and instruction letters from buyer's and seller's

counsel, respectively, the real estate transaction closes and the deed is released from escrow for recordation. The deed is not recorded until after the real estate transaction closes.

After the closing, the escrow period ends and the transfer of ownership is complete. The state of the title to the property at closing is typically insured by title insurance, which is issued by a title insurance company. During the due diligence period, legal counsel to buyer will negotiate the form of title insurance policy to be issued at the closing to the buyer.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Texas permits ownership of portions of land. A condominium is the most common. In a condominium regime, a portion of the property is designated as common elements (which are collectively owned by all of the condominium unit owners through a condominium association) and the remainder of the property is designated as condominium units (which are individually owned).

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Texas allows the joint ownership of real property through the use of tenancies in common, joint tenancies, and community property. In addition to individuals, the following entities can also own real property in Texas: Limited Liability Companies, Limited Partnerships, General Partnerships, and Corporations.

In Texas, co-ownership of real property through a tenancy in common does not create the right of survivorship in the co-owners unless a right of survivorship (commonly referred to as a tenancy in common with right of survivorship) is expressly granted. When one co-owner dies, the interest of the deceased co-owner goes directly to that person's heirs (either by will or intestate succession) and not to the other co-owner. Additionally, in Texas, a grant of ownership of real property to two or more persons is presumed to create a tenancy in common, unless otherwise expressly stated in the conveyance. Ownership of real property through a joint tenancy provides the co-owners with equal interests in the entire property, along with the right of survivorship. With respect to spouses in Texas, community property consists of the property, other

than separate property, acquired by either spouse during marriage. Each spouse owns an undivided one-half interest in all of the community property.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Texas, it is possible for the ownership of the land to be separate from the ownership of the building(s) located on the land. One example of a structure where the ownership of the land and the building(s) located on the land are different is a condominium structure in which the land is designated as a common element and owned in common by unit owners in accordance with their percentage ownership interest in the condominium project, while buildings on the land are divided into separate condominium units which are individually owned.

Another example of a structure where the ownership of the land and the building(s) located on the land are different is a property where the land is ground leased. When the land has been ground leased, during the term of the lease the building(s) on the land are generally owned by the tenant, while the land is owned by the ground lessor.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

In Texas, property deeds, as well as mortgages and other documents effecting title to real estate, are typically recorded in the County Registrar Recorder's office in order to protect the owner from losing title to a subsequent good faith purchaser (or, "bona fide purchaser") who purchases the property without notice of the current owner's title to it. Usually, absent express language of subordination or language otherwise altering priority, the instrument recorded first has priority. However, the question of whether the purchaser who records first is protected depends on the specific facts of the matter, specifically, whether the purchaser had notice of the other claim or deed even if such claim or deed is unrecorded.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In Texas, property taxes are imposed by local taxing authorities, including counties, cities, towns, special districts, and school districts. Each year, an appraisal district in each county sets the appraised value of the real property according to the market value of the real property. Depending on market conditions, the appraised value may increase or decrease from year to year. Property taxes are levied and paid annually according to the appraised value of the real property. However, unlike some states, upon the sale of real property in Texas, neither state nor local governments impose a transfer tax on the real property being conveyed.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no required hold period for real property in Texas. An owner can sell property at any time. In times when real estate values are rising, it is not uncommon for a purchaser to “flip” the property and resell the property the same day the purchaser acquires the property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States. There are U.S. tax implications for the foreign investor to consider including the Foreign Investment in Real Property Tax Act (commonly known as FIRPTA). FIRPTA is a United States tax provision that imposes income tax on foreign persons disposing of United States real property interests. Tax is imposed at regular tax rates for the type of taxpayer on the amount of gain considered recognized. Buyers of real property interests are required to withhold tax on payment for the property. Withholding may be reduced from the standard 10% to an amount that will cover the tax liability, upon application in advance of sale to the Internal Revenue Service. FIRPTA overrides most nonrecognition provisions as well as those remaining tax treaties that provide exemption from tax for such gains. A foreign investor should consult with a U.S. tax attorney specializing in investment in U.S. real property.



**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In Texas, a buyer of real property does not have the right to terminate existing leases unless the transfer is through a foreclosure by a lender that has a priority position or where the lease has been subordinated. The owner of the property must wait for the existing lease to expire or the owner may terminate the lease after a tenant default.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities and counties divide their jurisdictions into land use districts, or “zones.” Within each zone a specific set of rules control the use of land. There are often zones for single-family residences, multi-family dwellings, commercial uses, industrial activities, open space or agriculture and, sometimes, mixed uses. If a property owner desires to use property in a manner not permitted under the applicable zoning ordinances, the owner may seek a variance or conditional use permit, or seek to amend the zoning rules. Property in Texas is zoned for specific uses and the owner can not change a permitted use without governmental approval. Buyers must also be wary of covenants, conditions and restrictions (CC&R’s) which commonly restrict property. Such CC&R’s are private restrictions placed on the property which are enforced by private rights of action.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others

Notary Public charges in Texas are also typically less than \$20.00 U.S. Dollars and the fee to record real property documents in the real property records can vary substantially from county to county, but are generally nominal. Neither local nor state governments impose a transfer tax on real property being conveyed in Texas. Real estate agents in Texas typically charge a commission equal to 6% of the sales price of the real property, to be divided evenly between the buyer's agent and the seller's agent.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In the U.S., property taxes are imposed by local taxing authorities, including counties, cities, towns, special districts, and school districts. In Texas, each year, an appraisal district in each county sets the appraised value of the real property according to the market value of the real property. Depending on market conditions, the appraised value may increase or decrease from year to year. Property taxes are levied and paid annually according to the appraised value of the real property. However, unlike some states, upon the sale of real property in Texas, neither state nor local governments impose a transfer tax on the real property being conveyed.

In addition to the real property tax, a property owner may have to pay additional annual fees, such as business improvement district fees or CC&R assessments. The existence of these fees depends on a property location and the requirement to pay the fees is usually recorded in the real estate records. Proper due diligence before purchasing any parcel of real property is necessary to determine the annual taxes and fees applicable to a specific parcel of real property.

There may also be special assessment taxes, which are levied for the cost of specific local improvements such as streets, sewers, irrigation, and drainage. Special assessments may be due periodically to improvement districts or be levied only once by the city or county for a particular work or improvement.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Property management fees in Texas are negotiable but are typically 4% of the income from the property plus the property manager's out-of-pocket expenses. If the property manager does work in addition to managing the property, such as overseeing and coordinating tenant construction work, there is usually a separate construction management fee of up to 4% of the cost of such construction for such activities.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate**
- Through real property funds, open or closed ones**
- Through other clear and secure financial products**
- At the moment not because of the impacts of the worldwide financial crisis**

Texas has 4 of the 10 fastest growing cities in America (Dallas, Houston, Austin and San Antonio) which makes Texas an attractive option for foreign investment. The decision to invest in property is best determined by the foreign investor with the advice of a reputable commercial real estate broker and real estate investment advisor.

Foreign investors are free to invest directly in real estate or indirectly through open real property funds, closed real property funds, and other clear and secure financial products. The most appropriate vehicle for investment varies from real estate project to project and a foreign investor should consult a local attorney, a U.S. tax attorney specializing in foreign investment in real estate and an accountant to determine the best investment structure for a given project.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-residential aliens is subject to certain special taxation rules. In general, however, it is not difficult for foreign investors to purchase property in the United States, although careful tax planning is critical.

Individuals, domestic entities, and foreign entities are all permitted to own real estate in Texas; however, foreign entities must qualify to do business in Texas before “doing business” in Texas. The mere ownership of land is generally not enough to trigger the “doing business” requirement in Texas but the facts of each business investment must be analyzed to make the determination. Corporations, limited liability companies, limited partnerships and general partnerships are all appropriate entities for owning real estate in Texas.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or conditional use permit, or seek to amend the zoning rules, to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought and other factors, but takes approximately six months. The investor will also need to obtain applicable permits and licenses. The approvals and licenses needed to run a business vary depending on the type of business the investor intends to conduct in various cities in Texas. The time frame for obtaining the necessary approvals also varies depending on the nature of business and the city.

If a foreign investor is seeking citizenship in the United States, the EB-5 visa program offers a path to citizenship for non-citizens able to invest \$1,000,000 in a business in the United States.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

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## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

As a general matter, individuals and organizations are free to directly enter into and participate in real estate transactions not contrary to law in Vietnam. These transactions commonly involve the sale, assignment, leasing out or granting of hire purchase of real estate. Nonetheless, where a real estate transaction is made with a real estate company (or real estate developer) or an individual licensed for real estate business activities, the Law on Real Estate Business of Vietnam requires that such transaction be conducted, for purposes of publicity and transparency, via a real estate trading floor. The real estate company or individual licensed for real estate business activities may either establish a real estate trading floor or hire the real estate trading floor of another organization or individual in order to service the former's real estate business activities.

A real estate trading floor is a legal entity licensed to provide real estate business services such as the conduct of real estate transactions, real estate brokerage, and one or more of the following services: real estate valuation, consultancy, advertising, auctioneering and management. There are currently over 370 real estate trading floors in Vietnam, each of which basically serves as an intermediary where interested parties can obtain real property information, negotiate, and conclude relevant agreement/s relating to real property.

Once the parties have executed an agreement relating to real property, Vietnamese laws require the performance of the following steps for the validity and completion of the real estate transaction:

1. Certification of the relevant agreement by a notary public, except for contracts relating to real property that are entered into with a real estate company;
2. Fulfilment of tax obligations comprising registration fees and capital gains tax, where applicable; and
3. Application with the local office of the Department of Natural Resources and Environment (“DONRE”) where the real property is located for the issuance of the relevant certificate certifying ownership of any or all of the land use rights, residential housing and/or construction work/s on the land.

Prior to December 10, 2009, certificates were issued separately for ownership of the right to use the land (i.e., in lieu of private ownership of land;

“LUR”), residential housing, and constructions on the land. Decree 88/2009/ND-CP now provides for the issuance of a unified certificate of land use rights, residential house ownership and ownership of assets attached to the land (“Certificate”), which serves as the formal evidence of the ownership of any or all of the LUR to the land, residential housing (including an apartment unit in an apartment building and relevant section/s of community housing,) and/or construction work/s on the land.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

As there is no concept of private ownership of land in Vietnam, the State grants the right to use land to individuals or entities either by way of allocation or lease of LUR. Only Vietnamese individuals and entities may be allocated land by the State and depending on the intended use of the land, the allocated land can be either (i) on a stable long term basis (i.e., for an unlimited term) if the same is used for residential purpose; or (ii) for a fixed duration of up to 50-70 years if the use of the land is for other purposes.

As a general matter, the land user is also the owner of the construction on the land. Consequently, ownership or changes in the ownership of (i) both the LUR and the construction on the land; or (ii) solely on the construction on the land, are accordingly recorded in the Certificate.

For apartment buildings, a Certificate shall be issued for each of the apartment units in relation to the ownership of both the floor area (Net Sales Area) of the apartment unit and the common right to use the land where the apartment building is located.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

It is possible under Vietnamese laws for two or more individuals or entities to jointly own real property as for instance where there are multiple land users or multiple owners of the construction on the land, and each land user or construction owner, as the case may be, is issued with a separate Certificate, with the annotation therein that the LUR or the construction on the land are jointly held.



The following entities are allowed to own property in Vietnam:

1. Domestic organisations and individuals;
2. Vietnamese residing overseas, who, among others, return home to make a long-term investment, have made a significant contribution to Vietnam, or are permitted to live stably in Vietnam, but for residential purposes only;
3. Foreign individuals who, among others, have a direct investment in Vietnam, or hold managerial positions in enterprises currently operating in Vietnam, or are married to a Vietnamese citizen, but only for the purpose of owning one residential apartment unit for residential use; and
4. Foreign companies that (a) invest in the construction of houses and buildings for sale or lease, or upgrading land and investing in infrastructure works on the leased land in order to lease the land with completed infrastructure; (b) construct on a sub-leased land located in an industrial, export processing or hi tech zone; and (c) currently operate in Vietnam without having been authorized to conduct real property business but have a need for housing for the people working at the said enterprise.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Vietnam, ownership of the construction erected on the land generally presupposes and implies ownership of the land given that construction works on the land or investment in the construction works on the land can only be made by individuals or organizations granted the right to use the land, through allocation of land by the State; direct lease of land from the State; or capital contribution of LUR.

An exception to this principle is the recognition of ownership of the construction/s erected by sub-leasing investors (including foreign ones) on a sub-leased land located in an industrial, export processing or high tech zone. In this case, the investor does not lease the land directly from the State but sub-leases the same from the infrastructure construction company of the said zone, which has the Certificate for ownership of the LUR to the land. Although the investor is only a sub-lessee to the land, a Certificate will nonetheless be issued to the investor, certifying its ownership of the construction work/s on the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Vietnamese laws require that ownership of the LUR to the land, residential housing, and/or constructions on the land be registered and certified for the first time (to obtain the Certificate) and subsequently thereafter (for any changes thereon) with the Registrar of Issuance of Certificate under the provincial office of the DONRE where the real property is located. The transaction will only take effect as from the issuance of the Certificate or an amended Certificate, as the case may be, by the DONRE local office.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

The tax obligations in respect of a purchase of real property are as follows:

1. Registration fee of 0.5% on the transfer price, normally borne by the purchaser;
2. In case of capital gain arising from the transaction, a capital gains tax at the rate of:
  - (a) 25%, or alternatively, 2% of the transfer price (if the purchase price and other deductible costs are undetermined), on the seller being an individual;
  - (b) 25% on the seller being a legal entity, in case of transfer of property including the transfer of the LUR and the transfer of the right to lease land; and
3. Value added tax of 10% of the value of the assigned construction on the land, normally borne by the purchaser.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Under the laws of Vietnam, it is not mandatory for the owner of the property to hold the property for a certain period of time before being allowed to transfer such property to another.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, foreign investors are free to remit their legitimate profits abroad, provided that they have fulfilled their tax obligations and the remittance is carried out in accordance with Vietnamese regulations on foreign exchange control.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Under the Civil Code, where the leased property is purchased, the lessee of the property shall be afforded the same rights and obligations as agreed in the lease contract for the remaining term of the contract. The new lessor of the property cannot terminate the lease unless agreed to by the lessee.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use purpose of a construction project is initially approved by the competent authorities and any change of said approved use purpose must comply with the land use planning of the city/province where the project is carried out, and be approved in writing by the local People's Committee ("PC"), which supervises the use and management of land in its locality on behalf of the State. The use of residential housing for office use or business purpose has also been disallowed by the Ministry of Construction.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others?

Working on the assumption that the applicable exchange rate is EUR 1 = VND 25,000, the principal costs would involve the following:

1. Notarial costs: generally depends on the transaction value (for which, a fixed amount, or a fixed amount and another amount computed at a rate in the region of 0.03-0.1%, will be charged). For any transaction over EUR 400,000, the maximum costs will not exceed EUR 400; but if the transaction value is less than EUR 200, the rate in the region of 0.05-0.1% will be applied;
2. Registration fees: 0.5% of the transaction value (EUR 25,000 for the transaction value of EUR 5 million);
3. Legal fees: generally chargeable on an hourly basis, and vary accordingly depending on the complexity of the transaction and the expertise of the advising lawyers; may be subject to a lump sum amount per transaction, depending on the law firm involved;
4. Estate agent fees: normally charged at the rate in the region of 0.05-0.1% of the transaction value; and
5. Other fees: may include bank charges in terms of escrow arrangements, or applicable bank interests, depending on the bank used for the transaction.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

Individuals or organizations holding property are required to pay housing and land tax in accordance with the new Law on Non-agricultural Use Tax, as follows:

1. Residential land: tax calculation based on land area, land quota (as provided by the PC of the city/province as from 1 January 2012) and the following progressive rates:

<b>Tax Level</b>	<b>Taxable Land Area</b>	<b>Tax rate (%)</b>
1	Land area within the land quota	0.03
2	Land area not in excess of three times the quota	0.07
3	Land more than three times in excess of the quota	0.15

2. Residential land being an apartment building or an underground building: the tax rate of 0.03%; and

3. Non-agricultural production and business land: the tax rate of 0.03%.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Property management services can be provided by real estate trading floors licensed for this activity or by local and foreign property management companies (including Savills, CBRE, Colliers and recently, Knight Frank).

The current market information on property management fees estimates the same to be in the region of US\$0.5 to US\$0.8 per square meter of an apartment unit per month; and US\$0.8 to US\$1.0 per square meter per month for other properties such as villas and houses in a residential development complex. The property management charges normally cover management services such as common area utilities; repair and maintenance; housekeeping services and security services; and general administration. Management fees vary accordingly depending on, among others, valuation of the property and facilities available for common use.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

A foreign developer can invest in real property either by direct investment or indirect investment in Vietnam, in accordance with the provisions of the Law on Investment and the Law on Real Estate Business.

**1. Direct investment:**

Foreign developers invest directly in real property in Vietnam commonly through (a) a joint venture with a Vietnamese partner who contributes the LUR of the land for the project; (b) direct lease of land from the State by the foreign developer; or in view of the long and complicated process of acquiring LUR as well as addressing issues on compensation and eviction of land occupiers, (c) taking over an existing project or acquiring interest in companies licensed to carry out real estate projects.

2. Indirect investment:

Foreign investors can invest in real estate in Vietnam by way of indirect investment, including: (a) purchasing of shares, bonds and other valuable papers; (b) investing through securities investment funds; and (c) investing through other intermediary financial institutions.

These forms of indirect investment are also recommended since the foreign investors do not need to set up any legal entity in Vietnam. In the case of purchasing shares in a local public company, the maximum foreign capital ratio of 49% under the Law on Securities have to be complied with by the foreign investor.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions on the acquisition of real property by Vietnamese citizens and domestic companies.

Vietnamese residing overseas who, among others, return home to make a long-term investment, have made a significant contribution to Vietnam, or are permitted to live stably in Vietnam can purchase real property but only for residential purposes.

Foreign individuals meanwhile who, among others, have a direct investment in Vietnam, or hold managerial positions in enterprises currently operating in Vietnam, or are married to a Vietnamese citizen, are permitted to buy only one residential apartment unit for residential use.

Finally, foreign property developers and foreign entities that have made constructions on a sub-leased land located in an industrial, economic or hi tech zone are allowed by law to own such constructions on the sub-leased land; while foreign owned entities currently operating in Vietnam but not having been authorized to conduct real property business may own property for the residential use of the people working at the said enterprise.

While there may be restrictions as discussed above, it is possible for a foreign entity to acquire real property under a nominee arrangement, but only for purposes of the use or investment on the use of the same for property development.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

For a foreign investor to acquire land and conduct real estate business in Vietnam, the following approvals must be obtained:

1. With respect to the land: LUR to the land either through direct lease from the State, or through the capital contribution of the LUR by a Vietnamese partner; and
2. With respect to the project on the land: approval from the relevant authorities (inter alia, DONRE for the general plan on compensation and site clearance and the environmental assessment report; the Department of Construction for the master planning at 1/500 scale and construction permit; and the local PC for the compensation and site clearance and the issuance of an investment certificate).

The timing can take from several months to a year and even longer depending on the locality, the complexity and the schedule of implementation of the investment project.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Indochina Legal would certainly be delighted to assist foreign investors in all legal aspects of their real estate transactions in Vietnam, from the conduct of due diligence investigation, to the preparation of the relevant agreements for the licensing, implementation and completion of the transactions. Our firm has the significant experience and professional competence to assist the client on the proposed services as we have had the opportunity to handle the same type and nature of work in many real estate projects in Vietnam. We do not, however, provide property brokerage services but can recommend those who are able to do the same.







