

Deloitte.
Legal



**Handbook for Real Estate
Transactions**

Deloitte Legal Handbook for Real Estate Transactions



Juan Martínez Calvo
Global Leader, Deloitte
Legal Real Estate &
Construction
jmartinezcalvo@deloitte.es

Dear Colleague,

With over 1,800 experienced legal professionals in 75 countries, Deloitte Legal has a strong team of skilled legal professionals ; this provides both expert knowledge and the flexibility required to address matters cost efficiently, considering the complexity and importance of the matter for the client and the available budget.

One of the industries in which Deloitte Legal focuses predominantly is the Real Estate industry. We act as legal advisors of a relevant number of REITs and Property companies, investment funds, engineering and construction companies, tenants, occupiers, etc.

The *Deloitte Legal Handbook for Real Estate transactions* gives an overview of the main Real Estate regulations regarding transactions of different class assets in twenty-four countries where Deloitte Legal has active presence in the Real Estate Market.

It is no longer possible to look at domestic markets in isolation; Due to the globalization and the challenging economic climate, investors requirements are changing. We at Deloitte Legal have adapted to these changing needs, have a good understanding of the local legal, business and administrative environment in the jurisdictions where we operate, which we combine with an excellent connectivity to the global Deloitte Legal and wider Deloitte network. Together with

our clients, we are constantly improving the way we deliver our services with the aim of becoming the mayor non-traditional legal services provider in the Real Estate market.

Deloitte Legal offers a delivery model based on well-established practices of lawyers experienced in serving multinational clients and in working with colleagues in Tax, Consulting, Risk and Financial Advisory as part of a well-managed Deloitte client service relationship team.

Together with the International Property Handbook from Deloitte's Global Real Estate & Construction group, the *Deloitte Legal Handbook for Real Estate transactions* from the Deloitte Legal Real Estate group aims to overview the legal regulations regarding Real Estate transactions in the main jurisdictions we operate.

Building on the success of the first edition of the *Deloitte Legal handbook for Real Estate transactions*, the second edition now extends to 24 jurisdictions.

We hope you find this report interesting. We would be delighted to discuss the details of this handbook with you and how it may impact to your business.

Regards,

Juan Martínez Calvo





BELGIUM





Maximilien van de Werve

mvandewerve@laga.be

1. Real estate law: description of the main laws that govern property ownership and leases in Belgium.

The main provisions that govern property ownership, usufruct (*usufruit/vruchtgebruik*), and leases in Belgium can be found in the Belgian Civil Code, which contains provisions regarding property ownership and the different types of leases.

Other rights *in rem* including long leases (*emphytéose/erfpacht*) and building rights (*superficie/opstalrecht*), which are often seen as alternatives for property ownership or classic leases, are governed by separate laws (respectively the Long Lease act dated 10 January 1824 and the Building Right Act dated 10 January 1824 and recently amended on 25 April 2014).

The Mortgage Credit Act dated 4 August 1992 is another important law regulating, among others, property mortgages.


The Retail Lease Act dated 30 April 1951, which is incorporated into the Belgian Civil Code, governs all leases relating to retail premises in which the activities operated by the tenant involve a direct contact with the public, cannot be contracted out by the parties, and is very protective of the tenant's interest.

2. Ownership rights: is there any kind of restriction for real estate ownership (foreigners, areas of the country, others...)? Are there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

There are generally no restrictions on ownership or occupation by foreign entities, from a civil law perspective.

One restriction applies to both foreigners and nationals. Some areas of the country in Flanders, Wallonia, and in Brussels are subject to regulatory pre-emption rights in favour of public entities, entitling its beneficiary (-ies) to match the terms offered by a candidate purchaser and to pre-empt the property or right *in rem* put for sale.

The most common used real property rights in the framework of real estate development and/or investment, besides the full ownership of a property, are the rights *in rem*. In addition to ownership, Belgian law distinguishes between what are called rights *in rem* (*droits réels/zakelijke rechten*) which are attached to the land, transferred with it and enforceable against everyone, as opposed to personal rights (*droits personnels/persoonlijke rechten*) which are attached to a legal person. In respect of rights *in rem* it is not possible to create more rights than those provided by the law. The most commonly used rights *in rem* other than mortgages (*hypothèques/hypotheken*) and easements (*servitudes/erfdienstbaarheden*) are the rights of co-ownership and forced co-ownership, usufruct, long lease, and building right:

1. Co-ownership (*indivision/onverdeeldheid*): Belgian property may be owned by more than one person (e.g. as part of a succession following the death of a property owner). This involves the ownership by each co-owner of a share of the whole. Each co-owner is entitled to request the public auction sale of a property placed in co-ownership in order to terminate the co-ownership status of a property, unless the different co-owners waived their right to request such a sale (which waiver cannot be contracted for a period exceeding 5 years).
2. Forced co-ownership (*co-propriété forcée/gedwongen mede-eigendom*): Belgian law also regulates 

the forced co-ownership regime which applies to common parts of larger real estate projects (such as apartment buildings or larger commercial or multi-use developments) where for example foundations, courtyards, corridors, entrance halls, heating systems, and/or other areas are used jointly. Forced co-ownership implies the drafting of a so-called base deed (*acte de base/basisakte*) to be drawn up in the form of an authentic deed before a notary, which clearly describes the private and public parts of the complex, allocates shares in the common parts (which typically include the underlying land) between the various private parts of the complex, and generally organizes the co-ownership (management, use, maintenance and sharing of the costs relating to the common parts).

3. Usufruct (*usufruit/vruchtgebruik*): The right of usufruct is the right to have use of property which belongs to someone else. A right of usufruct is a temporary right granted for a limited period of time to a beneficiary (being either a legal or a natural person) who benefits from the right to use the property and obtain income from the property, such as, for example, rents resulting from a lease agreement, however with the obligation to maintain the property in good state of repairs (other than structural repairs which typically remain a responsibility of the bare owner).
4. Building right or right to build (*superficie/opstalrecht*): There is a presumption that any construction or object rooted in the ground belongs to the owner of the land. The building right derogates from this presumption by creating two owners, the first having the right of ownership of the land and the other having a right to own the buildings, works or objects which it would develop on or under the land. A building right is limited to a maximum period of 50 years, but there is no minimum duration. Building rights are often used by developers, as they enable to construct

buildings on land owned by a third party without need to purchase the land on beforehand, it being further noted that a building right can be granted for free. The purchaser of a part of a development will typically purchase the constructions from the developer and the shares in the land attached to the constructions (as described in the base deed) from the owner of the land.

5. Long lease right (*emphytéose/erfpacht*) is a form of long lease which confers, for a maximum period of 99 years and a minimum of 27 years, the use of a building/a land belonging to another, upon the condition that an annual payment called the canon be paid to the owner. The canon is generally indexed in line with the evolution of the Consumer Price Index. The beneficiary of an emphyteotic right (i.e. the long leaseholder) has the same rights and privileges as the owner of the building and/or the land which is the object of its right. He is consequently obliged to pay all charges and taxes related to the use of the building/the land for the duration of its right, but shall benefit from the income from the property, such as, for example, rents resulting from a lease agreement.

The holders of rights *in rem* of usufruct, building right and long lease are the full owners of the constructions they erect during the term of the right, it being noted that the bare owner of the property encumbered with the afore-mentioned rights *in rem* will recover the full ownership of the underlying property upon expiry of the relevant right *in rem*. Depending on the contractual arrangements and the nature of the right *in rem* a compensation for the (residual) value of the constructions might be due to the holder of the right *in rem* upon expiry of its right.

3. Registry system

3.1. Structure of the property registries in your country.

Belgian law provides for a system of title recording

Within four months from the date of signing the private contract, or of it becoming unconditional, or any shorter period which is agreed between the parties, the sale must be completed by signing the authentic deed

in a register held with the mortgage register to show ownership of real estate property. In the case of a transfer of real estate property, the mortgage register will only accept authentic deeds drawn up by Belgian notaries for inscription. It is only following inscription in the mortgage register that the transfer will be effective against third parties. The mortgage register is open to the public and is a mean of checking the ownership by a particular entity (either an individual or a company) of all buildings located in the mortgage registrar's jurisdiction.

3.2. Which authorities are in charge of them

The mortgage office (*bureau de conservation des hypothèques/hypotheekkantoor*) is the public institution in charge of the mortgage register.

3.3. Connection with the cadastral-tax registries: how that works?

Any transfer of property rights is also recorded in the land registry (*cadastre/kadaster*). The land registry, which is also open to the public, organizes a division of the Belgian territory in different plots of land (including by way of maps of the Belgian territory clearly showing the boundaries of the different properties), and is regularly updated following the recording of transactions in the mortgage register. Its data are for information purposes only and are very useful to check the surface of a plot of land and/or of surrounding buildings and the level of the yearly property tax attached a property.

3.4. Is the registration compulsory?

All deeds related to the transfer of real property, all lease agreements with a term exceeding 9 years and all deeds relating to the creation or transfer of rights *in rem* must be registered in the mortgage register (*bureau d'hypothèque/hypotheekkantoor*) where the goods are situated. If one of the deeds mentioned above is not registered it will not be enforceable vis-à-vis third parties acting in good faith.

The only documents which the register will receive for registration are authentic deeds passed before a notary or court judgements of equivalent status.

The registration of deeds is not free (see hereunder). Registration duties are typically paid by the purchaser, beneficiary or assignee of a right *in rem*, or tenant, even if parties may freely otherwise allocate the costs of the registration duties between themselves.


3.5. How registration guarantees the rights of the owner

See question above: if one of the deeds mentioned above is not registered it will not be enforceable vis-à-vis third parties acting in good faith.

3.6. How registration works in a typical transaction?

The acquisition of real estate property in Belgium is usually completed in two stages: (i) the signing of a private sales agreement, followed in a second stage by (ii) the signing of an authentic purchase deed before notary.

The private contract for the acquisition of property in Belgium is the contract known as the *compromis de vente/verkoopovereenkomst*, the effect of which is to bind the purchaser to pay the purchase price and for the vendor to deliver the property by transferring legal title on the date of signature of the subsequent notarial deed. The purchaser will not be protected against bona fide parties until signing of the notarial deed and the registration thereof at the mortgage register.

Although a private contract may contain valid binding obligations between the parties under Belgian law, only documents which have been elevated to the status of an authentic deed may be registered in the mortgage register and notaries have a monopoly over their preparation. 

Within four months from the date of signing the private contract (maximum term for the payment of registration duties), or of it becoming unconditional, or any shorter period which is agreed between the parties, the sale must be completed by signing the authentic deed.

The purchaser's notary will carry out various searches and will obtain a certificate from the mortgage register showing whether or not the property is burdened by an existing mortgage. The notary reviews the vendor's title to the property and recounts this in the deed. In his capacity as a public official the notary is required to conduct a fiscal search to ascertain whether the vendor has any outstanding tax liabilities to the Ministry of Finance. In this way the Ministry of Finance ensures, via the notarial system, that any arrears of taxes are collected on a transfer of property held by the taxpayer.

4. Notary role on the transactions

As mentioned before, the only documents which the mortgage register will receive for registration are authentic deeds passed before a notary (or court judgements of equivalent status).

A notary offers a public service, he is not one of the parties to the contract, nor does he negotiate any terms of the contract.

A notary is responsible for the validity of the transfer deed, for ensuring that the property is free of mortgages if the property is sold on that basis, and for reciting any easements or special conditions contained in the title deeds which may affect the property. The notary's responsibility also extends to other matters which might affect the land, e.g. he has to formally check, amongst others, the applicable town-planning requirements, the potential existence of public pre-emption rights and/or the potential pollution situation of the soil. Finally, the notary will also collect the registration duties applicable to a specific transaction.

Each party to an agreement, which must be drawn up as an authentic deed, has the right to elect its own notary. Notary costs are typically borne by the purchaser, the beneficiary of the right *in rem* or the lessee, even if parties can freely allocate notary costs and registration duties between themselves.

It is important to note that a notary deed is only necessary for asset deal transactions, and that the transfer of shares in a company owning real estate assets or holding rights *in rem* does not need to be notarized.

5. Representations and warranties in real estate transactions/general legal responsibility of the seller in front of the buyer/typical representations & warranties for transactions in different assets classes

The Belgian Civil Code provides that a seller must hold a buyer harmless against hidden defects of a property which appear shortly (*à bref délai/binnen een korte termijn*) after the purchase, but parties may derogate and/or organize this provision (e.g. by agreeing on a maximum term for filing claims relating to hidden defects with a seller), and quite often do so (it being noted that professionals may not fully contract out their liability for hidden defects).

A buyer also has a recourse against the architect and/or the building contractor for any major defects affecting the structure property (such as stability issues) for a term of 10 years generally starting at provisional acceptance (*réception provisoire/voorlopige oplevering*).

It is also market practice for the purchaser of larger properties to negotiate representations and warranties covering compliance of the properties with the applicable regulations (including building and environmental permits), and this both for asset deal transactions as for share deal transactions.

6. Mortgage regulation and other guaranties used in re transactions/common procedures for a mortgage constitution/how is the lender protected on a creditor execution

The only form of security taken with regard to immovable property in Belgium is a mortgage (*hypothèque/hypotheek*). A standard security package required by third-party lenders generally consists of a *hypothèque/hypotheek*, possibly in combination with an irrevocable mortgage mandate (*mandat hypothécaire irrévocable/onherroepelijk hypotheekair mandaat*).

A mortgage deed has to be signed before a notary public; substantial costs are involved in the vesting of a mortgage, the main cost being the registration and inscription duties at the Mortgage Registry (amounting to approximately 1.4% on the mortgaged borrowed amount).

As a result of this, it is common for real estate investors to negotiate with lenders to only have a first ranked mortgage on a lower part of the borrowed amount, coupled with a mortgage mandate for a more substantial amount; the duties only being due on the part of the mortgaged borrowed amount. Mandates to mortgage consist in the borrower irrevocably authorizing the lender to establish a mortgage on the

real property. Such mandates diminish the costs but increase the risks for the lender, due to the fact that no priority rights are granted to the lender as such; it is only after use of the mandate (and subsequent registration) that the mortgage will become effective and opposable vis-à-vis third parties.

In order for a mortgage to be enforceable and opposable towards third parties, the mortgage deed will have to be transcribed at the Mortgage Registry after being passed before the notary public. The enforcement procedure of securities, and mortgages in particular, is governed by mandatory provisions of law. In principle, the enforcement of a mortgage takes place by way of a sale on a public auction.

7. Leases of business premises: applicable laws/types/typical provisions

Belgium has four different types of leases, being (i) common leases (*lex generalis*), and three specific types of leases, namely (ii) retail leases (*bail commercial/handelshuur*), (iii) residential leases (*baux de residence principale/woninghuurovereenkomsten*), and (iv) agricultural leases (*bail à ferme/pachtovereenkomsten*). In principle, each of these specific types are subject to a different legal framework, but the common lease regime forms the general regime (*lex generalis*), which is applicable in case the specific regimes do not contain provisions with regard to a certain subject.

A retail lease is defined by the Retail Lease Act of 30 April 1951 as a lease of premises primarily used by the tenant for a retail or craftsman's activity in direct contact with the public. It is not possible to escape application of the Retail Lease Act by simply declaring the Retail Lease Act not applicable to a particular lease. The provisions are mandatory and cannot be excluded from the contract. In case of doubt or conflict, courts will look at the intention of the parties and will ignore any declaration in the lease agreement.

The Retail Lease Act applies to buildings or parts of a building which are used for commercial purposes only. It includes the retail of goods and services directed at consumers. This definition means that commercial leases will apply in the case of hotels, cinemas, garages, jewelers, cafes, restaurants, theatres, bank branches, etc. The main element is the direct contact with consumers.

The Retail Lease Act provides that a retail lease must have a minimum duration of nine (9) years, with the possibility of termination only by the tenant at the end of the third, sixth, or ninth year. The parties may not derogate from this, but may conclude a retail lease

for a longer term if it is subsequently confirmed in a notarial deed. In addition, the tenant benefits from the right to request up to three renewals of the lease term for successive 9-year periods, which can only be refused by a landlord for specific reasons, after having followed a specific procedure and paid, as the case may be, an indemnity to the outgoing tenant.


Other leases, such as offices, parking spaces, warehouses, industrial buildings, etc., do not entail a direct contact with customers and are not subject to the strict mandatory provisions of the Retail Lease Act. The general provisions of common leases apply, which are in general non-mandatory provisions.

8. Taxes

Investors wishing to invest in Belgian real estate will have various options as to the best way to structure their acquisition. Basically, an investor can choose between a direct acquisition of the targeted real estate and an indirect acquisition, i.e. the purchase of shares in the company that owns the targeted real estate.

In case of a direct acquisition of property, Belgian registration duty (*droits d'enregistrement/registratierechten*) is due on all transfers of ownership of immovable property located in Belgium, i.e. by means of sale, exchange or otherwise. This registration duty is calculated on the higher of the contractual price and the market value of the property. The applicable rate for real estate located in Wallonia and the Brussels region is 12.5%. The Flemish government, however, decreased the standard registration duty to 10% for property located in Flanders.

Professional real estate traders (corporate entities or individuals, whose business activities mainly consist of buying and selling real estate) may benefit from a reduced rate of 5% in the Flemish and Walloon region. In the Brussels region, the reduced rate is set at 8%. A business declaration must be filed and the real estate trader will have to provide evidence that he qualifies for the *régime des marchands de biens/vastgoedhandelaars regime* by carrying out successive sales within the next five years. Additionally the reduced rate can only be maintained if the property is resold within 10 years following the purchase agreement with application of the standard registration duty (12.5% or 10% in Flanders).

For long leases (*emphytéose/erfpacht*) and building rights (*superficie/opstal*) a transfer tax shall also be due. However, this will only amount to 2% on the total fees and charges payable by the holder of long term lease rights/building right holder. 

Furthermore, a value-added tax of 21% (which can be reduced in specific cases, for specific assets such as schools, etc. ...) is due on the value of the new constructions sold. When a developer sells newly constructed properties erected on a land owned by another related or unrelated entity pursuant to a building right, the value-added tax applies on the value of the constructions whereas registration duties apply on the value of the land. When a developer sells newly constructed properties together with the land, the value-added tax applies on the value relating to both the land and the constructions.

Annual real estate withholding taxes and most other local taxes (depending on the location of the property) regarding the land and constructions are due by the owner and/or holder of a right *in rem* of the property as at 1 January of the relevant fiscal year. Transfer deeds hence typically provide for a contractual *prorata* sharing of the real estate taxes between the parties for the year during which the transfer takes place.

9. Public law permits and obligations

In principle, mainly two permits are relevant: a building permit and an environmental permit. These two permits are governed by regional legislation (Flemish region, Walloon region or Brussels region), depending on the location of the property.

A building permit is in principle required for all types of construction works and also for some modifications to the designated use of buildings. The commencement of building works without a building permit is subject to criminal sanctions in each region.

Certain types of installations with a 'significant environmental effect' also require an environmental permit. Environmental permits are limited in time, which is a distinct characteristic to building permits, which are granted for an indefinite period. The holder of a building permit cannot commence works authorized by the permit until an environmental permit has also been obtained and vice versa. Proceeding without an environmental permit will result in criminal sanctions.

Other permits, such as the socio-economic permits, are required in specific circumstances.

The transfer of real estate properties and rights *in rem* also triggers certain soil obligations for the transferor, to be effected prior to the transfer. A transferor of land (or rights *in rem*) located in the Flemish or the Brussels Region must obtain a soil certificate from

either the Flemish regional waste body (*OVAM*) — if the land is located in the Flemish region — or the Brussels regional waste body (*IBGE/BIM*) — if the land is located in the Brussels region authorizing the proposed transfer transaction, it being understood that these certificates give an overview of soil pollution and soil investigations known by these authorities and that new soil investigations, as the case may be followed by remediation measures, may be imposed if risk activities are performed or were performed in the past on the relevant property. A similar soil legislation was voted for the Walloon region but its entry into force has been delayed and it is not yet clear if and when it will actually enter into force.

10. Environment/polluted land/energy efficiency qualifications

Reference is made to section 9 with respect to environmental obligations and obligations with regard to polluted land.

In addition, note that an energy performance certificate (*certificat PEB/Energieprestatiecertificaat (EPC)*) must be obtained by a seller, transferor or landlord, prior to the completion of most property transactions. This certificate must:

- be published in any advertisement relating to the sale or letting of a property;
- be communicated by the seller, transferor or landlord before the completion of the proposed property transaction; and
- be drawn up when completing construction works for which a building or environmental permit is required.

Finally, specific regulations apply to asbestos, which must be inventoried on a yearly basis and monitored closely, and to other toxic materials.





CHINA





Cody Zhen Chen

codychen@qinlilawfirm.com

People's Republic of China ("PRC", for the sole jurisdictional purpose excluding Hong Kong Special Administration Region, Macau Special Administration Region and Taiwan)

1. Overview Real Estate Legal System

The Chinese legislation takes reference of the basic and general property rules from the civil law system. The PRC Property Rights Law, which was promulgated on 16 March 2007, acts as the primary property law civil code in the real estate area. Based on such general property right legal principles, the Chinese law still has a number of statutory rules in the specific areas of land administration, property development, property registration, property finance, and security, etc.

According to the PRC Land Administration Law and its Implementing Regulations, land in China is theoretically legally owned by the State (for the land in urban areas) or collectively owned by a village (for the land in rural areas). For private property owners, a usufructuary right called "State-owned land use right" is granted to secure exclusive use right of the land covering a building. Duration of such land use right varies depending on the use purpose as approved by the planning authority. By law and in practice, it is maximum 40 years for commercial use land, 50 years for industrial, and 70 years for residential. Since a few years ago, the Chinese government has been piloting on a more stringent land use right duration policy for industrial land, e.g. in Shanghai the maximum industrial land use right is now generally 20 years. State-owned land use right, as a usufructuary right stipulated under the Property Rights Law, is tradable subject to statutory rules.

The PRC Real Estate Administration Law, jointly with a number of regulations, ministerial rules and policies, sets out the general rules for property development and property transactions. There are special market access, filing and foreign exchange control rules for foreign invested real estate companies in China, including both property development and property

management. For property lease and related area, the PRC Contract Law provides the basic rules.

China has recently issued the unified Real Property Registration Regulations and the Implementing Rules, which for the first time under the Chinese law provides a unified platform of property registration, including land use right and building ownership.

For property finance, the PRC Security Law and a related judicial interpretation issued by the Supreme Court constitute the basic rules for property mortgage and other legal security measures.

2. Real Estate Ownership

Due to foreign exchange control policies, China restricted ownership by foreigners and foreign entities from holding real property ownership in mainland China (i.e. excluding Hong Kong, Macau and Taiwan). Only the China branch or representative office of a foreign entity, or a foreigner which has worked/studied in mainland China for over one year is permitted to purchase one house for self-use in China. For bulk commercial property deals, a foreign investor is required to follow the business presence principle and first set up a foreign invested company in China to hold the property ownership.

Based on the PRC (Property Rights Law), the owner of a building and the owner of the corresponding land use right should be the same person. Therefore in case of transfer or mortgage of the building, the corresponding land use right shall also be transferred or mortgaged, and vice versa. The same applies to construction in progress if e.g. the corresponding land use right is mortgaged. Due to short history of the PRC real estate legal system and lack of regulatory monitoring years ago, there can be random cases where the ownership of the land use right and building deviates from each other. Legally this is a serious deficit and may lead to difficulties in further property transactions.



3. Property Registration System

General Introduction to Real Estate Registration System

Before the year 2015, the regulations with regard to the real estate registration were scattered, and the registration of different types of real estate right such as land use right, building, forest, farmland, sea area etc. were administrated by diversified authorities. Such chaos is expected to end with implementation of the Interim Regulations on Real Estate Registration which came into force in 2015 ("Registration Interim Regulations"), according to which China will establish a unified real estate registration system under the Ministry of Land and Resources. The Implementing Rules of the Interim Regulations on Real Estate Registration effective on 1 January 2016 ("Registration Implementing Rules") further clarify the specific rules regarding real property registration in China. The following rights of real estate shall be registered in accordance with the provisions of the Registration Interim Regulations:

- ownership of the collectively owned land,
- state-owned and collectively-owned land use right,
- contracted management right of farmland, forest land and grassland,
- ownership of buildings, constructions and structures,
- use right of sea area,
- mortgage,
- any other real estate rights required to be registered by law.

The Registration Interim Regulations also provide the general framework of various types of property registration, including initial registration, change registration, property conveyance registration, cancellation registration, dissidence registration, property conveyance pre-registration, etc.

Function of Real Estate Registration

PRC mainly adopts the civil law system for its property law. Therefore PRC clearly differentiates the right *in rem* and the right *in personam*. By law the right *in rem*, such as land use right, building ownership, property mortgage right, is only legally established upon registration. A party may enjoy right *in personam* towards the other party, if a property transfer or mortgage contract is legally established, however the right *in rem* is not established due to failure in the registration.

Property registration under the PRC law also has the function of public credibility in case of a bona fide third party. A person, who is not registered as the property owner but nevertheless can well prove his real right *in*

rem towards the property, may file a civil case to quiet the right *in rem*. However, if a bona fide third party has purchased the property and completed title transfer based on the registration information, such bona fide transaction is legally protected.

4. Role of Notary in Real Estate Transactions

Generally notarization is not a mandatory requirement in real estate transactions in China, except for:

- a property transaction where one or more of the co-owners are unable to be present in person for the title transfer registration, any such power of attorney should be notarized;
- any property purchase contract, loan contract or mortgage contract involving a foreigner as contracting party shall be notarized.

5. Typical Representations and Warranties in Real Estate Transactions

- seller is the legitimate owner of the property and there will not be any third party challenging the property ownership in any form;
- the property is legally permitted to be used by buyer in the form as described in the contract;
- the property has duly conducted and passed all legal required inspections and approvals including in particular fire, planning, construction completion etc.;
- except for the disclosed mortgage over the property, there is no mortgage, dissidence registration, freezing order or any other types of property encumbrances over the property;
- the building, fixtures and related facilities have been properly maintained and there has not been any structural damage occurred to the property;
- except for the disclosed information, there has not been and will not occur soil and underground water contamination for the corresponding land, and the buyer will not be punished by the local environmental authority and/or be required to conduct soil repair in connection with any contaminations occurred before handover of the property;
- seller has duly settled all property related land requisition fees, land use right grant fees, construction costs, as well as land and property related taxes and surcharges including but not limited to land use tax, land value appreciation tax, deed tax etc.

6. Mortgage

Establishing a Mortgage

Property mortgage is established upon registration at the same registration authority for the property title. Under PRC law, any security including the mortgage shall always be attached to a principal debt. Independent security not based on a contractual debt is legally invalid. Whenever the principal debt contract terminates, the security contract shall terminate automatically. Where the lender's rights under the principal debt are transferred, the attached mortgage right under the mortgage registration shall be transferred concurrently, unless otherwise prescribed by the law or agreed by the parties concerned.

In order to establish a real estate mortgage, usually the following preconditions should be met:

- a written mortgage agreement with necessary provisions including specification of the secured debt, the mortgaged real estate, as well as scope of the security interest etc.;
- the mortgagor shall have the right to set up a mortgage on the real estate;
- the real estate shall by law not be prohibited from being mortgaged;
- the mortgage must be registered with the registration authority.

Mortgage Realization

Any mortgage agreement providing automatic transfer of the title upon failure by the debtor to repay the debt is legally invalid. A creditor and mortgagee may either separately agree with the mortgagor on a transfer price of the mortgaged property for debt settlement, or alternatively seek to "liquidate" the mortgaged property for debt settlement purpose, via an auction procedure steered by a court.

The Parties may freely negotiate and agree on the coverage of mortgage security. In accordance with the Property Rights Law, the secured claims and the amount thereof (unless otherwise agreed by the parties) shall include:

- principal of the debt plus applicable interest;
- contractual or statutory penalty;
- damage claims;
- expenses for safekeeping of the mortgaged property and expenses for realization of the mortgage.

7. Property Lease

Lease of Land and Lease of Buildings


There are two concepts of property lease under PRC law. One is the commonly understood and adopted property lease which is stipulated under the PRC Contract Law, where a building plus its corresponding land use right is leased for a maximum term of 20 years, and renewable upon expiry of the lease term. Market practice in China is that a property lease contract usually takes a 3-5 years' lease term with a statutory pre-emptive right to renew the lease contract under the same conditions. A tenant also enjoys right of first refusal upon sale of the leased property by the landlord.

Typical terms of a property lease contract include lease term, rent and rent inflation rate in case of lease renewal, handover and handback of the property, sub-lease, tenant's right of first refusal, property maintenance and repair, mortgage status of the leased property and related legal consequence in case lease contract is terminated upon mortgage realization, breach of contract, termination, etc.

For industrial property investors, PRC law provides a different land lease model, in particular for vacant land with no constructions erected on the top. This is of particular relevance to property investors since the Chinese central government has been calling for more thrift and efficiency use of land. By law land can be leased for, depending on different use purposes, up to 40-50 years. Like the granted land use right holder, a land use right certificate remarked as "leased land use right" will be issued, based on which all further construction and property title registration related procedures can be carried out.

Lease of collective-owned land use right was generally prohibited except under certain particular circumstances prior to the year 2003. Since then the restriction has been gradually liberalized due to lack of land supply to the market. China is now reforming the land administration system in that collectively-owned land may also become tradeable.

Lease Registration

Unlike property title or mortgage registration, registration of the lease agreement is not a compulsory requirement to establish or change the lease right. Even though the parties fail to register the lease agreement, the lease right is still established or terminated upon effectiveness or termination of the lease agreement unless otherwise agreed by the parties. 

8. Taxes

Due to complexity of property related tax regime, this section focuses on the tax issues involving institutional investors. Tax issues only regarding property deals between individuals are not specified here.

Business Tax

Business Tax used to be widely applied in real estate industry, including property sale, transfer, construction cost, rental payment etc. However following the last batch of business tax to value added tax ("VAT") reform, as of 1 January 2016, all such business tax shall be converted to VAT at a rate of 6-11%.

Deed Tax

Deed tax is imposed on, and payable by, the transferee of real property upon the transfer of real property or land use rights in China. The rate ranges from 3 percent to 5 percent of the total value of the real property or land use rights transferred, depending on the location. Where, provided relevant policies and regulations are followed, certain activities, such as the enterprise and corporate restructuring, transfer of company's equity (shares), merger of companies, division of companies, sale of enterprises, insolvency of enterprises, and conversion of debt to equity, etc. may be eligible for tax preferential treatment including partial or full tax exemption.

Stamp Duty

For property transfer, a stamp duty of 0.05% on the contract value is levied on both the transferor and transferee. A stamp duty of 0.1% on the total aggregate rental as stated in the lease agreement is payable by both the landlord and the tenant.

Other minor stamp duties include e.g. RMB 5 per each real property ownership certificate and land use certificate.

Land Value Appreciation Tax

Land Value Appreciation Tax ("Land VAT") is imposed on taxable gains derived from the transfer of real properties in China. Value appreciation is calculated as the difference between the amount of the income derived from the sale and the amount of certain deductible items. The rates of land VAT are progressive, depending on the extent of the value appreciation.

Land VAT is the most controversial tax in the PRC real estate industry, not only because of its high rate, but also due to inconsistency in local enforcement and calculation methodology. Despite moves at the national level to encourage consistency in enforcement of

Land VAT in recent years, as of today, the practice still deviates significantly from location to location.

Enterprise Income Tax

Where the transferor is a body corporate, Enterprise Income Tax ("EIT") at the rate of 25% of profit is also payable for profit from the sale of the real estate, although the actual EIT payable ultimately depends on the profit or loss level of the body corporate from other business activities in the same fiscal year. Where a corporate transferor is not resident for Chinese tax purposes, a deemed EIT of 10% of the gain on sale of the real estate is imposed.

9. Public Law Permits and Obligations

Real estate is a heavily regulated and licensed sector in China. In general both real estate development/management and construction service are subject to special qualification licenses, which one needs to start from the lowest level qualification and get upgraded with competent performance credentials.

Since 2006, foreign investment in the real estate sector is further subject to regulatory restrictions, including:

- business presence requirement, i.e. property ownership must be held by an entity incorporated in China;
- every foreign invested real estate enterprise (including real estate development and real estate management) shall be filed with the Ministry of Commerce or its local provincial branch, which in practice acts as precondition for business operation;
- Special and more restrictive foreign exchange and financing rules apply for foreign invested real estate enterprises, which basically makes them difficult to develop property project on the strength of debt financing.

10. Environment

With increasing environmental pollution issues, China is tightening up soil contamination related measures. For industrial land which is re-planned for residential or commercial use purpose, exit environmental investigation is now mandatory to detect possible soil and ground water contamination. In case of serious land pollution, owner of the land use right could be required to take up the soil repair obligations.

China is also encouraging green construction materials which are more energy efficient. However there is still a long way to go before such green construction standard can be mandatory and commonly adopted in the construction market.





COLOMBIA



Mario Andrade
mandrade@deloitte.com

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country

In Colombia, the Constitution instructs the government and all the state authorities to protect and promotes access to private property, but especially to associative and solidarity forms. It is not a question of socialization of property but simply of its promotion, protection and encouragement, in order to ensure that they compete on an equal market. The right to property is located within the economic, social and cultural rights, which differ from human rights of freedom and formal equality, considered as fundamentals.

The main legislative acts that govern property ownership in Colombia are the Colombian Civil Code and Commercial Code. In addition, there are specific regulations as (i) law 791, 2002 by means of which the terms of prescription in civil matters are regulated, (ii) law 160, 1994 includes specific regulations on acquisition and property of rural land, and (iii) decree 1420 of 1998 that regulates the procedure and criteria to determine for the preparation of appraisals by which the commercial value of real estate will be determined.

In Colombia, there are different types of real state property, the first one, is the public property, that generally is property of subsoil and non-renewable natural resources, assets affected by the promotion of national wealth, goods affected by public use and goods that are a part of the public space. The rest of the goods are of private property, either way, issues related to the construction, maintenance and of buildings are regulated by public law. Each municipality or district has its own plan of territory ordering, in which it is determined the physical development of the territory and the use of the soil. In that matter, the property ownership and leases might be affected by this plan, regarding the licenses that can be granted or denied for the use of the soil.

Regulatory Framework:

Regulation	Subject
Civil Code (Chapter XXII. Article 1849 and after)	Real state Contract regulations. Duties and Rights of the parties.
Code of Commerce (Article 515 and after).	Lease of business regulations.
Law 820 of 2003	Urban Leasing Law.
Decree 2811 of 1974	National Code for Renewable Natural Resources and Environmental Protection.
Law 160 of 1994	Acquisition of rural land.

2. Ownership rights

Colombian legislation allows nationals and foreigners to acquire almost any real estate under the same conditions, thus, any individual or legal entity with legal capacity, may freely acquire real estate in Colombia. In the country's legislation, exists only one type of ownership and a triad of typical proprietary rights characterizes every subjective property right: usufruct and enjoy of its fruits and benefits and the disposal and possession right. Naturally, the right of ownership comprehends by the basic right to protection against any unjustified interference with the property rights.

3. Registry system

Acquisition of real estate in Colombia involves taking the usual measures to confirm ownership of the seller, without any limitations that may affect the property acquired by a potential buyer. It is also very



important to verify that the use of urban land allows development, the buyer's economic activity, and that the seller has no criminal record for activities linked, in particular, to terrorism or money laundering.

The property registry is in charge of the Registry of Public Instruments, in it there must be registry of every act, contract and/or decision contained in a public deed or judicial order regarding a real state and movables assets subject to registry. Also, any administrative or arbitral proceedings involving a constitution, declaration, clarification, award, modification, limitation, assessment, precautionary measure, translation or extinction of the domain or other principal real right or accessory over property estate. Each property is granted with title of transfer and release that contains every affectation or property movement that the property has been subject of.

The information on the legal history of real estate can be found in the registration sheet documentary real estate, in magnetic media and in the information system registry. The indexes of owners of real estate and the antecedent's registry must be unified using magnetic and digital means. For the above, entities are always employing new technologies and procedures of recognized technical value for the information that guarantees the security, speed and efficiency in the process of registration, throughout the national territory through a centralized database, in order to offer online the services that corresponds to the registration of the property. The registration in the Registry of Public Instruments is used in order to protect rights of the owner against third parties. Once the transaction is done, it is formalized with the registration of the new owner y in the registry of public instruments. The above, gives faith of the actual state of ownership against third parties.

4. Notary roll on the transactions

According to the Colombian Law, it is mandatory that all transactions related to the transfer of real state are reviewed by a notary public, as one of the requirements for the transaction to be considered completed. The parties prepare the sale and the respective purchase agreement, in accordance with the Colombian law and then they must present the agreement before the notary public. In case the terms of the agreement represents a violation of a Colombia Law, the notary can be liable for this disposition. All documents related to the agreement (transaction data, power of attorneys, documents concerning acquisition of the property, copies of identity documents, etc.) must be presented before the notary public in order to be properly checked and dully legalized.

Finally, the cost of this process is approximately zero point three percent (0.3%) of the value of the sale where, in the absence of a particular agreement between the parties, the law establishes that the seller and the Buyer will cancel it in equal parts.

5. Representations and Warranties in real estate transactions

5.1. General legal responsibility of the seller.

Pursuant to the Civil Code (Chapter VI, from article 1880), main obligations of the seller are defined in two principal duties: (i) deliver and (ii) selling without any limitations and any flaws or defects. Therefore, the buyer may request liability due to breach of the contractual terms and to hidden flaws.

In all other respects, extra duties should be included in the representations and warranties; otherwise, unexpected losses could be caused for the buyer.

From the seller's perspective, as in the case of all representations and warranties, an attempt will be made to negotiate the price by restricting or broadening the related clauses of the representations and warranties.

5.2. Typical Representation and Warranties for transactions in different assets class.

Before acquiring real estate property in Colombia, it is advisable to review the following documents in order to have a complete overview of the legal situation of the property at the time of the transaction: (i) the most recent chain of title and no-lien certificate (Certificado de Libertad y Tradición, in Spanish), issued in the past ten (10) days; (ii) public deeds evidencing acquisition and any other legal acts concerning the property over the past twenty (20) years; (iii) tax payment certificates; and (iv) the land use certificate.

The following aspects must be taken into account:

1. Analysis of title condition: This analysis is carried out by an expert lawyer in order to determine if there are any conditions or circumstances that actually or potentially affect or limit the right of ownership over the property. Basically, this analysis ensures that there are no legal risks entailed in the transaction, as well as in the chain of title, verifying that the sellers are the actual owners of the property.
2. Analysis of land use: This analysis is carried out by a lawyer or technical expert to determine what type of construction (including elevation) or development activities are permitted on the

property that is being acquired. The purpose of this analysis is to ascertain the possibilities of developing on the property in question the investor's plans, according to the technical specifications of the design.

6. Mortgage regulation and other guaranties used in RE transactions

6.1. Common procedures for a mortgage constitution.

Property mortgage is established upon registration at the same registration authority for the property title and is a security over an immovable asset, where a lien is constituted over its property.

Mortgage over real estate assets, can be as follows:

- Closed mortgage: granted obligations agreed in the contract. Public deed costs are composed of notary fees (3 x 1000 of the secured claim) plus certain fixed costs for issuance of photocopies, diligences, charitable receipt, and VAT
- Open mortgage: granted any debtor obligation in favour of the creditor. This registry at the Office of Public Instruments costs 0, 5% of the secured claim.
- With maximum limit: grant a determined amount.
- Without limit amount: when the amount is not determined.

A mortgage is constituted by a contract, which includes a permission to enter the mortgage into the land register, which must be notarized, or by concluding a contract in a form of a directly enforceable notarial deed. In any case the mortgage requires public deed and registry at the Office of Public Instruments within 90 days of its grant and enter into force since the next day of registry at the Office of Public Instruments. It can only be granted by the owner of the real estate asset.

6.2. How is the lender protected on a creditor execution?

The debtor is generally not protected against the creditor's execution. The only possible protection against execution of a mortgage is complete repayment of the debt.

7. Leases of business premises

Lease agreements can be executed verbally or in writing and all that is required for their enforceability is an agreement between the landlord and the tenant regarding the following essential elements: (i) value of the rent; and (ii) the property subject to lease.

Additionally, even if they are not essential for the legal formalization of the lease agreement, it is advisable that the parties agree upon the following elements: (i) payment method; (ii) date and delivery of the real state subject to the agreement; (iii) an inventory of the utilities, objects or associated uses; (iv) duration; and (v) designation of the party responsible for the payment of public utilities. It is recommended that this type of agreement is executed in writing.

Colombian regulations, set forth on the Commercial Code, are keen on the protection of the tenant in the lease of the so called commercial establishments (establecimientos de comercio in Spanish). As per established under Articles 518, Article 521, Article 522 of the Commercial Code.


- Applicable laws: Lease agreements are ruled by different laws: (i) civil laws regulated in the Civil Code, and (ii) commercial laws that are contained in the Commercial Code.

- Typical provisions

– Rent value

It is the price that the tenant must pay to the landlord for the use of the real estate property. The rent can be stipulated in the lease agreement in any foreign currency, but it must be paid in Colombian pesos (COP) at the market representative exchange rate established on the agreed date or the foreign exchange rate agreed between the parties.

– Contract renewal

Regarding the renewal of lease contracts, it is important to bear in mind, that involved parties have the right to freely determine the conditions under which the relevant contract is renewed. However, the tenant who has leased a real state property for two years or more has the right to a renewal of the contract at the time of its expiration; nonetheless, certain legal exceptions may apply. Article 518 of the Commercial Code provides three instances in which the lessee may not exercise his right to renew the lease contract: (i) when the tenant has breached the contract, (ii) when the owner needs the property for his own habitation or for a commercial establishment substantially different from that of the lessee, and (iii) if the property needs to be repaired and such repairs require it to be vacant in order to be performed; at the time of completion of the repairs, the tenant will have priority to rent the property. Except for the first occurrence, prior six (6) months notice is required. 

8. Taxes

The real estate tax is a duty imposed on real estate located in Colombia. It must be declared and paid once a year or quarterly by owners, users or usufructuaries, depending on the municipality or district where the real estate property is located.

The taxable base is determined by: (i) the current appraisal value which can be updated by the municipality as a consequence of new conditions, or through the urban and rural real estate valuation index (IVIUR in Spanish), or (ii) a self-appraisal value made by the taxpayer. The applicable tax rate depends upon the conditions of the real estate, which also depends upon elements such as constructed area, location and destination of the real estate property. The tax rate varies between 0.3% and 3.3% depending on the economical destination of the real estate. Real estate tax is 100% deductible for income tax purposes, considering that a cause-effect relation exists with the income producing activity of the taxpayer.

9. Public law permits and obligations

Land use in Colombia must comply with land planning regulations. These regulations are setting out by the following legal framework:

Norm	Subject
Law 9 of 1989 and 1469 of 2011	Municipal development plans, acquisition and expropriation.
Law 160 of 1994	Creates the National System for the Rural Reform and defines the applicable rules for the acquisition of vacant grounds.
Law 388 of 1997	Amendment of Law 9 of 1989.
Law 507 of 1999	Modifications of Law 388 of 1997.
Law 810 of 2003	Planning sanctions.
Decree 564 of 2006 (partially removed)	Planning permits.
Decree 2181 of 2006	Partial plans.
Decree 0097 of 2006	Planning permissions on rural land.
Decree 4300 of 2007	Partial plans.
Decree 3600 of 2007	Rural land zoning regulation.
Decree 4065 of 2008	Urbanization and development of lands and areas on urban land and expansion and applicable legislation on calculation of participation in surplus value.
Decree 1469 of 2010	Planning permissions.





CROATIA





Ivana Dominković Cecelja
idominkovic@deloittece.com

1. Main laws governing property ownerships and leases are Act on Ownership and other real Rights (hereinafter: Act on Ownership); Land Registration Act, Civil Obligation Act, Leas and Sale of business premises Act.

The main act governing property title is the Act on Ownership and Other Real Rights (herein after: "Ownership Act"). It defines right of ownership and other real estate related rights (such as servitudes, real burdens, the right to build and liens); restrictions on ownership; acquisition, protection and termination of ownership as well as of other real rights.

This Act was implemented in 1997 introducing an important novelty into the Croatian real estate system — the principle *superficies solo cedit*. Thereafter the general principle is that land and everything that is permanently connected to the land, either on the surface or beneath it forms one real estate. There are some exceptions to this rule which are quite common. In specific, a building built based on a right to build (in Croatian: "pravo građenja") or concession is considered to be separate from the land on which it is built for as long as such right to build or concession exists.

Land Registration Act primarily governs title registration procedure and mortgages.

Civil Obligation Act deals with lease contracts in general, while Lease and Sale of Business Premises Act is the primary source of legislation for commercial leases as well as for lease and sales of business premises owned by the Republic of Croatia.

2. Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)

The general rule is that ownership over real estate is such a right over the real estate authorizing its holder to use the real estate and any benefits arising from it as he deems fit, and to exclude any other person from it,

unless that is contrary to such other person's rights or limitations imposed by law.

On the other hand, an owner is bound by duty of care while exercising its ownership rights and for that purpose he is limited with general limitations on ownership — e.g. he is forbidden from exercising its ownership rights with the sole purpose of damaging others. Additionally, an owner may not prevent third party's acts on such a height or depth of its real estate, where he has no reasonable interest to exclude those.

According to type of real estate, we can differentiate between the following levels of owners' limitations:

- Types of real estate that are generally exempt from private ownership, so called common things (things that are used by all such as air, water in rivers, lakes, sea and maritime domain as defined by respective law) which cannot be the object of ownership right.
- Owners of some other types of land which are identified as the goods of the interest for the Republic of Croatia can be limited in their ownership rights by respective regulations — such as owners of agricultural land, cultural goods or forests. The limitations imposed on owners of such types of real estate vary, e.g. they can be limited in purpose for which they are using the real estate or in terms of transfer of title by means of right of first refusal of municipality or the state (in respect of cultural goods). General rule in these cases is that such an owner should adhere to the limitations set but is entitled to a compensation for the imposed limitations.

For Croatia being a country with a long coastline, it is important to stress that there can be no ownership on so called maritime area. This area is defined by the law but what is important, includes also a part of coastline. State Attorney of the Republic of Croatia is in charge of registering all such land in the land registry as



maritime area, however, in many cases it has not been done yet. Therefore, it is especially important to do a proper title due diligence while purchasing real estate alongside the coastline.

When it is necessary for the construction of buildings or works in the interest of the Republic of Croatia, a real estate may be entirely (taking away title over real estate from its owner) or partially (imposing servitudes or lease over real estate) expropriated. For the expropriation to be possible, the interest of the Republic of Croatia for construction or performance of works should be established and that the owner should be compensated with market value of the expropriated real estate. The expropriation as a tool is most commonly used by the Croatian electricity grid operator for construction of energy facilities usually when these should be constructed over land plots with numerous owners. The interest of the Republic of Croatia for construction of energy facilities is established by law which makes the procedure more time efficient. The procedure lasts approximately 6-12 months.

Foreign natural persons and legal entities (foreigners who are not citizens of EU or entities from EU) may acquire ownership of real estate in the Republic of Croatia under the condition of reciprocity, subject to obtaining prior approval of Minister of Justice of the Republic of Croatia. Reciprocity is also required in case of inheritance of real estate by foreigners. The information on whether reciprocity is already established with certain countries may be found on web page of Ministry of Justice, <https://pravosudje.gov.hr/istaknute-teme/stjecanje-prava-vlasnistva/informacije-o-uzajamnosti-u-stjecanju-prava-vlasnistva-nekretnina-izmedju-republike-hrvatske-i-ostalnih-drzava/6186>.

Generally, in terms of acquiring real estate in Croatia, citizens of the EU and EU legal entities are even with the citizens of the Republic of Croatia. The exception

exists though in respect of agricultural land (defined by the Agricultural Land Act) and secured parts of nature over which citizens of the EU and EU legal entities are put in the same position as foreigners generally, meaning they cannot acquire agricultural land in a transaction.

3. Registry system

Croatian properties are registered dually, in cadastral registry and land registry. Cadastral registry, under jurisdiction of State Geodetic Administration, is a land plot registry containing data about surface area, buildings and other monuments that are built on or under the plot and with data about the special legal status over the plot (if there is any). Cadastral registry also contains data about possessors of the registered plots.

Land registry, held by local Municipal Courts, is the registry of the land plots and their legal status. The title over real estate acquired in a transaction is perfected (legally effective) only once it is registered in the competent land registry. On the other hand, if the foundation of the acquisition is a decision of the court or other authority, the transfer of title shall be effective as of the day that the decision became legally valid and binding (in Croatian: "pravomoćna"). Although the registration is not compulsory in the latter case, it is advisable to make the registration since such an acquirer will not be able to challenge a bona fide third party's registration made prior to its registration in the court registry.

Land registries are public and for the real estate acquisition only the data from the land registry are relevant. i.e. if the data from the land registry are not in alignment with the data from the Cadastral registry, data from the Land registry is relevant.

The Principle of confidence in the land registry is applicable, meaning that any acquirer acting in good faith and with trust in land registers shall enjoy legal

For Croatia being a country with a long coastline, it is important to stress that there can be no ownership on so called maritime area. This area is defined by the law but what is important, includes also a part of coastline.

protection if he was not aware or, under the given circumstances, had no reasonable grounds to believe that what had been entered therein did not give a complete view of, or was different from, the actual state of affairs. However, the general rule has been limited and does not apply to real estate which was in communal ownership (in Croatian "društveno vlasništvo") on 1 January 1997, and thus extensive due diligence may be required before an interested purchaser gets a clear sign off for the real estate acquisition. The limitation of the principle shall be effective until 1 January 2017, but due to the fact that it has already been extended on a few occasions, the chances are that this limitation shall be prolonged by an amendment to the Act on Ownership and Other Real Rights made before the expiry of 2016.

The land registry registration of real estate transaction has effect as of the moment of submitting an application for registration to the land registry court, provided of course that the application is not denied in the end. This means that in case of multiple sale contracts i.e. if several persons conclude legal transaction documents with the seller with the aim of acquiring ownership of one and the same real estate, ownership shall be acquired by the person who was the first one to apply for entry in the land registry in good faith, providing that all other conditions for the acquisition and registration of ownership are satisfied.

Registration is based on the application submitted to the land registry. The application has to contain name of the competent court (land registry) according to the location of real estate; personal data (name, surname, address, OIB i.e. Croatian personal PIN) of applicant and person that needs to be informed about court's decision and data about the real estate (plot number, land registry file number and cadastral municipality). With the application applicant has to submit documents underlying the transaction (i.e. real estate sale and purchase agreement or court ruling or inheritance ruling etc.). If the foundation


of the acquisition is private transaction, applicant also has to provide so called *clausula intabulandi* i.e. valid declaration of will (private statement) where the signature of the registered owner is notarized and which states that he is irrevocably and without any further owner's approval being required, consenting to transfer of title to acquirer. Based on due application, the court brings the ruling permitting registration of the acquirer as new owner.

If the documents provided to the court are not entirely compliant with the elaborated registration conditions but fulfil general conditions for entry into the land register (e.g. only *clausula intabulandi* is missing), conditional registration can be performed (in Croatian "predbilježba"). In that case, the conditional registration should be justified afterwards by supplementing the application with valid and fully complying documentation. After the valid and fully complying documentation is submitted, the court brings the ruling on registration of title that has legal effect starting with the day when application for conditional registration was submitted.

4. Role of notary in a real estate transaction

According to the Land Registry Act, the registration in the land registry may only be permitted based on public deeds or private deeds where the notary notarizes the signature of the transferor.

In case that a transaction is made through a proxy authorized by a power of attorney, either from the transferor or the acquirer, the signature on such a power of attorney needs to be notarized too.

Additionally, the notary will have to make a notarial deed if the purpose of the transaction is the disposal of real estate owned by a minor, in case that a contract is made by a deaf person who cannot read or mute who cannot write. The same goes for the case where a real estate is given as a gift but the possession is not transferred simultaneously. 

Notary will also notarise owner's signature on a Mortgage Agreement, or even certify the whole agreement in case it contains an enforcement clause which enables the creditor to go directly into enforcement procedure in case of breach or the debtor. In case there is no such clause in the Agreement and the debtor is disputing the payable, the creditor will have to go through the civil proceedings prior to being able to enforce over the real estate to settle its receivable.

5. Representations and Warranties in real estate transactions

General legal responsibility of the seller in front of the buyer.

Main principles of the legal responsibility of the seller is proclaimed by the Obligations Act — the duty of cooperation, duty to act in good faith and prohibition to cause damages.

Also, seller is liable to the buyer for the material and legal defects of the real estate as in any other sale and purchase transaction.

The Obligations Act identifies when an item has a material defect, and in case of a real estate these will most often be the cases when real estate does not have the characteristics that have been expressly or tacitly agreed between the parties, e.g. when the surface area of real estate is less than the one agreed between the parties.

Of course, there is an obligation on the buyer to inspect the real estate in a usual manner and as soon as it is possible, and notify the seller within 8 days thereafter or even immediately thereafter in case of commercial contracts. Failure to adhere to the terms will prevent the buyer from exercising its rights entirely, unless the seller was aware of the defect but failed to notify the buyer. In the above example where the surface is less than agreed, it would be important to establish whether the discrepancy is such that it could have been noticed by plain inspection or not. In the latter case it could be deemed a latent defect and the buyer could raise its claim in longer terms — within 2 years from the handover of real estate (6 months in case of commercial contracts).

All the terms are set by the law but may be prolonged, shortened or entirely excluded by the agreement between the parties.

Buyer's claim in case of defects may vary from requiring the defect to be removed, requesting a new item without defect (which is not that customary in

case of real estate), requesting the price reduction or terminating the agreement under conditions set by the law. Any of the claims can be combined with the damages compensation request.

Similar to liability for material defects, a seller shall be liable to the purchaser in case there is a right of a third party in respect of a real estate that is being sold, and such a right excludes, decreases or limits the purchaser's right. Of course, additional condition is that the purchaser was not notified and did not accept to purchase the real estate under those terms.

In case that due to a right of a third party the real estate is entirely taken away from the purchaser, the sale and purchase agreement between him and the seller shall be terminated ex lege. In case the purchaser's right is only limited, he can request reduction of purchase price or terminate the contract. Again, the purchaser can request the compensation of damages, unless he was aware of the possibility that the real estate can be taken away from him.

The term for purchaser to raise a claim for legal defects shall expire after one year as of the day when he became aware of the third party's right. Similar to material defects, the liability for legal defects can be limited or even excluded in case of a bona fide seller.

Typical Reps & Warranties for transactions in different assets class.

Historically, it was not customary to have any specific representations and warranties in sale and purchase agreements. This is probably due to the fact that the seller is liable for legal and material defects under the law and the parties relied on that liability. The practice is still live in case of sale and purchase of apartments where it is quite rare to see any provisions regarding seller's liability other than general liability under the law.

In commercial real estate transactions it is becoming more and more common that they include a set of more or less extensive representations and warranties. Again, this is also triggered by the way the defects are regulated under the law, i.e. in case the purchaser is aware of any defect, the seller shall not be liable for it unless it specifically warrants for them. In other words, unless seller specifically warrants for something he could claim that the seller, having done the due diligence, knew about the defect and thus release himself from liability.

Moreover, in case there are representations and warranties, it is easier to prove which features of real estate are expressly agreed between the parties,

thus triggering seller's liability under the law which could, in the absence of such provisions, be left for interpretation of the court.

6. Mortgage regulation and other guaranties used in RE transactions

Common procedures for a mortgage constitution.

Under the Croatian law, mortgage is constituted by registration made into the land registry by a competent court based on a mortgage agreement. The mortgage agreement may be included in the loan agreement or executed as a separate agreement. It has to include all the data necessary for registration with the land registry, namely information on mortgagee and mortgagor, secured amount and interest, information on mortgaged real estate (land registry file number, land plot number and description, cadastral municipality designation) and explicit statement by the mortgagee, whereby the mortgagor is authorized to register the mortgage with the Land Registry.

In addition, the mortgage agreement usually contains an enforceability clause which enables the mortgagor to initiate enforcement procedure before a competent court without necessity to obtain a judgement beforehand in a separate judicial proceedings. The signatures of the mortgagor and the mortgagee on the mortgage agreement have to be certified by a notary public and if the enforcement clause is included, then the entire agreement has to be certified (croat. solemniziran) by a notary public.

As mentioned above, after signing and certification of the mortgage agreement, it has to be registered with the competent Land Registry in order to become valid. Land Registry procedure is very formal and any deficiencies in the agreement can be removed only by an annex to the agreement signed by the both parties and certified.

How is the lender protected on a creditor execution.

Land Registry files are publicly available and the creditor's mortgage is visible to anyone inspecting the status of the mortgaged real estate. The mortgagee may freely dispose of the mortgaged real estate, including the sale thereof, if not agreed otherwise. However, the real estate remains mortgaged and the creditor may initiate the enforcement proceedings on the real estate against the new owner. Initiation of enforcement proceedings is registered with the Land Registry and thereafter the mortgagee cannot dispose of the real estate in any manner.

At any time before or during the enforcement proceedings, the mortgagor may apply for temporary

measure if the mortgagee is taking any actions that could prevent or endanger the mortgagor's ability to settle its claim from the mortgaged real estate.

At the end of the enforcement proceedings, claims of all mortgagors are settled in accordance to their ranking, even of those who did not initiate nor participate in the proceedings. If the proceedings have been initiated by a lower ranked mortgagor, any higher ranked mortgagor is authorized to file for termination of enforcement proceedings if it is clear that the lower ranked mortgagor (initiator of the proceedings) will not be able to settle its claim at all from the sale of mortgaged real estate, taking into account value of the real estate determined during the proceedings and amounts secured by higher ranked mortgages.


If the mortgagor's claim is not due at the moment of settlement and there is no agreed interest rate, the paid amount shall be decreased for the statutory interest rate for the period between the end of enforcement procedure and due date. If the interest rate was agreed, the entire loan principal will be settled together with the interest calculated by the date of the court's decision on settlement.

7. Leases of business premises

Acts dealing with business premises are primarily Lease and Sale of business premises Act and to some extent Civil Obligations Act. The definition of business premises comprises business buildings, business room, and garage space.

To be valid, a lease agreement has to be concluded in a written form. If the business premises are in the ownership of the Republic of Croatia (or its local/ municipal government) it is obliged to lease it through a public tender.

In the last 6 years the contract strength has been shifted and the business premises lease agreements are more lessee friendly than they used to be before. In spite of the strong set of securities securing the landlords' positions — customarily debenture bonds and enforcement clause (but enabling swifter enforcement without having to go through civil proceedings), the lessees generally renegotiated the long term leases and managed to decrease the rental fee and obtain additional benefits, such as free garage spaces or fit-out budgets.

Croatian lease related law is neutral between landlords and tenants, and the majority of the provisions are of discretionary nature, meaning that the parties are free to regulate them in any other permitted manner. 

Therefore, the commercial leases are quite elaborated and deal in detail with handover of premises, obligations of the parties, maintenance, prolongation, termination etc.

In commercial leases it is quite customary to find provisions on change of control situations since according to the law, the change in the ownership of the premises does not in principle affect the validity of the lease agreement. The same rule applies in case of death or change of legal position of the lessee. In such cases the new owner of the premises or lessee's successor takes over the rights and obligations arising from the lease.

However, if the premises are sold in an enforcement procedure (forced sale) the lease agreement will be terminated if the lease has not been registered with the land registry. Irrespective of that fact, it is not market standard to have the lease agreements registered in the land registry.

8. Taxes

Real estate transfer tax ("RETT") or value added tax ("VAT")

Real estate acquirer is obligated to pay the taxes for the real estate acquisition. He has the duty to notify the Tax Administration about the acquisition within 30 days as of the conclusion of a contract for transfer of a real estate and to submit the tax request. Public notaries (in charge of certification of the signature of the transferor on the real estate transfer agreement), notify the Tax Administration about the legal transactions of the real estate but this does not release the acquirer of obligation to file the tax request.

Tax rate according to the Real Estate Transactions Act is 5 percent and is not deductible in any way, whereas in case of VAT it is 25 percent and may be deducted in case of transactions between two corporate entities—registered VAT taxpayers when the real estate is bought for business purposes.

As of 1 January 2015 there are several criteria that should be taken into consideration while determining the tax liability in case of a real estate transaction:

- whether the seller/vendor is registered as a VAT taxpayer
- whether real estate was used/inhabited
- category of the real estate (developed building or land).

According to those criteria if the seller of the real estate is not registered as a VAT taxpayer, no matter of the category of the real estate, RETT at 5 percent tax rate is payable.

If the vendor is registered as a VAT tax payer, it depends on the real estate category whether the RETT at the rate of 5 percent or VAT at the rate of 25 percent is applicable:

- If the real estate (building or part of buildings and land on which those are built) which is new (not occupied or used) or less than two years lapsed from the time it was inhabited for the first time/transferred — the transfer is subject to VAT
- If the real estate (building or part of buildings and land on which those are built) where at least 2 years lapsed from the time (i) it was inhabited for the first time; or (ii) transferred— the transfer is VAT exempt and subject to RETT. Referring to the latter case, as of Real Estate Transactions Act and VAT Act changes from 1 January 2015, in case the transaction is between two VAT registered taxpayers and the buyer is entitled to full deduction of input VAT, the supplier may opt to apply VAT to the transaction, in which case VAT is only calculative category (there is no actual cash flow of VAT).

In certain cases real estate transactions may be entirely exempt from RETT and VAT, e.g.:

- if the real estate is contributed as share capital into a company
- if the real estate is acquired in the process of merger or demerger

Investor is obliged to secure that a new building has an energy certificate available prior to putting it into use

- if real estate is transferred as a part of going concern
- property income tax

If the seller of a real estate is an individual the property income tax should be considered too.

The disposal (sale, exchange or another kind of disposal) of a real estate is subject to property income tax if the seller is an individual who has disposed of:

- a real estate within three years from the purchase/ acquisition date and/or
- more than 3 real estate of the same type (e.g. more than 3 buildings, apartments, land plots etc.) during the period of 5 years. The 5-years-period is calculated from the disposal date of the first real estate.

The taxpayer is the individual who disposes of the real estate. The disposal of a real estate is subject to property income tax at a 25% rate increased for surtax.

The tax base is determined as the difference between the contractual sale price (i.e. market value) and the purchase (acquisition) value of the real estate increased for the growth of the manufacturing prices of industrial products. The surtax is determined based on the city/ municipality in which the individual resides. Surtax base is the amount of the property income tax liability.

The Personal Income Tax Act prescribes certain exemptions from the property income tax. Accordingly, disposal of a real estate which was used for living purposes of the taxpayer, disposal between spouses and next of kin, inheriting property as well as the disposal of real estate three years or more from the purchase/acquisition date will be exempt from the property income tax.

9. Public law permits and obligations.


The main laws governing zoning and construction are Building Act, Zoning Act and Illegal Buildings

Act. Building Act regulates design, construction, use and maintenance of buildings, implementation of administrative and other procedures in connection with environmental protection, energy efficiency and zoning, and sets out the main conditions for buildings and the competences of the state and local authorities, administrative and inspection supervision. Zoning Act regulates zoning plans (adoption and implementations), formation of building plots and supervision while Illegal Buildings Act regulates the legalization of illegally constructed buildings.

For the building and use of real estate following permits are required: location permit — required only for certain types of buildings and/or in certain situations (e.g. exploitation fields, mining objects and constructions, when the ownership status is not resolved); building permit; use permit; and minimal technical conditions (for hospitality, commerce and tourism).

In order for a building in Croatia to be considered legally built, it should have a legally valid building permit and then use permit which confirms that the construction was done in line with building permit. On the contrary, illegally built building is a one built, fully or partially (e.g. by dimensions in excess to the building permit issued by the public authority) without an adequate building permit or without a use permit.

The building permit expires if the investor fails to commence building within three years from the day when the permit has been issued and can no longer be extended. During this period, the investor is required to resolve the issue of the right to build and access the building. There are however certain building permits issued under the former regulations which can be valid for indefinite term if the conditions for that were met under those regulations.

For simple buildings and works, such as, fencing, swimming pools, tanks, tracks, solar collectors, small agricultural buildings etc. it is not necessary to obtain a building permit but construction may begin on the 

basis of the main project, the standard design, or other act prescribed by the rulebook.

Constructed or reconstructed building could be used or put into operation, only after the issuance of the use permit.

10. Environment

Investor is obliged to secure that a new building has an energy certificate available prior to putting it into use. The same obligation is imposed on the owners of used apartments or buildings who are obliged to provide such a certificate when entering into sale and purchase or leasing agreement.

However, there are exceptions to this obligation, e.g. an energy certificate is not needed in case of lease of real estate to a spouse or a close relative, in case of lease of real estate with useful surface area less than 50 m² or in case of forced sale.

Certification has to be done by a person with adequate license and the real estate should be classified according to energy classes set by the Regulation on Energy Inspection and Energy Certification. The owner should provide the certificatory with all technical documentation, prior certificates and evidence of maintenance of equipment and data on quantities of utilities used. In view of that, utilities' providers are obliged to give data to the owner within 30 days as of the day the request is made. In practice, the data is supplied within a couple of days.







CZECH REPUBLIC





Martin Bohuslav

mbohuslav@deloitteCE.com

1. Real Estate Law

There is a complex legal system of maintaining Real Estate property in the Czech Republic. The legal system is divided into two main subsystems – public law and private law. These are independent of each other when the application of private law is independent of the application of public law and vice versa.

While public law determines public regulation for the preparation and realisation of constructions, resp. permitting procedures and stipulation of use for constructions, private law modifies relationships among private persons concerning mostly property rights to constructions including the preparation and realisation. Private law is also the most determining for Real Estate transactions.

1.1. Private law aspects regarding realisation of constructions

With the new Czech Civil Code (“CC”) within Czech private law recodification, replacing communistic civil law after fifty years, when constructions had had the character of independent objects, the *superficies solo cedit* principle¹ has returned to the Czech legal system. The Real Estate practice has still been getting used to the CC.

For dealing with Real Estate property it has to be currently taken into account that the same legal path mostly follows construction and the plot of land where the construction is located – these are considered one object from a legal point of view.² Regulation also tackles situations where the construction and the plot of land have different owners, mostly for historical reasons. Therefore, the statutory pre-emption right of the owner of the plot to the structure and vice versa

applies. The pre-emptive rights cease to exist when the owner of the plot of land and the construction is the same and the construction becomes part of the land in compliance with the *superficies solo cedit* principle. It will definitely take many years to unify this permanently.

When the developer intends to realise a construction on another owner’s plot of land the right of construction (right of superficies), in compliance with the *superficies solo cedit* principle, shall be arranged. Otherwise, a construction erected on the plot of land of another owner devolves to the owner of the plot of land. The right of construction authorises a developer to build and have a construction on another owner’s plot of land. The main feature of the right of construction is its strictly temporary nature; it can be established for a maximum period of 99 years and after lapse of the time period the construction has to be sold to the owner of the plot of land where the construction is located for half of the construction’s value, unless agreed otherwise.

2. Ownership right in the Czech Republic

There is one basic type of ownership in the Czech Republic. Co-ownership right arrangements (shared ownership, common property of spouses, and co-ownership of an accessory thing) are just modifications of general ownership types.

2.1. Restrictions to ownership

Ownership right may be restricted by the rights of third parties related to the subject of ownership right, i.e. Real Estate property, or in the public interest.

Restrictions, such as easements, i.e. servitudes and real burdens, pledges, reservations of property



1. Under this principle, constructions connected to the plot of land are considered as being part of the plot of land.
2. With some exceptions, for example utilities and temporary constructions.

rights, prohibition of alienation or encumbrance, building rights, pre-emption rights, rights of construction, and other rights of third parties to the Real Estate property may be agreed on with the owner of the Real Estate property only. These rights, to become effective, have to be registered in the Cadastre of Real Estate held by the Cadastral Office ("*Katastrální úřad*").

As regards public restrictions of Real Estate property these could be set up on the basis of public acts or special law, i.e. court of law, property could be expropriated based on law after fulfilment of conditions, legal pre-emption right of the state for certain property in the public interest, etc. In this connection, please note that with legal effectiveness as of 1 January 2018 the legal pre-emption right of co-owners comes back to the Czech legal system with the first amendment of the CC. In case of an intended transfer of the co-owner share, the co-owner will be obliged to offer it under the same conditions to his other co-owners in advance.

2.2. Restitution of property

Because of an over 40-year period of communism in the Czech Republic, a kind of settlement of injustices made during these times has been implemented into the Czech law. The so-called restitution of Real Estate property in the Czech Republic is bound to the property unlawfully escheated by the Communist regime in the 1945-1989 period. Restitutions are mainly governed by the so-called restitution acts.

The restitution process is not over yet in the Czech Republic and, currently, so-called church restitutions are ongoing.

Due to the various restitutions, it is necessary for investors to check thoroughly the legal status of the intended acquisition from the point of being potentially the object of restitution at the Czech State Land Office ("*Státní pozemkový fond*").

2.3. Public auction

An ownership right to Real Estate property could be also obtained in public auction, which can be voluntary or enforced (e.g. in case of insolvency proceedings, enforcement proceedings or mortgage realisation).

2.4. Transfer of the ownership right to Real Estate property

For a transfer of Real Estate property and to establish the relevant rights to Real Estate, a written form

of agreement and subsequent registration in the Cadastre of Real Estate is obligatory.

There are no specific contract terms or obligatory provisions in the Real Estate Agreement, however, for the registration in the Cadastre of Real Estate, it is necessary that proper specification of the construction, plot of land and contractual parties be included in the agreement concerning disposal of Real Estate property; officially verified signatures of contractual parties are necessary.

2.5. Liability of the owner of a construction

Generally, towards third parties, the owner of the construction (or a builder) is, primarily, liable for the construction pursuant to the CC and the Building Act.

The owner of the construction must particularly bear in mind the protection of lives and health of persons or animals, protection of the environment and property, and a considerate treatment of the neighbourhood. Other duties are stipulated in the Building Act and other administrative legal regulations, which can result in administrative offences. For the gravest offences, the builder/developer could also be held liable for criminal offences.

3. Registry system

3.1. Cadastre of Real Estate

Rights to Real Estate (ownership rights, rights of third parties to the Real Estate) have to be registered in the public register, i.e. the Cadastre of Real Estate held by the Cadastral Office. The Cadastre of Real Estate is publicly accessible and governed by the State Administration of Land Surveying and Cadastre.³ Effectiveness of the agreements regarding dealing with Real Estate property is bound to the registration of the agreement (the right arising from the agreement) in the Cadastre of Real Estate. Transfers of ownership right and other rights to the Real Estate are effective as of the delivery of the motion to the Cadastre of Real Estate based on the decision of the respective Cadastral Office.

Filing a motion to the Cadastre of Real Estate is a standard procedure usually taking about 30-50 days, whereby after the first 20 days the Cadastral Office only informs relevant parties (owners, state authorities, possible creditors with the property under the pledge) and awaits their opinions. If there is no dispute regarding the agreement, the Cadastral Office enters the right.

3. <http://www.cuzk.cz/en>

Proper registration is very important not only because of legal effects of the agreement but also because of the principle of good faith or the material publicity principle to the Cadastre of Real Estate. In case of a discrepancy between reality and the entry in the Cadastre of Real Estate the one that acts in good faith that the entry is right and true is protected.

3.2. Commercial Register

In case the transaction is realised via a share deal (i.e. transfer of the shares of the company that is the owner of the property), the changes must be registered in the Czech Commercial Register ("*Obchodní rejstřík*"). The Commercial Register in the Czech Republic is part of the relevant Regional Court and it is related to the area of the business seat of the company applying for registration. Registration could be also usually done by a notary (with some exceptions, please see below).

3.3. Registry of Pledges

The registration in the Registry of Pledges held by the Czech Notarial Chamber ("*Rejstřík zástav*") is necessary to establish a pledge for Real Estate property, which is not registered in the Cadastre of Real Estate and for the business enterprise. The Pledge Agreement must be made in front of a public notary who subsequently registers the pledge in the registry. If there is such a property (or other valuable property) involved in transactions, the Registry of Pledges should be also checked up on which can be done by any public notary. However, there are no specific formal requirements for specification of the registered asset and to properly identify the subject of the search might be problematic.

4. Notary roll on the transactions

When a transaction is realised via an asset deal, a notary is usually unnecessary. The notary can be used for official verification of the signatures (which is obligatory in case you transfer a Real Estate property), but an attorney or a "Czech point" (located usually at every post office) can manage it as well.

However, the notary can be very important once the share deal takes place. According to Czech law, when you transfer the shares in a company, the transfer must be registered in the Commercial Register (please see above). The registration can be done by an application to the register court or directly via a public notary. Registration by the notary is the most preferable way for all parties since the parties are usually able to avoid any possible problems which may occur during court registration (court registration is a very formal proceeding that is not entirely in the hands of the parties).

The notary can register only changes made in the form of a notarial deed. Almost everything (during the transaction) could be made in that form, nevertheless, some exceptions also apply (some changes of registered seat, registration of trade licence without obtaining it in advance at the Trade Licence Office).

5. Representations and Warranties in Real Estate transactions

As mentioned above, Real Estate transactions may be performed as a direct sale of Real Estate property ("*asset deal*") or as a shareholder purchase agreement ("*share deal*"). In the Czech Republic at present, share deals are more frequent. In case a transaction is realised via an asset deal, the parties must be extremely careful to transfer the whole set of rights embodied to the property – licences, permits, etc. If they choose the asset deal, the whole company is transferred and there is a higher level of certainty that nothing was left behind. Another option the parties may choose is the sale of business as a going concern. In this case, only part of the company is transferred (usually the most profitable part isolated from other unwanted property or to avoid any possible inherited threats).

For every successful Real Estate transaction it is necessary, first, to check the owner of the Real Estate property properly. Legal due diligence is usually carried out before any major acquisition. Due diligence usually includes an examination of the ownership title, a review of physical survey conducted, environmental risk analysis, zoning and land-use analysis.

Real Estate may be subject to restitution claims, therefore, as mentioned above, verification at the Cadastre of Real Estate is also recommended. For a share deal, corporate due diligence must be carried out as well.

5.1. General liabilities of contractual parties

The Seller and the Buyer of Real Estate property have, if not stipulated otherwise in the agreement, rights and duties, esp. warranties, generally resulting from the CC towards each other. A time period of 5 years regarding latent defects to the constructions together with adequate compensation from the Seller is stipulated by the CC. Furthermore, the Seller or the previous owner could be held responsible for environmental burdens and contamination or similar defects. Both legal and factual defects are mostly the subject or liability of the Seller.



A special kind of liability is the so-called pre-contract liability, *culpa in contrahendo*, applicable when the party of the transaction is responsible for damage arising esp. from the termination of ongoing negotiations without proper reason, abuse of confidential information and breach of information duty.

The situation may be prevented by agreement on future agreement, which is legally enforceable in case of its breach and assures parties that their claims will be fulfilled without any back out of the other party. However, lately with the CC the pre-contractual liability together with a concluded letter of intent is usually considered as a sufficient safeguard.

5.2. Examples of standard R&W

There are various different R&Ws used during the transaction. The seller (and to a very limited extent also the purchaser) should always stipulate R&W below. Usually, there are some exceptions from his claims ("other than as disclosed").

5.3. Asset deal

- The Seller is the legitimate owner of the Real Estate property for a period of at least 10 years and there are no challenges against him in this area (and to his knowledge no signs that this kind of challenges may arise).
- 10-year period is considered sufficient and safe according to case law and legal regulation in the Czech Republic.
- There are no encumbrances on the Real Estate property other than the disclosed.
- There are no distraint, court, administrative or other proceedings related to the Real Estate nor the threat of such proceedings.
- The Seller is not aware of contamination, pollution or any environmental damage regarding the Real Estate property.

5.4. Share deal

- The Seller has the legal capacity, power and authority to enter into the agreement and to sell and transfer shares owned by him to the Purchaser in the manner contemplated herein and to perform all of his obligations under the agreement.
- All accounts, books and records of the company have been kept completely, correctly, duly and accurately in all material aspects, have been updated, filled in and stored in a place and form complying with the applicable laws of the Czech Republic, excluding cases where such a change was imposed by a relevant legal regulation, no change was made to the accounting policies.
- The Company is not involved in, nor is the property of the Company subject to, any litigation, arbitration, execution proceedings, or administrative proceedings.
- The Company has no employees and no obligations towards former employees (in case of SPV companies).

6. Mortgage regulation and other guaranties used in RE transactions

Acquisitions of Real Estate property or shareholders purchase agreements are very often financed by the banks in the Czech Republic. Loans are mostly secured by the property (mortgage) and by pledges over business shares and bank accounts. There could be also a second mortgage on the property (could apply once the first one cease to exist).

When the mortgage affects Real Estate property, written form and officially verified signatures of the parties are necessary. General provisions of the CC related to the transfer of Real Estate property are used (although in this case the property itself is not the subject of transfer, creation of the mortgage is considered so serious that a stricter legal regime has to be in place). Mortgage in favour of the bank (or other

creditor) is created by recording the mortgage in the Cadastre of Real Estate; its priority is assessed by the date of record. Mortgages recorded sooner are prior to the later ones in case of realisation, which occurs when the debtor is unable to service its debt.

To establish a pledge over the business share a written form of contract is obligatory. In case of establishing a pledge over an ownership interest ("*obchodní podíl*") in the limited liability company ("*společnost s ručením omezeným*") officially verified signatures of the parties are necessary. The pledge is effective by recording the pledge in the Commercial Register.

A pledge agreement must be in the form of a public instrument (notarial deed) if an enterprise or another collective thing (*universitas rerum*) is pledged.

7. Leases of business premises

Czech law guarantees substantial freedom in regard to the conclusion of the Agreement on the lease of business premises. There are only a few mandatory provisions pursuant to the CC that cannot be excluded, otherwise, a wide berth to formulate own provisions applies.

No mandatory form for lease agreement in connection with the lease of business premises is stipulated (on the contrary, the lease of a residential apartment or house for living; lease of residential apartment or house for living needs to be concluded in writing).

A lease may be stipulated for a definite or indefinite period. If not stipulated the legal assumption is that the lease has been agreed on for an indefinite period of time; the same legal assumption applies for a period exceeding 50 years. Sublease is possible only with the consent of the lessor. However, in the case of the lease of an apartment, the lessee can sublet a part of the apartment without the consent of the lessor (only in case the lessee is also living in the apartment).

Lease expires according to the lease agreement, if not renewed impliedly, or by notice sent by one of the

parties. Lease for an indefinite period of time ends by notice with a three month period for Real Estate.

The CC puts great emphasis on the autonomous will of the contractual parties.

7.1. Technical aspects concerning the subject of lease


The lessor has the obligation to hold the energetic certificate and the lessee is entitled to obtain it before conclusion of the agreement (see Art. 10).

The lessor is not legally obliged to perform any kind of fit out work. Tax amortisation of technical improvement has to be explicitly stated in the lease agreement.

Repair work is performed by the lessor after mutual agreement with the lessee and with harassing a lessee in a minimal way. Special provisions apply for the lease of an apartment or house for living. The lessee is obliged to pay for operational costs / common service charges. Payments for the utilities are dependent on the lease agreement, if the lease agreement does not contain such a provision - the lessor is obliged to pay for utilities.

Only basic maintenance of the subject and costs which are attributable to his actions are borne by the lessee, however, this can be agreed differently in the contract. The lessor is obliged to pay up all other costs which are not minor. However, this can be agreed on differently in the contract. The same applies for technical improvements of the object of lease. According to the CC, the lessor should compensate the costs of improvements to the lessee. This situation is usually customised in the contract.

7.2. Break options

There are no legal limits for arranging any form of termination clauses, however, the termination clause cannot be against good manners - *contra bonos mores*. If the lessee notifies the lessor properly and in due time of a defect of a thing which the lessor is to remove and the lessor fails to do so without undue delay, 

wherefore the lessee can use the thing only with difficulty, the lessee is entitled to a reasonable price reduction of the rent, or repair the thing himself and claim reimbursement of the reasonably incurred costs. However, if the defect makes the use substantially more difficult or completely prevents its use, the lessee is entitled to have the rent waived or may terminate the lease without a notice period. If a subject of lease becomes unusable for the stipulated purpose or, where no such purpose has been stipulated, for the usual purpose for reasons not attributable to the lessee, the lessee has the right to terminate the lease without a notice period.

The lessor has the right to terminate the lease without a notice period where the lessee uses a thing in a way that it is becoming worn beyond a reasonable extent given the circumstances or there is a risk of destruction of the thing and no remedy is made. If a party commits a particularly serious breach of its duties, thereby causing significant harm to the other party, the party affected has the right to terminate the lease without a notice period. These statutory arrangements can be replaced by an agreement of the parties.

The possibility of the lessee to demand compensation for the takeover of a customer base after termination of the lease is contained in the CC. We cannot argue that there are situations in which a new lessee may benefit from taking over the customer base created by the previous lessee after the termination of a lease, especially if the subject of the business is the same. If the lessor terminates the contract, the former lessee is entitled to ask for compensation for the benefits which the landlord or the new lessee derive from the customer base developed by the outgoing lessee. In terms of this new concept, one will have to wait and see how it will be applied in practice, especially in regard to finding and proving the person liable for compensation.

7.3. Eviction of the Tenant

The lessee could be evicted after a legally valid termination of the contract and based on prior notification (some special exceptions). Usually standard arrangements on the process of eviction that allow the landlord to, e.g., store the property of the tenant etc., are agreed. In case the tenant does not co-operate - in particular is physically obstructing the eviction, it is

necessary to file a law suit for eviction of the property. The lease agreement is enforceable by action to the respective civil court – after a court decision the lessee could be evicted by state authorities. Other damages or unpaid rent are also enforceable after a court decision.

There are no general restrictions if the owner of a thing changes, the rights and duties arising from the lease pass to the new owner. If the lessor has transferred the right of ownership to the subject of lease, the new owner is not bound by any stipulations on the lessor's duties which are not provided by a statute. This does not apply if the new owner was aware of such stipulations.

7.4. Usufructuary lease

Usufructuary lease is a special form of relinquishing a thing to be used by another with a long history in the Czech legal system when, unlike a lease, the usufructuary lessee is also entitled to derive profits from the subject of lease. This kind of relinquishing of a thing to be used by another has been typically used for farming and other agriculture land use but the parties can also agree on usufructuary lease of a fully equipped hotel, restaurant or operation of utility networks, which is more common in these days.

There is also a special duty for the lessor to compensate the lessee for acquisition of a customer base. This institute is not used very often and there is no case law yet, however, it should be taken into consideration when the lessor intends to give a notice of termination to a well-established lessee and rent a place to the entity with similar business activity.

8. Taxes

The Real Estate business is affected by several types of taxes in the Czech Republic. The taxes that are, by nature, most closely related to the Real Estate transactions are the Real Estate transfer tax and the Real Estate tax. Nevertheless, the value added tax ("VAT") and the income tax have to be taken into account in considering any business activity in the Real Estate area.

Entities that are not tax residents of the Czech Republic may be liable to the income tax, if they receive income

- As regards the transfers of ownership that have been registered in the Cadastre of Real Estate since 1 November 2016, according to the new statutory provision, the new owner (transferee) of the Real Estate is obliged to declare and pay the tax. For the transfers registered in the Cadastre of Real Estate prior to 1 November 2016, the seller (transferor) is still the statutory taxpayer of the RETT imposed on the transfer emerging from a purchase or barter agreement. In such a case, the buyer (transferee) is a guarantor of the tax liability. The contractual parties were allowed to agree that the buyer (transferee) shall be the taxpayer instead of the transferor, though. In all other cases, the RETT shall be declared and paid by the new owner (transferee) without any guarantor.

derived from the territory of the Czech Republic, which may also become a significant factor for their business activities.

8.1. Real Estate Transfer Tax⁴

The transfer of ownership of Real Estate located in the Czech Republic is subject to the Real Estate transfer tax ("RETT"). The RETT rate amounts to 4% while the tax base corresponds to the agreed purchase price, provided that it equals or exceeds 75% of the Real Estate "market value". Otherwise the tax base equals the Real Estate "market value". The "market value" shall be assessed by a registered expert. Alternatively, the "market value" of a plot of land whose integral part is an individual dwelling house or a building legally divided into units (residential and/or non-residential) and the "market value" of a residential or non-residential unit can be assessed by the tax authority itself. The tax authority's assessment of the Real Estate "market value" is then based on the guide information provided by the taxpayer in the annexes to the tax return ("*směrná hodnota*").

If the transaction is not exempt from VAT, the purchase price shall be increased by the relevant VAT for the purposes of the tax base calculation, according to the interpretation of the Czech Ministry of Finance ("Ministerstvo financí") and the current case law. Under specific statutory conditions, the tax base can be decreased by the provable costs of the expert's opinion assessing the Real Estate's "market value".

8.2. Real Estate Tax

The Real Estate tax is levied on occupied or finalised Real Estate, i.e. plot of land, building (structure) and unit (both residential and non-residential). The Real Estate tax is formally divided into the land tax and the building tax.

The taxpayer shall submit the Real Estate tax return, based on the conditions existing by 1 January of the given year, no later than on 31 January. As long as the circumstances relevant for the assessment of the Real Estate tax do not change (and even if some changes determined by the law occur), the taxpayer does not need to submit the Real Estate tax return again throughout the following years. If the amount of the tax assessed does not exceed CZK 5,000, the tax is due no later than on 31 May. Otherwise the tax is payable in two instalments, due no later than on 31 May and 30 November.


If the petition for registering the (new) Real Estate owner into the Cadastre of Real Estate was filed before 31 December but had not been dealt with until that day, the (new) Real Estate owner shall submit the Real Estate tax return later on, within three calendar months following the month of their registration into the Cadastre of Real Estate. Such a tax return is effective for the calendar year following the year when the petition to the Cadastral Office was filed.

8.3. Value Added Tax

Generally, the basic VAT rate of 21%⁵ shall apply to the sale of Real Estate by a VAT payer, unless the conditions for a tax exemption are met. The first reduced VAT rate of 15% shall apply (unless the conditions for a tax exemption are met) to the sale of a structure for social housing (as defined by the VAT Act), plot of land that includes solely a structure for social housing as a part of the land, a right of construction that includes solely a structure for social housing, or a unit that includes solely premises for social housing, as defined by the VAT Act. The 15% VAT rate shall also apply to the provision of building and assembling work connected with the construction of a structure for social housing and to the provision of building or assembling work made on a completed structure for housing or for social housing. When providing a VAT payer with specific building or assembling work specified by the VAT Act, the payer shall apply the reverse charge scheme.

The transfer of securities, including booked securities and shares in business corporations is VAT- exempt without entitlement to tax deduction. There are many exceptions for VAT, e.g. sale of selected immovable property after the expiration of 5 years and others.

8.4. Income Tax

Generally, certain types of income acquired by a tax non-resident of the Czech Republic (natural person or legal entity) on the territory thereof are subject to taxation in the Czech Republic.⁶ The taxation of this income is executed either by the tax remitter via the withholding tax (or the tax security) or by the tax non-resident themselves via the submission of a tax return. The withholding tax rate amounts to 15% and 35% which applies to the EU and EEA non-residents and residents of any third jurisdiction that has not concluded any of the international treaties specified by the Income Tax Act with the Czech Republic, the 

5. According to the Value Added Tax Act No. 235/2004 Coll., as amended ("VAT Act")

6. According to Income Tax Act No. 586/1992 Coll., as amended.

withholding tax rate of 5% is set for the consideration for a finance lease.

When eliminating double taxation of income derived by the tax non-resident from the territory of the Czech Republic, the procedure under the relevant provisions of double taxation avoidance treaties binding on the Czech Republic shall apply.

9. Public Law Permits and Regulation

The most important public regulation for preparation and realisation of constructions in the Czech Republic is the Czech Building Act⁷ and its associated and implementing legislation. The Building Act does not only regulate construction itself, but it also regulates land-use planning and development strategy for whole region.

The first step for every intended Real Estate project should be the proper examination of a land use plan (and general development strategy). The land use plan determines areas that are available for building and specifies further requirements for building to develop this area in accordance with the region's development principles and the spatial development policy. The land use plan is issued by the municipality authorities of every location and is legally binding for the builder as well for the building office. Trying to change the land use plan is a quite time-consuming process with uncertain results, however, it is possible. At this stage, the wide public can also obstruct changes to the land use plan (or at the stage of preparation of a new land use plan) and has substantial rights in the process. This is usually a reason for delay of the project.

The next step is obtaining a permit from the Building Office; for simple constructions, only a notification to the Building Office is needed.

The permitting procedure, basically, consists of two phases. First, a developer is obliged to obtain a land-use permit containing conditions on the location of the building. The land-use permit is issued by the Building Office if the location of construction meets general criteria stipulated by law and specific criteria specified

in the land-use plan. After obtaining the land-use permit, the developer submits an application to the Building Office for a building permit.

Applications for both the land-use and building permit contain, apart from general essentials (e.g. identification of the developer, land, etc.), the basic data on the required project and the grounds' and building objects' identification data. The developer has to attach documents proving its rights to the land entitling it to realise construction, project documentation, control plan, binding assessments requested by a special regulation, e.g. environmental and health protection, fire protection, and opinion of owners of the public transportation infrastructure and utilities if the construction is connected to the infrastructure. For larger projects, the environmental impact assessment procedure (EIA) is needed. The Building Office is obliged to issue a land-use permit as well as a building permit without undue delay.⁸

A construction may be realised only by a building entrepreneur such as a contractor, who ensures the expert management of the building process through a site manager. Simple constructions may be realised by the self-help of a developer. The building entrepreneur is a person authorised to build constructions or assembly work as a scope of business pursuant to special regulations (must obtain a trade licence pursuant to the Czech Trade Licensing Act⁹).

After successful realisation of the construction, the developer shall obtain a Final Inspection Approval ("*Kolaudační souhlas*"). The Final Inspection Approval is issued by the Building Office after fulfilment of the criteria set for the building by the Building Act, Building Permit and other stipulated criteria, e.g. environmental and health protection, fire protection, etc.

Operating a construction is possible only after obtaining relevant, esp. environmental permits. For larger constructions a builder can ask for a so called integrated permit¹⁰ which can substitute all other sectorial permits (air and water protection permits, waste treatment, etc.).

7. Act No. 183/2006 Coll., on town and country planning and building code (Building Act), as amended.

8. The Building Office should decide within 60 days at the latest, for complex cases at the latest within 90 days, since the application has been submitted.

9. Act No. 455/1991 Coll., on licensed trade (the Trade Licensing Act), as amended.

10. http://www.mzp.cz/en/integrated_pollution_prevention_and_control

There are also many buildings located in the Czech Republic (especially in city centres) marked as a cultural heritage. These buildings have a stronger protection and their reconstructions (or even demolitions) may become serious and time consuming issue for a developer due to their special status.

10. Environment

Real Estate property in the Czech Republic is subject to various environmental legislature. It is crucial during Real Estate transactions to devote necessary care to environmental issues to avoid any possible future problems that may arise once the transaction is complete.

10.1. Energy Performance Certificate of Buildings

Due to EU law requirements (transposed to Czech law via the Energy Management Act); there is a duty to have an Energy Performance Certificate for all new buildings. The certificate is valid for ten years and contains the most important information about the energy consumption of the building, it also provides a quick summarisation of energy operations costs. The duty of having one also affects major reconstructions (exceeding 25% of the building area), every sale or lease of already an existing building (the seller/lessor should hand over the certificate to the other party) and all public authorities building property.

The Energy Performance Certificate is not obligatory for buildings with a surface area of less than 50 square meters, cultural heritage buildings, buildings used for religious purposes and for some other minor constructions.

It is highly recommended to examine the Energy Performance Certificate and its validity properly during the transaction.

10.2. Ecological burdens on the property

An integral part of every due diligence of the Real Estate property should be the proper examinations of land and buildings for any possible inherited legacy of former activities on the property. According to Czech law, the new owner could be held responsible for old ecological burdens on his property and the authorities may force him to remove the burdens. Typical examples are a contamination of the land, dangerous asbestos placed in old buildings or inappropriate air conditioner fulfilment. It brings substantial costs for the purchaser, thus, especially in case of former industrial property; the land and building examination is usually carried out.





ESTONIA





Merit Lind

melind@deloittece.com

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country

The main legislative acts that govern property ownership and leases in Estonia are: the General Part of the Civil Code Act (*Tsiviilseadustiku üldosa seadus, 2002*), the Law of Property Act (*Asjaõigusseadus, 1993*) and the respective Implementation Act (*Asjaõigusseaduse rakendamise seadus, 1993*), the Apartment Ownership Act (*Korteriomandiseadus, 2000*), the Law of Obligations Act (*Võlaõigusseadus, 2002*), the Land Register Act (*Kinnistusraamatuseadus, 1993*), the Land Cadastre Act (*Maakatastriseadus, 1994*), the Planning Act (*Planeerimisseadus, 2015*) and the Building Act (*Ehitusseadus, 2015*).

2. Ownership rights

Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)

According to § 32 of the Constitution of the Republic of Estonia, on public interest grounds, the law may provide restrictions for real estate ownership. Public interest grounds may be acquired only by citizens of Estonia, by certain categories of legal persons, by local authorities or by the Estonian government.

According to the Restrictions on Acquisition of Immovable Act currently in force, a citizen of Estonia or another country, which is a contracting party to the European Economic Area Agreement or a member state of the Organization for Economic Cooperation and Development (**Contracting State**) has the right to acquire an immovable which contains agricultural or forest land without restrictions.

A legal person the seat of which is in a Contracting State has the right to acquire an immovable which contains less than ten hectares of agricultural land, forest land or agricultural and forest land in total without restrictions.

A legal person of a Contracting State has the right to acquire an immovable which contains ten hectares or more of agricultural land if the legal person has been engaged, for three years immediately preceding the year of making the transaction of acquisition of the immovable, in production of agricultural products listed in Annex I to the Treaty on the Functioning of the European Union, except fishery products and cotton.

A legal person of a Contracting State has the right to acquire an immovable which contains ten hectares or more of forest land if the legal person has been engaged, for three years immediately preceding the year of making the transaction of acquisition of the immovable, in forest management within the meaning of the Forest Act (hereinafter forest management) or production of agricultural products.

A legal person of a Contracting State has the right to acquire an immovable which contains ten hectares or more of agricultural and forest land in total if the legal person has been engaged, for three years immediately preceding the year of making the transaction of acquisition of the immovable, in production of agricultural products or forest management.

Other persons than mentioned above may become owners of the respective land on rather limited grounds and only upon approval of the county governor.

Also, any natural person who is not a citizen of a contracting party to the EEA Agreement or any legal person whose seat is not in a contracting party to the EEA Agreement is prohibited from acquiring immovable on smaller islands and certain border areas. However, for reasons of national importance, the Government of the Republic may grant authorization for such acquisition. The specific areas are:



1. the sea islands, except Saaremaa, Hiiumaa, Muhu and Vormsi;
2. in the county of Ida-Virumaa: the cities of Narva, Narva-Jõesuu and Sillamäe and the rural municipalities of Alajõe, Iisaku, Illuka, Toila and Vaivara;
3. in the county of Tartumaa: the rural municipalities of Meeksi and Piirissaare;
4. in the county of Põlvamaa: the rural municipalities of Mikitamäe, Orava, Rāpina and Värskä;
5. in the county of Võrumaa: the rural municipalities of Meremäe, Misso and Vastseliina.

It is also important to be aware of the restrictions on the certain type of use of real estate. For example, the use of real estate may be restricted in the sea coast area, protected zone of power lines etc. The restrictions may mean that the part of real estate may not be used for buildings or the owner has to avoid activity in the protected zones, etc.

Is there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

In general, a transfer of a building separately from the underlying land is not allowed, except if the right of superficies is established and transferred. According to the Law of Property Act § 241, an immovable may be encumbered such that the person for whose benefit a right of superficies is constituted has a transferable and inheritable right for a specified term to own a construction permanently attached to the immovable. Only one right of superficies may be established on an immovable. In addition to the land under a construction, a right of superficies extends to the part of the immovable which is necessary for use of the construction. A construction which is constructed on the basis of a right of superficies or exists at the time of its constitution and to which the right of superficies

extends is an essential part of the right of superficies and not of land.

3. Registry system

Structure of the property registries in your country

The property registers operating in Estonia are:

1. The Land Register

The Land Register is a national registry, which includes information about the ownership and details about the real estate and related encumbrances under property law.

2. The Land Cadaster

The Land Cadaster is a general national register the objective which is to collect and maintain information reflecting the value, natural status and use of land and make it available to the public.

3. The Register of Construction Works

The main function of the national Register of Construction Works is to collect, preserve and make public the records of buildings under construction and those in use.

Which authorities are in charge of them

The Land Register is kept by the county courts. Its central database is governed by the Estonian Ministry of Justice.

The chief processor of the Land Cadaster is the Ministry of the Environment and the authorized processor of the Cadaster, i.e. cadastral registrar, is the Land Board.

The Ministry of Economic Affairs and Communications of Estonia is in charge of the Register of Construction Works.

Connection with the cadastral-tax registries, how that works?

There are no cadastral-tax registries in Estonia.

The Register of Construction Works:

The main function of the national Register of Construction Works is to collect, preserve and make public the records of buildings under construction and those in use.

Is the registration compulsory?

All the immovable property is entered into the Land Register, unless otherwise provided for by law. Each individual immovable property has an independent entry and is given a unique number (registered immovable property number).

How registration guarantees the rights of the owner.

The title to the real estate shall be considered transferred upon the registration of the ownership in the Land Register, not upon signing the Sale-Purchase Agreement. A person entered into the Land Register as the owner, is deemed to have all the rights of the owner, unless an objection stating that the information is incorrect is entered in the Register or the acquirer knew or should have known that the information was incorrect.

No one may be excused by ignorance of information in the Land Register. It is assumed that each and every entry in the Land Register is correct and valid vis-à-vis third persons acting in good faith.

How registration works in a typical transaction?

The notarized application to the Land Register is filed to transfer the ownership of the real estate to the buyer in the Land Register Book. As of 1 June 2007, this application can be filed online through the "E-Notary" system which allows the notary to submit the application electronically without using any paper application. In case the real estate is already registered in the Land Register (as in most cases), no publication is necessary. The documentation shall include:

- the Notarized Sale-Purchase Agreement
- agreement of the Transfer of the Ownership of Real Estate
- receipt of payment of state fee for making the changes in the Land Register

4. Notary roll on the transactions

Pursuant to Estonian law, it is mandatory that all transactions related to the transfer of real estate are notarized by a notary public. The parties may prepare the sale and purchase agreement in accordance with the laws of the Republic of Estonia. However, the notary will review it and if the agreement is not in accordance with the law, then the notary will amend the agreement or ask parties of the agreement to modify the agreement in accordance with the law, since the notary is financially liable for any potential mistakes or law violations. The notary shall also explain to the parties all the aspects related to transaction and check the authenticity of documents provided. Copies of all documents related to the agreement (transaction data, power of attorneys, documents concerning acquisition of the property, copies of identity documents, etc.) shall be delivered to the notary's office 3-4 days before the conclusion of the agreement. All originals shall be submitted to the notary on the day of the conclusion of the agreement. In case a document has not been issued in the Republic of Estonia, the document shall be certified by an apostille or legalized and translated into Estonian prior to the conclusion of the agreement. Once the contract is signed, the notary makes digital copy of the contract and the contract is thereof forwarded electronically to the Land Register.

5. Representations and Warranties in real estate transactions

General legal responsibility of the seller in front of the buyer.

The seller is liable for any lack of conformity of a property, which exists at the time when the risk of accidental loss of or damage to the property passes to the purchaser, even if the lack of conformity becomes apparent after that time. In the event of consumer sale, the seller is liable for any lack of conformity of a property which exists at the time when the property is handed over to the purchaser even if the passing of the risk of accidental loss of or damage to the property is agreed for an earlier date.



In the event of consumer sale, the seller is liable for any lack of conformity of a property, which becomes apparent within two years as of the date of handing over of the thing to the purchaser. In the event of consumer sale, it is presumed that any lack of conformity which becomes apparent within six months as of the date of handing over of a property to the purchaser already existed before that, unless such presumption is contrary to the nature of the property or the deficiency.

In the case of a contract of sale, the object of which is an immovable property or a part thereof, apartment ownership or restricted real right, the part of which is a building, or membership of a building association, and which has been entered into by a seller who is engaged in economic and professional activities and a buyer who is a consumer, it is presumed that any non-conformity with the terms and conditions of the contract which becomes evident within two years as of the day of delivery of the building to the consumer existed at the time of delivery of the building, if such an assumption is not inconsistent with the nature or defect of the building. Agreements which derogate from the provisions of this subsection to the detriment of the consumer are void.

The seller is also liable for any lack of conformity of a property which becomes apparent after the risk of accidental loss of or damage to the property passes to the purchaser if the lack of conformity of the property arises from a violation of obligations by the seller.

The seller is not liable for any lack of conformity of a property, if the purchaser was or ought to have been aware of the lack of conformity of the property upon entry into the contract. However, it should be noted that only the purchaser that has entered into a contract of sale in the course of his or her professional or economic activities, has the obligation to examine the property.

Typical Representations & Warranties for transactions in different assets class.

Reps and warranties are normally part of the Sale-Purchase Agreement. The seller represents himself to be the owner, who has the legal authority to sell the property and warrants that the property is as he represent it to be. The most common warranties include the confirmation that all the maintenance fees concerning the property have been paid, there are no third party rights to the property and that the seller has provided accurate information about the property.

6. Mortgage regulation and other guaranties used in RE transactions

Common procedures for a mortgage constitution.

The real estate purchase is often financed by the loan and mortgage is very commonly established as a security on the real estate in the favor of the bank. A real right contract entered into for the establishment of a mortgage shall be notarial authenticated and is usually concluded at the same time with the Sale-Purchase Agreement. An application shall then be filed to make an entry into the Land Register, concerning establishment of a mortgage. The respective entry shall set out the mortgagee and the monetary amount of the mortgage (sum of mortgage). It is possible for the owner of the real estate to create several mortgages over the real estate, which each will get certain rank as agreed between parties and/or the upper rank mortgagee. If a claim secured by a mortgage is not satisfied, the mortgagee has the right to demand compulsory execution (selling the real estate) with the help of bailiff and pursuant to the procedure provided for in the Code of Enforcement Procedure.

How is the lender protected on a creditor execution.

A mortgage gives the best protection for the lender of the real estate. If a compulsory execution is carried out in order to satisfy the claims of mortgagees, such claims are satisfied from the money received from the compulsory execution of the immovable according to the ranking of the creditors.

There are no transfer taxes for real estate. According to the Estonian Income Tax Act, the income tax is charged on gains from the sale or exchange of any transferable and monetarily appraisable objects, including the immovable property. The income tax rate in 2016 is 20%.

7. Leases of business premises:

Applicable laws

The leases of business premises are regulated by the General Part of the Civil Code Act and the Law of Obligation Act, which distinguishes between residential and business lease contracts.

Typical provisions

The general provisions of the lease contract apply to the contracts for lease of the business premises, unless otherwise provided by law. However, the main difference is that while in case of residential lease contracts, it is not allowed to derogate from the provisions of law regarding the rights, obligations and liability of the parties, in business lease contracts it is permissible for the parties to agree on other terms than those established by law.

8. Taxes. Probably centered in indirect tax.

There are no transfer taxes for real estate.

According to the Estonian Income Tax Act, the income tax is charged on gains from the sale or exchange of any transferable and monetarily appraisable objects, including the immovable property. The income tax rate in 2016 is 20%.

The income tax is also charged on gains derived by a non-resident from the transfer of immovable property if the immovable being sold or exchanged is located in Estonia.

Gains from the transfer of immovable property are not subject to income tax, if an essential part of the immovable or the object of the apartment ownership or a right of superficies is a dwelling, which was used by the taxpayer as his or her place of residence until transfer, or a summer cottage or garden house has been in the taxpayer's ownership as a movable or an essential part of an immovable for more than two years and the size of the registered immovable does not exceed 0.25 hectares. These exemptions are also applicable to non-residents. If the tax exemption is

based on the use of the dwelling as the taxpayer's residence, the tax exemption is not applied to more than one transfer in two years.

The sale of real estate is VAT exempt, but VAT is applied to sales of improved land, if the improved land is sold before first time use of the building or sale of unimproved building land. VAT is optional for commercial real estate.

The land is subject to the land tax. The annual rate is 0,1-2,5 % of the taxable value of the land. The taxable value of the land is determined by local government. The taxable value does not usually conform to the market value of the land, e.g. in Estonia the taxable value excludes value of buildings on the land.

9. Public law permits and obligations.

The use of real estate may be restricted in the sea coast area, protected zone of power lines, nature reserves etc. The restrictions may mean that the part of real estate may not be used for buildings or the owner has to avoid activity in the protected zones, etc.

The Planning Act regulates relations between the state, local governments and natural persons and establishes the principles of planning and the requirements for the planning procedure and for the implementation of spatial plans.

The Building Act establishes the requirements for construction works, their design, building, use and maintenance.

10. Environment

Polluted Land

Estonia has used economic instruments for environmental protection since the 1990s. Environmental taxes used currently include the fuel excise duty, the excise duty on packaging and the heavy goods vehicle tax. An excise duty on electricity was established in 2008. Excise duties in Estonia have, however, primarily revenue objectives.



The most important tool in achieving the objectives of environmental policy and the polluter/consumer-pays principle is environmental charges, which have also been implemented since 1991. The grounds for implementation of environmental charges and procedures for calculation and payment, rates and use of the state budget revenue from the charges are governed by the Environmental Charges Act and acts thereunder.

An environmental charge is a price placed on the right to use the environment. The main types of environmental charges in Estonia are natural resource charges and pollution charges. Charges on pollution include air pollution charges on emissions (SO₂, NO_x, CO₂ etc.), water pollution charges (on N, P etc.), and charge on depositing waste on landfills.

Energy Efficiency qualifications.

A building's compliance with the minimum energy performance requirements is attested with the energy performance certificate, in accordance with the methodology established by the Estonian Ministry of Economic Affairs and Communications. Minimum energy performance requirements must be observed upon construction of a building and for the purposes of major reconstructions and, based on the building project, the compliance of buildings with the requirements will already be appraised during the project design stage.

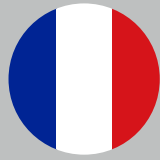
Minimum energy performance requirements are established for the building in general. Apart from the building shell and technical utility systems, local energy

production systems installed into the building or on the property are also considered as components of the building for the calculation of energy performance indicator. Technical utility networks that are linked to an energy distribution network (for example, district heating network) are considered as part of the building from the point of connection to the energy supply grid.

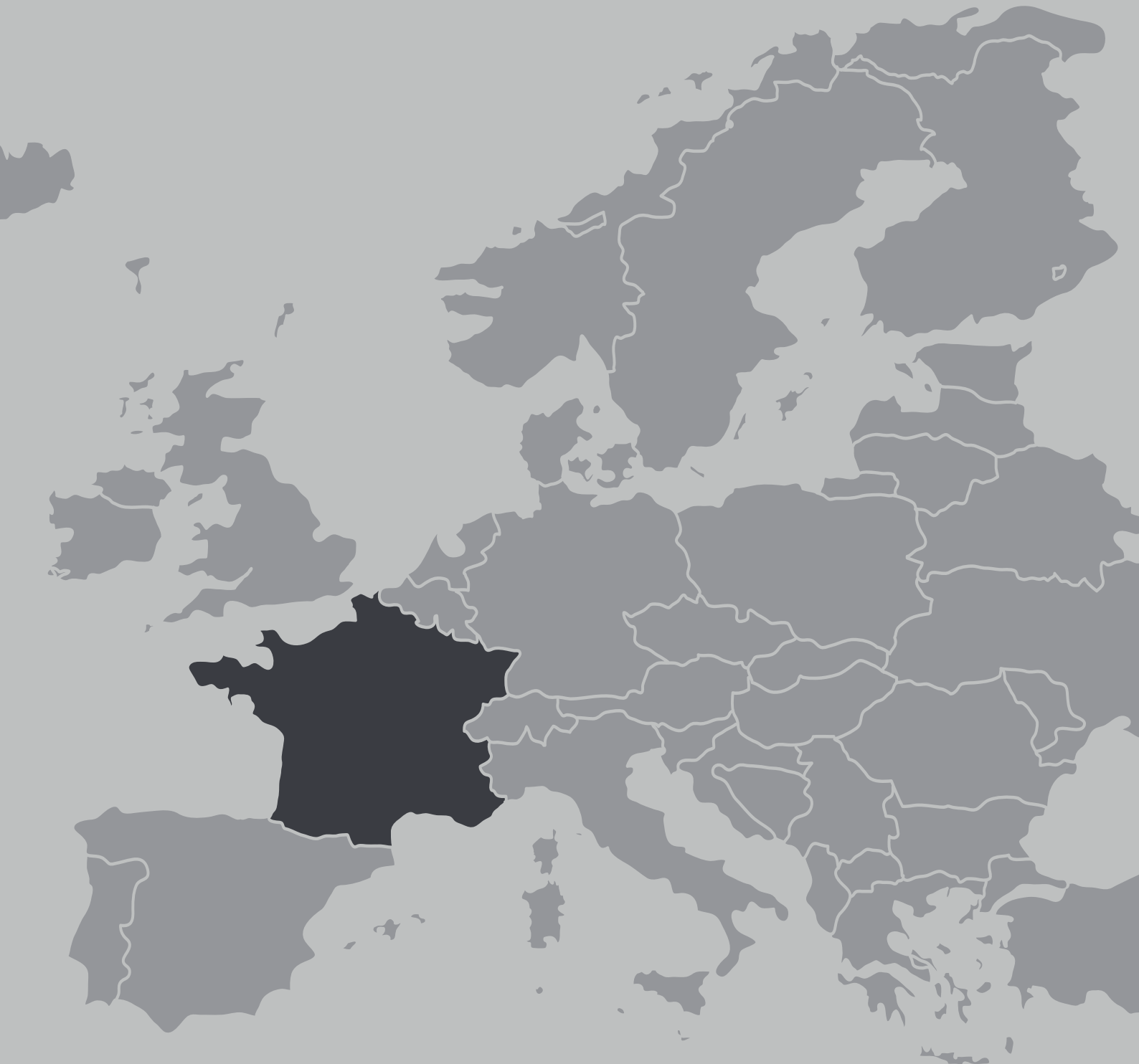
Compliance with minimum energy performance requirements is required of:

- small residential buildings
- apartment houses (incl. buildings used as welfare institutions and dormitories)
- office buildings, libraries and buildings of research institutions
- business buildings (accommodation and catering buildings, service provision buildings)
- public buildings (with the exception of zoo or botanical garden buildings, skating rinks and equestrian centers)
- trade buildings and terminals
- buildings of educational institutions
- buildings of pre-school child care institutions
- health care buildings





FRANCE





Jérôme Gertler
jgertler@taj.fr

1. Principal Real Estate Laws and Regulations in France

1.1. Ownership rights

Under French law, ownership rights are generally organized as follows:

- *Full ownership of real property ("droit de propriété")*: This right confers on the owner the right to use the asset (*usus*), the right to collect any proceeds therefrom (rents, interest on money due, etc.) (*fructus*), and the right to dispose of the asset (*abusus*).
- *Co-ownership ("copropriété")*: Co-ownership, a regime governed by the French law dated July 10, 1965, is an organization of the ownership of a building consisting of several ownership units (*lots de copropriété*) owned by various persons. Each unit comprises (i) a privately owned area (*partie privative*) and (ii) a right over the common areas (*parties communes*) (e.g. staircases, corridors, etc.). Each part of the building is identified in a statement describing the division of the property (*états descriptif de division*). The co-owners are required to abide by co-ownership rules and regulations (*règlement de copropriété*) which must be registered with the Land Registry. Each co-owner may freely enjoy not only their private area, but also the common areas, within the limits set out in the co-ownership rules and regulations.
- *Ownership by division into units ("division de propriété en volumes")*: This type of ownership pertains to a property that is divided into units of different size and shape (horizontally or vertically, or both), each unit having its own right of ownership. The owner is entitled to build within the limits of his or her unit, subject to any easements (right to natural light, etc.) set out in the deed establishing the division into units. There is no specific regulation governing the ownership by division into units. The principal difference between ownership by division into units and co-ownership is that, in the former case, each unit is independent and does not imply the creation of common areas as in co-ownership. In the unit concept, the property is divided vertically and horizontally (in cubic metres and not in square metres) into three dimensional units. Different portions of the property may be allocated to different owners, who have their own proprietary interest in their respective units. This type of ownership bestows upon the owner of each unit the right to build within it.
- *Long-term leases*: Such leases confer the equivalent of a real property right or right *in rem* ("*droit réel immobilier*") over the property upon the lessee. The two main types of long-term leases (both signed for a term of 18 to 99 years) are:
 - A construction lease ("*bail à construction*"): this is a long-term contract (minimum 18-year term, which cannot be tacitly renewed) under which the lessee must construct a predetermined structure on the land which is leased, as well as maintain/operate this structure. The construction lease confers a right *in rem* over the land and full ownership over the structure until the end of the lease. Upon expiry of the lease, the land, as well as the structure, revert to the owner of the property.
 - A long-term lease ("*bail emphytéotique*") under which the lessee is financially responsible for the maintenance of the land/property. The principal difference with respect to a construction lease is that the lessee has no obligation to build, but only the possibility to do so. As in the case of a construction lease, this lease confers a right *in rem* upon the lessee, which may be freely transferred or mortgaged.

1.2. Lease agreements

French law on commercial leases is governed by a decree ("*décret*") dated September 30, 1953, which



has been codified as part of the French Commercial Code ("*Code de commerce*"). French laws no. 2014-626 and no. 2015-990 enacted on June 18, 2014 and August 6, 2015 (respectively known as the "Pinel Law" and the "Macron Law") amended some of the provisions applicable to commercial lease agreements.

For the most part, these rules are mandatory and are lessee-friendly in that they aim to protect the security of tenure (*commercial property*) of the lessee and the stability of current businesses ("*fonds de commerce*") by:

- granting the lessee the right to renew the commercial lease; and
- granting the lessee the right to an indemnity should the lessor refuse to renew the commercial lease, to compensate the lessee for any harm suffered (the lessor's refusal to renew the lease must be based on serious and legitimate grounds, e.g. default by the lessee under the terms of the lease, unpaid rent or subleasing without consent).

The main provisions of commercial lease agreements concern its duration and renewal, rent, major repairs and the right to transfer or sublease the lease agreement.

The regulations applicable to commercial lease agreements are further detailed in Section 7 (Leases of business premises) below.

2. Ownership rights

2.1. Restrictions on real estate ownership (foreign entities)

Foreign-registered or foreign-controlled entities are free to carry out real estate investments in France, but they must subsequently file a declaration with the French Ministry of the Economy ("*Direction du Trésor*") (failure to file such a declaration, exposes the entity to a fine equal to the maximum amount applicable to class 4 contraventions), except in the case of direct investments in French-law companies having real

estate activities other than construction for sale or rental purposes (*article R.152- 5 of the Monetary and Financial Code*). The declaration is filed once the investment has been made and must contain the following information:

- Foreign investor (name, address and shareholders).
- French company which was incorporated, or in which a stake was purchased (name, address, type of activity and financial statements).
- Transaction details, including the location, scope and use of the property, as well as the principal terms and conditions.

The French central bank (*Banque de France*) must also be notified of real estate investments exceeding €15 million for statistical purposes.

2.2. Ownership structures usually applied in business transactions in which ownership of the property is distinct from the right to build

Ownership of real estate assets grants the owner a right *in rem*, which includes the right to build.

Nonetheless, under French law there exist certain alternative ownership structures wherein ownership of the property is distinct from the right to build as is the case for the construction leases and the long-term leases (with characteristics as detailed herein below).

3. Registry system ("*Services de la publicité foncière*")

To be enforceable against third parties, transfers of real estate ownership must be certified by a written deed of transfer, authenticated by a French public notary ("*Acte notarié de vente*") (transfer deed).

All transfer deeds must be registered by notaries with the local Land Registry ("*Services de la publicité foncière*") upon execution. The notary must provide evidence of a 30-year root of title in the transfer deed.

Foreign-registered or foreign-controlled entities are free to carry out real estate investments in France, but they must subsequently file a declaration with the French Ministry of Economy.

To date, no electronic access or electronic conveyance is available in France.

Information available at the *Services de la publicité foncière* includes:

- The identity of current and former owners.
- The acquisition date of the real estate.
- Details of any:
 - easements and encumbrances,
 - registered mortgages,
 - long-term leases (lasting over 12 years),
 - real estate finance leases.

As the above information must be registered with the *Services de la publicité foncière*, it is available to third parties. The other elements of the transaction are included in the section of the real estate transfer deed which is not registered with the *Services de la publicité foncière*. Accordingly, it is not disclosed to third parties.

There is no state guarantee of titles and the *Services de la publicité foncière* cannot be held liable for registering inaccurate information. Registration of titles with the *Services de la publicité foncière* by notaries allows the title holder to exercise owners' rights against third parties. However, any interested third party may challenge the title in court.

Title insurance is not widely available. The notary and its liability insurer guarantee the title's validity.

4. Notary roll on the transactions

4.1. Asset deals

In asset deals, the parties and the notary execute a transfer deed. The notary authenticates and stamps the deed, and must register it with the local Land Registry ("*Services de la publicité foncière*") within 1 month of its signing to make the title transfer enforceable against third parties. Indeed, in order to be enforceable against third parties, transfers of real

estate ownership must be certified by a written deed of transfer authenticated by a French public notary ("*acte notarié de vente*") (transfer deed).

Proof of a 30-year root of title must be included in the transfer deed by the French public notary.

Despite the fact that, under French law, the title will in principle be transferred once the terms and conditions of the sale have been agreed upon between the parties, the latter usually agree that the title only transfers upon payment in full of the purchase price to the seller.

Notarization is required. The buyer generally pays the notary's fees, which tend to represent approximately 0.825% (VAT excluded) of the purchase price (including VAT).


4.2. Share deals

In share deals, the parties sign a share purchase agreement and the concomitant warranty agreement (see paragraph below), as well as ancillary documents (such as the transfer order and escrow agreements), if any. The parties usually agree that the shares are transferred to the buyer upon payment of the provisional purchase price to the seller, it being specified that this price is usually adjusted after completion, on the basis of the final accounts of the purchased company as of the transfer date.

Notarization is not required.

5. Representations and Warranties in real estate transactions

The seller of real estate assets automatically warrants the purchaser that:

- the real estate property complies with the agreed-upon definition and characteristics (obligation of compliant delivery) in accordance with article 1605 of the French Civil Code, and 

- the purchaser shall enjoy the peaceful possession ("*possession paisible*") of the transferred real estate property in accordance with article 1625 of the French Civil Code.

Furthermore, several specific documents regarding environmental matters must be provided by the seller, including:

- Documents concerning specific issues such as:
 - Asbestos,
 - Termites (for buildings located in contaminated areas or areas likely to be contaminated, as identified by a prefectural order),
 - Lead (for residential property only),
 - Soil pollution,
 - Indoor gas installation (for residential property only),
 - Indoor electricity installation,
 - Private sewer system (*installations d'assainissement non collectif*) (for residential property only).
- A statement on natural, mining, and technological risks (*état des risques naturels, miniers et technologiques*) (ERNMT).
- An energy performance diagnosis (*diagnostic de performance énergétique*) (DPE).

In most cases (for asset deals in particular), in addition to the legal warranties that are automatically provided, the seller frequently provides additional warranties to the buyer (which may vary depending on the type of real estate asset transferred and on the outcome of the due diligence review) including:

- additional information regarding urban development, permits, construction and administrative authorizations,
- additional information regarding the rental situation,
- additional information regarding the local environment (soil conditions, absence of hazardous materials, etc.),
- the absence of default with respect to any of obligations or liabilities pertaining to the real estate property,
- the absence of mortgages, encumbrances, charges, liens or claims of possession,

- information regarding any preemption rights,
- the absence of commitments to or agreements with third parties affecting the real estate property,
- the absence of any action, violation or condemnation proceedings.

In the case of share deals, representations and warranties concerning the target company owning the real estate assets are provided by the seller (registration and existence of the company, share capital and ownership of the shares, subsidiaries, accuracy of the accounts, off-balance sheet commitments, indebtedness, taxes, contracts entered into by the company, employees and litigation, etc.).

Indemnities in the case of a breach of the above representations and warranties is usually limited as to:

- their amount (*de minimis*, threshold and cap), and
- their duration (which depends on the representation and warranty concerned). In France, the duration is usually 3 years.

Indemnities are usually excluded if the claim of the purchaser relates to any information or fact that has been disclosed in the course of the due diligence review (sometimes the entire data-room) or in the transaction documentation (including schedules to the SPA).

6. Mortgage regulations and other guaranties used in real estate transactions

6.1. Most common types of security interests, including mortgages

In France, the most common types of security interests granted to secure real estate financing are mortgages on the real estate assets (*hypothèques*) and assignments of receivables (e.g. rents, insurance indemnities, etc.).

Mortgages: mortgages are granted under a notarial deed, which is subsequently registered with the local Land Registry. Such registration aims to allow the title holder to exercise owners' rights against third parties.

Assignment of receivables: with respect to the assignment of receivables, the borrower must fill out Dailly law assignment forms (*bordereau Dailly*) in order for the assignment to be effective between the parties and enforceable against third parties. There are no specific registration requirements.

In addition, pledges of the borrower's shares and pledges of the borrower's bank accounts are often granted.

6.2. Protection of the lender

As a condition precedent, lenders typically require of the borrower a valuation report on the financed assets and the financial statements of the borrower and/or its shareholders. What is more, in accordance with the financing documentation, the borrower must comply with financial ratios and specific covenants.

In addition to the mortgages and assignment of claims referred to above, the lender may ask for additional guarantees from an additional guarantor (e.g. joint and several guarantee, autonomous guarantee, letter of intent, cash reserve, etc.).

If the debtor defaults on the loan, a mortgage entitles the lender to:

- require the sale of the property at a public auction and be reimbursed from the proceeds,
- obtain a court order transferring title to the secured property as payment of its claims.

The mortgage agreement may also provide that the lender, in the case of default, will be automatically vested with the title to the property for a consideration determined by expert appraisal.

Claims assigned by way of Dailly assignment of receivables: the lender to which the debtor's receivables have been assigned by way of Dailly assignment may seek direct payment of these assigned receivables despite any filing for insolvency. This decision was issued by the Paris Commercial Court in the *Coeur Défense* case, and upheld by the Versailles Court of Appeals on February 28, 2013.

7. Leases of business premises

French law on commercial leases is governed by the decree ("*décret*") dated September 30, 1953, which has been codified in the French Commercial Code ("*Code de commerce*"). The Pinel Law and Macron Law then amended some of the provisions applicable to commercial lease agreements.

i. Duration of the lease

The minimum term of a commercial lease agreement is 9 years. Nonetheless, if both parties are agreed, it may be entered into for longer terms (10, 12 years, etc.).

Prior to the Pinel Law (applicable principally to lease agreements entered into or renewed as of September 1, 2014), the lessee was entitled to terminate the commercial lease at the end of every 3-year period, unless otherwise agreed upon by the parties. Since the Pinel Law, the lessee can no longer waive its right to terminate the commercial lease at the end of every 3-year period except for certain leases (for instance, leases having a duration of more than nine years or leases for single-uses premises).

In cases where the lease exceeds 12 years, it must be registered with the local land registries, rent is no longer capped in the case of renewal, and additional taxes must be paid.

Despite the fact that commercial lease agreements provide for a definite duration, the lease will remain in force for an unlimited time unless (i) it is renewed (see paragraph *ii* below), (ii) 6-months' prior termination notice is served by either party (since the Pinel Law and the Macron Law, notice is served, for the lessee, by registered letter with acknowledgment of receipt or by an extrajudicial act or, for the lessor, by an extrajudicial act only), or (iii) the lessee is in breach of contract (enforcement of the forfeiture clause, "*clause résolutoire*").

ii. Renewal of the commercial lease

The rules governing French commercial leases grant the lessee a right of renewal of the lease. Accordingly, if the lessor refuses to renew the lease, the lessor must pay an eviction indemnity ("*indemnité d'éviction*") compensating the harm suffered and costs incurred by the lessee as a consequence of having to relocate its activities. However, the lessee's right of renewal is subject to three cumulative conditions:

- the existence of a commercial lease agreement,
- the lessee must operate its business as a going concern on the rented premises for a minimum of 3 years prior to the expiry of the lease, and
- the business activity and premises are duly registered with the Trade and Companies Register ("*Registre du commerce et des sociétés*") or the *Répertoire des métiers*.

The lease is normally renewed under identical terms and conditions, save for the rent (see paragraph *iii* below), unless otherwise agreed upon by the parties.

iii. Rent

The parties to a commercial lease agreement may freely determine the rent, although it should



normally be in line with the market value of the property.

Usually, the rent is either a fixed amount (e.g. for office buildings) or twofold, i.e. fixed rent (guaranteed minimum rent) coupled with a variable sum based on a percentage of the lessee's turnover (e.g. for retail space).

Indexation of the rent: indexation clauses are subject to the requirements of the commercial lease regulations and the French Monetary and Financial Code. Failure to comply with such requirements may entail the calling into question of the clause before the courts.

Usually, the parties provide for the rent to be automatically indexed annually on the basis of an index published quarterly by the INSEE. Nonetheless, depending on the activity carried out on the rented premises, the applicable index may be the ILC ("*indice des loyers commerciaux*"), or the ILAT ("*indice des loyers des activités tertiaires*").

Both the lessee and the lessor may claim for a revision of the rent after a minimum 3-year period.

Renewed rent: the renewed rent must reflect the market value of the property, but the rent under the renewed lease will be capped at the amount of the variation of the applicable index between the start date of the lease and its termination date.

There are some limited exemptions from the cap rules (the Pinel Law, however, provides that, should the cap not apply, the variation in the rent must be limited to 10% of the rent paid over the previous year), including:

- renewal for a term exceeding 9 years,
- leases for which the effective term exceeds 12 years due to tacit renewal, or

- significant changes in the characteristics of the rented premises, the use of the premises, the respective obligations of the parties, or local commercial factors ("*facteurs locaux de commercialité*").

iv. Major repairs

Since the Pinel Law, the parties must fill out the incoming and ongoing inventory of fixtures, failing which the lessee may not be held responsible for the poor state of the premises.

Major repairs are notably governed by article 606 of the French Civil Code.

The cost of major repairs is in principle borne by the lessor, but the parties may agree otherwise.

Nonetheless, it should be noted that, pursuant to a decree dated November 3, 2014 (in the framework of the Pinel Law), there exist "service charges, taxes, duties and fees that, given their nature, cannot be charged to the lessees".

v. Assignment and subleasing

Assignment: as a general rule, the lessee may not transfer the lease agreement without the prior authorization of the lessor, subject to certain formalities, except in the case of transfer of the lessee's business as a going concern ("*fonds de commerce*").

Generally, lease agreements stipulate that, in the case of assignment, the lessee shall remain the guarantor of its assignee until the expiry of the lease.

Since the Pinel Law came into force, the lessee enjoys, under certain conditions, a preemption right in the event that the lessor sells the rented premises.

Subleasing: unless specifically agreed upon by the parties (for instance, a sublease to a company controlled by the lessee), the lessee is not authorized to sublease the rented premises.

Lenders typically require from any borrower, as conditions precedent, a valuation report relating to the value of the financed assets and the financial statements of the borrower and/or its shareholders.

8. Real estate taxes.

8.1. Tax due in the context of the acquisition (transfer tax)

Acquisitions of real estate assets are generally subject to a transfer tax ("*taxe de publicité foncière*" or "*TPF*"). This transfer tax is due when registering the deed of transfer. The Transfer tax is in principle levied on the sale price (excluding VAT) of the real estate asset or on the market value if higher. The transfer tax rate depends on several factors, which are the VAT status of the vendor, the nature of the real estate asset, the location of the real estate asset and certain commitments which may be made by the purchaser.

A CSI tax of 0.10% is also due on the sale price (including VAT), as well as notary fees (0,814%, VAT excluded, of the sale price including VAT).

The TPF tax, CSI tax and notary fee are usually paid by the purchaser of the real estate asset, unless the parties decide otherwise.

TPF and CSI tax summary

The vendor is not a VAT taxable person	TPF of 5.80% plus an additional tax of 0.6% for certain assets located in the Ile-de-France region (e.g. office buildings), which gives a total of 6.40% CSI tax of 0.10%
The vendor is a VAT taxable person	Property to be built upon: TPF of 0.715% (VAT on price) or 5.80% (VAT on margin) Property completed for less than 5 years: TPF of 0.715% Property completed for more than 5 years: TPF of 5.80% plus an additional tax of 0.6% for certain assets located in the Ile-de-France region (e.g. office buildings) which gives a total of 6.40% CSI tax of 0.10% in all cases

The TPF tax may be reduced to the extent that the purchaser makes and fulfills a commitment to resell the property or to rebuild on it. Such commitments are limited to purchasers that are VAT taxable persons.

Commitment to resell the property: TPF reduced to 0.715%. The CSI tax of 0.10% remains due. The purchaser must resell the property within 5 years of the acquisition date. Under certain circumstances, the 5-year period is reduced to 2 years.

Commitment to rebuild on the property: TPF reduced to a fixed fee of €125. The CSI tax of 0.10% remains due. The purchaser must rebuild within 4 years of the acquisition date of the real estate asset. Annual extensions may be granted by the FTA. Certain refurbishments may be considered as a new building. French practice is to file a ruling claim.

8.2. VAT – acquisition of real estate assets and leases

Acquisitions of real estate assets may also be subject to VAT when the vendor is a VAT taxable person. The standard VAT rate is 20%. Reduced rates may be applicable to certain residential buildings. Certain transactions are VAT exempt. However, the vendor may waive the exemption. VAT is, in principle, due on the price. Under certain circumstances, VAT is due on the margin (sale price less purchase price).

A TOGC VAT exemption is applicable, under certain conditions, when the sale of the real estate asset occurs in the context of a transfer of activity, e.g. the property is sold with a lease subject to VAT by the lessor to another lessor, who will continue to rent the property with VAT.

The lease of a building is, in principle, VAT exempt. An option to tax is applicable, except for residential buildings. Certain leases are subject to VAT.

8.3. Local taxes

In France, local taxation principally comprises the following taxes:

- a real estate property tax ("*taxe foncière*"),



- a territorial economic contribution ("*contribution économique territoriale*"),
- an annual Ile-de-France office tax (for properties located in the Ile-de-France region),
- a 3% tax.

9. Public law permits and obligations

Building permits are required to:

- construct new buildings, or
- undertake construction work on existing buildings, if such construction results in a change of function or the creation of additional surface area.

In the Ile-de-France region, a specific authorization ("*agrément*") is required from the local representative of the state if the building is dedicated to certain activities (office, industrial, commercial, professional, administrative, technical, scientific or educational uses).

Authorizations to operate facilities that have been labelled "classified for the protection of the environment" ("*installations classées*") may also be required.

Lastly, a statutory preemption right ("*droit de préemption urbain*") entitles local collectivities to become priority acquirers of real estate property for sale in certain pre-defined zones. Since the passing of French law no. 2014-366 of March 24, 2014 on access to housing and urban development reform ("*Loi pour l'accès au logement et un urbanisme rénové*", also known as the "ALUR Law"), this preemption right has been extended, under certain conditions, to free transfers and to transfers of majority shares in real estate companies (SCIs).

10. Environment

10.1. Polluted Land

Classified Installations for the Protection of Environment ("ICPE") regulations apply specifically to installations likely to cause nuisances, hazards and pollution (including land pollution). As a consequence, a special permit delivered by the Prefect is required for the installation of an ICPE.

In accordance with French law no. 2014-366 of March 24, 2014 on access to housing and urban development reform (ALUR Law) the seller or lessor of a property located in a "soil information zone" has the obligation to inform the buyer or lessee in writing of such a situation.

Failure to comply with this requirement exposes the seller or lessor to penalties.

The buyer/lessee may even request the cancellation of the sale/lease, the repayment of a portion of the price or a reduction of the rent, or the rehabilitation of the polluted site if it proves to be the case that the pollution makes the land unsuitable for the use stipulated in the agreement.

Before the ALUR Law, rehabilitation work on an ICPE had to be carried out by the most recent operator. Even though such an obligation was contractually transferrable to a third party, the French authorities were not bound by the transfer. Subject to the approval of the *Préfecture*, the ALUR Law expressly authorizes the transfer of the rehabilitation work to a third party.

The order from the *Préfecture* authorizing the transfer and describing the rehabilitation work to be performed, as well as the financial guarantees, is communicated to the parties.

10.2. Energy efficiency qualifications

In accordance with French law no. 2009-967 of August 3, 2009 and French law no. 2010-788 of July 12, 2010 (known as the Grenelle 1 and Grenelle 2 Laws), buildings (whether residential or commercial) are subject to strict requirements with respect to energy efficiency. Such requirements were ratified by French law no. 2015-992 on Energy Transition for Green Growth.

In particular, new tertiary buildings must be "low consumption buildings" ("*Bâtiments Basse Consommation*")

What is more, for existing tertiary buildings, rehabilitation to improve energy efficiency must be undertaken in such a way that all buildings comply with the *Bâtiment Basse Consommation* regulations (or similar) by 2050.





FINLAND





Susanna Tiihonen

susanna.tiihonen@deloitte.fi

1. Real estate law: describe the main laws that govern property ownership and leases in your country

1.1. Background

The forms of ownership of real estate in Finland are somewhat different compared to many other countries. In Finland, property can be fixed (i.e. real estate) or movable (e.g. building). Under the Finnish legislation, real estate refers to an independent land ownership unit entered into the cadaster as real estate. Subsequently, there may be several buildings located in a real estate. Also the rights and obligations related to the actual real estate and the buildings located thereon may belong to different parties.

A real estate may be owned either by natural persons and/or legal entities. Alternatively, the real estate ownership may be structured e.g. in the following forms of legal entities:

- Real estate companies (REC);
- Mutual real estate companies (MREC); or
- Housing companies.

To further clarify, e.g. the assets of housing companies typically consist merely of a real estate owned or leased by the company. Subsequently, the buildings located in the real estate are movable property owned and maintained by housing company. The shareholders of the company typically own certain amount of shares providing the right for possession of one or more apartment(s) in the building located in the real estate.

1.2. Main laws

The basis of the real estate legislation in Finland is set out in the Code of Real Estate (12.4.1995/540, as amended). The provisions of the Code of Real Estate

contain, among other aspects, the basis for sale and purchase of real estate, registration procedures and real estate encumbrances. The provisions of the Code of Real Estate are crucial when ownership of a real estate changes. Where the ownership of shares in a company possessing the ownership of the real estate (and not the real estate itself) changes, the provisions of the Code of Real Estate will not be applicable to the transaction as such. Instead, the provisions of the Finnish Limited Liability Companies Act (21.7.2006/624, as amended) or Limited Liability Housing Companies Act (22.12.2009/1599, as amended) will be applicable to such transactions. However, as the real estate is an essential asset of the company in the above-mentioned transactions, e.g. the due diligence process and terms of the sale and purchase agreement will need to be paid careful attention to.

In terms of sale and purchase of real estate, the Code of Real Estate particularly states that the principle of freedom of contract is applied to real estate transactions, unless otherwise stated in the relevant provisions. Thus, the parties may determine the terms and conditions of the sale and purchase agreement rather freely as far as no restrictions on the relevant matters are imposed elsewhere in the legislation. However, there are certain formal requirements that need to be met in order to make a real estate transaction valid. Furthermore, also the Finnish Contracts Act (13.6.1929/228, as amended) is applicable to most of the real estate related contractual relationships as it is the general law in the field of contract law.

The rules on lease of real estate property are set out in the Land Tenancy Act (29.4.1966/258, as amended). Additional relevant provisions may be found from the Act on Residential Leases (31.3.1995/481) and the Act on Commercial Leases (31.3.1995/482).



However, the Act on Residential Leases and the Act on Commercial Leases regulate the situations where the lease relationship relates to a building, or its part, while the Land Tenancy Act is connected to the actual real estate property.

Although the Code of Real Estate sets out the basis for real estate law, also the company law perspective is relevant when having a look into the subject matter, especially from commercial perspective. When it comes to the commercial use, real estate property is in many cases, as indicated above, owned through legal entities. Subsequently, the provisions of the Finnish Limited Liability Companies Act and Limited Liability Housing Companies Act are relevant in the field of commercial real estate.

In addition to the above, there are several additional regulations governing e.g. building, land use and environmental matters.

2. Ownership rights

2.1. Restrictions on ownership of real estate

The principal rule is that there are no restrictions for real estate ownership. For example, foreign individuals or foreign legal entities may, as a rule, freely acquire real estate in Finland.

The main restrictions relate to ownership of real estate in Åland (in Finnish: Ahvenanmaa), where also the ownership of Finnish persons and entities is restricted and subject to proceedings with the authorities. Further, municipalities may have the right to redeem real estate sold if the land is required for civil engineering, recreational or protection purposes. However, it is somewhat general understanding that real estate ownership is not too much restricted in Finland.

Are there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

The right to build does not necessarily follow the ownership of a real estate. Under the Finnish legislation, it is possible that the owner of a real estate leases out the real estate with the effect providing the building right to the lessee. The land lease agreement has to be registered in the public registrations system with the National Land Survey Authority. The lessee may in many cases transfer the land lease right to third parties and also apply for encumbrances related to the land lease right e.g. for financing purposes.

3. Registry system

3.1. Structure of the property registries in your country

The National Land Survey Authority maintains registers concerning real estate, such as the title and mortgage register. In addition to the National Land Survey Authority, many municipalities participate in the maintenance of the Cadastre. The Cadastre is a public register that is a part of the Land Information System. The Land Information System consists of the information included in the Cadastre and in the title and mortgage register covering the entire country.

The title and mortgage register is a public source connected to the Land Information System. It contains e.g. the following information related to real estate registration matters:

- Property ownership information
- Mortgages (i.e. using real estate as debt collateral)
- Special rights granted upon application (e.g. leaseholds)

The official purchase price register contains information on transferred real estates, purchase prices, as well as transferors and recipients of real estate. The information is based on the notifications submitted by public purchase witnesses. The register contains information on all transfers that have taken place as purchases, exchanges, gifts, partition agreements and preliminary agreements related to real estate purchases. It should be noted, however, that the information only shows the transfer that have involved transfer of ownership of an actual real estate. However, deals involving ownership changes of shares in real estate company, are not presented in the registers.

In the field of real estate, registrations typically have major legal consequences. Briefly, most of the real estate related rights are established only at the moment when relevant registrations take place. For example, the new owner of a real estate will be registered in the public title and mortgage register. After the registration, the ownership information of the real estate is shown on the certificate of title. A title is also a requirement for using the property as debt collateral. In addition, the parceling of an unseparated parcel will not commence until title has been granted.

The process for applying for a title registrations is briefly the following;

- Completion of a real estate transaction;
- Buyer files an application for title registration with the National Land Survey Authority;
- The National Land Survey Authority examines the validity of the transaction;
- Subject to clearance of the above steps, the National Land Survey Authority enters the buyer of the real estate in the title and mortgage register.

As mentioned above, also registration of a land lease agreement is required.

4. Notarization

There is no need for notarization of a real estate transaction in Finland. However, a public purchase witness acts as a witness to a transaction as well as identifies the parties and confirms the formal validity of the real estate transaction. The public purchase witness is required in case of ownership change of a real estate. There is no need for public purchase witness in case of sale and purchase of shares in a company possessing the ownership of the real estate.

5. Representations and warranties in real estate transactions

5.1. General legal responsibility of the seller in front of the buyer

Provided that the principle of freedom of contract is applied in real estate transactions, a legal responsibility of the seller can be defined rather freely between the parties of a transaction. However, there are certain provisions defining the legal position of the parties. For example, the seller is by law responsible for payment obligations that are regarded as public in nature (i.e. obligations towards authorities) and created prior to the transaction in question.

5.2. Typical representations and warranties

Representations and warranties in real estate transactions are strongly dependent on the outcome of a due diligence review and findings of the same. Also the value of the transaction and the previous use of the real estate are typically relevant when determining how extensive representations and warranties are reasonable in the transaction in question.

In case of low value real estate transaction, parties can in many cases enter into rather straightforward agreement stating that the seller is the owner of a real estate, it has the authority to sell the real estate and that no mortgages and/or other similar arrangements

are encumbering the real estate. In case the previous use of real estate involves e.g. major environmental risks, this naturally should be taken into account in the sale and purchase agreement. The common terms include also e.g. confirmation on that all the statutory fees have been paid in full and in a timely manner.

If the ownership of a real estate is structured in the form of sale and purchase of shares in a company possessing the ownership of the real estate, the representations and warranties are in many aspects similar to those of typical share deals. The share sale and purchase agreements typically contain provisions on e.g. corporate law and compliance related matters. However, as the real estate mainly is an essential asset of the company in the above-mentioned transactions, it is advisable to also include provisions relating to the ownership of a real estate, mortgage arrangements and environmental matters in the share sale and purchase agreement.

6. Mortgage regulation and other guarantees used in RE transactions

6.1. Common procedures for a mortgage constitution

In Finland, there are several ways to secure financing real estate investments and to use real estate as a security. Practically almost any kind of asset can be subject to security provided that it can be identified, is assignable and can be subject of enforcement procedure as well as has value as a subject of exchange. Typical forms of financing and securities in the field of real estate include, but are not limited to;

- Pledge over real estate (mortgage)
- Pledge of movable property (e.g. shares and IPR)
- Floating charge
- Sale and leaseback arrangements
- Retention of title
- Contractual commitments, such as covenants and letters of comfort.

The procedures and publicity requirements of the above arrangements are different depending on the selected security and financing structure.

The most common security arrangement relating directly to a real estate is mortgage. A real estate mortgage is established by way of filing a



mortgage application with the National Land Survey Authority. In connection with the completion of the mortgage application procedure, the National Land Survey Authority notifies the applicant when the electronic mortgage deed is registered in the title and mortgage register. The National Land Survey Authority has issued only electronic mortgage deeds since 1 June 2017. However, there are still a lot of deeds of mortgages in use in paper form. The mortgages can be applied although there was no existing or contemplated loan arrangements at the time of application. Instead, the owner of a real estate may apply for mortgage establishment any time and issue the deed of mortgage as a security to the lender in the future. Thus, the actual security arrangement is established by way of providing the deed of mortgage (in paper form) to the creditor or by way of applying for the creditor to be registered as receiver of the deed (electronic mortgage deed). Further, there is no need to amortize the deed of mortgage as a result of loan repayment since the creditor is obliged to return the deed of mortgage back to the owner of a real estate as a result of repayment and the deed of mortgage can subsequently be re-used as a security for the potential future financing needs. As regards electronic mortgage deeds, changes regarding the receiver of the deed can be registered respectively.

The lender protection on creditor execution is strongly dependent on the used security. As a general remark, real estate mortgage provides the creditor with priority over unsecured creditors in execution procedure leading to a higher ranking pledgee over lower ranking pledgees. A possession of a real estate mortgage also provides the creditor a preferential position in the debtor's bankruptcy.

However, commercial real estate transactions typically involve complex financing arrangements where also other objects in addition to a real estate are involved. When structuring a transaction and arranging the

required financing, it should be noted that it is prohibited for a company to lend money or assets or grant a security for the purposes that a third party could acquire the company's or its mother company's shares.

7. Leases of business premises:

The rules on lease of real estate property are set out in the Land Tenancy Act. Additional relevant provisions may be found from the Act on Residential Leases and Act on Commercial Leases. However, the Act on Residential Leases and Act on Commercial Leases regulate the situations where the lease relationship relates to a building, or its part, while the Land Tenancy Act is connected to the actual real estate property.

Business premises are typically leased from buildings, unless the operations require land areas e.g. for storage of machinery. Thus, the Act on Commercial Leases is typically the relevant act regulating the leases of business premises. The provisions of the Act on Commercial Leases are mostly mandatory in nature, i.e. it is not possible to deviate from the provisions of the act unless it is otherwise stated in the legislation.

Under the Act on Commercial Leases, lease agreements may be entered into until further notice or for a fixed period of time. Further, it is mandatory to prepare the agreements in a written form. In case no written agreement exist, the term of lease is perceived to be until further notice.

The Act on Commercial Leases contains particular rules on unfair terms of a lease agreement. Thus, it is possible that unfair terms result in a situation where a party to an agreement cannot claim for unfair provision and/or unfair terms will be null and void.

Lease agreements relating to business premises typically contain provisions on lease collaterals.

Lease collaterals are used e.g. for the purposes to ensure that the lessor can get compensation for possible unpaid lease amounts and/or damages caused by the lessee. Other typical terms of a lease agreement contain e.g. provisions on the purpose of use of the premises and other clarifying provisions on the restrictions on the use of the premises. The lease amount is naturally one of the key terms of a lease agreement.

Based on the provisions of the Act on Commercial Leases, the lessee do not have, as a rule, the right to transfer the lease right to a third party without prior consent from the lessor. On the other hand, the right of a lessor to transfer its rights to a third party are more flexible. Parties may, however, agree on the details of the transfer to a third party rather freely as they may wish on a case-by-case basis.

8. Taxes

8.1. Transfer tax on acquisitions

The transfer of shares in a Finnish housing or real estate company (or in companies of other forms whose activities in practice consist mainly of directly or indirectly owning or controlling Finnish real estate) is subject to a transfer tax of 2%. This definition includes Finnish and non-Finnish holding companies.

The party liable to transfer tax is the purchaser. Generally, if the purchaser is a non-resident, the Finnish resident seller is liable to collect the transfer tax from the purchaser and remit that tax to the Tax Administration. Transfer tax is payable and transfer tax return due within two months from concluding the transaction.

- The tax base used for calculating transfer tax is:
- The purchase price plus,

- Any payment made by the purchaser that is a condition for the transfer in the transfer agreement (e.g. payments made in the closing event), plus

Any liability the purchaser assumes as part of the transfer where the transferor benefits from the arrangement (e.g. assumption of debt obligations),

and where the seller or a related party to the seller benefits from the arrangement.


Furthermore, generally where shares are transferred in an MREC, loans that are attributable to the designated shares of the MREC would also be included in the tax base.

Transfer of Finnish real estate is subject to transfer tax at a rate of 4% on the purchase price.

8.2. Value added tax

Real estate transactions are VAT exempt in Finland. The VAT exemption applies also to sale of shares of MREC or REC. Further, the input VAT on transaction costs related to sale of real estate or shares of a real estate company is not deductible in Finland according to the Finnish tax authorities' new guidance.

Also leasing of real estate property is VAT exempted in Finland and, accordingly, the input VAT on costs incurred in relation to the VAT exempt leasing, e.g., VAT on new construction and maintenance costs, is not deductible. However, it is possible to opt to VAT for leasing of real estate property provided that certain conditions are met. Most importantly, the real estate or a part of it needs to be used continuously for activity which entitles to VAT recovery.

Real estate investments, namely new construction or major renovation that are capitalized for corporate income tax purposes are subject to the VAT adjustment period. The adjustment period is 10 years, as from 

the beginning of the calendar year during which the construction work was completed. If the taxable use of the premises decreases during the 10 year adjustment period, VAT deductions made may need to be adjusted, i.e., VAT partially repaid. Respectively, if the taxable use of the premises increases, additional VAT deductions can be made. Proper documentation should be maintained and the taxable use of the premises monitored constantly during the 10 year adjustment period. In transactions, the adjustment liabilities and rights are, as a main rule, transferred to the purchaser of the real estate. The seller must provide specification of the real estate investments subject to the VAT adjustments in order for the purchaser to be able to comply with the VAT legislation.

9. Public law permits and obligations

As indicated above, real estate related proceedings, especially with regard to creating of a real estate unit, transfer of ownership of real estate and encumbrance proceedings, are rather strongly connected to proceedings with the authorities. In addition, construction works and handling of hazardous substances generally require permits from the authorities.

The most significant act regulating construction work is the Finnish Land Use and Building Act (5.2.1999/132, as amended). Prior to starting any construction work, a building permit needs to be received from the municipal authorities. Other typical permits that may be required, including e.g. environmental protection permits and related notification obligations.

10. Environment

10.1. Polluted Land

In Finland, the Ministry of the Environment is in charge of developing legislation and national guidelines pertaining to the recovery of contaminated areas. For example, the ministry is in charge for the support to the restoration of contaminated soil and groundwater in cases where the cause of the damage is unknown or a party is unable to compensate for such damage.

The Finnish legislation sets out a framework for the treatment of areas. The prohibition of actions that may contaminate the soil and groundwater aim at preventing contamination. The same aim is behind the general principles set out in the Environmental Protection Act (27.6.2014/527, as amended). If full prevention of the soil and groundwater is not possible, minimizing the environmental impact of harmful substances is the key principle.

The Finnish acts and decrees set out provisions on the assessment of the contamination and need for remediation in an area, the responsibility for remediation, permits required for restoration and the notification obligation when selling or renting out property. The relevant amendments to the Environmental Protection Act and Decree on Contaminated Areas entered into force on 1 September 2014. The Environmental Protection Act implements the European Union directive on industrial emissions (integrated pollution prevention and control, IED) which obliges EU member states to integrate the control of emissions caused by industry.

10.2. Energy Efficiency qualifications

In January 2010, the Minister of Housing, gathered a broad-based group of experts to map out the best ways to take us further in energy-smartness. As a result, the ERA17 for an Energy-Smart Built Environment 2017 action plan was created. The action plan aims at Finland to regain its position as the leader in energy-efficient built environments. The ultimate goal of the plan is that Finland will be able to offer the world's best living and operating environment for people and businesses in 2050.

In the ERA17, energy-smart built environment refers to an energy-efficient, low-emission, high quality built environment that employs all necessary means to mitigate climate change. The factors affecting the energy-smartness are regarded to be land use, construction and renovation, ownership and use of real estate, as well as utilization of renewable energy.

The practical measures for increasing the energy efficiency of buildings include energy certificates, environmental permits and voluntary energy agreements. Regulations on energy efficiency are mainly set out in the National Building Code of Finland. Energy certificates have been used in Finland in almost all new buildings since 2008. As from 1 July 2016 there have been only certain exceptions to the requirement to have an energy certificate.





GERMANY





Felix Felleisen
ffelleisen@deloitte.de

The German real estate market still offers interesting opportunities for investors.

1. Total Transaction Volume

According to market research, in 2016, the total transaction volume in residential and commercial real estate combined amounted to approximately EUR 66.6 billion.

2. Residential Real Estate

The transaction volume in the residential real estate market amounted to EUR 13.7 billion or 137,000 traded units and was therefore still above average, yet far from the record-breaking transaction volume of more than EUR 25 billion in the preceding year. In 2016, non-domestic investors accounted for more than 25% of investments in German residential property, compared to only 15% in 2015. As evidenced by the fact that in 2016, only four portfolio deals were closed in the residential sector - which is half of the number of comparable deals closed on average in the previous five years - however, there is a certain lack of quality supply in the field of residential portfolios. The average portfolio size fell to approximately 350 apartments, while the average price per apartment increased to approximately €100,000. Purchase prices showed a (moderate) increase.

Residential properties, Purchase Prices in Big 7

Purchase Price	Q4 2016	Q4 2015
Berlin	4,525 €/sqm	4,375 €/sqm
Düsseldorf	3,900 €/sqm	3,650 €/sqm
Frankfurt	4,450 €/sqm	4,400 €/sqm
Hamburg	4,850 €/sqm	4,750 €/sqm
Munich	8,750 €/sqm	8,150 €/sqm
Cologne	4,250 €/sqm	4,250 €/sqm
Stuttgart	4,400 €/sqm	4,050 €/sqm

3. Commercial Real Estate

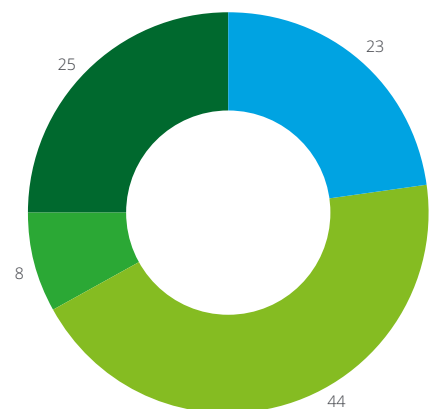
In the commercial investment sector, the transaction volume in 2016 amounted to EUR 52.9 billion, a decrease of approximately 4% if compared to 2015. Single asset deals accounted for 65% of the volume.

Transactions continued to be focused on the Big 7, i.e. Berlin, Düsseldorf, Frankfurt, Hamburg, Cologne, Munich and Stuttgart, who together have the share of approximately 56% of the total transaction volume.

If divided by types of use, there was a negative trend in retail and mixed real estate, whereas office, logistics and other, in particular hotels and special properties, were on the rise if compared to 2015.



Residential properties, Purchase Prices in Big 7



■ Retail ■ Office
■ Industries / Logistic ■ Others

4. Prime Rent Office

Prime rent for office space was relatively stable to slightly increasing in most cities.

Residential properties, Purchase Prices in Big 7

Prime Rent Office Space	Q4 2016	Q4 2015
Berlin	28.5 €/sqm	24.3 €/sqm
Düsseldorf	26.5 €/sqm	26.0 €/sqm
Frankfurt	37.5 €/sqm	38.5 €/sqm
Hamburg	26.0 €/sqm	25.0 €/sqm
Munich	35.0 €/sqm	33.3 €/sqm
Cologne	21.0 €/sqm	21.2 €/sqm
Stuttgart	23.0 €/sqm	22.8 €/sqm

5. Prime Rent Retail

Prime rent for Retail was pretty stable, as well:

Prime rent for retail, Big 7

Prime Rent Retail	Q4 2016	Q4 2015
Berlin (Tauentziensstraße)	350 €/sqm	350 €/sqm
Düsseldorf (Königsallee)	290 €/sqm	290 €/sqm
Frankfurt (Zeil)	310 €/sqm	310 €/sqm
Hamburg (Spitalstraße)	280 €/sqm	280 €/sqm
Munich (Kauf-ingerstr.-Marienplatz)	360 €/sqm	360 €/sqm
Cologne (Schildergasse)	255 €/sqm	255 €/sqm
Stuttgart (Königsstraße)	250 €/sqm	250 €/sqm

6. Trends for 2017

As regards trends for 2017, some claim that the German real estate market will soon be confronted with the 7-year-itch and that in particular due to the compression of yields - in the residential real estate market in part caused by laws designed to protect tenants from increases in rent ("Mietpreisbremse") - transaction volume will decrease.

At the same time, most players seem to believe that the German property market will continue to develop very positively thanks to Germany's economic situation, robust employment market, increasing population figures and, last but not least, low interest rates. Despite the historically low yield levels for traditional real estate investments, these factors still seem to instigate enthusiasm for buying German property.

Yield compression and price levels in A-Locations might increase the trend towards B- and C-Locations and niche investments. Prime rents for office space in B- or C-cities is expected to continue to increase because of demand. Demand could be further boosted if international companies and/or UK-based companies decided to relocate to Germany as a consequence of Brexit, in particular in the Greater Frankfurt area.

For more detailed information on the German real estate investment market, including a more elaborate division by markets and asset classes, please refer to the Germany section of the most recent edition of the Deloitte Property Handbook available at <https://www2.deloitte.com/de/de/pages/real-estate/articles/international-property-handbook.html>.

Knowledge of the German legal framework for the real estate industry is of importance not only for investors and owners, but also for companies interested in operating facilities in Germany on the basis of leasehold arrangements.

In the following, we will try to give an overview on some of the most important legal regulations in the field of real estate in Germany.

It should be noted, that some of the matters discussed herein are rather complex, and it is impossible to cover all issues for all asset classes, wherefore the summary contained herein should not be regarded as legal advice and should not supplant additional analyses to be undertaken in the individual case.

7. Main Real Estate Laws and Regulations

7.1. Private Law

Most of the relevant regulations related to real estate, both with respect to the (acquisition and financing of) ownership as well as lease agreements and the relationship between landlords and tenants are to be found in the German Civil Code (*Bürgerliches Gesetzbuch*).

The German Civil Code contains regulations related to the different types of property rights, their creation

and transfer as well as provisions dealing with the creation, transfer and enforcement of security rights with respect to real estate by which the real estate can be used as collateral for financing arrangements.

Currently, the German Federal Government is planning revisions to German law regulations related to contracts for works and services, including building contracts, as contained in the German Civil Code. The revisions will in particular affect provisions dealing with the relationship between building contractors and their principals and will thus have influence on the building industry in general. Having been initiated in 2015 and with the first draft bill published in March 2016, already, the reform has now been promulgated and the new rules will take effect as of the beginning of 2018.

In addition, there are numerous other laws regulating specific real estate-related issues for the German Civil Code only outlines the relevant principles, such as for example but not limited to the VOB (dealing with more specific construction law provisions), the ErbbauRG (regulating details with respect to hereditary building rights), or the WEG (outlining the legal relationship within a community of owners of apartments within a specific building).

7.2. Public Law

Issues related to the construction, maintenance and use of buildings are regulated by public law.

One of the cornerstones of public constructing regulations is the German Federal Building Code (BauGB) and the German Federal Town Planning

Regulations (BauNVO). The provisions in these acts are supplemented by building regulations for each individual German Federal state (*Landesbauordnung*, LBauO).

Apart from setting the rules for building permits and the proper construction of buildings, public law also regulates many other relevant aspects, such as the permit to operate certain businesses, dealing with contamination, etc.

Like it is the case with civil law provisions related to contracts for the performance of services and delivery of work, also public law has been undergoing certain revisions, with both regulations contained in the German Federal Building Code as well as the German Federal Town Planning Ordinance being the subject of a reform that became effective in May 2017. The most important cornerstones of the changes are the

introduction of a new building zone called "Urban Area" ("Urbanes Gebiet") and the implementation of the EU SEVESO-II Directive requirements by implementing changes to the German Federal Building Code. The "Urban Area" allows extensions to construction and the combination of residential, trade, commerce, and service uses in one area. The implementation of the EU SEVESO-II Directive, on the other hand, is designed to limit building activities near potentially dangerous industrial facilities.

8. Ownership Rights

8.1. Who can own real estate in Germany?

Generally, any individual or legal entity with legal capacity, whether resident or non-resident, can invest in and own real estate in Germany. This includes legal entities under private law, e.g. stock corporations (*Aktiengesellschaft* – "AG") or limited liability companies (*Gesellschaft mit beschränkter Haftung* – "GmbH") as well as legal entities under public law.

Commercial real estate is often owned by insurance companies, banks, investment companies, funds or real estate holding companies.

The so-called *Gesellschaft bürgerlichen Rechts* ("GbR"), which is a partnership with unlimited liability of its partners, also has legal capacity to own real estate. However, in the Land Register, it must be registered with both the name of the GbR itself as well as the names of all of its partners. Changes in the composition of the partners must be registered, as well.

Foreigners and legal entities with a foreign domicile can become and be registered as owners of real estate in Germany as well, but certain prerequisites must be fulfilled in the notarisation process (see below "Notarisation").

8.2. Types of property rights in real estate

8.2.1. Ownership

In Germany, land is typically held either under rights *in rem*, in other jurisdictions sometimes referred to as "freehold" (e.g. ownership, hereditary building rights, mortgages, land charges and easements) or on the basis of obligatory rights, i.e. relative rights which are typically regulated in contractual arrangements, in other jurisdictions often referred to as "leasehold" (e.g. commercial or residential leases).

Whereas the transfer of a right *in rem* only becomes valid if and as soon as it is registered with the land register, relative/contractual rights cannot



and need not be entered into any official or public register (while in practice, in particular for long-term commercial lease agreements, there is a certain tendency to have the tenant's position under the lease agreement strengthened by the creation and registration of specific easements).

As it is the case in all Western jurisdictions, ownership (*Eigentum*) constitutes the strongest right in rem.

It must be noted that under German law, save for the specific models listed hereinafter, the ownership to real estate is inseparable from the ownership in any buildings erected on that real estate, meaning that unless the real estate is subject to a hereditary building right or the building is subject to a WEG regime, the owner of the real estate automatically becomes or is the owner of the respective building.

8.2.2. Hereditary building rights

German law provides for the possibility of creating so-called hereditary building rights (*Erbbaurechte*, hereinafter "HBRs"). The HBR must be granted by the owner of the respective real estate that shall become the subject of the HBR.

On the basis of an HBR, the owner grants the beneficiary of an HBR (*Erbbauberechtigter*) the right to erect and own a building on a certain plot of real estate, together with the right to use - but not own - the respective plot. Such rights are typically granted for a period of 99 years, but sometimes also shorter terms. HBRs used to be quite common in residential real estate as a means used by the municipalities to enable less wealthy segments of the population to become building owners. Yet they are also used in the commercial real estate market, for example as an instrument in sale- and lease-back transactions as well as in infrastructure projects, such as the trimodal Duisburg Logport.

HBRs are the only way of separating the ownership in plots of real estate from the ownership in a building existing on that plot real estate. Save where stipulated

otherwise in the underlying arrangements, i.e. the contract for the creation of a hereditary building right (*Erbbaurechtsvertrag*), HBRs can be sold, inherited and encumbered in the same way as ownership rights to real estate. The beneficiary of an HBR usually pays remuneration for such HBR (*Erbbauzins*) to the owner, which remuneration is calculated on a per annum basis. Upon expiry of the term of the HBR, the owner of the land usually becomes the owner of the building while the former beneficiary of the HBR is compensated for the loss of his right to the building.

8.2.3. Easements

Easements (*Dienstbarkeiten*) can be of private or public nature. An easement is a means of providing security in rem for certain rights to a plot of land that is owned by another person. Such right to the plot of land can either consist in a right of use (e.g. right of way or a passing right) or a right to demand that an owner of the land must tolerate the beneficiary's actions or buildings (e.g. tolerance of a border building, i.e. a building extending to the very borders of another plot of land). An easement can be granted for the benefit of a certain plot of real estate (e.g. its respective owner) and thereby tied to real estate rather than a specific person (*Grunddienstbarkeit*) or to a specific person (individual or entity) (*beschränkte persönliche Dienstbarkeit*). With respect to the latter, certain transfer restrictions apply. In order for an easement to come into existence, it must be registered with the land register. It may not be deleted from the register without the approval of the registered beneficiary of the associated right.

Public easements can also relate to certain public requirements or duties vis-à-vis the building authority which cannot be derived from the law already (e.g. the duty to provide enough parking space when planning a new building). In most federal states, easements must be registered in a special local register (*Baulastenverzeichnis*), and may not be deleted without the approval of the holder of the associated right. This means that in order to have a good overview on existing encumbrances, one will not only have to look into the land register but also in the register of

While the German property market should continue to develop positively, yield compression and price levels in A-Locations might increase the trend towards B- and C-Locations.

public easements. The exception is the federal state of Bavaria where rather than in a special register, public easements are registered in the land register.

8.3. Transfer of title/registration of owner

8.3.1. General

In Germany, direct ownership in a plot of land (and the building erected on such plot of land) is typically acquired through an agreement for the acquisition of the respective plot of land, i.e. an acquisition of an asset (*Grundstückskaufvertrag*).

In particular in larger real estate transactions, an alternative route can consist in acquiring (the shares in) the legal entity owning the respective plot or plots of real estate, mostly an SPV whose purpose is limited to owning and operating the respective real estate, i.e. to go for an acquisition by means of a share deal.

Obligatory versus in rem rights, separate and abstract nature of in rem rights German law is characterized by a strict separation between a set of rules applicable to obligatory rights, i.e. rights based on contract or statutory law to demand something from another party and a set of rules for in rem rights, i.e. absolute rights, such as ownership, and dealing with the creation and transfer of such in rem rights.

Following such basic concept, the obligation to sell or acquire real estate is separate (*Trennungsprinzip*) and abstract/independent from the transfer of the real estate in fulfilment of such obligations. Accordingly, under German law the mere execution of a purchase agreement related to real estate is not sufficient for the ownership in (or other in rem rights with respect to) real estate to transfer. Rather than that, the transfer of title to land is subject to two substantial criteria: the so-called conveyance of property (*Auflassung*) and entry into land register (*Grundbucheintrag*).

8.3.2. Conveyance of property (*Auflassung*)


The conveyance of property is an agreement between the transferor and the transferee regarding the

transfer of the ownership of the real estate. Although typically declared as part of the respective sale and purchase agreement, it is different from and comes in addition to that (obligatory) agreement. The conveyance must be declared by both parties in the presence of a notary. As commonly, the conveyance of ownership is declared within the notarial sale and purchase agreement, it mostly does not require the execution of a separate notarial deed.

8.3.3. Entry into land register (*Grundbucheintrag*)

The entry in the land register completes the sale and purchase of a plot of land and brings about the transfer of the property, i.e. the transfer of the title to the plot of land. Only upon the purchaser being entered as the new owner of the real estate in Section I of the land register, the transfer of title is perfected, complete and effective.

The process of registration in the land register usually takes several weeks or even months to be finalized. In the period of time between the signing of the purchase agreement and the registration of the transfer of title in the land register, the purchaser's claim to become owner of the real estate would generally be unsecured and might even become unenforceable, for example if the seller decided to sell and transfer the respective property to a third party (which can of course lead to compensation claims of the purchaser against the seller coming into existence).

Protection during interim period, priority notice In order to protect the purchaser and its contractual claim during the interim period between the execution of the underlying agreements and registration with the land register, the parties to the sale and purchase agreement therefore usually agree upon the registration of a priority notice (*Auflassungsvormerkung*). The priority notice is a special security right registered in Section II of the land register which protects the purchaser's claim to acquire title to the real estate and to a correctly ranked entry in the land register. The registration process of a 

priority notice takes less time than the actual transfer of title and can usually be obtained within a few days. The priority notice is valid until it is deleted from the land register. In order to protect the purchaser's financial interest, the parties to the purchase agreement usually agree that the registration of the priority notice shall constitute one of the conditions precedent for the purchase price to become due for payment.

8.3.4. Share Deal

Besides an acquisition by way of an asset deal, real estate can also be acquired indirectly by acquiring shares in the legal entity holding the ownership of the respective real estate, i.e. by means of a share deal.

Sometimes, (and provided that less than 95% of the shares are acquired) an acquisition by means of a share deal can also be used to avoid real estate transfer tax (*Grunderwerbsteuer*). In that context, it should be noted, however, that recently, politicians have pleaded for abolishing the preferential treatment of share deal transactions and/or at least reduce the relevant thresholds and that it is not unlikely that the relevant laws will be changed.

The acquisition of real estate by means of a share deal also entails some risks: The purchaser of shares in an entity holding real estate cannot be secured by means of a priority notice. This results from the fact that the legal entity will remain the direct owner of the real estate before and after the transaction and accordingly, there will be no change in ownership with respect to real estate eligible for a priority notice. Therefore, the share purchase agreement will have to provide for alternative mechanisms protecting the purchaser's legitimate interest, such as for example clauses protecting the purchaser the owner to sell the real estate to a third party prior to the transfer of the shares to the purchaser. Furthermore, unless otherwise agreed by the parties, the purchaser will not only indirectly acquire the real estate, but also "inherit" a legal entity "with a history" and, therefore potential risks stemming from the past. Therefore, sufficient diligence should be undertaken and representations and warranties to be granted by the seller discussed as part of the negotiations with respect to the contractual arrangements.

In that context, the purchaser should always consider that any representations and warranties given by the seller will only be as good as the person or entity giving such warranties and strongly depend on the seller's financial covenant. Also, it must be taken into consideration that in case of a share deal the real estate asset cannot generally be used as collateral for

financing the purchase price because the purchaser (who is the borrower of any financial means) is not and will not become the registered owner of the real estate to be encumbered. Hence, alternative security/collateral mechanisms, such as a pledge of shares etc. must be considered.

9. Registry System

9.1. Land Register/ Structure

9.1.1. General

The most important public register for real estate located in Germany is the so-called land register (*Grundbuch*). The land registers (*Grundbuchämter*) – which are generally (local particularities in the southwestern part of Germany will be abolished by the end of 2017) located at the German Local Courts (*Amtsgerichte*) – are in charge of the respective land register.

9.1.2. Form, Sections

The land register is divided into three sections (*Abteilungen*) and a reference list (*Bestandsverzeichnis*). The reference list contains a detailed description of the real estate and corresponds with the cadastral plan indicating the size and location of the land. Section I lists the former and current owner(s) of the land in historical order. Section II contains all relevant covenants and restrictions (*Belastungen und Beschränkungen*), e.g. hereditary building rights, private easements, pre-emptive rights etc. to the land. Finally, Section III lists the former and current land charges and mortgages.

As indicated before, the land register does, however, typically (i.e. outside of Bavaria) not list public easements and generally does not list "defects" with respect to the real estate, such as contamination, etc. Therefore, prior to acquiring real estate, one might also want to undertake research into the information available in other registers, such as the register of public easements (*Baulastenverzeichnis*) or the register for contaminated soil (*Altlastenkataster*).

9.2. The concept of public reliance

9.2.1. Compulsory nature of registrations

As indicated before, registration with the land register is compulsory for *in rem* rights to come into existence or be transferred. For as long as the creation or transfer of *in rem* rights has not been registered, it is not effective (certain exceptions apply to some encumbrance certificates).

9.2.2. Public reliance

The land register is a public register granting public reliance (*öffentlicher Glaube*). This means that interested

parties can rely on the registrations in the land register. Consequently, it is possible to acquire a plot of real estate from a person or entity which is registered as owner in the land register, i.e. the registered owner, even if this person or entity is in fact not the legal owner of the respective plot of land. Given the public reliance on the land register, parties to any real estate transfer agreement should always review the content of a recent excerpt from the land register prior to signing the sale and purchase agreement and the Notary Public is held to elaborate on the content during the execution of the notarial deed (see below "Transfer of title").

9.3. Notification of tax authorities

9.3.1. Obligations to notify

As the acquisition of real estate generally triggers real estate transfer tax (RETT), the parties to real estate transfer transactions are obliged to notify the tax authorities of any such transactions.

9.3.2. Data transfer

While to date, the land register and the competent tax office are not connected in the sense of meaning of an automatic data transfer, German notaries public are under an obligation of informing the competent tax authorities of any transfer of ownership stipulated in any deed that they execute.

9.3.3. Consequences of noncompliance

It should be noted that apart from fines that can be imposed for noncompliance with notification obligations, also making use of certain provisions of German tax laws pursuant to which RETT will not be payable/repaid where a transaction is unwound/undone, for example on the basis of a rescission, is generally subject to proper compliance with the notification obligations.

10. Notarisation

10.1. Sales and Purchase Agreement

10.1.1. Formal requirements

Purchase agreements related to real estate located in Germany require execution by notarial deed. As opposed to that, a private written agreement is not sufficient to constitute legally binding and enforceable obligations to transfer real estate, let alone bring about the transfer itself.

10.1.2. German Notary Public

Generally speaking, execution by a German notary public is required, provided that under certain circumstance a valid obligatory agreement, and potentially, even a valid transfer of title can be brought about by execution before a non-German notary public.

10.1.3. Extended reach of formal requirements

If a real estate transaction is associated with (the conclusion of) ancillary agreements so closely linked to a sale and purchase of real estate that neither can stand alone, e.g. construction contracts, lease agreements, finance agreements etc., then the entire contractual package can require execution by notarial deed, even if the relevant ancillary agreements have been concluded prior to the execution of the sale and purchase agreement or would not be subject to specific formal requirements executed on a standalone basis.

10.1.4. Notary fees

Notarial costs in a German real estate transaction depend on the value of the land and buildings and should not be underestimated. In fact non-German investors are often surprised when being confronted with German notary fees.

10.1.5. Application for registration

Usually it is also the (German) notary who applies for the registration of the real estate transaction with the land register. As indicated above, German law differentiates between the contractual obligation to transfer land and the *in rem* transfer which must be declared by the so-called conveyance of ownership (*Auflassung*).

10.1.6. Requirements in case of non-German entities acting as purchasers

If a legal entity with a foreign domicile or a non-German legal entity purchases real estate property in Germany, some additional formal requirements may have to be complied with. Amongst others, the foreign company acting as the acquirer must prove its existence. This is typically done by presenting/submitting an excerpt from the commercial register of the country in which the company is registered, which excerpt will have to be translated into German and legalised (to the extent the country of origin is a signatory to the Hague Convention by means of a so-called Apostille). Furthermore, the persons acting as signatories will have to render proof of their authorities to act on behalf of the foreign company acting as acquirer.

To the extent the company acting as acquirer originates from "exotic" countries, dealing with the relevant formalities can be tedious and time-consuming, as the German (land and other) registers are not always familiar with the respective local laws and the involvement of Embassies can be required. ➔

11. Representations and warranties; responsibility

11.1. Sellers' warranties

11.1.1. General

Pursuant to German statutory law, in the case of a sale of real estate, the seller is obliged to transfer full legal title to the property to the purchaser and is reliable and for responsible for delivering a plot of land and building which is free from defects.

11.1.2. Individual liability concept

As a general rule, in an agreement for the sale of estate plot of land, rather than relying on the standard liability concept set by statutory laws, the purchaser and the seller would typically agree on a specific set of representations and warranties and liability regime.

11.1.3. Scope

The exact scope of the representations and warranties as well as the consequences of a breach of these representations and warranties, also in terms of *de minimis*, basket and cap provisions, largely depends on the individual case as well as the market circumstances, negotiation position and bargaining powers of the parties to the transaction.

In times of sometimes overheated markets, as currently given in many regions of Germany, there is a certain tendency at the side of prospective sellers to limit the scope of the representations and warranties and/or work with high thresholds and low caps.

Market research shows that there are certain swings following market circumstances and that it is very hard to define an over-arching customary practice or market standard.

Common representations and warranties - Land Representations and warranties that are rather commonly provided for would generally inter alia include (i) title (i.e. the guarantee that the transferor actually holds full and unrestricted legal and beneficial ownership and title to the property), (ii) no

encumbrances (i.e. that the property is not subject to easements and encumbrances other than those specifically disclosed) and (iii) (while regulations dealing with contamination are often a hot topic and heavily debated during the negotiations) that the transferor is not aware of any contamination of soil.

11.1.4. Common representations and warranties - Buildings

Where the acquisition of the real estate relates to and includes one or several buildings, one would often come across additional representations and warranties pursuant to which (i) apart from normal wear and tear, the building is in normal condition and that the transferor is not aware of any specific grave defects, sometimes also representations and warranties to the effect that (ii) all the relevant building and other permits exist and that the transferor is unaware of any breaches of the existing permits and/or any intentions of the relevant authorities to change, amend or withdraw the relevant permits.

11.1.5. Common representations and warranties - Lease agreements

Where the transaction relates to real estate and buildings for which lease agreements exist, as this will regularly be the case for financial investors, representations and warranties will often also relate to the existence, validity, remaining term of the lease agreements and/or the WALT (i.e. weighted average lease term) as well as the actual net rent per annum generated under the existing lease agreements.

11.1.6. Knowledge

It goes without saying that in many cases, the representations and warranties are qualified by specific or general knowledge qualifiers ("to the best knowledge of transferor"; "unless the circumstances giving rise to the claim were known to the acquirer or would have been known to the acquirer had he exercised sufficient diligence") or limited by specific or general disclosures ("save as explicitly disclosed in Schedule X", "unless the circumstances constituting a breach and/or giving

If a legal entity with a foreign domicile or a non-German legal entity acts as purchaser of real estate in Germany, additional formal requirements have to be considered

rise to the claim were discernible from the information made available in the data room") and, finally, come with limitations for damages payable by the transferor in case of a breach ("the transferor's aggregate liability for a breach of any of the representations and warranties is limited to x% of the purchase price").

11.1.7. Circumstances of the individual case

Also, it must be noted that the exact content and scope of the reps and warranties largely depends on the circumstances of the individual case, the goals that the acquirer pursues with the acquisition, the asset class, the "bargaining power" of the parties involved, the market conditions, etc.

11.1.8. Escrow and comparable concepts

Although this has become less common in recent years, the potential claims of the acquirer for a breach of the representations and warranties are sometimes secured by adequate mechanisms, including clauses pursuant to which parts of the purchase price will only fall due after a certain period of time and only if and to the extent that no breaches given, guarantees issued by financial institutions or parent company guarantees, escrow arrangements, and, sometimes, specific insurance.

11.1.9. Environmental Issues

Usually, environmental insurance is taken out if the acquired property is burdened with an elevated environmental risk (such as a petrol station). In that context, it must be noted that under German environmental legislation, apart from the user (tenant/occupier) that has caused the contamination, both the former and the current owner of a property can be subject to environmental liability for the same event of damage. Therefore, in purchase agreements a balance must be struck between the seller's interest in being relieved from liability and the purchaser's interest in not being held liable for damages caused by the seller or even by the previous owner. This is most commonly intensely negotiated. Generally, a seller or occupier remains liable for environmental damages even though

the real estate has been transferred (for further information see chapter 10.1.3).

11.1.10. Disclosure obligations

When discussing representations and warranties as well as associated liability of the Seller, it must be noted that under German law, a seller - even without explicitly being asked for it - is held to disclose such information to the purchaser that is substantially relevant to the purchaser's purchase decision. If the seller fails to duly inform the purchaser - and subject to more specific regulations in the underlying agreements, - the purchaser can have the possibility to void the contract or claim compensation on the grounds of willful deceit (*arglistige Täuschung*).


12. Mortgages and other Securities

12.1. General

The "classic" means of providing collateral for the financing of the purchase of real estate consists in the creation of land charges or mortgages. If a loan is secured by that type of collateral and the borrower does not fulfil his obligation under the loan, the lender can satisfy the debt by enforcing and realising the collateral, e.g. in the case of mortgages or land charges finally by having the land sold (in an auction sale).

Although back in the day, the legislator had thought of the mortgage as the primary instrument to be used, in practice, land charges have become by far more commonplace.

12.2. Mortgage

The mortgage is one of the instruments with respect to real estate typically given to a financial institution as collateral for a loan to be received by the owner or acquirer of real estate. A mortgage is granted for one specific claim/loan with limited possibilities of exchanging the loan that is secured by the mortgage without affecting the mortgage itself. Given its nature as an accessory right, a mortgage automatically decreases in amount to the extent the loan that it secures is repaid. A mortgage loan usually covers around 60-70% of the real estate's market value. 

Among others, typical kinds of mortgage are the Fixed Interest Loans structure (with capital & interest repayment) and Interest Only Loans structure (*Zinszahlungsdarlehen*). There are also supporting programs like the Bank Home Ownership Programme (*Kreditanstalt für Wiederaufbau, KfW*).

To grant a mortgage, the mortgagor has to register the mortgage with the land register. When doing so, the mortgagor is obliged to specify the mortgagee, the secured claim and the lending rate. The mortgagee usually acquires the mortgage by obtaining the mortgage certificate. However, the issuance of a mortgage deed can be excluded. In case of the latter, the mortgagee acquires the mortgage as soon as it is registered. The mortgage is strictly accessory in nature, i.e. its existence depends on the existence and "fate" of the secured claim.

12.3. Land charge

Whilst the mortgage is a so-called accessory right which is strongly linked to the contractual claim it secures as referred to in the corresponding loan agreement, the land charge is an abstract right. This means that the land charge and the obligations thereunder are independent of a specific contractual claim and may even exist in the absence of an underlying claim that it secures, only for the purpose of securing a certain rank in the land register. The land charge may be used to secure other, also future obligations.

While in practice, many land charges take the nature of land charge for securing claims (*Sicherungsgrundschuld*), where the exact scope of secured claims and other terms and conditions for its enforcement are regulated in a separate contractual arrangement (*Sicherungszweckvereinbarung*) between the owner and the financial institution, this does not change the abstract nature of the land charge as such. A land charge does not decrease in amount where repayments with respect to the claims that it secures are being made. Also, the land charge can typically be enforced without having to demonstrate that the underlying claims that it secures (still) exist. For these reasons, land charges bring along advantages with respect to enforceability and flexibility, and, therefore, have become the most prevalent collateral in real estate transactions.

However, as a result of legislative changes (which were at least in part owed to some cases of abuse of the abstract nature of the land charge by financial institutions) this flexibility has suffered in recent years.

While previously, it was possible to acquire a land charge free from any pleas or defences of the debtor if the purchaser was in good faith, the owner may now resort to pleas or defences deriving from the contractual arrangements originally entered into by and between the owner and the financial institution.

Therefore, irrespective of the abstract nature of the land charge, at least where a land charge has the character of a land charge for securing claims, the owner can now invoke the regulations contained in the contractual arrangements pursuant to which the bank has declared that it would not enforce the land charge to the extent the secured claims have already been satisfied.

13. Leases

13.1. Applicable Laws/ Types of Leases

13.1.1. Main source

The majority of the regulations of German tenancy law is found in Book II (Law of Obligations) of the German Civil Code (BGB), i.e. in §§ 535 ff. BGB.

13.1.2. Other sources

Other pieces of legislation - some of which are only relevant for specific types of real estate - include:

The Ordinance on the Calculation of Heating Costs (*Verordnung über Heizkostenabrechnung - HeizkostenVO*) setting forth rules on the calculation and allocation of costs for heating and warm water for premises with more than one apartment.

The 2nd Ordinance on the Calculation of Housing Costs (*II. Verordnung über wohnungswirtschaftliche Berechnungen = II. BV*) containing a full set of rules on the calculation and allocation of costs, charges, encumbrances etc.

Special regulations concerning stable-value clauses (*Preisklauselgesetz*), operating costs (*Betriebskostenverordnung*) and so forth.

13.1.3. Distinction between various classes of users/classes of use

While some general rules related to lease agreements are applicable to virtually all asset classes, German Law provides for a clear distinction between the rules applicable to residential real estate, i.e. regulating the relationship between the landlord and tenants, mostly individuals, for residential buildings at the one hand and the rules applicable to commercial real estate, i.e. regulating the relationship between landlords and businesses, at the other hand.

13.1.4. High level of protection in residential tenancy law

It is fair to say that German residential tenancy law is characterized by a remarkable level of tenant protection, where sometimes the tenants' right of use as interpreted by German courts shows features that would typically be associated with ownership rights. The same does not necessarily hold true for commercial lease agreements.

13.2. Lease Agreements General

As it is the case with other agreements, a lease agreement is brought into existence by reciprocal declarations of intent (*Willenserklärungen*), i.e. an offer and an acceptance.

13.2.1. Written form requirement

Although a lease agreement does not have to be executed in writing in order to be valid, § 550 (1) BGB states that contracts for a term of over one year must be executed in writing or else they are deemed to have been concluded for an indefinite period in time. Numerous court decisions deal with the prerequisites of § 550 (1) BGB.

Both the conclusion of and any and all amendments to a commercial lease contract must be made in writing, otherwise the parties run the risk of triggering statutory termination rights allowing for premature termination of a fixed term lease contract.

13.2.2. Freedom of contract

Whereas the parties to a commercial lease contract generally enjoy ample liberty to deviate from statutory tenancy law, this is not the same with residential tenancy agreements, for which numerous compulsory provisions must be observed.

13.2.3. Standard agreements/GTC

Making use of standard agreements and/or general terms and conditions is generally allowable; it must be noted, however, that - in particular in residential tenancy agreements, where the vast majority of tenants are individuals, but also albeit to a lesser degree, in commercial tenancy agreements - standard agreements, standard clauses and GTC (i.e. general terms and conditions) are subject to strict scrutiny by German courts.

13.2.4. Minimum content

Any tenancy contract, especially a commercial lease agreement should at least describe the parties, the rental object, the term, the amount of rent and the residential purpose, which is especially necessary in case of a mixed-use-tenancy.

Apart from these mandatory minimum requirements, other provisions that would typically be included relate to information on the start date for the first term, the size of the rented premises, the purpose for which the premises shall be used, scope of use, terms on the keeping of animals, contracts of supply, the allocation of costs for utilities and the duty to carry out cosmetic repairs as well as to bear the costs for minor damages.

13.3. Residential lease agreements

13.3.1. Tenant protection

As indicated before, when it comes to residential lease agreements, German law provides for a rather high level of tenant protection.

More in particular, residential lease agreements cannot be freely terminated by the landlord, the amount of rent payable by residential tenants is regulated and, finally, in order to have tenants effectively vacate dwellings after a justified termination of the lease agreements can require going through rather tedious (court) procedures.

13.3.2. Recent developments

Residential lease contracts which were always highly regulated have recently become even more regulated with the introduction of a cap on city rent rises (*Mietpreisbremse*) in §§ 556 d – 556 g BGB.

Already more than one year and six months have passed since the legislator has introduced these new rules related to caps on residential rent. Pursuant to these rules, increases in rent in certain regions are subject to new statutory restrictions. According to the rules, in regions with a so-called tightened/overheated residential real estate market (*Gebiete mit angespannten Wohnungsmärkten*) the initial rent due under newly concluded residential lease agreements may not exceed the comparative local customary rent (*ortsübliche Vergleichsmiete*) by more than 10%, unless the rent owed by the previous tenant was higher.

By means of the Act, governments of the federal states have been authorized to - by means of ordinance and for periods in time not exceeding five years - establish those regions with tightened/overheated residential real estate markets, to which the respective rules shall apply. In fulfilment of the respective authorizations and following the entering into force of the Act on June 1, 2015, many ordinances have already been enacted in numerous federal states and, sometimes - as in January 2016 in 16 Bavarian municipalities - have already been abolished. Currently, regions with tightened/



overheated residential real estate markets for example include Berlin, Potsdam, Hamburg, Düsseldorf and Stuttgart. On the contrary, the federal states Saxony, Saxony-Anhalt, Mecklenburg-Western Pomerania and Saarland have not yet introduced any such ordinances (status as of March 2017).

Irrespective of the rather unclear consequences of the recent amendments, the German Federal Minister of Justice, Heiko Maas, would not eliminate the possibility of further amendments to tenancy law. In this context, not only further aggravations of the statutory rules (as *inter alia* demanded by the Berlin tenants' association) are under discussion.

For the time being, one will have to wait for the current plans to materialize and to see what changes will finally be enacted. What seems to be clear, however, is that at least individual regulations (e.g. comparative local customary rent, qualified rent index) will be amended (in this context cf. articles "Envisaged changes to German regulations related to standard rent tables", "Reduction of modernization surcharge", "Tax benefits for the promotion of investments in new rented housing": <http://www2.deloitte.com/dl/en/pages/legal/articles/real-estate-artikel.html>). However, the plans for introducing new regulations on comparative local customary rent and qualified rent index have not evolved since summer 2016. Thus, further developments remain to be seen.

While it is not entirely clear, yet, how German courts will interpret the newly-established rent control rules, owners and investors should closely monitor the further legislative developments and take the existing and potential additional future limitations on rent into consideration when taking investment decisions.

13.3.3. Common problems

Common problems between landlord and tenant involve security deposits and the termination of the lease.

Usually, the tenant has to pay a security deposit which serves the purpose of securing proper fulfilment

of its obligations by the tenants. Security deposits often equal two or three month rent, the latter also representing the allowable maximum amount. The security deposit may be paid in three monthly instalments, whereby the first instalment falls due upon the beginning of the lease. The landlord must keep the security deposit in a separate account. If the landlord intends to retain all or part of the deposit, he has to give the tenant a list of the damages and repair estimates within a reasonable period of time after the tenant moves out. In the case of real estate transaction, i.e. the acquisition of real estate with existing lease agreements, the purchaser would have to ensure that he will get access to these security deposits, as he may be held liable for repayment by the tenants.

In Germany, a landlord cannot freely terminate a residential lease agreement. He is only entitled to terminate where sufficient cause exists. German law describes several acceptable reasons: A landlord who needs to use the rented premises for himself, his family, or a member of his household has valid reasons, but only if the need is compelling. Termination is also lawful if a landlord wishes to sell the residential property and can prove that selling the property "with tenants" will result in substantially less profit than selling it "without tenants." A landlord may also terminate a lease if the tenant permanently/repeatedly violates the lease. In case a landlord wants to terminate the lease, he has to give the tenant a written termination notice. For leases of up to five years duration, the notice has to be given three months prior to the termination date. Longer leases require longer termination periods. The notice must explain the justification for the termination.

Against the background of the above it is fair to say that it is rather difficult for a landlord to terminate any residential tenancy agreements.

13.4. Real Estate Agents/Brokers

13.4.1. General

Both landlords and tenants may and often do make use of real estate agents/brokers when looking for tenants or space to let, respectively.

German residential tenancy law is characterized by a remarkable level of tenant protection, the same does not necessarily hold true for commercial lease agreements

13.4.2. Brokers versus agents

German brokerage law distinguishes between mercantile brokers and real estate agents, the latter brokering lease contracts, property deeds and so forth.

The real estate agent's primary duties and obligations are regulated in the German Civil Code (BGB), the German Industrial Code (GewO) as well as the German Brokers' and Commercial Developers' Ordinance (MaBV).

According to German Law, the agreement between a real estate agent and its client represents a unilateral contract, meaning that the agent has no duty to perform. Likewise, the client is not obliged to accept the real estate agent's service. The agent's fee depends on whether the lease agreement was actually brought about thanks to the agent's efforts and services.

13.4.3. Recent changes

As regards the field of brokerage in residential real estate, recently new rules regulating the allocation of real estate agent's fees have been introduced in German law (*Bestellerprinzip*). Pursuant to the new rules, the party that has instructed the agent will also be obliged to come up for the agent's remuneration.

Hitherto, it was common practice that landlords instructed the real estate agent, but then made the new tenant pay the agent's invoice.

The new regulations make this practice unlawful and lead to the consequence that where a landlord instructs the agents, he will also have to bear the associated cost.

While this has been done in order to protect tenants, it is not entirely clear, yet, whether the changes in law will have detrimental effects on the quality of services provided by agents.

13.5. Commercial lease agreements

13.5.1. General

Unlike this is the case for residential leases, the statutory regulations governing commercial leases do

by far not cover every relevant aspect and provide for a higher degree of freedom of contract for the parties.

13.5.2. Termination rights

For commercial lease agreements, no statutory regulations excluding ordinary terminations or making terminations subject to sufficient cause exist. Also, there are no specific rules governing rent adjustments.

This means that more issues must but also can be regulated in the respective agreements and the continuous developments in case law on a wide range of standard clauses/contractual conditions must be taken into consideration when entering into commercial lease agreements.

13.5.3. Formal requirements

Both the conclusion of and any and all amendments to a commercial lease contract must be made in writing, otherwise the parties run the risk of triggering statutory termination rights allowing for premature termination of a fixed term lease contract. Stricter formal requirement can apply where a lease agreement is concluded in the context of a transaction which requires execution by notarial deed.

Also, parties sometimes agree on a right of purchase wording that right as a unilateral option, as a preliminary contract or as a conditional contract of sale that is then incorporated in the lease agreement. This can lead to the entire lease agreement being considered null and void because it has not been recorded by a notary. The same principle applies when an *in rem* pre-emptive right is granted.

13.5.4. Fixed term

In contrast to the most residential lease agreements commercial lease agreements can be and often are concluded for a fixed term. Depending on the exact asset class and the parties, commercial lease agreements often provide for a fixed term of five or 10 years, quite commonly combined with extension options for the tenants.



13.5.5. Minimum contents

The leased object and the purpose of the lease must be described exactly. Prior to the conclusion of the agreement, the competent authority must have approved of the property's use for commercial purposes in general, and its use for the specific purpose intended by the tenant, in particular, so called "*Bau-/Nutzungsgenehmigung*".

13.5.6. Amount of rent

The parties to a commercial lease agreement are generally free to agree on any amount of rent for as long as the amount of rent is not unconscionable. The amount of rent is deemed to be unconscionable if the rent exceeds the customary local rent for similar properties by 100%. In case it is determined that the amount of rent was or is unconscionable, the tenant may demand that the landlord repays any excess amount received.

The amount of rent will not increase or decrease automatically. It is common practice for commercial lease agreements, however, to include indexation clauses that allow for the rent to be adjusted to changes in the consumer price index. While previously, such indexation clauses were subject to approval, this is no longer the case.

Nevertheless, certain prerequisites would have to be fulfilled in order for indexation clauses to be lawful and enforceable.

14. Tax

14.1. Real Estate Transfer Tax

The transfer of real estate located in Germany is subject to the real estate transfer tax (RETT). RETT also generally applies to the direct or indirect transfer of at least 95% of the shares in a company holding German real estate and to the unification of at least 95% of such shares for the first time in the hands of a single shareholder. As indicated above, political discussions are currently ongoing and may result in changes of the law and in abolition of the allegedly preferential treatment of share transfers and/or, at least, a reduction of the relevant thresholds.

In a direct transfer of real property, RETT is calculated on the basis of the purchase price. For direct and indirect share transactions, it is determined based on the special tax value of the property, which following recent court decisions would however typically be similar to its fair market value.

Since September 2006, the federal states have been

free to set their own rates (before that time, RETT was levied at a standard rate of 3.5%). As a consequence, there has been an ongoing trend to increase the RETT rate to improve the state budgets. The federal state of Thuringia intends to increase the RETT rate from 5% to 6.5% on 1 January 2017. The following table summarizes the RETT rates in all the German states as of March 8, 2017:

Although pursuant to the law, RETT is owed by both, the seller/transferor and the purchaser/transferee, agreements for the acquisition of real estate frequently contain regulations pursuant to which in the relationship between the parties, RETT is imposed on the acquirer, which also from an economic perspective is in line with customary practice.

Due to the fact that RETT will regularly be triggered at the date when the purchase agreement is actually signed (regardless of the date of transfer of economic ownership or the date of payment of the purchase price), one must be careful when entering into pre-contracts and/or when entering into agreements where discussions about the entity to act as final purchaser, for example an SPV are still ongoing.

14.2. Indirect Tax (Value-added tax)

The regular Value-added tax ("VAT") rate in Germany is 19%. Depending on certain characteristics of the acquired real estate, the acquisition of real estate may be regarded as a transfer of a business unit ("*Geschäftsveräußerung im Ganzen*") on which no VAT will be levied. In addition, in such a case the purchaser enters in the seller's VAT position with respect to the deducted input VAT amounts and a potential correction. Therefore, should – following the acquisition – the use of the real estate change (i.e. property that was let without charging VAT on the rent prior to the acquisition, but is let with a VAT charge after the acquisition and vice versa), input VAT on the initial acquisition/construction of a building or on services to renovate a building may either be refunded on a pro rata basis (to the extent it could not be claimed in the past) or it may have to be repaid on a pro rata basis (to the extent it was claimed in excess in the past). The correction period for such a refund/repayment is up to ten years following the acquisition/construction of a building or on services to renovate a building. For assets that are 'fixed' (i.e. certain kinds of operational facilities which cannot be easily separated from the building), the 10-year correction period applies as well. Additionally, construction costs etc. generally lead to separate correction periods which start after this has been completed. For all other assets that are not

'fixed' in nature but can be separated easily, a 5-year correction period applies.

Even if the transfer of the real estate does not fulfil the requirements for being qualified as a transfer of a business unit, the sale is generally VAT-exempt. However, the seller may waive the exemption and opt to VAT. In this case, the purchaser is obliged to calculate and pay the VAT according to sec. 13b VAT Act ("reverse charge"). The seller has to issue an invoice without VAT, but with a reference to sec. 13b VAT Act.

14.3. Real Property Tax

Every property owner in Germany is liable to pay real property tax (*Grundsteuer*). The tax rate depends on the type of real property which is sorted into two categories, namely (i) real property tax "A": Real property used for agriculture and forestry and (ii) real property tax "B": Constructible real property or real property with buildings.

The real property tax burden is calculated by multiplying: (i) the assessed value of the real property, (ii) the real property tax rate and (iii) the municipal multiplier.


The real property value for purposes of the tax assessment is determined by the tax authorities according to the German Assessment Code (*Bewertungsgesetz*). The German Assessment Code refers to historic property values that are usually significantly lower than their current market values.

The tax rate varies between 0.26 % and 1 % (if calculated on the basis of market values) depending on the Federal State (in which the real estate is located) and the use of the property.

There are currently plans to revise the regulations dealing with real property tax and in that context re-evaluate real estate assets. These plans are - at least in part, fiscal interest may play a role here - owed to the questionable constitutionality of the present procedure of assessing taxes based on often outdated historic values. A bill has already been introduced in the German Parliament on 4th November 2016. However, new values are intended to become applicable not earlier than with effect as of 1st January 2022 at the earliest.

15. Public Law Permits and Regulations

15.1. Building /planning restrictions

The construction, alteration, change in use and demolition of a building structure in Germany generally requires a building permit in accordance with state 

Real Estate Transfer Tax

State	Date	RETT Rate
Baden-Wuerttemberg	Since 05.11.2011	5%
Berlin	Since 01.01.2007	4.5%
	Since 01.04.2012	5%
	Since 01.01.2014	6%
Brandenburg	Since 01.01.2011	5%
	Since 01.07.2015	6.5%
Bremen	Since 01.01.2011	4.5%
	Since 01.01.2014	5%
Hamburg	Since 01.01.2009	4.5%
Hessen	Since 01.01.2013	5%
	Since 01.08.2014	6%
Mecklenburg-Vorpommern	Since 30.06.2012	5%
Lower Saxony	Since 01.01.2011	4.5%
	Since 01.01.2014	5%
North Rhine-Westfalia	Since 01.10.2011	5%
	Since 01.01.2015	6.5%
Rhineland-Palatinate	Since 01.03.2012	5%
	Since 01.01.2011	4%
	Since 01.01.2012	4.5%
Saarland	Since 01.01.2013	5.5%
	Since 01.01.2015	6.5%
	Since 02.03.2010	4.5%
Saxony-Anhalt	Since 01.03.2012	5%
	Since 01.01.2012	5%
Schleswig-Holstein	Since 01.01.2014	6.5%
	Since 07.04.2011	5%
Thuringia	As from 01.01.2017	6.5%
Other federal states (Bavaria and Saxony)		3.5%

building regulations. While the exact requirements for obtaining a building permit are contained in building regulations issued by each individual German federal state, it is fair to say that building regulations are pretty standardized throughout Germany. Pursuant to the standard rules, each project involving construction, change or structures being demolished must comply with the specifications of zoning law and building regulations. The zoning law covers the so-called land-use planning and distinguishes two levels of detail: The first level is the land utilization plan (*Flächennutzungsplan*) which is a preparatory plan; the second level is the development plan (*Bebauungsplan*) which is the legally binding plan showing the permitted use of land.

15.2. Development Plan

The development plan (*Bebauungsplan*) is the decisive regulation for the building permit. Whether and how a piece of land may in principle be developed and built on is governed by public planning law. The urban development permissibility of a building project depends on the development categories in which the area/site to be developed is situated. The federal building code provides for three different development categories:

- Designated development area: If a piece of land falls within the scope of a local development plan which contains specifications regarding the type and extent of the development, areas to be developed and the local public access areas, then the building project is generally permitted.
- Developed areas without local development plan: Development is also permitted inside continuous build-up areas for which a local development plan does not exist. However, this only applies if the type and extent of the building project, the construction method and the area which is to be built upon fit into the surrounding area and development infrastructure.

- Non-developed area: if the land is not located within a continuous build-up area and if there is no local development plan, then a building project is only permitted provided that it does not conflict with public interests, that the development infrastructure is assured and that the building project is a privileged project, e.g. agricultural plants, power plants etc.

15.3. Building Permit

Once the plans for a building project have been drawn up and prior to its implementation, a building permit (*Baugenehmigung*) must be applied for and obtained. The exact requirements for the issuance of a building permit vary according to the different statutory laws of the federal German states. In order to obtain a building permit a written application accompanied by a number of documents required by law must be filed with the competent building control authority (*Bauaufsichtsbehörde*). This involves the co-ordination with architects etc. If the building project complies with local development plans and does not infringe any public-law requirements, then the local authority will issue the building permit, possibly subject to fulfillment of some additional requirements (*Auflagen*) e.g. relating to fire protection and building safety. The neighbors adjacent to the site will be notified and given an opportunity to comment on the permit. As long as rules for the protection of neighbor interests might be violated, neighbors may file objections and/or initiate legal proceedings against the building permit within a statutory term. This may hinder progress of construction work.

15.4. Environmental Issues

15.4.1. Low-energy construction methods

New buildings must comply with the Energy Saving Act (*Energieeinspargesetz*) in conjunction with the Energy Saving Regulation (*Energieeinsparverordnung*). The Energy Saving Regulation provides for specific standards regarding the conservation of energy through heat insulation and water consumption which must be observed by property developers. A further requirement stipulated in the Energy Saving Regulation

Purchasers of German real estate should have sufficient due diligence reviews undertaken; purchase agreements often provide for limited representations and warranties and limitations on Seller's liability

is the Energy Pass (*Energieausweis*) which amongst other things documents the energy needs of a building.

15.4.2. Waste law

Waste management is an integral part of environmental protection especially for commercial properties. The main issues to be resolved are the avoidance of waste and the proper recycling or converting of materials into energy. Production plants and other real estate development projects must comply with extensive waste prevention regulations.

15.4.3. Soil protection

"Inherited" environmental liability can lead to an enormous financial burden and thus is one of the critical issues in real estate sales. Therefore, contamination/environmental are a recommendable/essential component of due diligence to be undertaken by the purchaser, at least in cases where the real estate in question is known to have been used for industrial purposes before.

Liability for inherited environmental obligations is mainly governed by the Federal Soil Conservation Act (*Bundesbodenschutzgesetz*). That act states that contamination must be avoided and, in addition, precautionary measures to avoid contamination must be taken. Contaminated soil must be cleaned up. These statutory regulations are especially important because it is not only the party having caused the contamination which is held liable and obliged to remedy the damage. In general the authorities choose the most effective means of averting risks for the general public and may decide between a number of possible parties. It can either be the party that has caused pollution/contamination (such as previous tenants/owners that have operated facilities on the real estate, as far as these can be identified) or the owner of the real estate or the party exercising actual control of the real estate, such as a current tenant, even if such party has neither caused nor even has been or is aware of any contamination of soil. As in Germany there is a large number of areas that have been used for industrial

and comparable purposes and could therefore cause events of inherited environmental liabilities, allocating the economic risk stemming from potential liability for environmental issues frequently is one major issue in negotiations. It is recommended that the purchaser undertakes a thorough due diligence review prior to acquiring certain pieces of land. Sale and purchase agreements generally contain detailed provisions dealing with environmental liability. This allows a risk assessment and the allocation of risks between the parties concerned. These aspects should also be considered when negotiating a lease agreement.







HUNGARY





Dr. Gábor Gömöri

ggomori@deloittece.com

The Hungarian real estate market offers interesting opportunities for investors. All segments are witnessing dynamic expansion. In 2016 the investors spent 1,54 billion euros in the retail sector, which exceeds the 2015 level by 107%. This growing trend continues in 2017.

A significant indicator of the Hungarian real estate market is the decreased average transaction size, which is lower than the level prior to the financial crisis. Due to the improved liquidity of the lower segment, the demand is also growing for the smaller properties (value of 50-60 million euros); the demand thereof is intense among the investment funds and the private investors.

The positive trends of the previous year continued in 2016. Beside the market drivers the government also supported the residential sector by the announcement of family housing allowance (named "CSOK"), and decreased VAT in case of newly built residential real estates from 27% to 5%. These provisions enhanced the activity of real estate developers, frozen projects were recommenced and numerous new developments have started.

Regarding the retail sector, the vacancy rate in the office stock has shown a decreasing trend for years, and in 2017 further decrease is expected (The vacancy rate in 2017 Q1 is 9.2%), meanwhile in city logistics a higher 13.1% of vacancy was recorded. These figures show a stagnating trend with no considerable new stock on the market.

The prevailing low interest rates play an important role in the current growth since the financing is not an issue at the moment.

1. Main laws governing property ownership and lease in Hungary

In Hungary, the main source of law with respect to real properties is Act V of 2013 on the Hungarian Civil Code. The Civil Code stipulates the general rules applicable to the acquisition of ownership and also sets forth the main rights and obligations related to real property. Besides the Civil Code the main laws are Act No. CXXII of 2013 on Trade of Agricultural and Forestry Lands (Arable Land Act), Act CXLI of 1997 on Real Estate Registration, Act LXXVIII of 1997 on the formation and protection of built environment (Construction Act), and Act LXXVIII of 1993 on the main rules of leasing residential and non-residential properties (Flat Lease Act).

2. Ownership rights

2.1. Acquisition of ownership

The Civil Code sets forth the main types of real property acquisitions. Any form of transferring the real estate ownership requires a written form and the previous owner is deleted from the Land Registry System simultaneously with the registration of the new owner. Registration usually takes 5 to 30 days.

2.2. Transfer

The most common way of acquiring the ownership of a real property is the sale and purchase thereof at an agreed purchase price under a written sale and purchase contract. Besides sale and purchase the real property can also be transferred as a gift where the ownership is transferred without paying any consideration.

2.3. Structure of acquisition

The real property can be purchased directly through an asset deal or through a share deal, i.e. by the



acquisition of the shares of the company holding the real property. In each case a due diligence procedure is required before acquiring the real property in order to ascertain the legal, tax and physical status of the target property and/or the target company.

2.4. Ownership of the land diverges from the ownership over the building

The Civil Code provides that the ownership of the buildings and the land can be separated, based on an agreement between the land owner and the owner of the building. At the discretion of the real property's owner, the building and the land on which it stands may be registered in the real estate register as separate properties. The land owner and the owner of the building may enter into an agreement to stipulate that the owner of the building shall be permitted to sell or encumber the building only with the land owner's consent.

In the cases where the ownership of a building and that of the land on which it stands are separated, the owner of the land shall have right of pre-emption in respect to the building, while the owner of the building shall have right of pre-emption in respect to the land.

2.5. Expropriation

Under Hungarian law there are some exceptional cases when the ownership of real property may be acquired for public use by the Hungarian state. If the owner receives immediate, full and unconditional compensation.

2.6. Inheritance / legal succession

A natural person may inherit a real property either by the force of law after family members or based on the last will of the testator. Regarding legal entities the ownership of the real property is passed by the force of law to the legal successor of the previous owner in case the previous owner ceases to exist. The legal succession procedures are carried out by public notaries in case of natural persons and by the competent courts which order the termination of the legal predecessor company.

2.7. Restrictions

In principle the ownership of a real property may be acquired by any person. However, in case of some types of real properties or subject to the citizenship of the future owner, certain restrictions may apply.

2.8. Non-tradable properties

There are several types of real properties that solely belong to the Hungarian state and therefore these properties cannot be alienated to third persons (e.g. building of the Parliament, squares and parks, etc.).

2.9. Arable Land

There are detailed rules, conditions and restrictions regarding the acquisition of arable land in Hungary. Without going deep in detailed regulations the main rules are that an arable land may be acquired by Hungarian private individuals, EU citizens. Legal entities, whether foreign or domestic cannot acquire ownership rights of arable land with some exceptions such as the State of Hungary, local governments and public foundations. The Hungarian state, current occupiers and neighboring landowners have pre-emption rights over arable land. The ownership of land may not be acquired by third-country natural persons or foreign states, including their provinces, local authorities, and the bodies thereof or legal persons, except as provided in the Arable Land Act. There is also a land acquisition limit pursuant to which a farmer is entitled to acquire a maximum of 300 hectares, and any other person who does not qualify as a farmer may acquire a land up to 1 hectare.

2.10. Non arable Land

Hungarian and EEA resident natural and legal entities may acquire any real property (considering the relevant legal regulations and possible contractual restrictions). Non Hungarian or EEA resident legal entities and private individuals may acquire ownership of non-arable real property, however in this case an authorization is needed. Granting this authorization may be denied, if the purchase of the real estate is against public interests of Hungary.

However, cases of denial are rather rare and most of the time the authorization is obtained. Besides the above, there are some techniques to avoid authorization procedures, e.g. set up a company or establish a branch office in Hungary or to join a Hungarian business as a member or acquire shares therein.

2.11. Jointly owned property

The Hungarian Civil Code provides specific rules for real properties which are jointly owned by several persons. The main rules are that each co-owner has the right to possess and use the property. However, none of the owners may exercise this right, if it adversely affects the rights and relevant lawful interests of the others in connection with the property. If one of the co-owners wishes to sell its interest in the property, the other co-owners have pre-emption rights.

3. Registry System

Under Hungarian law the registration of land is compulsory. The most important information in connection with real properties is recorded in the

Hungarian and EEA resident natural and legal entities may acquire any real property. Non Hungarian or EEA resident legal entities and private individuals may acquire ownership of non-arable real property.

public land registry system. The land registry system is a large official database, accessible to the public, and official data extracts can be requested therefrom. Registered users can view information online as well. The records of the land registry are considered as authentic proof of registered rights. Each real property has a land registry sheet that includes the area and description of the property, the previous and current owners, and indicates other registered rights such as easements, usufruct, right of use, mortgage, right of execution and other facts related to the property.

The registration system serves to guarantee the safety of real estate transactions. The land registry office is responsible for registering any data regarding registration, modification, cancellation on the request of either the owner of the property or third party who has any rights to the property (e.g. mortgage).

The role of the land registry is significant in real estate transactions as in case of change of owners, if the purchaser fails to register its right in the land registry, the acquisition would be ineffective against third parties. The registration is subject to the submission of the written real property sale and purchase

agreement and some further mandatory annexes. The sale and purchase agreements are prepared and countersigned by a Hungarian attorney at law or a public notary, and then filed with the competent land registry office within 30 days from its signing.

In case of ownership transfer the connection between the land registry system and the tax authority is direct. A special registration form needs to be attached to the sale and purchase agreement, which will be forwarded to the tax authority.

3.1. Representations and Warranties in Real Estate transactions

The following standard provisions are applied in real estate transactions as representations and warranties: real estate ownership and title, bona fide ownership,

land registers accurate, no encumbrances, easements, environmental issues, hazardous substances, permits and zoning compliance, public utilities, no expropriation, leases, assets (other than property).

3.2. Mortgage Regulations and other guaranties used in RE transactions

The most common guarantee in a real estate transaction is a mortgage. When a mortgage is registered, the property charged with mortgage will remain in the possession of the obligor (owner). It is necessary to register the mortgage in the land registry and it has to be contracted in writing. Under the laws of the Hungary, the mortgage is constituted by the registration of such right into the land registry.

3.3. Lender protection on a creditor execution

According to the continuous practice in Hungary, the parties of a credit agreement usually establish a (first ranking if possible) mortgage on the real property. This type of security allows the lender to exercise certain rights if the borrower does not comply with its obligations under the loan agreement (i.e. a default event occurs). In that case the lender is able to sell the real property in several ways. The mortgage agreements are usually concluded in a notarial deed form in order to have a document with full probative force, because in that case the lender may exercise its rights originating from the mortgage much quicker.

4. Leases of business premises

In Hungary the Flat Lease Act governs the lease of flats and commercial premises. The office lease agreement needs to be concluded in writing between the lessor and the lessee. There are no restrictions regarding the lessor and the lessee, both may be foreign individuals, legal entities or organizations that are not legal entities.

The main rights and obligations of the parties are also regulated in the Flat Lease Act. As for securities bank guarantees and deposits are the most typical securities in rent agreements. Contracting parties are free to decide on the term of the contract.



5. Taxes

In relation to asset deal transactions, the purchaser is required to pay a duty on the transfer of real property to the tax authority. The general rate of duty is 4 percent of the market value of each property acquired up to 1 billion forints (~EUR 322,000) and an additional 2 percent of the portion of the market value above 1 billion forints (not exceeding 200 million forints per property, ~ EUR 645,000). In case of share deal transactions, on acquisition of shares in a company with holdings in real estate properties, the beneficiary of the shares has to pay duty in case of special circumstances.

6. Public permits and obligations

In Hungary, development of any real properties are regulated mainly by the Construction Act. The Construction Act regulates construction works and activities at both national and local level.

7. Environment

7.1. Polluted Land

Construction work needs to be carried out in accordance with environmental obligations. The environment protection and conservation of nature areas are additional requirements to fulfil. A legal entity carrying out construction work is also liable for the harm or threat posed to the environment and responsible to pay costs of prevention or remediation. The party registered as the owner will be liable for environmental damage, unless it can identify the actual user of the real property and provide proof beyond reasonable doubt that liability lies solely with the actual user. Consequences are severe, in case of non-compliance with environmental regulations the authority may limit or suspend the harmful activity, and impose fines.

7.2. Energy efficiency qualifications

In real estate transactions, the sale and purchase agreement includes provisions regarding energy performance certificates. The seller is obliged to obtain and hand over the energy certificate to the buyer. The rules for providing energy certificates are set out in the Government Decree No. 176/2008 (VI. 30.) on the Certification of Energetic Characteristics of Buildings.







ITALY





Gerardy Bochicchio
gbochicchio@deloitte.it

1. Real Estate Law

In Italy there are several types of rights related to real estate assets and, consequently, different laws and regulations.

In particular, as the most representative, there are:

- full ownership ("*piena proprietà*"): the right to fully and exclusively enjoy and dispose of the property, which is the broadest right that may be held in real estate;
- right to build ("*diritto di superficie*"): the right to build and maintain a building on or underneath a third party's property. Please consider that, if the right is limited in time, when the term expires, the owner of the property becomes the legal owner of the building;
- easement ("*servitù*"): the right to "use" the real property, owned by a different person/entity, for a specific aim ("*utilità*"), resulting into the "creation" of an encumbrance ("*onere*") burdening the third party's property;
- leases: the right to enjoy, for specific aims and a fixed term, a third party's property in exchange of a payment.

Please consider that the laws regulating each of these rights, which are classified as *in rem* rights ("*diritti reali*"), are the provisions of the Italian Civil Code (hereinafter "**ICC**") — e.g. full ownership articles 832 and followings ICC, right to build articles 952 and followings, lease articles 1571 and followings — and the provisions of specific laws and regulations — e.g. L. n. 392/1978 and n. 431/1998 concerning leases.


In addition to the above, as part of the category of *in rem* rights, there are also beneficial interest ("*diritto di usufrutto*"), right of use ("*diritto d'uso e di abitazione*") and emphyteusis ("*diritto di enfiteusi*").

2. Ownership rights

In general, there are no restrictions on the purchase of real estate assets by foreign investors. However, please consider that some restrictions may depend on the citizenship of the buyer or family status, if a person, and on the specific characteristics of the property.

With reference to the citizenship of the buyer, it is necessary to underline that some rights are granted to foreigners according to the principle of reciprocity, pursuant to art. 16 of the "General Disposition" ("*Disposizioni sulla legge in generale*"), connected to the ICC. According to such principle, except for the fundamental rights which are always recognized, Italy recognizes to foreigners the same rights that the foreign country grants to Italian citizens. Please consider that it is not necessary to verify such principle of reciprocity in some cases pursuant to the Legislative Decree n. 286/1998 (e.g. European Union's citizens, citizens of countries that have signed a Bilateral Investment Treaties).

Regarding the family status, it must be stressed that the existence of a certain matrimonial regimes (e.g. community property, conventional regime) of the seller may implicate restrictions on the transfer of the real estate assets.

Please note that the real estate assets may be burdened by restrictions due to legal, technical, cultural and scenic reasons. As significant, please consider that there are restrictions set by the law and the applicable planning instruments (e.g. use of the real estate assets) and other related to the qualification of the real estate assets as of cultural and scenic public interest and, for such reason, the transaction is subject to an administrative procedure according to the Legislative Decree n. 42/2004. 

3. Registry system

In Italy, there are two different property registers:

- Real Estate Register ("*Conservatoria dei Registri Immobiliari*");
- Cadaster Register ("*Catasto*").

The Real Estate Register is held by each Province ("*Provincia*") and it records all the information and data relating to real estate assets (e.g. sale and purchase agreements, deeds establishing mortgages or *in rem* rights, decisions of the Court and information on pending disputes).

Even if it is not requested for the validity of the deeds, usually they are filed to the Real Estate Register and the filing ("*trascrizione*") is effective against third parties. Please consider that, according to art. 2650 ICC, the publicity of the deed and its consequent effects against third parties are effective only whether it is respected the rule of the "continuity of filings", which means that there is an uninterrupted chain of ownership.

It must be stressed that also preliminary agreements may be registered according to art. 2645 bis ICC in order to protect the buyer against subsequent filings of third parties, granting the so called "booking effect", which means a prevalence of the filings of the preliminary agreement over any other subsequent third parties' filing. The protection lasts one year after the completion date specified in the preliminary agreement and, in any event, three years after the registration of the preliminary agreement.

Each Province ("*Provincia*") in which the real estate asset is located holds the Cadaster Register. It is divided into the "Land Cadaster", in which lands are recorded, and the "Building Cadaster" in which buildings are recorded.

After the compulsory registration, it is assigned to each real estate asset the so called "cadastral income", which

is the basis for the calculation of the municipal property tax. Please note that the cadastral income is not a fixed amount since the relevant authority may review it.

4. Notary roll on the transactions

The essential elements of the deed of transfer are the price, the identity of the property, details of the relevant permits (e.g. certificate of compliance ("*certificato di agibilità*") and certificate of conformity ("*certificato di conformità*") and information on the property. While all the others elements are negotiable (e.g. representations, mortgage, guarantees). When the contract is signed in front of a public notary, in the notarial deed there must be reference to the means of payment, the agent involved and the agency fee.

As mentioned for publicity scope, in order to file the agreement to the Real Estate Register, it is necessary that the deed of transfer is made in writing and authenticated by a public notary.

The same form of the final deed of transfer shall have the preliminary contract, therefore, it must also be in writing.

5. Representations and warranties in real estate transactions

The seller's responsibility is limited to grant:

- The effective ownership of the real estate asset sold. The evidence of the ownership is very difficult on basis of the Italian law, because you must demonstrate that your ownership came up from another person which was legally owner of the asset at the moment of the purchase. So this last person bought the asset from another person who was legally owner of it and in this way for the 20th years before the last purchase. This is the same period of time to acquire the ownership by an original title. This kind of prove is named "*Diaboli*".
- That nobody anyone could ask right on the asset (the "*Evizione*");

It must be stressed that also preliminary agreements may be registered according to art. 2645 bis ICC in order to protect the buyer against subsequent filings of third parties, granting the so called “booking effect.

- The quality needed to utilize the asset for the use who is fated and the non-existence of lacks that could threaten the utilization of it.

6. Mortgage regulation and other guaranties used in RE transactions

A mortgage (“*ipoteca*”) is the most common form of security over a real estate asset (land, buildings erected on it and fixtures which form part of those buildings). A mortgage may burden not only the right of full ownership over real estate, but it may be established also over certain other *in rem* rights (e.g. bare ownership (“*nuda proprietà*”) and right to build).

There are three types of mortgage:

- The voluntary one (“*ipoteca volontaria*”) established by means of a voluntary deed of the debtor (or of a third party over its properties);
- The legal one (“*ipoteca legale*”) established pursuant to specific provisions fixed by the law;
- The judicial one (“*ipoteca giudiziale*”) established by judicial awards and orders of payment issued by a Court.

Please consider that mortgages must be executed by deed in front of a Notary Public and must be filed to the Real Estate Register in order to be validly established.

The creditor may execute the property burdened by its mortgage and he is entitled to start an expropriation (“*espropriazione*”) of the asset. Following to the sale, the proceeds are distributed amongst all creditors in the enforcement procedure, after prior payment of the beneficiary of the mortgage.

Please consider that a property may be burdened by more than one mortgage, in such case, a claim regarding the credit secured by the senior mortgage (first-ranking mortgage) has priority over those secured

by junior mortgages established subsequently (second-ranking mortgage, third-grade, fourth-grade etc.).

The mortgage is an *in rem* security, therefore, if not settled, mortgages “follow” the property even in case of transfer of the properties burdened by the same, according to the principle of *ius sequelae*.

In addition to mortgage, which is the most common form of security, there are pledge (“*pegno*”), which may burden only movable assets, and privileges (“*privilegi*”), which consists in statutory priority in relation to the proceeds of a debtor’s assets. In principle, pledges prevail over privileges over movables while special privileges over immovable properties prevail over mortgages.

7. Leases of business premises

With reference to commercial lease, there are two types of agreement: (i) property lease agreement (“*contratti di locazione*”) for non-residential use and (ii) business lease agreement (“*contratti di affitto di azienda*”).

Regarding the property lease, Law n. 392/1978 (the so called “Italian Tenancy Law”) contains the applicable provisions. Please consider that certain provisions are considered mandatory and they may be departed only in favor of the tenant. Any other contractual deviation, that is less favorable to the tenant, even if mutually agreed, would be declared null and void and automatically replaced by the mandatory provision of the Italian Tenancy Law.

Please note that the mentioned mandatory provisions of the Tenancy Law do not apply to agreements entered into after 11.11.2014 with a yearly rent higher than €250.000,00 (excluding those buildings recognized as with a historical value) and, as a consequence, the parties are free to negotiate terms and conditions of mentioned lease agreement.

The most common provisions in a property lease agreement are:



- **Duration:** It is fixed as minimum term of duration of the agreement a period of 6 years and 9 years for hotel leases (except where the activities to be carried out are temporary). The provision is mandatory, therefore the parties may only negotiate longer leases. Upon expiration, the agreement is automatically renewed on the same terms and conditions for the same duration, unless either party gives notice not to renew at least 12 months (or 18 months in the case of hotels) in advance, being stated that the landlord, upon the first expiration, may only refuse to renew for strict reasons.
- **Price:** The parties are free to determine the amount due for the lease, however, rents may be annually adjusted by a maximum of 75% of the variation in the ISTAT index.
- **Maintenance:** Generally, unless otherwise agreed, the landlord is responsible for extraordinary maintenance while the tenant is responsible for the ordinary one.
- **Assignment:** According to the Italian Tenancy Law, the tenant may assign the lease, without the consent of the landlord, whether the assignment takes place in the context of a sale or lease of the going concern of the tenant, of which the property lease agreement is a part.
- **Transfer of the property:** In case of transfer of the ownership of the leased premises, the lease in force will remain effective and a clause providing for its termination would be null and void. Whether the landlord decides to sell the leased premises during the term of the lease, the tenant has a pre-emption right to purchase the premises following to the procedure set by the Italian Tenancy Law or to redeem the real estate asset in case the procedure has not been respected by the landlord.

Differently, the business lease agreement concerns a “going concern” (“*azienda*”) or a business branch (“*ramo d’azienda*”). Pursuant to art. 2555 ICC and relevant case law, a going concern is a unitary and organized complex of movable and immovable assets, linked by an interdependence and complementary relationship, which are necessary to carry out the enterprise. The business branch is an autonomous articulation of a going concern made of movable and immovable assets, linked by an interdependence and complementary relationship, which are necessary to carry out part of the enterprise. The mentioned provisions of the Italian Tenancy Law do not apply to business lease agreement.

8. Taxes

The follow table summarize the tax regime applicable to the different assets.

9. Public law permits and obligations

The land use in Italy is planned at different levels of government. In particular, the administrative authorities involved are State, Regions (“*Regioni*”), Provinces (“*Province*”) and Municipalities (“*Comuni*”). The State is responsible for guidance and coordination and establishes the general rules concerning the planning and building law. These rules are then specified by the other levels, each one in accordance with the competent authority.

A central role in the definition of programs for development and transformation of land is given to the Municipalities, which approve the General Town Planning Instrument. This urbanistic instrument sets the requirements and the conditions that each building has to comply. Each building is classified in a category (the main categories are: residential, commercial, touristic, productive and rural). The category is not immutable and the change from one category to another could require the issuing of a building title and the payment of the related fees.

In case of transfer of the ownership of the leased premises, the lease in force will remain effective and a clause providing for its termination would be null and void.

The surface right- VAT and Registration TAX

1. Surface right- on the roof top of a building/shed/ store — purchased from a taxable person (generally a company).

Indirect taxed to be applied

- Italian VAT (Standard rate 20%)
- Fixed Registration tax equal to Euro 168,00
- Mortgage and Cadastral tax

Mortgage and Cadastral Tax (imposte ipocatastrai)

Capital buildings (fabbricati strumentali) under the art 10 n 8-ter) of d.P.R. 633/1972 exempt or liable to VAT.	3%+1%
--	-------

2. Surface right- on the roof top of a building/shed/ store— purchased from a taxable person.

Indirect taxed to be applied

- No VAT
- Proportional Registration tax
- Mortgage and Cadastral tax

Mortgage and Cadastral Tax (imposte ipocatastrai)

Residential buildings (immobili abitativi) from individuals	2%+1%
---	-------

Proportional Registration Tax

Surface right on	Rate
Buildings and its appartemances	7%
Lands building and not building (Agricultural land)	8% 15%
Private home	3%

In Italy, Presidential Decree n. 380/2001 states the entire regulation concerning the construction or refurbishment activity. According to the mentioned decree, it is allowed to conduct some activities without a building title. In this case, the owner has to communicate the activity performed to the Municipality following specific procedures (CIL — “Comunicazione Inizio Lavori” — and CILA — “Comunicazione Inizio Lavori Asseverata”).

On the other hand, when a building title is needed the decree provides three kinds of building titles:

- The building permit, which is the administrative

license to construction issued by the Municipality;

- The SCIA — certified declaration of commencement of works (“Segnalazione Certificata di Inizio Attività”), which is a documentation prepared by the owner and signed also by an architect or an engineer to be filed to the Municipality. The filing of this documentation has the aim of communicate to the local administration the beginning of the construction/ refurbishment works (the owner is allowed to start the works immediately after the filing);
- The DIA — communication of commencement of works (“Denuncia di Inizio Attività”), which differs from SCIA only because in the case of the



DIA the works can be started only if the Municipality does not contest the legality or the legitimacy of the documentation or of the works within 30 days from the filing.

Please consider that in case of peculiar characteristics of the building, the mentioned disciplines could not be applicable.

10. Environment

According to the Italian legislation, it is necessary to evaluate the environmental effects in performing activities linked to real estate asset.

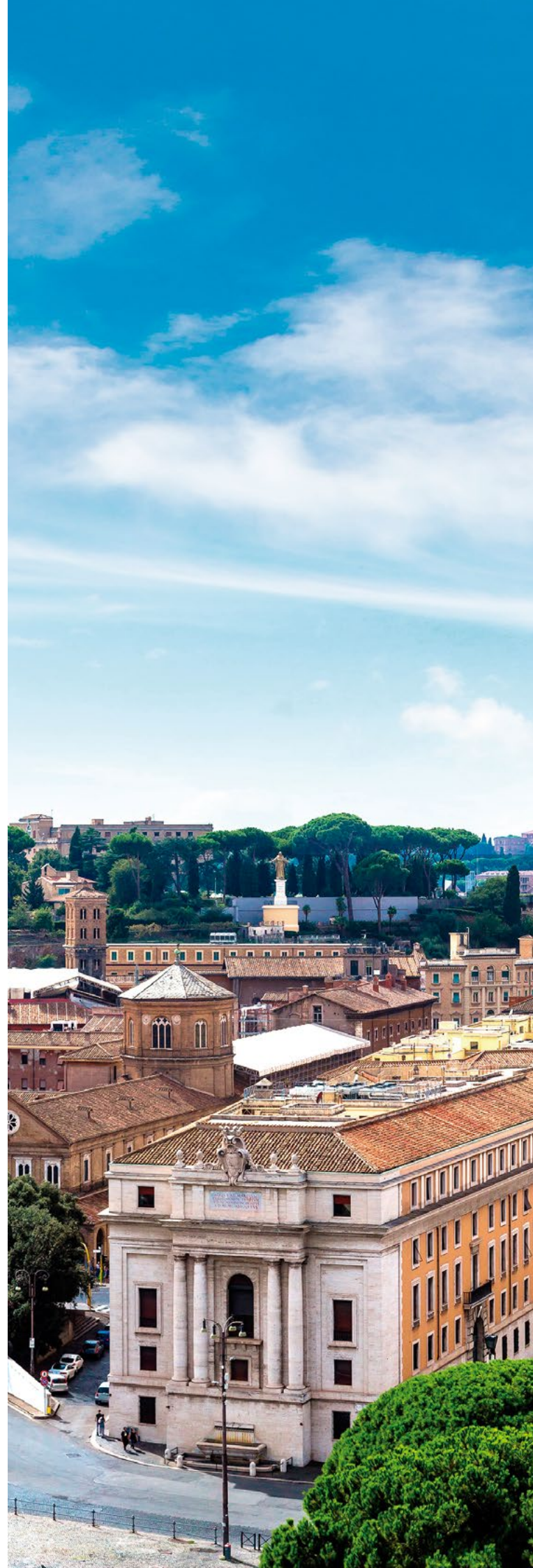
Specifically, the Legislative Decree n. 152/2006 provides for:

- Strategic Environmental Evaluation (“*valutazione ambientale strategica*”): an evaluation on the effects due to a variance to the General Town Planning Instrument in order to verify the sustainability of the plan or program from an environmental point of view;
- Environmental Impact Evaluation (“*valutazione d’impatto ambientale*”): a preventive evaluation of potential impacts on the environment of a project and its execution.

With reference to the energy qualifications, being stated that there are several applicable territorial legislations, according to the national law, there are two certifications referred to property:

- Energy qualification certificate (“*attestato di qualificazione energetica*”);
- Energy performance certificate (“*attestato di prestazione energetica*”).

According to the Italian law, in case of transfer of real estate assets upon payment, the agreement shall contain a disposition referred to the confirmation of the buyer on the receipt of the energy documentations and information (included the energy performance certificate). In event of transfer of real estate asset, the mentioned certificate shall be attached to the deed of transfer. The violation of such obligations may imply a fine on both seller and buyer.







LATVIA





Ilze Znotiņa na

Ilze Znotiņa na

1. Real Estate Law

- Civil law — general provisions of Real estate ownership and lease.
- Law On Residential Properties — provisions of the ownership of apartment property.
- Land Register Law — provisions of the Land register and Land register books registered real estate ownership.
- Law On Recording of Immovable Property in the Land Registers — provisions of recording the ownership of Real Estate.
- On Land Privatization in Rural Areas — provisions of obtaining land in Rural areas.
- Law On Residential Tenancy — provisions of lease of residential real estate.

2. Ownership rights

Rural land ownership

Citizens of the Republic of Latvia and citizens of other Member States of the European Union, as well as citizens of the states of the European Economic Area and the Swiss Confederation; the Republic of Latvia as the initial legal person governed by public law, and derived public persons; a capital company registered in the Republic of Latvia, as well as a capital company registered in another European Union Member State or state of the European Economic Area, or the Swiss Confederation, which has registered as a taxable person in the Republic of Latvia may own any Real Estate at the territory of Latvia. Some restrictions may apply in case of acquire in ownership:

- Land in the border zone of the State;
- Land in nature reserves and other protected nature areas in zones of nature reserves;

- Land in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga;
- Land in the protection zones of public bodies of water and water courses;
- Agricultural and forest land;
- Land in the mineral deposits of national significance.

The same restriction is applied for 3rd country citizens.

One natural or legal person may acquire up to 2000 hectares of agricultural land into ownership.

Municipalities right of first refusal

Before the property rights will be registered in the Land Book, by the process of alienation of immovable property, the purchase contract or a copy shall be submitted to the local government council, its authorized institution or official, which after the receipt of purchase agreement or copy of it, shall issue a written statement. The statement shall contain waiver or consent to use the right of first refusal.

There are not any ownership structures in which ownership of the land diverges from the right to build. But there can be restrictions to right to build depending on where the owned land is. For example, in case if you have land in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga you may not build there anything.

3. Registry system

Real estate ownership register In Latvia is Land book registers. Which are one Land Register authority, with many territorial representative offices. This register works under Ministry of Interior of Republic of Latvia.

The State Land Service of the Republic of Latvia is responsible for Real Estate address assignment and defining of real estate Cadastral value.



Immovable property shall be recorded in the Land Register, on the basis of the document, which certifies the legal acquiring of the immovable property.

Only such persons shall be recognized to be the owners of immovable property, as are registered in the Land Register as such owners.

Until registration in the Land Register, acquirers of immovable property shall not have any rights against third parties, they may not use any of the priority rights associated with ownership, and they must recognize as valid any acts pertaining to such immovable property by the person who is indicated, pursuant to the Land Register, as the owner of such property. However, they have the right, not only to request compensation for all acts done in bad faith by the earlier owner pertaining to the immovable property, but also to request that the latter take all the appropriate steps to register the passing of the immovable property in the Land Register.

Rights to immovable properties shall be corroborated in Land Registers, understanding rights also as the security and restrictions of rights if the contrary does not arise from the content and direct meaning of the law.

After the transaction was made the new ownership on the basis of Agreement or another legal act (court decision) can turn to the Land Register with a notarized corroboration request.

4. Notary roll on the transactions

Collaboration request submitted to the Land Register shall be notarized by notary public.

5. Representations and Warranties in real estate transactions

To sell the real estate the Seller shall be the registered owner or empowered representative of registered owner of real estate. The information of the real estate owner is publicly available and each buyer can familiarize with it. Both parties shall must take into account mandatory rules of obligations law. All other Representations and Warranties can be specified by the parties for each particular case in accordance with the conditions of the deal. It can be, for example:

- responsibility of the seller to pay all utilities before selling day;
- responsibility of the seller to pay all real estate tax duties before selling day;

- Responsibility of seller for not informing the buyer about any mortgages or encumbrance of the real estate property.

In Latvia we have not any differentiation of assets classes in real estate area.

6. Mortgage regulation and other guaranties used in RE transactions

Common procedures for a mortgage constitution. According to the Latvian Civil law a mortgage gives a creditor a property right regarding pledged real estate only after its registration in the Land Register. A mortgage may be established by a court decision or a legal transaction. A mortgage shall be registered in the Land Register. In order the registration of the mortgage in the Land Register to be in effect, following is required:

- it shall be registered at the appropriate authority (the registration of a mortgage may only be made at the Land Register office in whose administrative area the immovable property is located.)
- it shall be registered in due time (for example — insolvency of the owner of the real estate has not been intervened);
- registration of a mortgage in the Land Register is only allowed after the consent of the mortgagor (a request for corroboration by the public notary is required — it shall be signed by both parties — pledger and pledgee);
- a mortgage shall only be in specific value and with respect to specific real estate, which is owned by a mortgagor;

The following documentation shall be submitted to the Land Register:

- a request for corroboration;
- loan (credit) agreement;
- mortgage agreement;
- a consent of a pledger spouse, that states, that the property of spouses is separate (in case of matrimonial property);
- a consent of a third-party (if the prohibition in favor of a third party is registered in the Land Register);

According to the Latvian Civil law a mortgage gives a creditor a property right regarding pledged real estate only after its registration in the Land Register. A mortgage may be established by a court decision or a legal transaction.

- receipt of the payment for stationery fee in amount of 14.23 euros;
- receipt of the payment for state fee;
- power of attorney (if the documents have been signed by the power of attorney).

How is the lender protected on a creditor execution.

According to the Latvian Civil law the alienation by a debtor of the real estate to a third person does not alter the rights of mortgage creditors, and any such disposals can only be done while maintaining its pledge rights to expropriated real estate.

A pledge right (mortgage) shall remain in force until the creditor is completely satisfied.

7. Leases of business premises

Applicable laws

- Cabinet of Ministers Regulation No. 735 "Regulatory provisions on the lease of the property of public person".
- Law on Residential Tenancy
- Law on Residential properties

Types

There are no specific types of the lease of business premises.

Typical provisions

Latvian Civil law regulates the procedure for concluding a lease agreement. The object of the lease agreement is a non-residential premise, although in practice apartments are leased as non-residential premises as well.

A lease agreement shall be concluded in written form. A lease agreement must stipulate amount of the rent, as well as additional services provided (public utilities, security, and telecommunications) and payment.

deadlines. The law does not prohibit the parties to agree on an advance lease payment and/or a bail.

It is recommended, to include provisions in the lease agreement, that state under what conditions a rent is promoted or reduced.

Usually a lease agreement is concluded for a fixed time period. The lease agreement may be terminated on the basis of law before the expiration of the fixed time period (if the leased premises are destroyed or the owner is changed).

8. Taxes. Probably centered in indirect tax

According to the Latvian law on Property tax a property tax (as indirect tax) is usually paid by the owner of the real estate (leased premises), but this obligation may be transferred to the lessee as well.

9. Public law permits and obligations

According to the Article 6 of the Latvian law On Privatization of State and Local Government Residential Houses following persons have a right to privatize Apartments, Non-residential Premises, Artist's Workshops, as well as Multi-apartment Houses and Single Dwellings:

- owners of privatization certificates — Latvian citizens, non-citizens and persons who have received a permanent residence permit;
- owners of privatization certificates — legal persons who have the right to purchase land in accordance with the Latvian laws, except State, local governments and capital companies, in which State or local government capital shares separately or in total exceed 50 percent.

According to the Article 30 of the Latvian Law on Land Privatization in Rural Regions non-citizens need to obtain a special certificate to acquire the right to buy real estate.

According to the article 78 of the Latvian law On Local Governments, local governments have the right



of the first refusal, if immovable property in the local government administrative territory is being alienated and such is necessary to perform the local government functions prescribed by law, by taking into account the use of the territory permitted (planned) in the territorial planning, laws and regulations, development planning documents and other documents that substantiate the necessity of the relevant immovable property for the implementation of the local government functions.

10. Environment

Polluted Land

According to the Latvian law On Pollution the owner or a user of a property has a duty to notify the possible successors in interest or duties in respect of the polluted or potentially polluted sites in the relevant property or territory in use, and its vicinity.

Energy Efficiency qualifications

The Latvian law on the Energy Performance of Buildings regulates the minimum energy performance requirements of buildings.

The purpose of this Law is to promote rational use of energy resources, improving the energy performance of buildings, as well as to inform society regarding the energy consumption of the buildings.

The law provides for cases when the energy certification of buildings is required, the requirements for heating and air conditioning systems, as well as regulates the rights of potential tenants of the buildings or the buyer the right to meet the requirements of the building energy performance.

The law imposes obligations and responsibility of building owners for energy certification of buildings and the provisions of the minimum energy performance requirements in buildings.







LUXEMBOURG





François Lerusse
flerusse@dlaw.lu

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country

Real estate law is mainly governed by the Civil Code, at the chapter regarding the lease contract (“*Du contrat de Louage*”), and by the principle of freedom of contract. Specific laws complement these general provisions on certain points.

Lease provisions are freely negotiable between parties other than for some provisions of the Civil Code (e.g. commercial leases must comply with Articles 1762-3 to 1762-8, which include rules regarding the notification of renewal request and right of preferential renewal for commercial tenants who operate a business in the leased premises for more than three years).

2. Ownership rights

2.1. Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)

There are no restrictions on transferring property. For example, foreign shareholders, individual owners, and companies can freely hold shares and real estate assets in Luxembourg.

Nevertheless, undertakings are not free to establish their business anywhere in Luxembourg, see §1 hereafter.

2.2. Is there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

In principle, the ownership of land cannot be transferred without simultaneously transferring the immovable property erected on it. By exception, the followings are long term rights *in rem* deriving from the ownership of property that must be executed before a notary (Law of 22 October 2008 on the right of superficies and emphyteusis).

- the building right (*Droit de superficie*) is a tenancy and building right (max 99 years), granted from the landowner to a tenant against the payment of a fixed rent, authorizing the tenant to build structures on the land which will be the property of the tenant until the end of this Droit. At the end, the property of the building is transferred to the landowner against the payment of the net value of the building.
- the long lease (*Bail emphytéotique*) is a tenancy right (min 27 years, max 99 years) on a building allowing the holder to use and enjoy property belonging to a third party in consideration for a payment. The tenant exercise all the rights attached to property but is not permitted to reduce the value of the property.

At the expiration of the long lease, the lessor becomes the owner of all building and plantings located on the land. The holder will not be entitled to compensation for buildings the holder has erected or plantings the holder made, unless provided otherwise in the lease.

3. Registry system

The Law of 25 September 1905 as amended on registration of rights in immovable property is governing this subject.

3.1. Structure of the property registries in your country

Luxembourg has a Mortgage Registry (*Bureau des hypothèques*) listing all transfer of ownership, rights and interests, leases concluded for a period exceeding nine years, mortgages, easements and encumbrances in the estate. It is managed by The Registration and State Lands Authority (*Administration de l'enregistrement des domaines*).

The Land Register (*cadastre*) provides information about the current owner, the description, the exact situation and surface of the property.



The Cadastral and Topographical Administration (Administration du Cadastre et de la Topographie) is therefore the national public supplier for cadastral and topographical/cartographical data.

3.2. Is the registration compulsory?

Registration is mandatory in order to be enforceable against third parties but it does not affect the validity of the transaction between the parties.

3.3. How registration guarantees the rights of the owner

Enforceability is ensured by the registration of the notarial deed.

3.4. How registration works in a typical transaction?

The purchase of a property is generally carried out in two phases:

- a pre-contractual arrangement: It can be a preliminary private contract between the parties (compromis de vente), bidding between them if reciprocal consent as to the property and price is present (but only enforceable against third parties upon registration within 3 months of the date of the contract); or a letter of intent (lettre d'intention).
- and a notarial act: In order to register the transfer of the ownership, the notarial deed must be registered with the Registration and State Lands Authority (which triggers the payment of registration taxes) and must be recorded at the mortgage register (Bureau des hypothèques). The notary presents the notarial deed for recording in the register.

4. Notary roll on the transactions

4.1. Notarial deed

Guarantee of title: The notary has responsibility for checking the ownership of real estate at the Public Register, so that there is no need to be insured against

financial loss from defects in title to real estate and from the invalidity or unenforceability of mortgage liens.

4.2. Transfer of monies

The purchase price is generally transferred to a third-party account of the notary prior to the signature of the notarial deed and is later transferred to the vendor, after deduction of any sums due to mortgagees (if applicable), fees and taxes.

Pursuant to the law of 12 November 2004 as amended relating to the subject "know your customer" obligations and has to verify the source of the funds.

5. Representations and Warranties in real estate transactions

5.1. General legal responsibility of the seller in front of the buyer

The seller must explain clearly to the potential buyer what he binds himself to. Any obscure or ambiguous agreement is interpreted against the seller (Art. 1602 Civil Code). Therefore, the seller must demonstrate that it has obtained all required authorizations, that there is no easement, mortgage, encumbrances, lien or charge on the real estate and that there is no claim in relation to the real estate.

The seller must also inform the notary about easements that are known to exist and is liable if these easements are not mentioned in the notarial deed. The notary carries out compulsory research that is included in the notarial deed before registration.

Breach of contract

According to article 1184 of the Civil Code, the party towards whom the undertaking has not been fulfilled has the choice either to compel the other party to perform its obligations under the agreement.

(if this is possible), or to request the cancellation of the sale and the award of damages.

Registration is mandatory in order to be enforceable against third parties but it does not affect the validity of the transaction between the parties.

Environment liability

Where there is an imminent threat of environment damage, the new owner must take the necessary preventative measures (Law of 20 April 2009 relating to environment liability). However, he does not have to bear the cost of remedial action where the following conditions apply:

- it demonstrates that the damage or threat results from a third party's behaviour despite security measures undertaken
- the occupier demonstrates that it was not at fault or negligent under some conditions.

Consequently, the owner is liable for environmental damage even if it occurred before it bought or occupied the land, unless it can demonstrate that all necessary measures to avoid damage/threat resulting from third party behaviour were taken and it was not at fault or negligent under the conditions set forth by the law.

Where there is fraud, latent defects and/or representations and warranties provisions, the owner can bring an action against the seller.

Breach of representations and warranties

In addition those liabilities, the seller remains contractually liable for breach of representations and warranties covered in the sale agreement.

5.2. Typical Representations & Warranties for transactions in different assets class

The sale agreement must provide for representations and warranties of the seller to cover any liability (particularly related to the environment) occurring after completion of the sale.

The seller owes the buyer a statutory warranty of the following (unless provided otherwise).

Peaceful possession of the property sold (Art. 1625 Civil Code)

Therefore, the seller cannot disturb the buyer in possession of the property sold. On the sale of a business, Luxembourg judges consider the seller's warranty to include obligations with respect to goodwill, including the customers of the transferred business and the obligation of the seller to refrain from diverting these customers to his advantage (Law of 1 June 1966).

That there are no latent defects of the property, or defects that render the property useless:

This warranty applies when defects render the property unfit for the use for which it was intended or when such defects so impair that use that the buyer would not have acquired it, or would have paid a lesser price for it, had he been aware.

N.B: Additional seller's warranties regarding the sale of property which has yet to be constructed (Art. 1601-1 to 1601-14 Civil Code): In this sort of sale where the buyer makes payments in instalments to the seller according to the progress of the construction (and then before final completion), the seller must give a first demand bank guarantee covering the completion of the construction and the repayment of advances in case of non-completion.

In relation to existing leases

Generally representation and warranties relate to the validity of the lease, the compliance with legal and regulatory requirements (i.e., environmental legislation, operating permits), the absence of defects, the absence of litigation, etc.

Typical covenants made by the seller relate to usage and alterations of the property (i.e., no changes to the property prior to closing), no execution of new leases or subletting without the prior consent of the purchaser, maintenance in good condition and undertaking repairs and replacement, keeping



appropriate insurance, maintenance of property management agreements and rent adjustments.

Environment

Sale agreements generally include representations and warranties given by the seller in relation to possible pollution of the property, as well as indemnification clauses and clauses regarding clean-up or decontamination costs.

6. Mortgage regulation and other guaranties used in RE transactions

6.1. Common procedures for a mortgage constitution

Lenders usually require that a mortgage is recorded on the real estate or that a personal guarantee is provided by a third party guarantor, either under the form of a first-demand guarantee or under the form of an ancillary liability (*cautionnement*).

The mortgage is established in writing and must be registered in the Mortgage Registry. Luxembourg law recognizes three types of mortgages (i.e., legal, judicial and contractual mortgages). The contractual mortgage has to be in the form of a notarial deed.

Other guaranties

In addition, potential claims are secured by account pledge agreements, receivables pledge agreements or share pledge agreements (Law of 5 August 2005 on financial collateral arrangements, as amended). The privilege granted shall only remain on the pledged collateral if the possession of such collateral has been and has remained or shall be deemed to have remained transferred to the creditor or to the agreed-upon third party custodian.

Pledge agreements may be evidenced among the parties and against third parties, in writing or by any other legally equivalent manner as determined by article 109 of the Luxembourg Commercial Code.

6.2. How is the lender protected on a creditor execution?

Registration of the mortgage grants the real estate lender the right to an effective payment over the proceeds of the sale of the real estate by priority to the subsequent registration. When the debtor fails to meet its financial obligations, the lender terminate the loan and require immediate reimbursement. The possible enforcement actions depend on the securities that have been granted.

7. Leases of business premises

7.1. Applicable laws and types

Office leases are ruled by ordinary law (article 1708 to 1762-2 of the Civil Code) and the principle of freedom of contract. Recently, in order to prevent abuses with respect to commercial leases and in particular regarding rent, a new bill of law n° 6864 has been presented to the Chamber of Deputies.

Office leases are ruled by common law (which promotes contractual freedom) while commercial lease are ruled, besides common law, by protective rules for the tenant (Art. 1762-3 to 1762-8 Civil Code).

7.2. Typical provisions

Length of term

The parties are free to determine it and are in general concluded for a 3-6-9 year period. A longer term obliges the parties to conclude the lease contract before notary.

If a determined duration is provided, the lease ceases at its expiry date without any requirement of prior notice (Art. 1737 Civil Code). However, if at the expiry date the landlord lets the tenant in possession of the premises without protest, the lease contract is tacitly renewed (Art. 1738 Civil Code).

Rent and taxes

The law does not impose any threshold, it is fixed by mutual agreement.

The transfer of real estate is subject to a registry tax assessed on the purchase price or the effective value of the property. It amounts in principle to 6% registration duty plus, only for properties within the municipality of Luxembourg, a municipal surcharge of 3%.

In principle, rent is exempted from VAT and the tax rises to 0.6% of the amount of all rents to be paid. If the lease is greater than 9 years, it has to be concluded before a notary and an additional transcription tax of 1% must be paid.

But the parties may agree to waive this exemption and opt to charge VAT. A prior approval of the VAT option declaration, which has to be filed by the parties with the Registration and State Lands Authority, is necessary and can only be obtained if both parties are at least 51% subject to VAT. A fixed tax of 12€ is due.

Remedies for non-payment of rent and breach for other covenants including forfeiture:

Frequently, leases contain “defeasance clauses” (clauses résolutoires) qualifying certain breaches as gross misconduct justifying early termination of the lease and, if applicable, a claim for damages.

Breaking rights

In case of a fixed term contract, if concrete termination events have been stipulated (clause résolutoire) the contract can be terminated prior to such term.

Subletting, use and insurance

Lease agreement may be sublet or assigned by the tenant unless it contains a prohibition of such thing. The tenant has to use the premises with due-diligence (en bon père de famille Art. 1728 Civil Code).

By virtue of law, the tenant does not need to conclude any particular insurance but, in general, the lease contract contains provisions specifying which insurance the tenant need to contract.

8. Taxes (centered in indirect tax)

The transfer of real estate is subject to a registry tax assessed on the purchase price or the effective value of the property, whichever is higher.

It amounts in principle to 6% registration duty plus, only for properties within the municipality of

Luxembourg, a municipal surcharge of 3%.

To this is added a transcription tax (*droit de transcription*) which amounts generally to 1%.

However, for sales of existing buildings subject to precedent conditions are only subject to a fixed tax of 12€.

As a general rule, transfers are not subject to VAT, except those transferring the ownership before construction is started. Furthermore, the parties may opt to make the transactions chargeable to VAT (which the normal rate is 15%) in order to allow the seller to deduct its input VAT on investment costs.

Registration tax must be paid within 15 days of signing the notarial deed but in practice, notaries require the funds on the day the deed is signed. Property taxes set by the municipality are required to be paid by the owner.

9. Public law permits and obligations

Pursuant to the Law of 19 July 2004 on communal and urban development as amended, the destination and use of land (i.e. commercial, residential, industrial...) is fixed in a general town planning scheme (*Plan d'aménagement général*) drawn up by each municipality and approved by the Ministry for Internal Affairs.

A particular planning scheme (*Plan d'aménagement particulier*) regulates further precisely the constructions to be built on each part of the general town planning scheme.

Furthermore, each construction, transformation, demolition or modification of use (e.g. change from residential into business or commercial) has to be authorized by the mayor of the municipality.

The Administration for Organization of the Territory (*Département de l'Aménagement du Territoire*) regulates zoning and urban development according to the Grand-Ducal Decree of 27 July 2009 and the Law of 30 July 2013 on the organization of the territory.



The Bill referenced 6124 concerning the organization of the territory and intended to reform the Law on the organization of the territory is currently under discussion before Parliament.

Legal regime for compulsory purchase of real estate:

According to article 16 of the Constitution, no one may be deprived of his or her property except on the grounds of public interest in cases and in the manner set forth by the law and subject to an indemnification. This expropriation has to be ordered by a court (the law of 15 March 1979).

10. Environment

10.1. Polluted Land

Luxembourg has enacted the polluter pays principle, according to which the person responsible for contamination must pay for the damage, even if said person is no longer the owner or occupier of the contaminated asset. Criminal sanctions may apply in the case of violation of environmental legislation.

Moreover, Luxembourg environmental legislation requires the owner of a potentially polluting establishment to provide financial guarantees or take out insurance to cover the costs of the decontamination of the site in the event of a closing-down of business or accidental pollution.

Therefore, before an acquisition, although Luxembourg law does not provide for a compulsory environmental and engineering review as part of a real estate deal, it is common for the buyer to perform due diligence to cover, in particular, environmental review, including:

- Assessing building, construction and environment concerns, especially pollution through tests carried by specialised firms. Professional engineering firms are commonly used for building, construction and environment investigations.
- Assessing the urban planning situation and potential difficulties in obtaining building permits.

10.2. Energy Efficiency qualifications

Since 1 July 2012, real estate advertisements published in the business media must indicate the energy efficiency class (based on the index of primary energy expenditure) and the class of insulation (based on the index of energy expenditure heating) of a residential building (Regulation of 5 May 2012 and the Law of 5 August 1993 related to the energy performance of residential and commercial buildings).







MEXICO

**César Morales**

cesmorales@deloittemx.com

**Pablo Arellano**

paarellano@deloittemx.com

1. Real Estate Law: Describe main laws that governs property ownership and leases in Mexico.

Article 27 of Mexican Constitution (*Constitucion Política de los Estados Unidos Mexicanos*) (the "Mexican Constitution") provides that "The ownership of the lands and waters within the nation's boundaries correspond originally to the Nation, which has had and has the right to transfer the domain to individuals and entities; creating private property."

Besides the Mexican Constitution, under Mexican law, the main laws governing ownership of real estate and the use thereof are the General Law for Human Settlements, Territorial Organization and Urban Developments (*Ley General de Asentamientos Humanos, Ordenamiento Territorial y Desarrollo Urbano*), General Law for the Ecologic Equilibrium and Protection of the Environment (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*), the Civil Codes for each of the States which conform the Mexican Federation and the Agrarian Law (*Ley Agraria*) (which governs the creation, ownership and management of *Ejididos* – a special real estate regime destined to promote and support rural communities).

Depending on the location of the real estate property, its composition and mineral properties and its intended use, there are several different laws which may be applicable (federal and local statutes or regulations and ordinances) in connection with the ownership and use of real estate. Based on that provided in the Mexican Constitution and the General Law for Human Settlements, Territorial Organization and Urban Developments (which provides the general principles and attributes of each governmental order to regulate on human settlements and urban development within the Mexican territory), from a legal perspective the real estate within Mexico is mainly

governed by local statutes and each State regulates ownership, transfer and use of the real estate property.

2. Ownership rights

2.1. Is there any kind of restriction for real estate ownership? (foreigners, areas of the country)

The Mexican Constitution provides that the Nation has the right to impose restrictions and prohibitions on private property based on, and to the benefit of, public interest. As a consequence, the Nation shall dictate the necessary measures to establish adequate provisions to exploit certain locations and minerals and elements which compose the land in order to preserve life and to execute all public works that will benefit the quality of life of its citizens; this may include the right to expropriate land from private owners. In addition, the Mexican Constitution provides a limitation to exploit certain locations and minerals and elements which compose the land (e.g. ecologic national reserves, lakes, beaches and rivers, hydrocarbons and radioactive elements or materials).

Finally, Mexican Constitution provides a limitation to foreigners to directly own real estate on a designated strip of land (one hundred kilometers wide as of each border and fifty kilometers wide next to the coast line). Please note that there are legal and valid schemes by which foreigners may "enjoy" and even "dispose" of real estate on this zone, known as the "Restricted Zone" (i.e., via a real estate trust - *fideicomisos*).

2.2. Is there ownership structures usually applied in business transactions in which ownership of the land diverges from right to build?

Yes, there are many structures under which real estate can be used and enjoyed by an entity or individual who is not the rightful owner of the property, especially in the context of attracting investors to new industrial projects within a specific State. ➤

3. Registry system.

3.1. Structures of the property registries in your country.

Public Registries in Mexico are the local institutions by which the government of each State grants the public effect to all legal acts that, based on the applicable law, require such registration in order to be enforceable vis-à-vis third parties (e.g., the transfer and, in certain cases, the use of real estate property). As previously mentioned, real estate in Mexico is governed locally by each State which means that the structure and organization of each Public Registry is different. The main laws that governs the authorities, attributions and organization of each Public Registry are the Civil Code and the Regulations of the Public Registry of each State.

In addition to the Public Registries of each State, the Mexican Constitution and the Agrarian Law provides for the National Agrarian Registry (*Registro Agrario Nacional*). Such registry will record the composition of all agrarian parcels (*ejidos*) within Mexico.

3.2. Which authorities are in charge of them?

The main authority within the Public Registries of each States is entrusted to the corresponding Governor. Such individual will appoint a Registry Director and several "*registradores*" to provide the services of recording and issuing the corresponding certifications or entries requested by the public. In addition, Public Registries are provided with a Legal Unit (*Unidad Legal*), which will act as the legal branch of the registry in connection with litigation and legal opinions involving the operation of the registry and the acts recorded thereat.

3.3. Connection with the cadastral – tax registries ¿how that works?

The local or municipal authorities control the cadastral registry. Each real estate property (land, buildings, constructions, etc.) is identified with a reference number. In order to obtain said reference number, certain documentation has to be filed by the owner

before municipal authorities, such as: Owner's personal information, public property deed registered before Public Registry, purchase and sale agreement, location map, boundaries, etc.

It is important to mention that real estate property procedures are not related to tax authorities.

3.4. Is the registration compulsory?

The transfer of ownership of a real estate property as well as the creation of rights *in rem* ("*derechos reales*") over a portion of land is not compulsory (it is not a formal requirement to perfect the legal act); however the law will recognize as the owner / lawful holder of the corresponding real estate property or "*derecho real*" to the individual or entity who is recorded in the Public Registry.

3.5. How the registration guarantees the rights of the owner.

The main purpose of the Public Registry is to grant publicity of a specific legal act. By recording the relevant "*derecho real*" with the Public Registry, the titleholder is publicly announcing / claiming the ownership of the property and therefore creating an enforceable right vis-à-vis third parties.

3.6. How registration works in a typical transaction.

During a typical transaction involving the acquisition of real estate property (located in Mexico City for example), the parties will enter into a purchase and sale agreement which will then be notarized before a Notary Public (who are authorized by Mexican law to give faith and formalize the creation of rights *in rem*). The public deed containing the purchase and sale agreement will then be recorded with the Public Registry of the corresponding State, in this case Mexico City. The timing for obtaining the recording of the corresponding purchase and sale agreement and the corresponding entry data will vary significantly but the effect thereof will be retroacted to the date when the documentation and duties for registration were

filed. The assistance for the recording of the public deed in the corresponding Public Registry is usually coordinated by the Notary Public and the legal counsel advising the parties.

4. Notary roll on the transaction.

Mexico follows a civil law system based primarily in Spain's and Napoleon's Code civil law system, thus it is very formalistic for purposes of perfection and enforceability of legal acts, especially those related to real estate. Generally, the acquisition or transfer of real estate or the creation of "*derechos reales*" over real estate property requires that the relevant legal act be granted before a Notary Public for the perfection and validity of the corresponding act, lack of formality would give rise to the possibility to invalidate or annul the corresponding transfer or creation of a right *in rem*.

Based on the foregoing, usually the parties will negotiate the terms and conditions of the transaction and will formalize the definitive agreement before a Notary Public, which will review the terms thereof and issue a public instrument containing such legal act and will supervise the recording thereof with the corresponding Public Registry.

Because of their close contact with Public Registries and Administrative Offices, it is customarily that the Notary Public would help obtaining certain certificates and documents required to evidence the good standing of the real estate property (e.g. no-lien certificate, real estate - tax indebtedness certificate, etc.).

5. Representations and Warranties in real estate transactions.

5.1. General legal responsibility of the seller in front of the buyer.

The responsibility of the seller vis-à-vis the buyer in a real estate transaction will depend on the sophistication of each of the parties entering into the agreement and the representations made by the seller regarding the ownership and standing of the real

estate property; however, the general obligation of sellers is the *saneamiento para el caso de evicción*, which implies that if the proposed seller did not have the right to sell the corresponding real estate property or there was a third party with better title to such property, the seller shall indemnify and hold the purchaser harmless from any loss or damaged suffered as a result of such eviction, in fact a seller disposing of a real estate property to which it had not title may be committing fraud or other crimes.

Further, misrepresentations made by seller in connection with the ownership and standing of the real estate property may result in other civil or criminal responsibilities. Civil responsibly would give the purchaser the right to (i) terminate the agreement and claim damages or (ii) require compensation. Please note that punitive damages are not customarily granted by Mexican judges. All damages should be direct damages; thus, in order to determine them, a judge would consider the direct damage or loss incurred and the economic situation of each party. A misrepresentation made by seller could also result in criminal liability (fraud, "*abuso de confianza*").

5.2. Typical representations and warranties for transactions in different asset class.

The representations and warranties made by seller within a real estate transaction will depend on the legal, regulatory and tax-indebtedness standing of the property and of its previous and proposed use. Typical representations made will include (i) legal ownership (seller is the rightful owner of the property), (ii) no liens (the property is free and clear of any lien, charge or domain limitation), (iii) litigation (the property is free of any litigation or administrative procedure filed by any third party or the government), (iv) non indebtedness – tax and utilities (all of the real estate taxes and the utilities bills have been paid by seller) and (v) environmental compliance (the property is in compliance with that provided in the environmental laws and regulations. In addition to these representations, the parties may also



include regulatory representations based on the attributes, composition and use of the property (e.g. authorizations or permits granted by the government to exploit the property).

6. Mortgage regulation and other guaranties used in real estate transactions.

6.1. Common procedures for a mortgage constitution.

The main laws governing the creation of mortgages and other guaranties on real estate are: (i) the Civil Code of each State, (ii) the Credit Institutions Law (*Ley de Instituciones de Crédito*) and (iii) the General Law for Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*). Mexican law considers the mortgage as a "*derecho real*" – a right protected by the asset over which such right is created. Mexico City's Civil Code provides that the creation of a mortgage shall be formalized before a Notary Public, within the main agreement or as a separate agreement (except for transactions below roughly €1.500) and shall be recorded with the Public Registry of Property. The typical terms and conditions provided in a mortgage are (1) the creation of the mortgage, (2) the obligations guaranteed by the mortgage (e.g., principal amount and interests under a loan transaction), (3) indemnification (in the event the real estate property is expropriated by the Nation or any governmental authority), (4) term of the mortgage, (5) specifics on the foreclosure proceeding (in the event of default) and (6) other provisions (taxes, insurance obligations, etc.). Finally, the individual granting the mortgage (on its own behalf or on behalf of another person) shall need the necessary powers and authorities to dispose of the real estate property (this would depend on the person executing the mortgage (individual or entity) - mainly the parties would need a general power of attorney for acts of ownership) and there is a principle that only who can sell a property can create a mortgage on it.

The Credit Institutions Law also provides a different type of mortgage known as "industrial mortgage". This kind of guarantee or "*derecho real*" incorporates all movable assets, cash and other rights used in the operation of a business in addition to the real estate property. This kind of mortgage also needs to be granted before a Notary Public and recorded in the corresponding Public Registry.

Further, a common guaranty created which may also include real estate property is the Guaranty Trust, under such structure, title to the real estate property is transferred to a third party, trustee, for the benefit of the creditor or beneficiary. The trustee will hold title

to the real estate property to secure the guaranteed obligations and will foreclose on the trust assets in an event of default and pursuant to the foreclosure procedure agreed upon by the parties to the trust.

6.2. How is the lender protected on a creditor execution?

The mortgage is considered a "*derecho real*" which means that its titleholder has an immediate and direct right over the real estate property upon which the mortgage is created (it is considered as a "secured guarantee" as the real estate property would directly guarantee creditors obligations under certain credit agreement). In the event of a breach of creditor's obligations, the lender would have the right to request the foreclosure of the mortgage (judicial sell of the asset) to recover the outstanding amounts. Although there is no provision regulating the ratio (debt – guarantee), generally, the value of the real estate property guarantying the credit obligations of lender exceeds the credit amount disposed by creditor. It is also customarily to request additional guarantees to secure the debtor's obligations such as personal guarantees (*aval*) or the issuance of negotiable instruments such as a promissory note.

7. Leases of business premises.

7.1. Applicable laws.

Under Mexican law, the agreement by which a party grants another party the use of a real estate property (real estate lease) is governed by the Civil Code of each State. Depending on the party executing the real estate lease, other administrative laws or regulations may be applicable (e.g. the party executing the agreement – as lessor or lessee - is a federal, state or local authority). Other laws, statutes or regulations may be applicable depending on the proposed use to the real estate property. These laws and regulations shall only govern the activities authorized to be carried out or performed on the property and not the lease agreement relationship entered into by the lessor and the lessee. Further, in addition to real estate leases it is common practice that premises are granted to the tenant under a gratuitous bailment structure or also the creation of a usufruct or right of enjoyment may be possible, in the understanding that the latter is a right *in rem*, thus the same formalities for the transfer of title to a real estate property must be complied with.

7.2. Types.

The Civil Code distinguishes between the leases of real estate destined to housing, commercial or industrial activities. Rights granted to lessee are broader and more protective when it comes to a housing lease than

in the context of leases for industrial or commercial purposes.

7.3. Typical provisions.

The terms and conditions provided in a real estate lease should be drafted considering the intended use for the leased premises (housing lease / commercial lease / industrial facilities lease). In general terms the main provisions in lease agreements are: (i) the authorized use granted to lessee, (ii) term and term extension rights (including a rent increase mechanism), (iii) guarantee deposit / guarantor / joint obligor which will guarantee lessee's obligations under the agreement, (iv) vacating of the real estate property upon termination of the lease, (v) repairs / improvement (provisions regulating the mechanism to carry out repairs and improvements to the property and which party should bear the costs associated therewith), (vi) utilities / taxes (provisions which establish which party should bear the utility costs and be responsible for payment of real estate taxes), (vii) right of first refusal in the event of a proposed change in ownership of the property, (viii) insurance, and (ix) environmental matters and waste disposal provisions.

8. Taxes.

8.1. Real estate property tax

In most of municipalities, real state tax basis is calculated considering: (i) Soil value, and (ii) Construction value. Rates are levied by each municipality and must be paid by owners annually. Paid real state property tax is deductible for Mexican corporate tax calculation purposes.

8.2. Real estate transfer tax

Transfer tax is calculated at a rate between 2% and 5% (State/Municipal level tax) of the tax or commercial value of the transferred real estate, depending on the state and municipality in which the real estate is located.

8.3. Value Added Tax (VAT)

VAT is levied on the supply of goods, provision of services, imports and leasing transactions. In this sense, real estate transfer is also subject to VAT at a 16% rate, but such VAT is only payable on the construction, not the soil. On the contrary, soil and housing construction alienations are exempt of VAT.

9. Public law permits and obligations.

As previously mentioned, the territorial order and organization of the land in Mexico is governed a federal, state and municipal level under the provisions of the Mexican Constitution and the General Law

for Human Settlements, Territorial Organization and Urban Development.


There is also the ecologic ordinances and regulations which are environmental policy instruments which purpose is to governed or introduce the use of the land and the productive activities in order to achieve a sustainable development. The urban development programs and plans must consider the ecologic regulations and the general criteria of ecologic regulation for the human settlements in order to determine the optimal use, establishment and management of ecologic preservation areas, efficient collective public transportation and the exploitation of water and natural resources.

The general rule provides that the local governmental order (States and municipalities) will establish the requirements needed to grant authorizations, licenses or permits in connection with the use of land, constructions, parcel mergers and subdivision of real estate and any other urban actions related to such premises.

Under Mexican law and regulations, an authorization or permit is required in order to build, modify or demolish a construction. The main permits and authorizations needed for the real estate development are: (i) use of land, (ii) construction license, (iii) civil protection authorization, (iv) traffic impact authorization and (v) environmental impact authorization. Depending on the location and specifications of the project an authorization or expert opinion in connection with the impact of the project in the corresponding environmental or historic protected zones may be requested or needed.

10. Environment.

The General Law for the Ecologic Equilibrium and the Protection of the Environment is the legal ordinance that governs environmental policy in Mexico. Such law provides the mandatory guidelines for preservation and restauration of the environmental equilibrium, the sustainable exploitation of natural resources and the protection of wild life. Mexican environmental policy and matters are also governed and regulated by other federal governmental agencies or entities, as well as by local and municipal governmental bodies.

In connection with the subject matter of this article, one of the most important components to take into consideration for the development of real estate related projects in Mexico is the Environmental Impact Study. Such authorization is obtained through an 

analytical process that evaluates the environmental potential impact that may be generated as a result of the construction or activity in such specific real estate property and the surrounding areas. Such analysis also includes protective and preventive measures that should be considered and carried out during the development of the land.

10.1. Polluted Land.

Among all of the aspects regulated by the environmental laws and regulations, the pollution of land is considered as one of the most important subjects involving real estate property. Mexican law regulates residual disposals and hazardous substances used or created in a determined real estate property (as a consequence of the development of land or the business activity performed in such land) based on the hazardous/toxic characteristics of its components. Parties responsible for activities generating hazardous waste and substances must be duly recorded with the environmental authorities as “Waste Generators”. Also, the environmental authorities set out the guidelines that must be followed by “Waste Generators” in the management, transportation and final disposal of hazardous wastes and substances.

10.2. Energy Efficiency qualifications.

Under Mexican law the energy efficiency qualifications are considered as voluntary compliance measures that may be taken by individuals and entities. The compliance with such qualifications could help the parties to obtain a “Clean Industry” or an “Energy Efficiency” certificate and, in certain cases (and under certain parameters), tax breaks.

There is no law or regulation that governs the energy efficiency qualifications in constructions (there is no need to require any authorization regarding this subject); however, there are certain Official Mexican Standards (*Normas Oficiales Mexicanas*) that set out the ideal minimum technical requirements (based on the use of the real estate property) in terms of energy efficiency that should be followed by real estate developers or constructors.







NORWAY





Thorvald Nyquist
tnyquist@deloitte.no

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country.

The purchase of the property is regulated by the Norwegian Alienation Act while the purchase of shares of property SPVs is regulated by the Norwegian Sale of Goods Act. As most commercial property is held through separate limited liability companies the distinction is important. This duality has raised certain questions in the past regarding the buyer's right to claim damages for defects in the property when the formal object of purchase has been shares. The Alienation Act is also fairly consumer-oriented; thus, a commercial real estate transaction will normally be regulated by a customised standard agreement to cover both the aforementioned duality and the professional business aspects of the transaction.

Various standards are on the market, with the Norwegian Business Real Estate Brokers Association being the prevailing today, although it is considered somewhat lenient towards the interests of the seller.

All commercial and residential lease is regulated by the Tenancy act. The act applies to all agreements relating to the right to use of property in return for remuneration. In connection with renting of business premises, agreements may deviate from the provisions of the act, however some regulations will still be mandatory, i.e. general rent protection prohibiting unreasonable rents, reimbursement of unlawful rent and formal requirements regarding termination of agreements.

2. Ownership rights

Nearly all commercial real estate is held through separate limited liability companies, with each company functioning as a single purpose vehicle (SPV) for the property in question, and with such SPVs typically again being owned by a limited liability company in a

holding structure. The main drivers for such structure is tax regulation and, to some extent, stamp duty.

Investments in the Norwegian real estate sector are mainly carried out through the acquisition of shares of property SPVs or property portfolios consisting of SPVs (in whole or in part), or through professionally managed funds.

Normally, the real estate ownership pertains to both the building and the plot of land upon which the building is standing. However, ownership may be split between the building and the land upon establishment of a ground lease agreement with a duration exceeding 10 years (typically 99 years for commercial real estate).

Due to historic reasons, some properties are also owned separately from the property title, with such title being held elsewhere in the corporate structure.

Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)

All acquisition of real estate ownership rights as well as right of usage are conditioned upon the applicable concession from the authorities.

However, there are no practical limitations on foreign investment in and ownership of Norwegian real estate, except for farmland and some important exceptions within the industry and energy sectors (waterfalls, etc.).

The most important acts limiting acquisition and ownership of real estate are the Norwegian Concession Act and the Act on Acquisition of Waterfalls, Mines and other Real Estate. In effect, the Norwegian Competition Act will also limit acquisitions of companies in possible violation of Norwegian and EU competition and antitrust legislation.



A concession is normally not necessary for the acquisition of SPVs that already have obtained a concession; direct acquisitions of developed property when the plot of land is no larger than 100,000 square meters; or acquisitions of undeveloped land for the construction of a permanent residence or holiday home on plots of land no larger than 2,000 square meters. The purchaser must, however, in the last two cases, obtain a confirmation by the municipality to document the fact that a purchase is concession free. Some concessions are also granted under certain conditions — for example, farmland, where the acquirer normally must live on and operate the acquired land.

Is there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

Most commercial and residential properties in Norway will consist of ownership of both ground and buildings, however there is a long history for ground lease contracts, whereas the lessee owns the building and leases the ground on a long term contract. For commercial property these agreements generally range from 50 to 100 years.

Ground Lease contracts are governed by the Ground Lease Act and contains complex regulations, generally considered consumer friendly.

In general property that includes Ground Lease contracts are prized considerably lower than properties containing full ownership.

3. Registry system

Norwegian properties are registered in a land register maintained and operated by the Norwegian Mapping Authority, which is the judicial authority for properties in Norway. The land register is the official register of legal rights and obligations associated with fixed property and housing cooperatives. The land register lists ownership in addition to rights and encumbrances such as mortgages, leasing rights and pre-emptive purchasing rights. Registration requires originals

paper based documents sent by post, it is however announced that it will be opened for digital registration by professional users in 2016.

Details of the physical aspects relating to a property, such as borders, areas, buildings and addresses, are registered in the new cadaster property register, which is maintained by the individual municipalities.

Failure to register ownership of property, rights, encumbrances, etc., does not alter the underlying legal situation between the original contractual parties. However, a third party may in good faith extinguish all rights, including ownership rights that are not registered prior to the time of the colliding right of the third party.

Registration of a transfer of title in the land register is therefore the only way to obtain legal protection against third parties. No notary public is involved during the registration process.

Registration of a change of ownership to a property by the Norwegian Mapping Authority is subject to 2.5 percent stamp duty based on the market value of the property. This does not apply to the sale of companies that own the property, as the direct ownership of the property itself does not formally change. Exceptions are also made for the first transfer of newly built properties, where the 2.5 percent stamp duty applies only to the appropriate ground value.

The sale of real property or shares is not subject to VAT. This implies that input VAT on building costs is not deductible when the purpose is to transfer the property after completion. However, some exceptions exist where the property is built with the purpose of letting out.

The authorities do not hold a similar register for the purchase of shares. Transfer of shares is registered in a register of shareholders operated by the company itself (private limited companies) or by the

Norwegian Electronic Securities Register (mandatory for public limited companies, opt-in available for private limited companies). Access to the register of shareholders must be given to all who request it, so anyone may review who owns the shares of a limited company.

4. Notary roll on the transactions

There are no general Notary rolls in transactions. See the above section on registration.

5. Representations and Warranties in real estate transactions

The following are considered standard warranties of the seller in the most commonly used standard form contracts regarding purchase of SPV companies:

- that the Company owns the Property and holds title thereto
- that the Company holds full and unrestricted title to all assets entered on the Balance Sheets, unless otherwise set out in this contract, and that the Company holds no other types of assets than those set out on the Balance Sheet
- that the Company has no debts or other financial liabilities apart from those set out in the Balance Sheet and in the agreements disclosed to the Purchaser in connection with the conclusion of this contract, hereunder tax liabilities of any type
- that the financial statements of the Company are correct and based on generally agreed accounting principles
- that the Company is in possession of the documentation required under applicable Value Added Tax provisions for the acquisition/production and use of capital goods
- that the information in the Adjustment Specification (for VAT), is complete and correct
- that the Company has not rendered any guarantee or furnished any security for the benefit of the liabilities of any third party.
- that the Company has no employees, and no pension obligations as against the Seller or anyone else.
- that the Company is not party to any legal proceedings or other legal dispute.
- that the Seller holds, as per the transfer of ownership, full and unrestricted title to the Shares, that the share capital of the Company is fully paid up, that the Shares are transferred free of any encumbrances of any type, and that the Shares are not subject to any rights of first refusal or other pre-emptive rights.
- that no distributions on the Shares, or other wholly or partly gratuitous transfers, to shareholders or anyone else, have been resolved, other than those reflected in the Balance Sheet.
- that no rights relating to the Shares (hereunder dividend rights, pre-emptive rights, etc.) have been separated from the Shares.
- that the activities of the Company will, during the period from signing of this contract until Closing, be pursued in the customary manner, hereunder that no material agreements will be concluded, terminated for breach, amended or terminated without cause, and that, during the same period, no other decisions of material importance to the Company will be made without the written consent of the Purchaser.
- that the encumbrance situation of the Property will be as set out in Appendix [o], subject, however, to mortgages marked "x" in Appendix [o] being de-registered in connection with closing of the transaction.
- that the Property is leased as stated in Appendix [o]. 

- that the Seller is not aware of any claims or rights that limit the use or utilisation of the Property beyond what follows from the Land Titles and Land Charges of the Property or the zoning plan and zoning regulations applicable to the Property and the entries recorded in respect of the Property.
- that the Seller is not aware of the existence of any written order, etc., from government authorities in relation to the Property that has not been complied with, paid or similar.

6. Mortgage regulation and other guaranties used in RE transactions

Properties may be encumbered with mortgages as well as other types of securities, based on a first-come, first-served principle with no upper limit. Properties are generally also considered as stable collateral for other financial purposes, and are therefore widely used for financing bank loans and similar.

Even though there is a general prohibition against using the assets in a target company as security for a loan that enables the acquisition of such target company, there is a narrow exemption with regards to using the property as security in SPV transactions.

As with the protection of the title to the property, unregistered loans or other types of agreed securities will not have any effect against third parties that have registered their security in good faith prior to the unregistered security.

Two other common forms of securities are the *urådighetserklæring* and the *sikringspant*. The first, which can be loosely translated as a declaration of non-disposal, is a catchall encumbrance that prohibits anyone deleting or registering any security, mortgage or lien without the written approval of the right holder. The latter is a normal mortgage, but with the sole function of securing any and all liabilities that may arise during the course of a transaction. There has been a legal debate on the security obtained by these suggested securities.

7. Leases of business premises

Based on the prevailing Norwegian lease standards, the three most ordinary contract types regarding leases of business premises are as follows:

- as is: the tenant rents the business premises as they are presented at the time of the contract or takeover, and accepts all non-material defects. The tenant will be responsible for indoor maintenance, whereas the lessor assumes responsibility for the maintenance of the exterior of the building as well as the replacement of technical installations (lifts, air conditioning systems, etc.). The lessor must accept normal wear and tear during the lease period (i.e., the general deterioration of the lease object due to normal usage by the tenant). Thus, the tenant is only responsible for lack of maintenance and any damage caused to the lease object that arises during the lease term. The lessor will maintain the common areas, such maintenance being a part of the joint costs paid by all tenants;
- as built/as new: the tenant rents business premises that are new and often built to the particular specifications of the tenant. All defects or deviations from the specification are subject to complaint by the tenant; in all other ways, as above; and
- barehouse: as above, but the lessor rents the entire building structure and will thus assume the entire responsibility of the building, including insurance, all maintenance and replacements.

The typical commercial lease term will be for a fixed period of between five and 10 years; however, certain commercial properties are also rented out on a short or mid-term basis. In many cases, long-term agreements have an option for the tenant to extend the lease, normally for no longer than 10 years (five plus five years), under the same legal terms and conditions but at a renegotiated price (at the market level) for each prolongation term.

Registration of a change of ownership to a property by the Norwegian Mapping Authority is subject to 2.5 percent stamp duty based on the market value of the property.

Lease agreements may be terminable or non-terminable during the fixed lease period; they may also be agreed to have an undefined term, but typically with a requirement of six to 12 months' prior notice of termination.

Rent is normally agreed as a fixed sum per square meter per year, exclusive of the proportional part of the joint costs of the property and applicable VAT. Lease for retail property is often set as a percentage of turnover.

The tenant must also pay any and all costs that relate to own usage of power, insurance of its own business, normal indoors maintenance and repairs. In 'as is' and 'as new' leases, the lessor will insure the building and replace all technical installations when maintenance is no longer remunerative. The tenant must normally accept all actions by the lessor that are necessary for the maintenance and renewal during the lease period. If such actions affect the lease materially, the tenant may claim damages or a discount on the lease, the latter normally being capped at the amount of three to six months' lease.

Prior to the commencement of the lease, the tenant must normally issue a bank guarantee equal to, three to 12 months' rent, or deposit into a deposit account as security for any unpaid rent or other claims the lessor may have against the tenant.

The rent is typically adjusted yearly to accord with the general consumer price index. The parties will often agree that the rent may not be reduced. Normally, the tenant may not hold back or offset his or her rent obligations against claims he or she has against the lessor. If such claims are not honored by the lessor, the tenant must therefore take out separate legal proceedings to have his or her claim covered.

Subletting and transfer rights normally require the prior written approval of the lessor, subject either to reasonable cause or without reason. However, the tenant may normally transfer the agreement, or sublet within a structure of companies, as long as the

guarantee is upheld and the solvency and solidity of the final tenant is not reduced.

8. Taxes

The leasing of real property is exempt without credit for VAT purposes. It is, however, possible to opt for a voluntary registration for VAT purposes for the leasing of real property to taxable businesses. Consequently, it is not possible to opt for a VAT registration when renting to tenants that only carry on business that falls outside the scope of the VAT acts (state governmental bodies, health-care and financial institutions, etc.).

A consequence of voluntary registration is that the lessor may deduct input VAT on the building costs, maintenance, etc., and at the same time invoice the rent and other supplies with VAT.

The VAT adjustment scheme applies for input VAT on the building costs (capital expenditure) of real property. The adjustment period is 10 years, implying that the real property must be used in taxable business for this period in order to avoid repayment of deducted VAT.

9. Public law permits and obligations

The Norwegian Planning and Building Act contains:

- rather detailed regulations related to planning on the national, regional and local levels;
- requirements for dispensation and exemption applications;
- regulations related to responsibility, control and supervision during the construction phase; and
- the main requirements during the completion and approval phase.

In addition, the Act also regulates landowners' general right to compensation due to the compulsory acquisition by the authorities for planning purposes or by direct claim of public ownership (expropriation). ➔

Planning is organized as a top down system, so that no plan at a lower (more local) level may be in conflict with plans higher in the hierarchy. Planning is generally a continuous and sector-dependent process at all governmental levels.

As an example, the latest revision of the national transport plan influences regional zone planning, which again may have consequences for the approval or refusal of local construction projects that appear to be in line with current plans. A plan may also be objected by any party directly affected by said plan, as well as being subject to overriding sector-specific public concerns. Thus, ratifying plans is considered a complex affair.

10. Environment

Polluted Environmental considerations have occupied a considerably larger place in Norwegian legislation over the past few decades, and are particularly visible in the planning and approval stages of property development projects. Environmental warranties have also found their way into most business real estate transactions.

The Norwegian Pollution Act stipulates that the main responsibility for pollution damage rests on anyone that 'operates, uses or holds' any real estate, object, plant or business without regard to culpa. As a starting point, this would normally be the owner. In cases where the owner and the operator of the property are not the same, the owner may be jointly liable with the operator (as the polluter) (e.g., if such owner is liable according to the Norwegian Neighbor Act).

Pollution liability in Norway is built upon the international polluter pays principle. This means that the polluter shall not only cover all reparative and preventive costs, but also the social costs that such pollution results in for society.





VISMA

DNB



POLAND





Justyna Milewska

jmilewska@deloitteCE.com

1. Introduction

Polish legal system is based on the structure of continental system built *inter alia* on comprehensive codification of substantive and procedural law. The codified law is supported by the judgments of common courts on the basis of which it is interpreted for the purposes of each case.

Due to the above, the Polish law contains number of detailed regulations which will apply to entities planning to invest in Poland.

As Polish real estate market is one of the most interesting in Central and Eastern Europe for real estate investors, this guide book was prepared to give such investors an overview on main regulations and processes involved in widely understood real estate investments.

2. Real estate registers

in Poland there is no cadaster registry system but there are two official registers concerning the real estates:

- land and building register kept by local government units (powiats); and
- land and mortgage register kept by the district courts.

The role of each of these registers is different. The land and building register generally contains information on physical features of the real estate while land and mortgage register contains information on legal status of the real estate.

Both: (i) excerpts and maps from the land and building register and (ii) excerpts from the land and mortgage register book, should be analyzed during the due diligence of the real property which is usually part of the process of preparation to the transaction. In

addition, mentioned excerpts are required by the notary public at the conclusion on the agreement to transfer the rights to the real estate.

2.1. Land and building register

The land and building register is kept by the administrative authority and includes information on the physical features of the land, the class of soil and the designated use of the property. Such information is necessary for example for the purpose of zoning or tax assessment.

The local government units (powiats) issue the excerpts and maps from the land and building register to owners and people who prove their interest in this regard.

The land and building register is supposed to be converted into the cadaster registry showing the value of the property but at the moment it is impossible to anticipate when this will happen.

2.2. Land and mortgage register

The land and mortgage register is kept by district courts competent for the relevant area. This is a public register which is generally available for everyone via Internet. It contains information about each piece of real estate in Poland (it should be noted that there are real estates in Poland which are unregistered but there are no official information on the number of such properties across the country).

The land and mortgage register book contains in particular the basic information regarding:

- the description of the property (disclosed on the basis of the land and building register),
- the ownership and perpetual usufruct right,



- the rights established in favour of the property or aggravating the property (such as usufruct, easements, registered claims and rights arising out of agreements, administrative decisions, court rulings),
- mortgages encumbering the property.

In order to disclose or delete an information in the land and mortgage register book, an authorized person should file a motion to a court in this regard and pay the court fee which is usually PLN 100 or 200.

Land and mortgage register is governed by several principles among which the most important are:

- the principle of public availability according to which one cannot plead ignorance of entries in a land and mortgage register or applications logged therein;
- the principle of presumption of the veracity of entries according to which the rights disclosed in a land and mortgage register book are true and reflect actual legal status of the real estate;
- the warranty of authenticity of a land and mortgage register which means that in case of discrepancy between the legal status of the real estate reported in a land and mortgage register book and its actual legal status, the content of the land and mortgage register book favors the person who has acquired the ownership (or other rights *in rem*) to the real property through a legal transaction executed with the person authorized according to the content of the land and mortgage register book;
- the principle of priority of the revealed rights according to which a limited right *in rem* to real property, revealed in a land and mortgage register book, has precedence over the same type of right *in rem* not reported in the register.

3. Titles to real estate

In the Polish legal system there are various forms of possession of real estate. The most common are:

- the ownership and the perpetual usufruct right entitling to the most extensive rights to the real estate;
- the limited property rights (among others: usufruct, easement, servitude and mortgage): entitling another person to real estate in the scope defined by law;
- the rights arising from the contractual relationships (for example: lease and tenancy) entitling to use another person's real estate.

3.1. Ownership

Ownership right is the most extensive legal title to the real estate which is limited by law, its social and economic purpose and general principles of community life. The owner of the real property is entitled to use it, collect profits and other revenues, encumber it and of course freely transfer its right.

The transfer of the ownership right is performed by conclusion of the agreement under which the seller assumes the obligation to transfer to the buyer the ownership of a real estate and hand it over to him, while the buyer assumes the obligation to take over the real estate and pay the seller the price.

The contract must be concluded in the form of a notarial deed under pain of nullity. The notary public will collect a stamp duty (if VAT is not due) and a notarial fee.

The ownership is disclosed in the land and mortgage register book but the transfer of ownership is effective when an appropriate agreement is concluded (the entry in the land and mortgage register book is declarative in nature).

3.2. Perpetual usufruct

The scope of the perpetual usufruct is very similar to ownership but there are some distinguishing features.

The main features that distinguish the perpetual usufruct

Type of land:	perpetual usufruct can be established only on the land owned by the State Treasury or by a unit of local government;
Period:	generally the perpetual usufruct can be granted for a maximum period of 99 years which can be further extended (in special circumstances it can be granted for a shorter period of at least 40 years);
Facilities:	buildings and other facilities erected on real estate by a perpetual usufructuary (and those acquired at the time when the agreement on putting real estate into perpetual usufruct was executed) become the property of that perpetual usufructuary;
Disposal:	only joint transfer of: (i) the ownership of buildings and facilities erected on real estate held in perpetual usufruct and (ii) the right of the perpetual usufruct of that real estate, is legally possible and valid;
Fees:	the perpetual usufructuary is obliged to pay a specific annual charge for the perpetual usufruct determined by the public authority.

Generally, the perpetual usufruct is created by means of a contract concluded in the form of a notarial deed between the State Treasury or a unit of local government and a holder of perpetual usufruct. Such contract should specify the manner in which the land will be used (for commercial, residential or other purposes). If the land is used in a manner contrary to the contract, the public authority may terminate the contract. The perpetual usufruct is transferable, however: (i) an agreement in form of a notarial deed and (ii) an entry made in the land and mortgage register book (the perpetual usufruct is established on the basis of an entry made in the land and mortgage register book, but with effect from the date of submitting an application for this entry), are both required.

3.3. The limited property rights

The limited property rights can be determined as the rights to someone else's property. This group of rights consists of the exercise of certain powers vested in ordinary circumstances to the owner and as such burden the real estate.

The exhaustive list of those rights is set out in the Polish Civil Code however the most important (in particular from the perspective of the professional developer) are: usufruct, easement and mortgage.

There are two categories of limited property rights:

- the rights entitling to control the real estate (usufruct, easement); and
- the rights which give the ability to satisfy the claims of its holder (mortgage).

The form of a notarial deed is necessary for the declaration of the owner. In case of a mortgage - an entry in the land and mortgage register book is required.



3.3.1. Usufruct

The right of usufruct consists of the entitlement to use real estate and gather profits from it. The owner of the real estate is in exchange entitled to a rent. Usufruct is disclosed in the land and mortgage register book however entry is not necessary for the validity of the agreement. The usufruct expires if it is not exercised for 10 years and – what is important – it cannot be transferred.

Usufruct does not binds only the parties to the agreement but it is effective also against third parties (*erga omnes*).

Subject to the above the usufruct right is quite similar to lease (*dzierżawa*) however the conditions of the lease may be freely determined by the parties.

3.3.2. Easement

Easement is a limited property right aggravating servant real estate in order to: (i) enhance the usability of benefit real estate (land or transmission easement), or (ii) provide satisfaction of the specific needs of the natural person (personal servitude). The easement limits the possibility of using the burdened real estate by its owner.

As mentioned above, Polish Civil Code introduces three types of easements:

Easements can be purchased on the basis of:

- agreement (the declaration of intent of the owner of the servient real estate must be submitted in the form of a notarial deed under pain of nullity); or
- court judgment (i.e. for the establishment of an easement of access by necessity); or
- acquisitive prescription (only in case of (i) land easements consisting in the use of permanent and visible device or (ii) transmission easements; the personal servitude cannot be purchased by acquisitive prescription; the purchase of the acquisitive prescription occurs after 20 years of its possession in good faith or 30 years in case of a bad faith of the possessor);
- administrative decision (the decision on expropriation for public use).

The right of easement may be disclosed in the land and mortgage register book but such entry is not necessary for the validity of the establishment of the easement.

3.3.3. Mortgage

The mortgage is a legal institution which secures the receivables resulting from a legal relationship under which the mortgage creditor may claim satisfaction from the real estate.

Land Easement	Personal servitude	Transmission easement
<ul style="list-style-type: none"> • Established in favor of the owner (perpetual usufructuary) of the beneficiary real estate. • Encumbers the servient real estate in order to increase the usefulness of the dominant estate. 	<ul style="list-style-type: none"> • Established in favor of a specific natural person. • Encumbers the servient real estate in order to meet the specific needs of the beneficiary. • Expires with the death of the beneficiary at the latest. • Is non-transferrable. 	<ul style="list-style-type: none"> • Established in favor of a business entity that intends to construct or owns such transmission facilities. • Allows to use the transmission facilities for supplying or discharging liquids, steam, gas, electricity etc. • Is transferred to the acquirer of an enterprise or the acquirer of the facilities.

The mortgage creditor has the priority over the personal creditors of each subsequent owner of real estate. The sale of the real estate by the debtor does not affect the mortgage creditor's right who can claim satisfaction from each subsequent owner or perpetual usufructuary of the real estate.

To establish a mortgage, an entry in the land and mortgage registry book is required. Moreover, the mortgage cannot be transferred without the debt, which protects.

3.3.4. Rights arising from the contractual relationship (tenancy and lease)

On the basis of the lease or tenancy agreements the lessee and the tenant respectively are able to use someone else's real estate.

The parties to both agreements are able to freely arrange for the contractual relation between them with the provision of the limitation contained in laws.

Both lease and tenancy can be disclosed in the land and mortgage register book.

The most characteristic features about each relationship are listed below.

a. Tenancy

The tenancy agreement (in Polish: *najem*) provides the tenant with the right to use the real estate in return for rent. The agreement can be concluded for definite or indefinite period of time. In case it is concluded for definite period it can be terminated only due to reasons specified in the agreement. If the term of the agreement is indefinite, each party may terminate it upon the notice period. The subject to the tenancy agreement can only be items and premises (with the exclusion of the enterprise or the agricultural enterprise). According to provisions of Polish Civil Code the tenant can sublet the premises if opposite reservation was not provided in the agreement.

It should be noted that there are special provisions regarding the tenancy of the residential premises under which tenants are entitled to additional privileges.

b. Lease

In the lease agreement (in Polish: *dzierżawa*), the lessee is entitled to use the real estate and (unlike in case of the tenancy) collect profits from it. In exchange, the lessee is obliged to pay the rent to the lessor. The subject of such agreement are not only items but also

rights and (in contradiction to tenancy agreement) the enterprise as well as the agricultural enterprise.

According to the provisions of the Polish Civil Code, in case of termination of the lease of the agricultural land, one year's notice effective at the end of the lease year is a standard rule. In other cases, the lease may be terminated within six months' notice before the end of the lease year unless the parties agree otherwise. If the lease agreement was concluded for the fixed term, it can be terminated only due to reasons provided in the agreement.


Polish civil code provides regulation according to which the lessee is protected in case of reduction of its income – there is a possibility to reduce the rent which the lessee is ought to pay. What is more, the law regulations provide for the lessee the pre-emption right of the agricultural land when it is subject to sale agreement.

According to the provisions of Polish Civil Code the lessee cannot pass the real estate to third party for free-of-charge use or sublease it without the lessor's consent.

The provisions of the lease and the tenancy agreement arising from the Polish Civil Code are supplemented by the parties in a manner consistent with their business requirements. In particular, in case of commercial lease or tenancy agreements the following specific issues (besides the issues resulting from the provisions of the Polish Civil Code) are usually addressed: valorization of rent and maintenance fees, amount of security deposit, penalties for non-performance of the contract, arrangements regarding the fit-out works, limitation of liability, insurance obligations, confidentiality clause and non-competition clause.

4. Foreign investors

As a rule – under Act on acquisition of real estates by foreigner – the acquisition of a real estate by a foreigner requires adequate permit issued in a form of administrative decision by the Minister of Internal Affairs unless no objection is raised by the Minister of National Defense or – in case of agricultural real estate – the Minister of Rural Development. The permit is given at the request of an interested party (a foreigner).

Such permit is not required in case of the entities with their seat in the European Economic Area (EEA). It is important that the Ministry of Internal Affairs considers Polish-based SPVs acting as purchasers as undertakings from the EEA, even if they are fully controlled by entities from outside the EEA. 

From 30 April 2016, additional restrictions regarding the acquisition of agricultural real estates has been introduced and are binding upon most of legal entities (including foreigners).

5. Limitations in acquisition of agricultural real estates

Pursuant to the provisions of the Act on suspension of sale of real estates of Agricultural Property Stock of the State Treasury and on amendment of certain laws (Journal of Laws of 2016 item 585) the sale of agricultural real estates has been severely restricted. Generally, only a person with status of an individual farmer is now entitled to acquire freely agricultural real estates, save that it is not allowed to purchase an agricultural area exceeding 300 hectares in total.

The above restrictions are not applicable to certain kinds of entities (relatives of the seller, local government units, Treasury of State or its agency, catholic church or other religious associations) or in case of inheritance, record debt collection, acquisition of neighbor area (when the constructed building crosses the real estate border), in case of request to transfer property situated on the land when its value is higher than value of the land or in case of certain restructuring proceedings.

Also other exemptions from the above restrictions are possible provided that the seller of the real estate or a natural person that intends to establish a family farm obtains the necessary approval of the Agricultural Property Agency. However there are also specific conditions under which said approval may be issued, inter alia the seller of the agricultural real estate applying for approval of the Agricultural Property Agency has to prove that there was no possibility to acquire the land by an individual farmer or other entity specified in the mentioned Act on suspension of sale (relatives, Treasury of State, local government unit, church, by way of inheritance, etc.).

As a rule, the acquirer of agricultural property (except for relatives, Treasury of State, local government unit, church, by way of inheritance, etc.) is obliged:

- to conduct the agricultural activities for at least 10 years from the date of acquisition by him of agricultural property;
- not to dispose of acquired agricultural property for at least 10 years from the date of the acquisition.

Notwithstanding the foregoing, the Act states that for the term of five years starting from its entering into

force, the sale of real estate properties constituting part of the Agricultural Property of the State Treasury shall be withheld.

6. Structuring of the sale transaction

6.1. Preparation to the transaction

There is number of stages of preparation of the transaction in the framework of which the property may be sold.

Usually first stage of a transaction consists of preparation of the letter of intent or/and term sheet in which the parties to the transaction present their intentions and goals. Polish provisions of law do not stipulate requirements which such documents shall meet, therefore their form and content depend on parties and their expectations.

After execution of the abovementioned documents in many cases the due diligence examination is conducted during which party interested in purchasing the real estate verifies not only the legal status of the real estate but also the process of the construction of the buildings on the real property and all contracts related to it. The report prepared during the due diligence process constitutes grounds for proper structuring of the transaction.

6.2. Sale transaction

6.2.1. Preliminary sale agreement

After a due diligence examination – if the purchaser is still willing to conduct the transaction – the parties usually conclude a preliminary sale agreement. Of course it is possible to conclude an agreement transferring the right to real estate without prior conclusion of the preliminary sale agreement although this solution is quite rare due to the fact that due diligence often reveals issues that need to be addressed and managed before the final sale of the real estate.

In preliminary sale agreement the parties shall provide all stipulations essential and necessary for the conclusion of the final agreement. Therefore the preliminary sale agreement shall contain among others: the description of the property which is subject to the transaction, its price and representations and warranties concerning the factual and legal status of the property.

Under Polish law each party to the preliminary sale agreement is entitled to:

- seek damages in case the other party is no longer interested in conclusion of the final agreement;

Examples of the statutory pre-emption right

Beneficiary	Type of land
Municipality	undeveloped real property purchased from the State Treasury or local authorities,
	undeveloped land held in perpetual usufruct,
	land designated for a public use in the zoning plan on condition that it is registered in the land and mortgage register book,
	real estate entered into the register of monuments (or the right of perpetual usufruct of such property) on condition that it is registered in the land and mortgage register book,
	real estate located in the area of revitalization,
	real property located within the Special Revitalization Zone.
Agricultural Property Agency	agricultural land (with exceptions indicated in the law).
Administrator of the economic zone	real estate located in special economic zones.

- demand to execute the final sale agreement if the preliminary sale agreement meets specific requirements as regards its form (notarial deed) and content.

In addition, the preliminary agreement can be registered in the land and mortgage register book as to inform any interested party (e.g. in purchasing the property) about the expected sale.

6.2.2. Conditional sale agreement

In reference to specific parts of land, the specific entities may be entitled to pre-emption right. The pre-emption right consists of the right to purchase the property with the priority for the price which is offered to the buyer. The pre-emption right may be established on the basis of the legal act (statutory pre-emption right) or contract (contractual pre-emption right).

If the pre-emption right is reserved, the parties shall conclude a conditional sale agreement in which they provide stipulation according to which the ownership or perpetual usufruct of the property will be transferred if the entitled entity does not take advantage of its pre-emption right.

Generally, in case of statutory pre-emption right, the unconditional sale of the property shall be deemed invalid if such result has been stipulated in law. On the other hand, in case of contractual pre-emption right, the sale executed without notifying the pre-emption right beneficiary will be generally valid, but such beneficiary may demand compensation of damages or the unconditional agreement can be determined by the court invalid in respect of the beneficiary of the pre-emption right.

6.2.3. Final sale agreement

The last stage of the transaction itself is the execution of the final sale agreement. Such agreement must be concluded before the notary public in form of the notarial deed. Failure to comply with this obligation result in the invalidity of the agreement. The legal title to the property is transferred to the purchaser with the moment of execution of the final sale (with the provision that the perpetual usufruct is transferred on the basis of an entry made in the land and mortgage register book, but with effect from the date of submitting an application for such entry).

The parties should include in the final sale agreement in particular: full description of parties and real property, representation and warranties made by parties, sale price and date of payment, information if or when the real property will be handed over to the buyer, motion to land and mortgage register in order to disclose the data of the new owner or perpetual usufructuary.

7. Planning and development of real estate

7.1. Study of a local zoning

The purpose of use of the real estate is indicated in documents provided by local authorities. Local governments enact documents which specify policy regarding land (or its part) on the territory of municipality called a study of a local zoning.

The study of a local zoning is an internal document of the local government. The study provides guidelines in respect to zoning of the municipality territory and specifies the structure and details of the zoning plan.



7.2. Zoning plan

On the basis of the study of the local zoning the zoning plan is prepared. The zoning plan provides the list of information such as: planned and existing infrastructure and other developments, protected areas, assumptions regarding the protection of environment.

The zoning plan as a document adopted by competent authorities and - unlike the study of a local zoning - is generally binding as an act of local law.

Due to fact that the procedure of adoption of the zoning plan has a multistage character and it is expensive, many municipalities in Poland did not enact zoning plans for their subordinate territory.

7.3. Zoning decision

If there is no zoning plan for the land on which the investor intends to build, a zoning decision should be obtained by him from the local authorities. The issuance of the zoning permit is obligatory and precedes in this case the issuance of the building permit.

In order to receive the zoning decision the investor (applicant) is required to fulfill specific conditions and provide information regarding the land, its technical infrastructure, planned purpose of its use, details of planned investment and its influence on the environment.

During the proceedings regarding the issuance of the zoning decision there is a risk of occurrence of claims of owners and occupiers of neighboring real properties. Nevertheless the procedure of obtaining of the zoning decision takes few months after filing an application to local authorities.

The zoning decision may be issued for the benefit of more than one investor. What is more, an interested party can obtain the decision regardless of holding a legal title to the property. The decision can also be transferred to third parties, therefore there is a possibility to acquire a property with a valid zoning decision issued for a specific investment on the property.

The zoning decision expires in case: (i) when other party obtains a construction permit for the site or (ii) when the zoning plan is adopted and it does not comply with such decision.

7.4. Construction permit

In order to commence the construction works on the land it is necessary to notify the works to appropriate public authority or obtain a construction permit which is issued in a form of decision of relevant administrative entity.

The notification shall take place as regards smaller investments like single-family house. Although the procedure is simpler than in case of applying for construction permit, the investor is obliged to provide number of needed documents.

The applicant shall notify intention to conduct construction works 21 days before the works are commenced. Within this period the authority can raise and presents its objections. If within such period the entity will not undertake any activity, the investor can start works on the land.

As a rule, in majority of the construction investments, the investor is obliged to obtain a construction permit.

The construction permit includes the conditions which shall be met in order to commence the construction works. What is more the construction permit may be obtained if the project is consistent with the zoning plan (and in case of lack of the zoning plan – with the zoning decision).

In order to obtain such construction permit the applicant should file a motion to the competent authority. At this stage, the investor is obliged to hold a legal title to the site (ownership, easement, lease etc.).

The construction permit shall be issued by the authority within 65 days after filing of the application.

The construction permit usually consists of approval of the designs presented by the investor and permission to commence the works on the site.

The construction works to which the authority gave its consent should be commenced within period of 3 years after obtaining the final construction decision.

The decision on construction permit may be transferred to third party however the former investor must give its consent and the future investor shall accept the conditions upon which the construction permit. The future investor also shall prove it is entitled to use the construction site for the building purposes.

The relevant authority has the power to inspect the construction site at any time.

7.5. Occupancy permit

The occupancy permit issued by relevant entity after the completion of the construction works allows the use of the building or other structures.

In some cases it is sufficient to notify to the authority that the construction works are finished without the need of obtaining the occupancy permit in form of the administrative decision. If the authority will not raise any objections within 14 days after the notification, the investor is entitled to use the building.

The Construction Law contains the list of the investments which require the issuance of the occupancy permit in form of administrative decision. The occupancy permit is necessary in particular in reference to:

- investments build on the basis of the construction permit,
- buildings or structures which are going to be used before the finish of the construction works,
- illegal construction works (if in the course of legalization proceedings the obligation to obtain the occupancy permit is imposed on the investor),
- construction works suspended due to specific reasons.

The occupancy permit can be issued only on the demand of the investor and there is no other party of such proceedings.

The relevant entity is obliged to conduct inspections of the building and construction in order to verify if the building meets the requirements provided in construction permit as such verification is necessary to issue the occupancy permit. Despite the verification by relevant entity, the investor needs to inform other specific institutions – Sanitary Inspectorate and Fire Marshal – that the works have been done and the investor is ready and willing to use the building. The institutions are entitled to present objections as regards the building, if such will not be presented with 14 days, the investor is allowed to use the building.

Fulfillment of abovementioned requirements – making a notification or obtaining the occupancy permit – ensures that the use of the building is legal.





PORTUGAL





João Pinheiro da Silva

jpsilva@ctsu.pt

1. Main laws that govern real estate and leases

The Portuguese Constitution (*Constituição da República Portuguesa*) foresees the strongest and widest title over real estate which is the “ownership right”. According to this, the titleholder has the exclusive and unlimited right to own, to use and to dispose of the property within the limits of the law. This concept is equivalent to the “freehold title” in common law systems.

The Portuguese Civil Code (*Código Civil Português*), establishes the lawsuit and other legal action regimen directed toward property, the general principles and rules applicable to contracts, the horizontal property regime as well as the condominium rights.

Non-residential (business), or residential leases are also regulated by the Portuguese Civil Code and mainly by the “Urban Lease Law” (*Regime to Arrendamento Urbano*).

These are seen as the main laws that rule the real estate acquisitions and leases in Portugal.

2. Ownership rights

There are no restrictions to the ownership right in Portugal regarding foreign or non-resident investors. Nevertheless there are some formalities related to the tax authority that need to be observed — to obtain a Portuguese taxpayer number and in case of a non-resident, that has his residence outside the European Union, it is mandatory to appoint a tax representative. This principle is applicable whether the transfer of the real estate rights is done directly (asset deal) or indirectly, through the acquisition of a Portuguese company (share deal).

3. Registry system

All the properties need to be registered at the Land Registry and at the Portuguese Tax Authority. These two registries have different purposes. The first one is

mandatory after a purchase and sale and it grants that the ownership right is opposable to third parties, which gives it total effectiveness and protection. The Land Registry gives publicity to the creation, modification and acquisition of real estate rights and other rights *in rem* related to the property. It is important to highlight that in Portugal the system is based on the principle of the first register that says that every incompatible rights that come after cannot be invoked against the parties. Therefore the information that is provided by the Land Registry can be decisive to the purchaser to carry out with the deal.

After the public deed or a private document certified by determinate entities, the ownership title must be registered at the Land Registry Office within 60 days. The registry can be promoted namely by a Notary, a lawyer or the Land Registry Office.

The Land Registry Office certified information is accessible to the parties electronically. The seller must require an access code to provide that information to the buyer and then the document called “Certidão Permanente”, with all the information of the property, is available for a period of 6 months.

On the other hand, the tax authority registry is quite different because it was created to keep an updated description of the property, the tax value of it (which is called the VPT —Valor Patrimonial Tributário) and the identification of the owner, basically to know who is going to support the taxes, calculated according to the VPT of each particular property.

4. Notary roll on the transactions

The direct transfer (asset deal) of real estate rights occurs with a public deed or a private document certified by a Notary, a lawyer or a Land Registry office. In Portugal, it is necessary for some documents to be signed in the presence of these entities



to be legally binding. A Notary is a public official and therefore an independent third party who has a spread role at the point of completion, with the signature of the public deed.

Indirect transfers of real estate rights (share deals), through the acquisition of shares of a Portuguese company that owns a property does not need to take place in front of a Notary and can be concluded by a private agreement signed by the parties.

5. Representations and warranties in real estate transactions

To guarantee the safety of the investment, it is desirable to proceed with a Due Diligence before the completion. This Due Diligence must be focused on verifying the commercial, legal, tax and environmental situation of the property to make sure that it is free from any burdens or encumbrances, or if it is not that the seller can guarantee the extinction of them before or after the purchase and sale agreement.

Usually, the parties set the conditions of the sale by entering into a promissory agreement. In this agreement it is common to establish the following:

- **Price and payment conditions:** usually a deposit is stipulated, which typically represents only a percentage, between 10% and 25%, of the full purchase price. It is seen as an anticipation of the price payment. If the parties do not agree in the future, according with the Portuguese applicable law, in case of breach from the promissory buyer, the promissory seller can retain the amount. On the other hand, in case of breach from the promissory seller, the promissory buyer has the right to receive twice the amount paid as down payment. As an alternative, the specific performance can be used (called “Execução Específica”), which means that the non-breaching party can obtain a court order which compels a party to execute the contract according to the exact same terms agreed;

- **Deadline of completion:** The date will depend on whether there is a need or not to obtain documents, permits, economic financing, etc.;
- **Pre-emption rights:** There are some privileges granted by Law to the Portuguese State (by the National Heritage Direction) and to tenants (when the property is rented). These privileges enable them to have the first option to buy before it is offered to a third party. Therefore, before a purchase, it is mandatory to give notice of the terms and conditions of the intended deal;
- **Representations and warranties:** According with the Civil Code, the seller is responsible for defects and for lack of qualities that were granted to the buyer or that are necessary for the purpose for which the property is intended for a period of five years. The seller can give additional warranties, regarding the environmental, licensing and tax status of the property and in case of misrepresentation or warranties infringement, the seller is liable to the buyer.

6. Mortgage regulation and other guaranties used in real estate transactions

In order to finance the purchase of a property in Portugal, it is common for the lending institutions to create mortgages to better protect their interests. There are also some other credit guaranties as pledges over shares and pledges over receivables, but the one that has most expression in our country is definitely the mortgage. It has the characteristic that is more appealing — the possibility to be paid by the value of the property with priority over the other borrower's creditors. It is important to highlight that this possibility results of a special proceeding through courts. After the judicial decision, the property is sold and the creditor is paid with the sale revenue. There are no distinctions between foreign investors and national citizens in regards to the mortgage.

Some formalities related to the tax authority need to be observed — to obtain a Portuguese taxpayer number and in case of a non-resident, that has his residence outside the EU, it is mandatory to appoint a tax representative.

The main law applicable to the lending and the guaranties is the Civil Code and the Banking Law (Regime Geral das Instituições de Crédito e Sociedades Financeiras).

7. Leases of premises

Applicable Laws

In Portugal, the lease agreement framework is mainly found under the Portuguese Civil Code and the Urban Lease Law ("*Regime do Arrendamento Urbano*"). In this regard, and accordingly with the applicable law, lease agreements may be executed for a fixed or an indefinite term and may be for residential or for non-residential purposes. Additionally, lease agreements must be executed in writing and, when entered into for a term longer than six years, must be fully registered with the Land Registry Office in order to be effective before third parties.

Additionally, any building that is subject to a lease agreement must have an updated use permit, issued by the relevant municipality, in accordance with the activity to be carried out at the property (ex: housing, commercial, offices, etc.).

Types of lease agreements

According with the Portuguese law, there are two types of leases: **(i) for residential purposes and (ii) for non-residential purposes**. In this regard, all business leases are qualified as non-residential leases under the Portuguese law. Furthermore, please note that, whilst the residential leases must foresee specific provisions determined by law, the rules on duration, termination and opposition to renewal of non-residential lease agreements (e.g. business leases) can be freely established by the parties.

Typical provisions for lease agreements

- **Term:** lease agreements for residential purposes may be entered into by the parties with a fixed term, which may not be executed for periods longer than 30 years, or for an indefinite period. On the other hand,

the term for the lease agreements for non-residential purposes can be freely agreed by the parties;

- **Renewal:** It is usual for the parties to foresee that fixed term lease agreements for residential purposes are automatically renewed for successive periods (of equal duration or different duration). Thus, for this type of leases, the landlords may only oppose to the renewal of the respective term, which must be executed by giving a prior written notice determined in accordance with the period of the agreement. On the other hand, the tenants of this type of leases may oppose to its renewal and, in addition, may terminate the agreement at any time, after 1/3 of the initial term of the agreement, or its renewal period, has passed, which should also be executed by giving a prior written notice. On its turn, lease agreements for residential purposes for indefinite periods may be terminated by the tenant, provided that the lease has been in force for, at least, six months, or by the landlord, at any moment — with a prior written notice to the tenant of no less than two years — or on certain grounds expressly provided in the law (e.g. for residence of the landlord);
- **Termination:** Leases usually terminate at the end of the respective term; although, lease agreements may also be terminated for other reasons, either (i) by mutual consent of the parties or (ii) in result of a contractual breach by one of the parties;
- **Maintenance works:** The parties may agree on the rules applicable to any maintenance works on the leased property. However, unless otherwise provided by the parties, the landlord is responsible for the maintenance of the property. Therefore, usually the landlord is responsible for structural and major repairs whilst the tenant is responsible for any interior repairs;
- **Rent amount and updates:** Parties may agree on phased or variable rents, as well as on the rent update mechanism. In Portugal, the rent is



usually paid on a monthly basis, and is updated on an annual basis according to official criteria under the Price Consumer Index, if otherwise not agreed by the parties;

- **Security:** The tenant's security obligations are normally secured via a cash deposit or a bank guarantee in the amount corresponding to a certain number of rental instalments;
- **Assignment and Sublease:** The assignment of the tenant's contractual position, as well as the sublease of the property, is not allowed without the prior consent of the landlord. However, the assignment may be allowed in the event of a transfer of the tenant's commercial activity, which will result on the automatic transfer of the lease agreement to the respective third party, provided that certain legal requirements are fully fulfilled.

Pre-emption rights

Tenants who have held leases for longer than three years have a pre-emption right in the event of the sale of the relevant property, as well as in the event if the landlord wishes to enter into a new lease agreement with a third party.

Taxes payable on rent

Lease agreements are subject to stamp duty, which is currently payable by the landlord at a rate of 10% on the first rent. Please note that, usually, the rent is exempt from VAT, but the landlord may waive this exemption provided that certain legal requirements are met. In addition, the rental income of the landlord will also be subject to taxation, either income tax or corporate tax.

8. Taxes on real estate

Taxes associated with the acquisition and ownership of Real Estate

When buying a property in Portugal, the tax charges associated with the acquisition and ownership of a property are: **(i) Municipal Real Estate Transfer Tax** ("*Imposto Municipal sobre as Transmissões Onerosas*" — *IMT*), **(ii) Municipal Property Tax** ("*Imposto Municipal sobre Imóveis*" — *IMI*) and **(iii) Stamp Duty** ("*Imposto do Selo*"):

- **IMT:** The transfer of property rights is subject to IMT, which is payable, by the purchaser, prior to the execution of the respective transaction, and is assessed on the purchase price or its tax value, whichever is higher; Currently, the IMT rates apply as follows: (i) residential properties: between 0%

and 6% (depending on the value of the property and whether or not if the property is for use as the buyer's permanent residence); (ii) other urban properties: 6,5%; (iii) rural properties: 5%; and (iv) 10% for properties purchased by an entity resident in a country with a more preferable tax regime. In some situations especially foreseen by law, the purchaser may be exempted to pay the IMT;

- **IMI:** The IMI is charged annually on real estate property located within each municipality and is levied on the tax value of the property. This tax is payable by the registered legal owner of the property in two or three instalments, depending on the tax value of the property. The IMI rate for urban properties varies between 0,3% and 0,45%, depending on the location of the property, whilst a 0.8% rate is levied for rural properties. The tax value of urban property is determined by reference to certain criteria (e.g., average construction price, type of construction, quality standard, age and location of the building, other features of the property). Similar to the IMT tax, some properties may also be exempt of IMI taxation, in specific cases determined by law;
- **Stamp Duty:** Simultaneously with IMT, Stamp Duty is also charged at the transaction of any property rights, at 0.8% rate of the value of the transaction, or the tax value of the property, whichever is higher. Stamp duty is also charged on certain formal acts and documents, such as contracts, that are executed within the Portuguese territory and which are not subject to VAT, in accordance with the General Table of Stamp Duty.
It is important to highlight that Stamp Duty is also charged at the rate of 1% on the ownership of urban properties with tax value equal to or greater than one million euros.

Personal income tax (IRS)

Fifty percent of the capital gains which result from the sale of a property shall be aggregated with the remaining taxable income of the taxpayer resident and will be taxed in accordance with the progressive rates foreseen in the Portuguese personal income tax code, unless the property was acquired before 1989. Furthermore, please note that the capital gains obtained by non-resident individuals are subject to a tax rate of 28%, which may be excluded from taxation in Portugal if a double taxation agreement applies.

Notwithstanding the above, the taxation of this capital gains may be exempt if the property is the taxpayer's primary residence and if these capital

gains are reinvested in the acquisition, construction or improvement of another property for permanent residence purposes, either in Portugal or in an European Union or an European Economic Area Member State, since this reinvestment is executed between the 24 month period prior and the 36 month period after the relevant property sale.

The municipal civil protection service tax (Taxa Municipal Proteção Civil — “TMPC”)

According with the legal general municipal tax system (“*Regime Geral das Taxas das Autarquias Locais*”), several Portuguese municipalities, including Lisbon, approved within the respective Municipal Assemblies, a new municipal tax aimed to remunerate the municipal civil protection services in each municipality. As an example, the municipality of Lisbon approved in 2015 this TMPC, which is levied, annually, in accordance with the tax value of the property and is payable by whoever is the registered owner of the property as at 31 December of the year to which the tax relates, similar to the IMI tax. Still regarding the Lisbon example, the TMPC rates varies between 0.0375%, and 0.6%, depending on the maintenance level of the property and whether if the property is vacant or occupied.

Non-regular tax regime for non-regular residents

The non-regular resident tax regime is available for foreign citizens who wish to transfer their tax residence to Portugal and have not been deemed resident on Portuguese territory during the five years prior to the year pretended to be taxed as a non-regular resident. Thus, under this special tax regime, foreign citizens acquire the right to be taxed as non-regular residents for a period of ten consecutive years, at the end of which they will be taxed in accordance with the general rules of the Portuguese personal income tax code.

In this regard, an individual is considered a tax resident when he/she has remained in Portugal for 183 days, whether or not consecutive, or, regardless of the time spent in the Portuguese territory, if the taxable person owns or leases a permanent residence in Portugal before 31 December of the relevant year.

9. Public law permits and obligations

Main permits/licences required for building works and/or the use of real estate

The municipality with jurisdiction over the territory where the real estate is located is responsible for the issuance of the relevant permits regarding the construction works and the use of each property. Regarding the construction works, please note that, taking into consideration the kind of works to be

executed, the beginning of such works may depend on obtaining a prior construction permit by the respective municipality, or they may be only be executed after a communication procedure submitted on the respective municipality. Furthermore, we inform that this communication procedure is usually applicable to interior works and/or works that do not change the façade, height or structure of the property.

On the subject of the buildings use purposes, the municipalities are also responsible to issue the respective use permits, which will be granted if the respective construction project of the real estate has been executed in accordance with the approved plans and drawings submitted before the urban department of the respective municipality. The municipalities are also liable to confirm if a building is capable for the respective owner to carry on certain activities.

Compulsory acquisition of private real estate

Accordingly with the applicable law, it is possible for certain administrative entities to proceed with a compulsory acquisition of private real estate, provided that a justified public interest exists.

In this regard, prior to a compulsory acquisition procedure takes place, the administrative entity shall endeavour to acquire such real estate, by entering into a private agreement with the respective real estate owner. Thus, if the parties do not reach a mutual agreement, the compulsory acquisition procedure will begin with the issuance of a public interest declaration (“*Declaração de Utilidade Pública*”) by the relevant administrative entity, which shall include the relevant public interest justification for acquisition purposes, as per the relevant legal applicable provisions. After a 15 days period from the issuance date of the mentioned declaration, the administrative entity responsible for the compulsory acquisition shall present to the real estate owner a proposal for purposes of compensation of the intended compulsory acquisition.

Special urban rehabilitation framework

In Portugal, the government has approved an exceptional and temporary regime for the rehabilitation of buildings for residential purposes, which construction works have been completed for at least 30 years or that are situated in urban rehabilitation areas determined by each municipality.

Additionally, the government also approved several tax benefits to urban rehabilitation procedures, such as: (i) an exemption from Municipal Real Estate Transfer Tax (IMT) on the purchase of real



estate for rehabilitation purposes; (ii) an exemption from Municipal Property Tax on buildings subject to urban rehabilitation, for a period of three years; (iii) a reduced VAT rate of 6% on the rehabilitation works; (iv) a reduced rate of 5% shall be applicable to the capital gains and losses earned by individual taxpayers residents, when such capital gains arise from the sale of a rehabilitated property; (v) the rent income earned by individual taxpayers resident in Portuguese territory are taxed at a rate of 5%, provided that this income arise from leased real estate located within an urban rehabilitation delimited area or from leased real estate with a special rent increase procedure, which are subject to rehabilitation works.

Protection of historic areas

The municipalities and the National Heritage Agency (*"Direcção Geral do Património Cultural"*) have a pre-emption right in the transfer of any classified real estate or buildings which are located within certain historical areas. Furthermore, any construction works project, submitted to the respective municipality, which shall be executed within a historical area, or that will aim a classified real estate, must be dully approved by relevant entity, before the beginning of the works.

10. Environment

Applicable law

The Portuguese environmental law establishes the legal regime of liability for environmental damage and transposes the Directive 2004/35/CE of the European Parliament and of the Council of 21 April, which approved, based on the polluter-pays principle, the environmental liability applicable to the prevention and remediation of environmental damage. Thus, according to the applicable legal framework, the party that caused the environmental damage is responsible for the payment of the preventive and remedial measures

to be adopted.

The Portuguese environmental law foresees three types of environmental liability: civil, administrative and criminal liability. Thus, the civil and administrative liability may arise from damage caused to the environment by an economic activity. In its turn, the Portuguese Criminal Code foresees, among others, the environmental crime of pollution offense. Furthermore, the Portuguese Law also establishes a joint and several liability between legal persons and their directors and managers for any environmental damage.

Energetic certification system of buildings

In accordance with the Portuguese applicable law, for purposes of transfer and lease of residential and some types of non-residential properties, the owner or the landlord must obtain and deliver with signature of the property transfer agreement, or the lease agreement, an Energy Performance Certificate describing the building's energy efficiency and consumption expected from normal use. This Energy Performance Certificate is issued by a certified technician and must be registered before the respective competent Energy Agency (*"ADENE"*). Finally, the Energy Performance Certificate is issued for a 10 year period and, as specially provided on the applicable law, this building energetic certification is not applicable to certain buildings.



RUA
DA
SAUDADE



ROMANIA





Alexandru Reff

areff@reff-associates.ro

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country.

The main sources of real estate law are listed below (where the case, such shall be accompanied by the relevant implementation norms):

- The Civil Code;
- Law no. 50/1991 governing the authorization of construction works;
- Law no. 350/2001 governing territorial planning and urbanism;
- Law no. 10/1995 governing quality of constructions;
- Law no. 7/1996 on cadaster and real estate publicity;
- Special laws governing restitution of real estate taken-over by the State during the communist political regime.

2. Ownership rights

Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)

The legal regime regarding acquisition of real estate assets by foreign investors differs depending on:

- the type of real estate assets (land or buildings); and
- whether the foreigners are nationals of EU member states or non-EU members states.

While there are no restrictions for acquisitions of buildings by foreign entities and individuals, with respect to acquisition of land, the following should be noted:

- Nationals of EU member states (both companies and individuals) and stateless persons domiciled in EU member states:

- may acquire land under the same conditions as those provided by law for Romanian nationals, for the purpose of setting up secondary offices or secondary residence in Romania, starting from 1 January 2012.
- may acquire agricultural land and forestry land under the same conditions provided by law for Romanian nationals starting from 1 January 2012.

- Nationals of non-EU member states (both companies and individuals) and stateless persons domiciled in non-EU member states:

- may acquire the ownership right over land in Romania under the terms set by the applicable international treaties, on the basis of reciprocity;
- conditions for acquisition of land may not be more favorable than for nationals of EU member states.

Is there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

Under Romanian law, the right to build is granted only to owners, as well as to holders of real estate related rights (except for special licenses granted to oil and natural gas operators).

3. Registry system

Structure of the property registries in your country

Real estate is registered in the relevant land books held by the relevant authorities. Land books are opened for



each immovable asset (land or, respectively, land and building) regardless of the identity of the owner.

Which authorities are in charge of them

Local Offices for Cadaster and Land Registration are located in each county of Romania. All public registrations carried out within the above-mentioned structures are further centralized under the supervision of the National Agency for Cadaster and Land Registration.

Connection with the cadastral-tax registries, how that works?

As prerequisite for transferring the ownership (or real estate related rights) over a property, an updated land book excerpt, as well as a fiscal certificate (certifying there are no local taxes/debts overdue and unpaid) are obtained. The public notary authenticating the respective transfer deeds is in charge with applying for the registration of the transaction with the land book. In addition, the purchaser shall register itself as new owner with the relevant fiscal authorities.

Is the registration compulsory?

Registration with the relevant Land Books of real estates is compulsory.

Currently the registration only renders the respective title opposable to the public. However, once the cadastral works are finalized in each administrative territorial unit, the registration with the land book shall become a condition for the valid transfer of title over real estate (with the exception of certain types of acquisitions such as those deriving from inheritance, accession, forced sale, expropriation).

Real estate rights which are not registered within the relevant land book are generally not enforceable against third parties.

How registration guarantees the rights of the owner

The registration itself does not necessarily represent a guarantee of title. However, the law sets forth an assumption of ownership to the benefit of the person/

entity registered with the land book, until contrary is proven. The registration is also relevant for secured creditors (e.g. financing banks), in the sense that the registration date ensures the priority ranking against other creditors. In addition, land book registration offers special protection against third parties claiming against the title, after the passing of a certain time period (usually of 5 years).

How registration works in a typical transaction?

Prior to the execution of a sale and purchase agreement of a real estate is concluded, the following steps are required:

- contacting a public notary in order for the latter to obtain a recent land book excerpt for authentication purposes;
- the seller obtains a recent fiscal certificate of the real estate from the local fiscal authorities certifying there are no local taxes/debts overdue and unpaid;
- the seller obtains an energy performance certificate with respect to the real estate;
- signing of the sale and purchase agreement of a real estate in front of a public notary (once all the legal formalities are met);

Upon signing of the sale and purchase agreement of a real estate, the public notary sends the documentation and the registration application to the Land Book Office in order for the transfer of the ownership right to be further registered in the relevant land book. Once the updated land book excerpt is issued, the new owner of the real estate undertakes to register its ownership title with the local fiscal authorities.

4. Notary roll on the transactions

The transfer of title to real estate can generally be validly effected through the execution by the parties of a transfer agreement which must be authenticated by a public notary.

Nationals of non-EU member states (both companies and individuals) and stateless persons domiciled in non-EU member states may acquire the ownership right over land in Romania under the terms set by the applicable international treaties, on the basis of reciprocity.

The notary performs a “basic” check of the seller’s title, as well as of the other documents requested by law for authentication purposes (e.g. land book excerpts, fiscal certificates, etc.). The notary also confirms the execution date and the fact that the signatories executed the respective deed in front of the respective public notary.

The notary fee is calculated either by reference to a set of official evaluations (the public notary grid). If the purchase price is higher than the values in the grid, the fees are calculated by reference to the purchase price; otherwise, the calculation is made based on the official values. For transactions that do not exceed a threshold of approximately RON 15,000, the notary fee is a fixed fee of 2.2%. The notary fee for a transaction of a higher value shall be calculated as an additional percentage applied to the value of the transaction (e.g. 1.6% or 0.44% depending on the value).

It is customary for the buyer to also pay the land book registration and notary fees, however, the parties may agree to share these costs.

5. Representations and Warranties in real estate transactions

The Civil Code regulates only two types of warranties (applicable in case of an asset deal): warranty against eviction (i.e. total or partial loss of title) and flaws of the real estate. The seller’s liability against eviction and flaws is regulated in detail by law and can be limited or extended (to the extent permitted by the Civil Code).

Since the legal regime of other representations and warranties is not clearly defined under Romanian law, the remedies available to the buyer are generally the ones regulated under the contract, which can be further settled in court or in arbitration.

Generally, the seller gives representations regarding the following:

- validity of title,

- lack of litigation,
- state of the asset,
- disclosure of due diligence information,
- potential litigation regarding the real estate,
- technical situation of the asset (including equipment), environmental obligations, fiscal and land book registration;
- validity of its corporate approvals; sufficiency of funds; lack of any insolvency state (or alike).

6. Mortgage regulation and other guaranties used in RE transactions


Common procedures for a mortgage constitution

Mortgages may be created by agreement between the parties in the form of a notarized deed. The mortgage agreement must identify the person establishing the mortgage, the creditor, the cause of the secured obligation and must describe the asset that is subject to security. With respect to lease receivables related to an immovable asset and insurance receivables related to the payment of such lease receivables, registration with the Electronic Archive and land registry is required.

On the granting of real estate mortgages, two types of costs are triggered: (i) notary fees: approx. 0.07% of the value of the secured amount and (ii) land registry fees: approx. 0.1% of the value of the secured amount plus certain fixed costs for issuance of authentication excerpts — between EUR 10 and EUR 50 per cadastral number.

In order to be enforceable against third parties, security over real estate needs to be registered with the relevant land registry (i.e. land book).

How is the lender protected on a creditor execution?

The lender may protect itself from claims arising from the creditor execution by concluding a first rank mortgage agreement over the real estate property. First 

rank mortgage over the real estate property should cover the entire amount of the loan and all related fees, costs, interests, etc., further registration of such with the relevant land book being mandatory.

The order of priority of a lender's security over a certain real estate in front of other creditors is established chronologically based on the date the mortgage was registered with the relevant land book register. Importantly, upon completion of the cadastral works for each administrative unit, registration with the land registry shall have constitutive effect for real estate mortgages. Currently, registration with the land book is made for rendering the mortgage opposable towards third parties only.

For real estate mortgages, approval for initiation of enforcement is granted by a court of law (without judging on the substance of the matter, the court only verifies existence of a writ of execution). Non-observance of the legal provisions for carrying out the enforcement procedure itself or for any enforcement act triggers cancellation of the unlawful act. In the event the writ of execution or the enforcement itself is cancelled, the interested party may request restoration to the original condition (*restitutio in integrum*).

7. Leases of business premises:

Applicable laws

The general framework applicable to lease agreements is regulated by the Civil Code; specific provisions govern the residential leases and the land leases. Residential leases are also governed by EGO no. 40/1999 on tenant protection. Specific provisions may apply in case the premises are located within an industrial park (qualified as such according to the law).

Apart from the mandatory legal requirements, other exceptions to the parties' entitlement to freely negotiate lease agreements may apply, for example: if the premises are subject to bank financing (minimum lease terms imposed by the bank must be observed) or if the building was developed under EU financing. In this latter

case, for a certain period of time, lease agreements must take into account the fact that the project has to meet certain parameters undertaken upon the granting of the EU financing (such as granting microenterprises several facilities in terms of lower rents)

Types

Although not expressly regulated by law, the market standard includes two main types of leases, namely: (i) Triple Net Leases (although, in Romania, capital repairs are born by the landlord) and (ii) Non-triple net Leases.

Typical provisions

Typical provisions should refer to:

1. Length of lease term;
Terms of a lease may vary as follows:
 - 3 to 5 years (exceptionally 7 to 10 years) in cases of regular tenants;
 - 10 to 20 years in case of anchor tenants of retail projects.

Frequency of rent payments

Rent is typically paid always in advance. Rent payments are performed either monthly or quarterly (the last payment mechanism being applicable in case of anchor /large scale leases).

Payment of Guarantee at the start of the lease

The Tenant may provide the Landlord with the following guarantees securing its obligations:

- letter of bank guarantee (preferably irrevocable, unconditional and at first demand); or
- cash deposit;

the above accompanied (if the case) by a parent company guarantee or a corporate guarantee.

Indexation of rent

As a rule, the base rent is indexed annually based on either MUICP or HICP. In some cases, the parties may

The registration itself does not necessarily represent a guarantee of title. However, the law sets forth an assumption of ownership to the benefit of the person/ entity registered with the land book, until contrary is proven.

agree for fixed base rents applicable during certain periods of time. The turnover rent mechanism is also frequently encountered in case of retail projects. Thus, the tenant pays the higher amount between a certain base rent and turnover rent calculated by reference to an agreed percentage of the tenant's annual turnover.

Insurance of the Premises

Typically, the tenant contracts and maintains insurance for: (i) tenant's fit-out works; (ii) content, equipment, assets, furniture and other personal properties in the premises and (iii) civil liability insurance towards third parties and/or its employees and/or any other third parties, including the tenant's liability towards the landlord.

Typically, the insured risks include: fires, storms, blizzards, floods, earthquakes, lightning, explosions, rebellions, riots, deliberate damages, explosions and overflowing of water tanks, devices or pipes and other risks or insurances requested by the landlord (in any case under the reserve of excluding excesses and limitations imposed by insurers).

The landlord concludes (i) a property insurance for the building (including landlord's installations and equipment) and (ii) an insurance against property owners' and third party liability in respect of the common areas.

The insurance taken by the Landlord does not cover the assets located within the premises which are not under the landlord's ownership.

Execution of Fit-out works within the Premises

As a general rule, for any works entailing the issuance of the building permit, such building permit is issued in the landlord's name. Thus, only minor/temporary works can be performed independently by the tenant without the landlord's prior approval or acknowledgment.

Even anchor tenants are usually imposed contractual prohibitions in performing certain works/alterations in the premises, such as those which:

- affect the structure of the building
- affect the external appearance of the premises or of the building;
- impact on the heating, air-conditioning, ventilation or other systems of the building;
- would reduce the leasable area of the premises;
- obstruct the glasses, doors or any areas of natural light.


Service Charge

Payment of service charge refers to an estimated amount multiplied by the gross leased area, set for the first calendar year, starting with the handover date, paid in advance, on a monthly basis, for the Services provided by the Landlord according to the lease agreement (such Services may refer, but not limited to: repair, renewal, decoration, cleaning, maintenance and lighting of the common areas of the building, cleaning the outside external glass façade, snow and ice clearance, providing the operation of heating, air conditioning and ventilation systems within the common areas, heating, cooling and ventilation of the tenants premises, security and protection 24 hours/365 days, etc.).

Termination of the Lease

The lease agreements can be terminated either: (i) unilaterally (break options) as per the contractual provisions; (ii) for default or (iii) in case of force majeure. Out of the typical events of default triggering termination included in lease agreements, we note:

- delay in payment of rent or service charge;
- breach of the permitted use of the premises;
- breach of the tenant's obligations regarding the security instruments to be made available by the tenant;
- breach by the tenant of its obligations regarding the permitted works/alterations within the premises.

If the lease is concluded for an unlimited duration, such can be unilaterally terminated by either parties, subject to serving a prior written notice with a reasonable time in advance. 

8. Taxes. Probably centered in indirect tax Value added Tax (VAT)

The VAT treatment depends on the status of the building (new or old). For VAT purposes buildings remains new for by the 31st of the year following the one of their reception.

For new buildings, the sale will be subject to VAT as follows:

- VAT at the standard 20% rate will be charged by the seller directly on the invoice, if the buyer is not VAT registered in Romania. The person liable for VAT is the seller in this case who needs to declare and pay such VAT to the state budget by the 25th of the month following the reporting period in which the sale takes place.
- No VAT will be charged on the invoice, if the buyer is VAT registered in Romania. In this case, the person liable for VAT will be the buyer, under the VAT reverse-charge mechanism (nil cash flow impact).

Old buildings are VAT exempt without credit. This means that no VAT will be charged on the sale but part of the input VAT related to the construction/purchase of the building may become a cost, as it cannot be deducted and adjustment will be necessary. The VAT adjustment period for immovable property is of 20-years.

There is an option to apply VAT on the sale of old buildings as well — this is done by submitting a special notification to the tax authorities (format of the notification provided by the law). The notification can be submitted anytime within the 5-years status of limitation and has retroactive effect.

Tax on property

According to the Romanian tax code, the following local taxes could be due with respect to real-estate: Building tax and Land tax.

Starting with 1 January 2016 the computation method of the building tax was changed, by taking into consideration the purpose for which the building is used: residential, non-residential or mixed. The tax rates in case of non-residential buildings are higher than those applicable to residential ones, as follows:

- residential — between 0,08% - 0,2% of the taxable value of the building;
- non-residential — between 0,2% - 1,3% of the taxable value of the building.

Note that the above-mentioned rates are established by the relevant local tax authority, however their value cannot exceed the above presented values by more than 50% (for each type of building). Exceptions apply for cases where the value of the building is not declared according to the legislative provisions (i.e. a revaluation report is not prepared and submitted to the local tax authorities once in three years). In these cases, the local tax authorities have the right to increase the tax rate to 5%, irrespective of the building's purpose.

Land tax is determined based on certain elements provided by the legislation, such as: square meters, value/square meter depending on the rank of the locality, category of land use etc.

9. Public law permits and obligations

The strategic planning and zoning in Romania are governed by the provisions of:

- government Decision no. 525/1996 approving the general urbanism regulation;
- law on territorial planning and urbanism no. 350/2001 and the related Implementation Norms (approved by Order no. 233/2016).

Under the Romanian legislation, the buyer of a real estate asset would be compelled by the public authorities to perform the remedial/decontamination measures.

The typical legislative and governmental control in respect to strategic planning and zoning are performed as follows:

- on the occasion of preparation and approval of the strategic planning documentation as follows: (i) the Plan for the planning of the national territory; (ii) the Plan for the planning of the zonal territory; (iii) the Plan for the planning of the county;
- on the occasion of preparation and approval of the zoning documentation as follows: (i) the General Urbanism Plan; (ii) the Zoning Urbanism Plan; (iii) the Detailed Urbanism Plan;
- the implementation of and compliance with the strategic planning and zoning regulations is typically ensured by the Romanian State Inspectorate in Constructions and the Chief Architect institution (through their representatives at local level).
- restrictions deriving from the specific location of the plot — e.g. vicinity of special types of facilities/ infrastructure such as: historic monuments, archaeological sites, special protection areas, military units, airports, utilities networks;
- general building restrictions/prohibitions on plots qualified as green areas, forests, arable lands;
- specific height regime and other requirements deriving from the location of the buildings in the vicinity of air traffic corridors;
- specific requirements entailing the neighbors' approvals in case either new constructions are developed adjacent or in the nearby vicinity of the neighboring ones for which protection intervention measures are necessary;
- in case of development of constructions with a destination different than the one of the neighboring building; for change of destination of premises in the existing buildings.

Furthermore, specific legislative and governmental controls are applicable in view of ensuring a strategic planning and zoning of certain areas/objectives of public interest such as highways, national roads, bridges, railways, environmental protected areas, historical monuments etc.

The first step in the construction permitting process is the issuance of the urbanism certificate which presents the building parameters, restrictions, limitations and/or specific requirements to be observed in respect to the development on a certain land plot.

Out of the restrictions or special requirements typically applicable, the following should be highlighted:

- specific restrictions deriving from the zoning regulations — e.g. permitted and prohibited use of the plot of land and building parameters;

Thus, the construction permitting procedure entails the following main steps:

1. issuance of an urbanism certificate; if required under the urbanism certificate — preparation and approval of an urbanism plan (either zoning urbanism plan — PUZ or a detailed urbanism plan — PUD);
2. issuance of all prerequisite approvals requested under the urbanism certificate (fire permit approval, approval issued in connection with the environmental protection, approvals referring to several utilities' connection, etc.);
3. issuance of the building permit.



In addition to the above, a rather complex technical project (that must be endorsed by specialized verifiers) stands as basis for the building permit.

Once the building permit is obtained, the investor is requested to communicate to the City Hall's attention, as well as to the State Inspectorate in Constructions' attention, a written notice certifying the certain date when the execution works effectively start. Once this term is officially announced, the execution works must be performed within a certain limited period of time (as provided in each building permit, it may vary from 12 months to 36 months).

During the performance of construction works, the State Inspectorate in Constructions as well as other special local authorities/bodies are entitled to verify if the works are being commenced/performed in compliance with the building permit.

Completion of works is marked by the execution of a reception protocol with the participation of the local city hall's representatives and (in certain cases provided by law) of the representatives of firefighting authorities and State Inspectorate in Constructions.

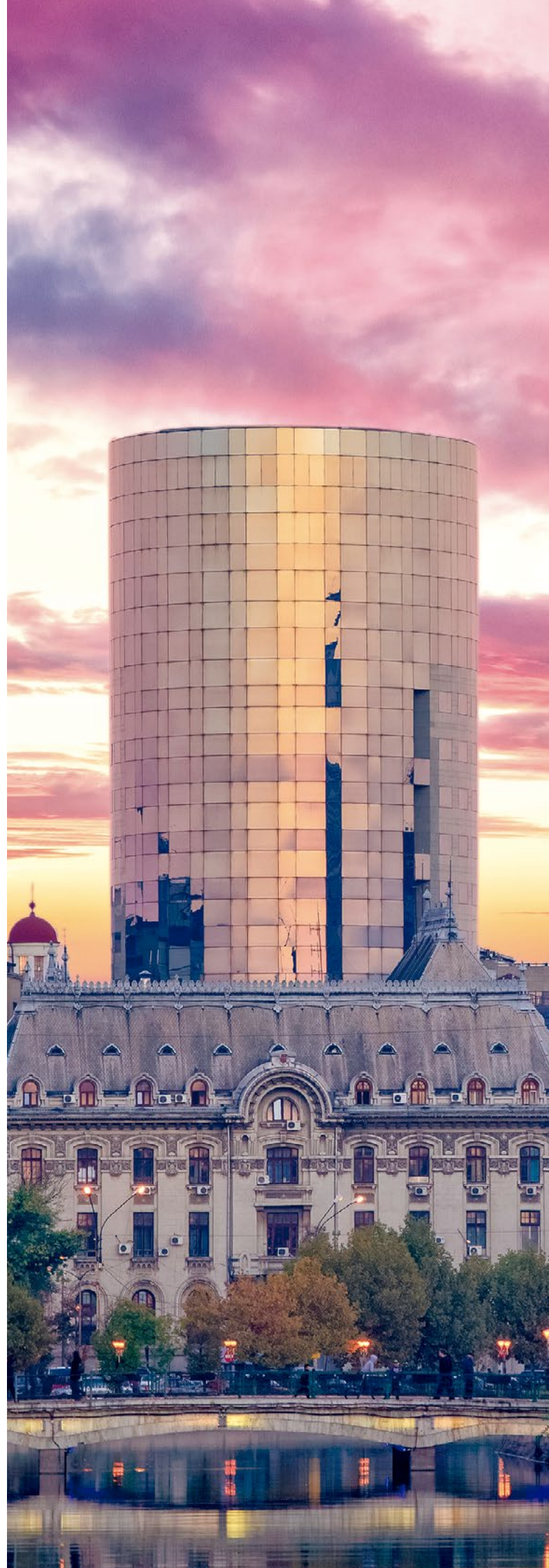
10. Environment

Polluted Land

Under the Romanian legislation, the buyer of a real estate asset (although not having caused the pollution or contamination) would be compelled by the public authorities to perform the remedial/decontamination measures. Depending on the transaction mechanism, the buyer may further trigger the seller's liability in this respect. In addition, in certain instances (i.e. if the seller's activity on the property required an environmental permit), before closing the transaction, the parties are bound to undertake a procedure in front of the environmental protection authority and indicate the manner in which they agree to split the environmental obligations.

Energy Efficiency qualifications

With respect to buildings, the energy efficiency verification is performed by way of issuance of an energy performance certificate. According to Romanian legislation, upon the finalization of a construction, it is mandatory for the owner/investor/manager to obtain an energy performance certificate issued by an independent auditor. Apart from the applicable fine for lack of obtaining and displaying such certificate, any transfer of ownership over the building in the absence of the energy performance certificate shall be sanctioned with relative nullity, while the reception minutes shall be null and void in such an event.







SLOVAKIA





Miroslava Terem Greštiaková
mgrestiakova@deloitteCE.com



Dagmar Yoder
dyoder@deloittece.com

1. Main laws that govern property ownership and leases in Slovakia

The legal basis of ownership (including real estate) is the Constitution of the Slovak Republic. Its Article 20 stipulates that everyone has the right to own property. The ownership right of all owners has the same statutory content and protection.

Most of the relevant legal regulations related to real estate are comprised in Slovak Civil Code. It mainly regulates the definition of an ownership right, legal means of property rights protection, methods of acquisition and co-ownership, as well as ways of termination of property rights, etc.

The public regulations relating to real estate law are especially the Real Estate Cadastre Act, the Building Act, the Flats Ownership Act, the Act on Protection and Use of Agricultural Soil and Environmental Impact Assessment Act (EIA).

2. Ownership rights

Slovak legislation allows Slovak citizens and foreigners to acquire almost any real estate under the same conditions. Any individual or legal entity with legal capacity may freely acquire real estate in Slovakia. There are, however, some exceptions for agricultural land, forests and other property of special interest to the Slovak Republic as specified by law (e.g. waters, minerals, etc.).

Slovak legal regulation of real estate is governed by the principle of *superficies solo non credit*. The Civil Code expressly determines that the structures are not part of the plot of land. It means that the owner of a plot of land and the owner of a construction built on it may be different persons.

In Slovakia only one type of ownership exists, meaning that the ownership right has for all owners the same

legal content. Every subjective property right is characterized by a triad of typical proprietary rights: usufruct and enjoyment of its fruits and benefits (*ius utendi et fruendi*), the right of disposal (*ius disponendi*), the possession right (*ius possidendi*). The right to protection against any unjustified interference with the property rights also belongs to these basic rights. The same real estate may be owned by two or more co-owners.

The Slovak Civil Code further stipulates that the rights to real estate may be acquired based on several legal grounds:

- by contract (e.g. purchase contract, deed of gift)
- inheritance
- decision of a state authority (e.g. decision on expropriation)
- on other ground provided by law (e.g. prescription)

It is necessary to point out that ownership to real estate does not automatically mean that the owner can make arbitrary changes to it. Buildings, changes to them and maintenance work on them may in general be carried out only under the building permit or on the basis of a notice to the building office. Building permit is required under the Building Act for buildings of all kinds without regard to the technical nature of their construction, purpose or duration of construction; building permit is also required for changes to buildings, especially for horizontal extensions, vertical extensions, and for building modifications (including proceedings concerning permission for land modifications, mining and similar or related works, information, advertising or promotional structures, etc.).



3. Registry system

The Real Estate Cadastre (the „Cadastre“) is the only public register of real estate located in Slovakia. Cadastre is a geometric determination, inventory and description of real estate. Data on the rights to such real estate, including ownership rights, pledges, in rem pre-emption rights, easements etc. constitute a part of the Cadastre. For the purpose of the Cadastre these rights are referred to as “rights to real estate”.

Rights to real estate are entered to the Cadastre in three ways:

- Registration: Unless stated otherwise by the law, ownership rights, the pledge and the easement are entered by registration. Since the registration has constitutive character the rights to real estate are by registration established, changed or terminated.
- Record: It has only evidential character. The right to real estate has already been created based on other legal ground (e.g. Certificate of Succession, Decision of the court, Prescription, etc.).
- Comment/mark: It serves only as an information about certain circumstances relating to the real estate or the owner of real estate.

Real estates – i.e. plots of land and permanent structures connected to the land with fixed foundations are compulsorily registered in the Cadastre.

Real estates which are not registered are small buildings under the Building Act and civil engineering such as highways, roads, local and tertiary roads, cable and other lines, bridges, dams and levees, etc., nevertheless they are considered as real estate under the Civil Code. Ownership rights to these real estates are not established by registration in the Cadastre but based on another ground (contract, construction). As an example a situation when a person acquired plots of land together with a small building constructed on it may

be used. Such person becomes the owner of plots of land by the effective registration with the Cadastre but for acquiring the ownership over the small building the moment of signing the contract on purchase of these real estates (including the small building) is decisive.

Rights to the real estate are also recorded on the Certificate of ownership (the “Certificate”). Certificate consists of the following parts:

- Part A) contains information on given real estate,
- Part B) contains information on the owners of real estate and their co-ownership shares and
- Part C) states information on encumbrances, pledges, easements and other rights of third persons to the given real estate. The content of Certificate constitutes a binding information until it is proven otherwise. In this regard a situation when the actual owner of the real estate is not the same person who is registered as an owner in Cadastre may occur. In such case the actual owner may claim his rights by the action for determination of his ownership submitted to the competent court. This means that there is no state guarantee of correctness and/or completeness of the registered data inscribed in Certificates of ownership and no guarantee of the state that the inscribed data fully reflect the reality.

State authorities which are in charge of Cadastre are Cadastral departments of District Offices as local bodies of state administration, which cover the territory of particular district. The District Office in the territory of which the real estate is situated is competent for cadastral proceedings (registration), to establish, change or terminate the rights to real estate upon effective registration. District Office also manages and secures updating all cadastral data concerning the real estate and its owner. State administration, carried out by the District Offices is managed and controlled by the Geodesy, Cartography and Cadastre Authority of the Slovak Republic.

Slovak legal regulation of real estate is governed by the principle of superficies solo non cedit. The Civil Code expressly determines that the structures are not part of the plot of land.

Application for the registration of transfer of ownership shall be filed by parties to the respective sale and purchase contract on real estate ("Contract") in written form. The application has to be accompanied by the Contract in two copies and it has to fulfil the statutorily required criteria. The Contract and all the documents submitted to the Cadastre shall be compulsorily in Slovak language and has to contain the identification of the transferred real estate and the identification of the contracting parties. The signature of transferor has to be officially certified.

An administrative fee for the registration application represents a statutory lump-sum amount and does not depend on the value of the transferred real estate. Cadastre decides within 30 days after the submission of the application. If the Contract had been executed in the form of a notary deed or was authorized by the attorney and the Contract is not in contradiction with the Cadastre information and documentation and the procedural criteria for registration are fulfilled, the District Office shall decide on the registration within 20 days. There is also a possibility of the payment of a higher administrative fee for shortening the procedure to 15 days. The ownership to real estate is transferred upon the decision of the District Office on the registration becoming effective.

4. Role of a notary in real estate transactions

Under the Slovak legislation a role of a notary in real estate transactions consists mainly in:

- Certification of signatures of sellers and other persons stipulated by law on the Contract (e.g. an obligor from a pre-emption right, obligor in case of establishment of easement, obligee in case of agreement on termination of easement, signatures of co-owners on the contract on termination and settlement of co-ownership or of spouses at settlement of joint co-ownership of spouses, etc.);
- Preparation of a notarial deed in case a certain legal act is executed in this form (e.g. a sale and purchase

contract on real estate is often executed also in form of a notarial deed);

- A central role in inheritance proceedings.

5. Representations and Warranties in real estate transactions

Sellers' warranties

Pursuant to Slovak law, in case of a sale of real estate, the seller is obliged to transfer a legal title and to hand over the property to the purchaser. Since a purchase contract on real estate is not regulated by Slovak law as a separate type of contract, but it is subsumed under the general provisions of a purchase contract, a seller and a purchaser typically agree on a specific set of representations and warranties.

The exact scope of the representations and warranties as well as the consequences of breach of these representations and warranties depend on the specific case, mainly on the market circumstances, negotiation position and powers of the parties to the transaction, the goals that the purchaser pursues by the acquisition, etc. However, a legal practice shows some commonly included representations and warranties.

Commonly used representations and warranties of the seller related to a land could be summarized as follows:

- Warranty that the seller holds a valid legal title to the transferred property;
- Warranty that there are no encumbrances or other third party rights to the property except for the ones disclosed;
- Warranty that the transferred property is not a subject matter of any litigations or administration proceedings except for the ones disclosed;
- Representation that the seller is not aware of any contamination of soil;



- Warranty that the land is not a subject of a bankruptcy, execution or similar proceeding and was not contributed into the capital of company;
- Warranty on existence of access from the public road;
- Warranty that the land is not an archeological site.

Where the acquisition of the real estate includes a building, the frequent additional representations and warranties express that:

- Apart from ordinary wear and tear, the building is in proper condition for use and that the seller is not aware of any specific serious defects;
- All the relevant building related and other permits exist and that the transferor is unaware of any breaches of the existing permits and/or any intentions of the relevant authorities to change, amend or withdraw the relevant permits.

Where the transaction relates to leased real estate and buildings representations and warranties will often also relate to the existence, validity, and remaining term of the lease agreements and to the rent per annum agreed under the existing lease agreements.

The above mentioned representations and warranties should not be considered as an exhaustive list and in specific cases some other may be added or vice versa left out.

Other groups of commonly used representation and warranties in relation to all real estates (a plot of land, a building or other) are:

- Escrow and comparable concepts: Mechanism pursuant to which the purchase price or its parts are held and disbursed to the seller by a third party, while they fall due only if no breaches of defined provisions occur on side of the seller within the agreed time periods. In order to secure fulfilment of representations and warranties of the seller another commonly used concept are guarantees.
- Environment related provisions
- Disclosure obligations: Under Slovak law a seller is obliged to disclose information to the purchaser that are substantially relevant for the purchaser's decision to buy the real estate. If the seller fails to fulfil this obligation and the buyer concludes the Contract as an error arising from a circumstance decisive for

conclusion of the Contract and if the seller evoked this error or must have known about it, a legal act shall be invalid. The legal act shall also be invalid if the error was evoked by this person intentionally. Error in motive shall not make the legal act invalid.

Non-disclosure of a substantial fact may be used as a basis for withdrawal from the Contract if the Contract provides for it.

6. Mortgage regulation and other guaranties used in real estate transactions

6.1. Common procedures for provision of mortgage credit by a bank

The regulation on mortgage credit provided by a bank is comprised in the Act on Banks. A mortgage credit is provided based on a contract on mortgage credit concluded between a bank and a debtor.

A mortgage bank provides mortgage credits under its general terms on provision of mortgage credits. These general terms must contain mainly:

- due form of application for a mortgage,
- procedure for applying for a mortgage,
- terms and conditions for granting mortgage,
- the manner in which a mortgage agreement may be terminated,
- a procedure to be followed by a mortgage bank in the event of debtor's default with repayment of a mortgage or its accessories,
- specification of those changes on a debtor's side, which shall entitle a mortgage bank to demand early repayment of a mortgage credit,
- conditions for exercising a lien over a real estate established to secure mortgage credit.

A bank is obliged to make accessible also further information specified by the Act on Banks and the percentage of a state contribution determined for respective calendar years. On demand of a client a mortgage bank is obliged to provide further supplementary information.

A contract on mortgage credit must be in writing and a detailed content requirements are stated in the Slovak Act on Banks (such as identification of a mortgage bank and of the client, the amount of a mortgage credit and its maturity, the rules for principal and interest

payments, the level of per annum percent interest rate, designation of domestic real estate, type, method and extent of securing the mortgage bank's claims, etc.)

6.2. How is the lender protected against creditor's execution

Protection arises from rules stated in the Act on Banks pursuant to which:

- A mortgage bank cannot require from the client (the debtor) a premature repayment of instalments of the mortgage for reasons attributable to the bank or its legal successors;
- A mortgage bank may not request from the client (the debtor) the payment of interests, fees or other costs that are not specified in the contract on mortgage ;
- In some other situations stipulated by the Act on Banks, a mortgage bank cannot request payment of interests, fees or other costs in relation to premature repayment of a mortgage or its part (e.g. if the mortgage is prematurely repaid in relation to expiration of the fixation period for interest rate of the credit or in relation to a change of the interest rate in case of a variable interest rate).

6.3. Non-banking mortgage

On the Slovak financial market also non-banking institutions offering so called non-banking mortgages are present.

One of the differences between banks and non-banking institutions is that banks are subjected to strict supervision of the Ministry of Finance and in the same time to a supervision of the National Bank of Slovakia. Although creditors providing non-banking products must comply also with the Slovak effective legislation and must be registered with the Register of Creditors maintained by the National Bank of Slovakia, their supervision is in practice more complicated and less effective.

A non-banking mortgage is in contrast with a banking mortgage a consumer credit product, therefore provisions on protection of consumers are applicable on non-banking mortgages. Unlike banking mortgage, it is not required to demonstrate the purpose of use of funds provided based on non-banking mortgage. The feature which a non-banking mortgage and banking mortgage have in common is that both are a credit secured by a real estate.

6.4. Other guaranties used in real estate transactions

A frequently used concept for securing a receivable and its accessories by a real estate is a pledge to

a real estate established based on a contract on establishment of pledge. The purpose is to authorize the creditor for satisfaction of his receivable from the pledge if the receivable is not duly and timely fulfilled. The contract on establishment of pledge, provided the pledge is a real estate, must be in writing and registered by the Cadastre. A pledgor and a debtor is usually the same person.

7. Leases of business premises

7.1. Applicable laws

General provisions on lease and sublease are included in the Civil Code. By these provisions for instance a lease of land would be governed. The Civil Code contains also specific provisions on lease and sublease of apartments.

A lease and a sublease of non-residential premises, i.e. also business premises is regulated by a separate act – by the Act on lease and sublease of non-residential premises ("the Act").

7.2. Types of leases of business premises

All business premises are leased on the basis of the Act which does not distinguish between specific types of lease contracts or types of leases.

A contract on lease on non-residential premises may be concluded for a definite or an indefinite time period. However, in case of a sublease contract only a definite time period may be negotiated. This requirement arises not only from the Act but also from the accessory nature of a sublease contractual relation, which is dependent on the lease relation and which shall cease to exist at the latest in the same time as the lease relation, meaning that the sublease contract shall be concluded maximally for the period of the lease contract (which is considered to be a definite time period, not indefinite, and that applies also to the cases when the lease itself is concluded for the indefinite period).

7.3. Typical provisions

All lease contracts on business premises must be in writing and besides the essential elements required for validity of legal acts they must define a subject-matter and purpose of the lease, amount and maturity of the rent and the method of its payment. If the lease contract is not concluded for the indefinite time period, the contract must also state the time period for which it is being concluded. If the contract does not contain one or more of these elements, it is automatically invalid.

Matters regulated by the Act (such as termination of lease contracts on non-residential premises)



do not have to be included in the lease contract on business premises, unless parties wish to regulate these matters differently (provided that diversion from the statutory provisions is allowed).

It is not recommended to extend the grounds for termination by notice beyond the grounds stated in the Act, because it could raise questions regarding the validity of such agreement since there is no unambiguous opinion on cogency of these provisions as well as on the fact whether the grounds for termination by notice are formulated in the Act exhaustively.

Pursuant to the prevailing interpretation of the Act by courts, if the lease contract on business premises does not contain a provision distinguishing the rent and the payments for services related to use of business premises, it could be sanctioned by the absolute invalidity.

Besides the essential elements which must be present in every lease contract on business premises, as typically included provisions may be observed for instance:

- Warranty of the lessor that he holds a valid legal title to the leased property and is entitled to use the property and to lease it to a third party;
- Representation of the lessee that the leased property is suitable for contemplated use and that are therefore required permits have taken issued and are valid and effective;
- Provisions on payments for services related to the lease (use of water, electricity, gas, collection of waste, security services, cleaning services, maintenance and repairs, marketing services, etc.);
- Provisions on contractual penalty in case of default of the lessee with payment of rent and other sums payable under the lease;
- Provision regulating a deposit / bank guarantee as a security for fulfilment of lessee's obligations;
- Provisions regulating use of common premises;
- Provisions related to termination of the lease contract (e.g. imposing an obligation of *restitution in integrum* on the lessee, arrangements concerning technical improvement of the leased property, etc.).

The non-essential elements included in lease contracts on business premises may however vary from case to case and depend on many factors such as character

of the business performed in the leased property, interests of the parties, etc.

It can be called a common practice that the parties to the lease contract sign along with the lease contract an acceptance protocol to document in detail all items handed in by the lessor and accepted by the lessee together with the subject of lease. In this protocol also defects of the leased property and values showed by energy meters (if any) are usually noted.

8. Taxes

8.1. Real Estate Transfer Tax

The transfer of real estate located in the Slovak Republic is not subject to the real estate transfer tax as of 1 January 2005.

8.2. Indirect Tax (Value-added tax)

The standard Value-added tax ("VAT") rate in Slovakia is 20%.

In general, when supplying the construction or a part of the construction following situations may occur:

- The supply of construction or part of the construction performed within the period of 5 years from the first approval or from the first day of the use of the construction or part of the construction is not VAT exempt, i.e. the supplier should apply the output VAT, 20%. However, provided that the supplier and customer are registered for VAT in Slovakia, the supply of constructions or part of the construction which are mentioned in the section F of the Commission Regulation (EU) No. 1209/2014 and supplied based on the contract on performance of work or other similar contract is subject to the reverse charge in accordance to the article 69, section 12j of VAT Act, i.e. the customer will be obliged to pay Slovak VAT.
- The supply of construction or part of the construction performed after the period of 5 years from the first approval or from the first day of the use of the construction or part of the construction is VAT exempt, however the supplier may waive the exemption and opt to apply VAT. In this case following situations may occur:
 - In the event the supplier decides to apply the VAT, the reverse charge will be applied in accordance to article 69, section 12c of VAT Act, provided that the supplier and customer are registered for VAT in Slovakia, the customer will be obliged to pay Slovak VAT. Supplier will be obliged to issue an invoice without VAT with reference "reverse charge

according to the Article 69, section 12c".

- In case the supplier opts to apply the VAT exemption to the supply of construction or part of the construction, the supplier will issue an invoice without VAT with reference "VAT exempt in accordance to the Article 38 section 1". In the event the supplier deducted the input VAT on the initial acquisition and also opts to exempt the supply of the construction or part of the construction from the VAT, the use of the real estate changes, i.e. the supply of construction or part of the construction is subject to capital goods adjustment scheme. The period for performance of such adjustment is 20 years starting in the year in which the building was put into use.

8.3. Real Property Tax and specific charges related to real estate

There are three real estate taxes in Slovakia, depending on the type of the real estate:

- The tax on land,
- The tax on buildings and
- The tax on apartments and non-residential areas located in a residential building.

The owner or administrator of real estate is considered as a tax payer of real estate taxes. In specific cases also lessee or user of the real estate might be regarded as taxable person.

In general, the tax liability arises on 1 January of the year following the year in which the property is acquired (rented/started to be used) and ends on 31 December of the year in which the ownership (renting/use) ends.

In the event the real estate is in the co-ownership, every co-owner is regarded as taxable person to the extent of the respective share.

The annual rates of the aforesaid real estate taxes can be reduced or increased based on the issuance of generally binding regulation reflecting the local conditions with effect from 1 January of the taxation year.

8.4. Local Development Fee

Local Development Fee ("Development Fee") is one-time fee applied to new developments. The Development Fee can be introduced by a municipality in its territory, a individual part thereof or a individual cadastral area, by a generally binding regulation. The Development Fee rate ranks from EUR 3 to EUR 35 per each m², or a part thereof, of the floor area of the above-ground part of the building. The Development Fee is an income of the municipality budget.

The payer is a natural person or a legal entity in a position of a developer for whom:

- the building permit,
- decision on approving changes to the building before its completion,
- the decision on additional building permission has been issued, or
- who as a developer announced the construction to the Building Office.

9. Public law permits and obligations

Public law permits relates mainly to construction of buildings. They can be categorized as:



	Tax on land	Tax on buildings	Tax on apartments
Taxable person	Owner/ administrator of the land/ beneficial owner of land*	Owner/ administrator of the building/ beneficial owner of building	Owner/ administrator of the apartment
Tax base	The value of the land** multiplied by its area in square metres	Built up area in square metres of a building	Total floor area of an apartment in square metres
Tax rate	0.25%	EUR 0.033***	EUR 0.033

*Tax on arable land, forests and other agricultural or meadow land situated in the Slovak Republic and leased for more than 5 years to the lessee who is registered in the cadastral register, is payable by the lessee.

**The value of the land for tax purposes is determined by the law unless local municipalities determine the value of the land by a general binding regulation.

*** If the building has several storeys, the municipality may impose an additional surcharge of up to EUR 0.33 for each floor.

- **Zoning Decision** – In this decision the competent Building Office shall delineate the area for the proposed purpose and shall prescribe the conditions which are to ensure the interests of the public in the area, especially conformity with the aims and objectives of land-use planning, the material and temporal co-ordination of selected buildings and other measures in the area as well as to ensure care for the environment including architecturally and urbanistically valuable objects in the area;

- **Decision on the placement of a building** – It is a part of the zoning decision (together with decision on the use of land, decision on a protected area or on a protective zone, and with decision on a building closure). This decision determines the building land, locates the building on the building land, states the requirements for placement of a building, defines requirements for content of project documentation and period of validity of the decision.

- **Building Permission** – By this permission the Building Office shall determine the binding terms for the realisation and use of the building and shall rule on the objections of participants of the proceedings. The Building Office shall secure in particular the protection of interests of the public during construction works and during use of the building, the complexity of the building, adherence to general technical requirements for construction or to other regulations and technical standards and compliance with requirements determined by the relevant state authorities, mainly it shall secure the prevention or restriction of negative effects of the building and its use on the environment;

- **Occupancy Permission** – The completed building or its parts eligible for independent use or that part of the building which has been changed or maintained may be used only on the basis of the Official

Approval. This means that the purpose of the Official Approval is to permit the use of the building for the intended purpose, and if it is necessary, to determine the terms of use of the building.

The Building Act states when some or all of the above stated decisions are not required.

For construction works on buildings which are recognized as cultural landmarks an assessment of the Authority of Monument Preservation is required by Slovak law.

10. Environment

10.1. Environmental Impact Assessment (EIA)

Before the Zoning Decision is obtained, the assessment of impact on the environment of the proposed activity has to be performed. The proposed activity is the realization of buildings, other facilities, an implementation plan or other intervention in the natural environment or in the country, changing the location's physical aspects, including mineral resource extraction. Not all proposed activities are subject of EIA, but only those that have a significant impact on the environment and which are also specified in Environmental Impact Assessment Act (e.g. new production hall, landfills, power plants etc.). Decisions made in this proceedings may determine additional conditions for subsequent authorization of construction or reject the recommendation for the construction.

10.2. Energy efficiency qualifications

The Energy Efficiency Act establishes the obligation of owners of buildings to have the Energy Certificate. By the energy certification the building is classified in relevant energy class. When selling or leasing the building the owner of the building is obligated to state as part of the advertised in commercial media also indicators of its integrated energy performance stated in the energy certificate.







SLOVENIA





Sanja Savič M.Sc

sasavic@deloittece.com

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country.

In Republic of Slovenia legislation governing real property ownership and leases is governed by multiple laws listed hereinafter:

- Constitution of the Republic of Slovenia (Official Gazette of Republic of Slovenia, No. 33/91-I with amendments);
- Law of Property Code (Official Gazette of Republic of Slovenia, No. 87/02 with amendments) governs ownership of real property, possibilities on encumbrance etc.
- Land Register Act (Official Gazette of Republic of Slovenia, No. 58/03 with amendments) governs the land register, entry of real property in the land register, governing principles, including publicity, of the land register etc.
- Code of Obligations (Official Gazette of Republic of Slovenia, No. 97/07 — official consolidated version) governs transfer of title of ownership and lease agreements of real property etc.
- Claim Enforcement and Security Act (Official Gazette of Republic of Slovenia, No. 3/07 — official consolidated version with amendments) governs the procedure and possible consequences of enforcement of encumbrances (such as mortgage) over real property.
- Reciprocity Act (Official Gazette of Republic of Slovenia, No. 9/99) governs restrictions on foreigners owning real property in Republic of Slovenia.
- Act governing conditions for the acquisition of title to property by natural persons and legal entities of European Union candidate countries (Official Gazette of republic of Slovenia, No. 61/06) governs conditions for acquisition of real property by persons of EU candidate countries.
- Business Buildings and Business Premises Act (Official Gazette of Socialist Republic of Slovenia, No. 18/74 with amendments) governs conditions, rights and obligations associated with leasing business buildings and business premises.
- Protection of Buyers of Apartments and Single Occupancy Buildings Act (Official Gazette of Republic of Slovenia, No. 18/04 with amendments) governing rules of sale of apartments and one apartment buildings.
- Housing Act (Official Gazette of Socialist Republic of Slovenia, No. 69/03 with amendments) governs types of residential buildings, maintenance conditions, ownership relations and management of residential buildings, among other.
- Construction Act (Official Gazette of Socialist Republic of Slovenia, No. 102/04 with amendments) governs construction of buildings, necessary permits and also includes environmental requirements associated with construction,
- Environmental Protection Act (Official Gazette of Socialist Republic of Slovenia, No. 39/06 — official consolidated version with amendments) governs basic principles on pollution etc.
- Energy Act (Official Gazette of Socialist Republic of Slovenia, No. 17/14 with amendments) governs energy related issues and presents the basis for secondary legislation, including, among others Regulation on promotion of effective use of energy and use of renewable energy sources (Official



Gazette of Republic of Slovenia, No. 89/08 with amendments);

- Spatial Management Act (Official Gazette of Republic of Slovenia, No. 110/02 with amendments) governs spatial planning, enforcement of spatial enforcement measures, provision of building land and management of spatial databases.

Please note that the list above is not comprehensive and other laws and/or additional secondary legislation may govern other aspects of real property ownership and leases.

2. Ownership rights

2.1. Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)

Restrictions or limitations for real estate ownership exist in Slovene law and they can be divided in two categories, restrictions that are in private interest and restrictions that are in the public interest. General rule is that each owner may perform his/her right in a way so that he/she does not violate the right of others or the law.

Law of Property Code provides for essential limitations on use of real property such as:

- prohibition of abuse of rights;
- rules of neighborhood law;
- preemptive rights;
- limited rights *in rem* under the law;
- etc.

Foreigners may, on the basis of Article 68 of the Constitution of Republic of Slovenia, acquire ownership rights on real estate in Republic of Slovenia under conditions prescribed by law or an international treaty, ratified by the General Assembly of Republic of Slovenia.

For foreigners, generally, reciprocity rule applies, meaning that a foreign person may acquire real-estate in Republic of Slovenia under the same conditions as would apply to a Slovene citizen when acquiring real-estate in the country where the foreign person is a citizen, unless prescribed differently by law or ratified international treaty.

Citizens of European Union, European Economic Area and OECD member states may acquire real-estate in

Republic of Slovenia under the same conditions as Slovene citizens may.

2.2. Is there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

Right to build is the right of the investor to build on certain real-estate that is based on investor's ownership right or any other right *in rem* or other right. Usually the investor is the owner of the real-estate.

Exception from the rule *superficies solo cedit* may be applied when the investor is not the owner of the underlying real-estate. In such cases the underlying land and the building are not owned by the same person. Right to build is limited by time to 99 years. Right to build is transferable under the rules that apply to the transfer of title on real-estate, *mutatis mutandis*. For a right to build to be valid it must be entered into the land register.

3. Registry system

3.1. Structure of the property registries in your country.

Different registries regarding real-estate are established in Slovenia. Land cadaster and building cadaster are two essential registers that are connected with the land registry. For acquisition of real-estate the land registry is the most important register as all right connected with real-estate, including ownership, are governed by the principle of publicity, meaning if a right regarding real-estate is not entered into the land registry it does not exist. This being said, signed agreement on transfer of ownership over real-estate is not enough for the transfer of ownership as such. Transfer of ownership must be entered into the land registry for the transfer to be valid.

3.2. Which authorities are in charge of them

Land cadaster and building cadaster are managed by the Surveying and Mapping Authority of the Republic of Slovenia. Land registry is managed by the competent land registry court.

3.3. Connection with the cadastral-tax registries, how that works?

N/A

3.4. Is the registration compulsory?

Registration in the land registry is compulsory. All right connected with real-estate, including ownership, are governed by the principle of publicity, meaning if a right regarding real-estate is not entered into the land registry it does not exist. This being said, signed agreement on transfer of ownership over real-estate

is not enough for the transfer of ownership as such. Transfer of ownership must be entered into the land registry for the transfer to be valid.

3.5. How registration guarantees the rights of the owner.

As above.

How registration works in a typical transaction?

In a typical transaction a contract on transfer of ownership right would be signed. The contract must be in a written form. Permission for registering the ownership into the land registry may be a part of the contract or it may be in the form of separate document. The signature on the permission for registering the ownership into the land registry must be notarized. With such a valid permission from a previous owner entry into the land registry of the transfer of title is possible. With the registration into the land registry the ownership on real-estate is transferred.

4. Notary roll on the transactions

Parties to the transaction may decide to conclude the entire contract in a form of a notarial deed. By law only the signature of the seller on the permission for registering the ownership into the land registry must be notarized. In many cases, where the real-estate subject to the transfer is encumbered by a mortgage, the purchase price is paid to an escrow account managed by a notary, which is to be paid to the seller under the condition that all encumbrances are deleted from the land registry.

5. Representations and Warranties in real estate transactions

5.1. General legal responsibility of the seller in front of the buyer.

Seller is responsible for material defects that the real-estate had when the title was transferred to the buyer, irrespective of whether the seller knew of them. The seller shall also be liable for those material defects that show themselves after the title was transferred to the buyer if they are the result of a cause that existed prior to the transfer of title.

5.2. Typical Representations & Warranties for transactions in different assets class.

Legal and material defects according to the Slovene Code of Obligation.

6. Mortgage regulation and other guaranties used in RE transactions

6.1. Common procedures for a mortgage constitution.

A mortgage is constituted by a contract, which includes a permission to enter the mortgage into the land

register, which must be notarized, or by concluding a contract in a form of a directly enforceable notarial deed. In any case the mortgage must be entered into the land register for it to be valid and effective.

6.2. How is the lender protected on a creditor execution.

The debtor is generally not protected against the creditor's execution. The only possible protection against execution of a mortgage is complete repayment of the debt.

7. Leases of business premises

7.1. Applicable laws

Business Buildings and Business Premises Act (Official Gazette of Socialist Republic of Slovenia, No. 18/74 with amendments).

7.2. Types

Generally the lease of business premises is concluded for a definite or indefinite period of time. As provisions of the Code of Obligations and Business Buildings and Business Premises Act are by their nature optional, the parties may agree on any number of types of leases. Contracts concluded for a definite period of time may only be terminated by the lapse of time. For contracts concluded for an indefinite period of time the termination period is 1 year by law.

7.3. Typical provisions

Contract on the lease of business premises must be concluded in a written form, must define the rent and the subject of the lease. It is advisable that the parties define the duration of the lease (definite or indefinite period of time) as it is held that contracts that do not define the duration, are concluded for an indefinite period of time. The parties may agree on any provision they wish.

8. Taxes. Probably centered in indirect tax.

8.1. VAT

Transactions related to supply of real estate and leasing of real estate are in principle deemed VAT exempt. The Slovene VAT Act nevertheless sets out the optional taxation with VAT of real estate related transactions, which are otherwise deemed VAT exempt. Namely, it stipulates that a taxable person engaging in real estate related transactions for which exemption from VAT is prescribed has an option to make an arrangement with the lessee or buyer of immovable property to charge VAT on respective transactions, at the required rate. The party with whom the taxable person makes such an arrangement, however, is required to be a taxable person having the right to full deduction of VAT. To be able to charge the VAT under such



an arrangement, both taxable persons shall make a separate declaration in electronic form towards the Slovene tax Authority.

Additionally, the Slovene VAT Act stipulates that the following supplies of real estate are excluded from the VAT exemption and are thus taxable with VAT:

- supplies of buildings or parts thereof, and of the land on which they stand, if the supply is performed before the buildings or parts thereof are first occupied or used;
- supplies of buildings or parts thereof, and of the land on which they stand, if the supply is performed prior to the expiration of the two-year period from the commencement of the first use or first occupation;
- supplies of building land; and
- leasing of parking spaces and garages.

8.2. Real Property Transaction Tax

In case VAT is not charged and paid on supplies of real estate, such transaction is subject to real estate transaction tax (hereinafter RETT). In principle, the person liable for payment of RETT is the seller of real estate. The seller shall submit the relevant tax return on real estate transaction within 15 days after conclusion of the transaction to the tax authority in whose jurisdiction the real estate is located. The tax base for RETT is the selling price of the property, where the selling price includes any payment that constitutes consideration and has been or will be received by the seller from the buyer. The tax is calculated and paid at the rate of 2% of the tax base.

8.3. Capital gain

When selling a real estate or donating a property, in case where the seller property or donor of the property is a natural person and the property was acquired after 1 January 2002, such transaction shall, in accordance with the provisions of the Slovene Personal Income Tax Act, be deemed a capital gain.

9. Public law permits and obligations.

For the valid hand over of real state the seller must obtain the permit for use. Depending on the location, type and other specifics of real estate, other permits may be necessary.

10. Environment

As a general principle provided by the Constitution the ownership right must be implemented in a way that its ecological function is ensured. Any interference in the environment must be planned and carried out so as to cause the least possible environmental pollution. Polluter is responsible for the elimination of the source of excessive pollution of the environment and its implications in accordance with the Environmental Protection Act.

10.1. Polluted Land. Energy Efficiency qualifications.

Energy Act, which governs energy related issues, presents the basis for secondary legislation, including, among others Regulation on promotion of effective use of energy and use of renewable energy sources. Regulation on promotion of effective use of energy and use of renewable energy sources provides for incentives and state aids for effective use of energy and use of renewable energy sources. Qualifications are stipulated in public tenders used for allocation of funds.





SPAIN





Juan Martínez Calvo

jmartinezcalvo@deloitte.es

1. Real Estate Law

The basic legislation regulating part of real estate law is contained in the Royal Decree of July 24, 1889, by means of which the Spanish Civil Code is approved. Mortgage legislation is established in Decree of February 8, 1946, approving the new official wording of the Spanish Mortgage Law (reformed by Law 13/2015 of June 24) and the Decree of February 14, 1947, which approved the Mortgage Regulations.

The legislation governing urban leaseholds is Spanish Urban Leasehold Law 29/1994, of November 24, which was amended by Law 4/2013, of June 4, on measures to increase the flexibility of and encourage the residential housing rental market.

Real estate law covers the main laws governing real estate ownership and letting in Spain. However, other related regulations should be taken into account.

Regarding the planning and zoning law, the Royal Legislative Decree 7/2015, of October 30, by means of which the consolidated text of Land and Urban Redevelopment Law is approved, should be taken into account. It establishes the basic regime that is developed by the Autonomous Communities and municipalities.

The environmental regulations regarding polluted land are foreseen in the Law 22/2011, of July 28, about Waste and Polluted Land.

These brief statements are developed below.

2. Ownership rights

The right of ownership is the most characteristic and common right in real estate transactions, whereby the owner holds all the legal powers to be exercised over a given asset.

However, Spanish law also includes other types of rights that, without covering such broad powers as the right of ownership, are usually taken into consideration by economic operators for certain commercial activities. These include surface rights regulated in State land legislation that has recently been amended — Legislative Royal Decree 7/2015, of October 30, by means of which the Consolidated Land and Urban Regeneration Law is approved. According to this Law, surface rights are defined as rights *in rem* enabling buildings or structures to be constructed in the airspace above and the ground beneath another property, while the holder of the surface rights maintains temporary ownership of the buildings or structures built, notwithstanding the separate ownership of the owner of the land.

For these surface rights to be validly created, they must (i) be executed in a public deed and registered at the Property Registry, and (ii) establish a term for such surface rights not exceeding ninety-nine years. Surface rights may only be created by the owner of the land, whether a public or private entity.

Another right generally used in Spain is administrative concession, which is a legal transaction whereby the public authorities grant one or several subjects rights over, or obligations in relation to, public property.

The administrative concession concept may be analysed from two different perspectives: (i) the concession of public domain regulated in the Law 33/ 2003, of November 3, of Property of the Public Administration; and (ii) the administrative concession contracts, regulated in the Royal Legislative Decree 3/2011, November 14, of Public Procurement.

Lastly, another type of right that does not appear frequently in real estate transactions should be noted, namely usufruct, whereby the owner of an asset grants the use and enjoyment of it to a third person.



Regarding the existing restrictions on real estate ownership, the right of ownership is defined in Article 348 of the Spanish Civil Code as the right to “enjoy, use and dispose of a thing, with no limitations other than those established by laws”.

This definition means that the right of ownership is not an absolute right and is limited by legal provisions.

Of note in this regard are the limitations regulated in private law, such as the Spanish Civil Code, Spanish Mortgage Law, etc., whereby the right of ownership may be limited. For example, in accordance with Article 26 of the Spanish Mortgage Law, the following are considered to be prohibitions relating to disposition and alienation:

- those established by the Law which have full legal effect without an express court or administrative decision do not require separate and special registration and are effective as legal limitations on ownership.
- those of which the immediate origin is a court or administrative decision shall be subject to a provisional entry in the Property Registry.
- those imposed by the testator or donator in acts or dispositions of a will, marriage settlements, donations and other acts for no consideration may be registered provided that current legislation recognises their validity.

In addition, other types of restriction on ownership involve those included in administrative law whereby reasons of public interest prevail over private ownership. This would be, for example, in the case of compulsory purchase, where the deprivation of ownership is due to reasons of public use entailing the recognition of a right to indemnification (just compensation) for the owner of the property subject to compulsory purchase. Another instance would be where the building in question has a historic value,

which would prevent it from being purchased by a private operator.

In both cases, the right of ownership would be limited.

Another limitation on the right of ownership in real estate transactions in Spain lies in the urban planning legislation of each Autonomous Community and the urban planning rules of each municipality.

Urban planning legislation, both at Autonomous Community and municipality level, in the latter case implemented through municipal planning regulations, implies a limitation on the powers inherent to the right of ownership and on the building rights over a piece of land. This is due to the fact that it regulates the maximum buildable volume calculated by reference to the use, the free and green spaces per square meter to be granted as part of the planning obligations relating to the ownership, including limitations on uses and the establishment of technical and construction conditions relating to specific buildings. These may result in a limitation on real estate transactions.

In addition, there is the industry-specific legislation, which, together with the urban planning legislation, also limits the right to build (for example, where a residential area was to be built in an aviation or road easement zone).

In these instances, despite having ownership of the land, it may not be built on or, where this is possible, there are limits to construction.

3. Registry system

The Property Registry is a public registry that comes under the Spanish Ministry of Justice. Each Registry is headed by a Registrar and has a specific territorial scope.

Any acts affecting ownership or rights *in rem* over public or private real estate are registered at the Registry. Certain administrative concessions and public property can also be registered.

Since the introduction of Sustainable Economy Law, this opening permit has been replaced by a prior notice and declaration, which is not automatically applicable to all types of activities but only to those envisaged in the aforementioned Law.

The Property Registry provides legal certainty regarding the rights registered, and helps ensure that legal dealings are secure and run smoothly.

The principles governing the functioning of the Property Registry are as follows:

- **Voluntariness:** the entry of registrable events in the Property Register is voluntary, except in the case of mortgages, which must be registered in all cases as they do not exist if they are not entered.
- **Principle of request:** whoever wishes to register a title must make a request to the corresponding Registry.
- **Priority:** this means that where applicants wish to register two incompatible rights, the rights of the holder who arrives at the Registry first shall be registered and if there are two rights registered in relation to the same property, the oldest right will have priority. For example, a person goes to the Property Registry to register the contract by means of which he purchased a property from another person and, subsequently, a third person goes to the Registry to request the registration of the contract whereby he purchased the same property from the same person as the first one who applied to the Registry. In this case, the Registrar would register the purchase of the person who applied to the Registry first, even if the purchase agreement of the second buyer is prior.
- **Lawfulness:** Registrars must classify under their responsibility the lawfulness of the extrinsic forms of all the types of documents whereby registration is requested as well as the capacity of the executing parties and the validity of the acts with operative effect contained in the public deeds from which they originate and of the Register entries.
- **Specificity:** in order for titles to be registered at the Registry they must meet the requirements

concerning form and content under the terms established by law.

- **Chain of title:** in order for titles to be registered or entered the right of the person who granted them must have been previously registered or entered.

In addition, registration at the Property Registry results in the following most significant effects:

- **Registry legitimacy:** Registered rights *in rem* shall be presumed to exist for all legal purposes and belong to their holder in the manner determined by the respective entry. Likewise, the person who has registered ownership or the rights *in rem* has possession of them.
- **Unenforceability:** Titles or other rights *in rem* over real estate which have not been duly registered or filed at the Property Registry shall not adversely affect a third party. For example, a person who acquires a usufruct over a property may not be adversely affected or deprived of his right as a result of a title which contains a usufruct in favour of another person if that right has not been registered at the Property Registry.
- **Registry authentication:** A person who, in good faith, acquires for valuable consideration a right from someone who appears in the Register as having the powers to transfer it shall retain such acquisition, once his right has been registered, even though, subsequently, the transferor's right is shown to be invalid for reasons not stated in the Register.
- **Presumption of truthfulness:** Entries under which titles are registered in the Property Register are effective until they are declared to be inaccurate (*iuris tantum* presumption). In other words, entries in the Property Registry are presumed to be true unless proven otherwise.

Lastly, the Cadastral Registry is an administrative registry managed by the Ministry of Finance and



Public Administration. The Cadastral Registry contains a description of the real estate properties for tax purposes.

Historically, there was usually no coordination between the Land Registry and the Property Registry so that it was, and still is, possible for the surface area of a property registered at the Land Registry to be different from that registered at the Property Registry.

The Mortgage Law and the Consolidated Land Registry Law, following reform by Law 13/2015, of June 24, establish a system of coordination between the Land Registry and the Property Registry to ensure that the latter includes a graphical georeferenced description of the registered properties, using the mapping system used by the Land Registry. The aim of this change is to provide greater certainty concerning the information on the location, boundaries and surface area of registered properties subject to legal dealings.

This exchange of information and improved coordination between the Land and Property Registries were implemented by means of a joint ruling of the Land Registry and Notaries' General Directorate, which came into force on November 1, 201

This ruling states the requirements and procedure for the supply of information between the two. For example, Section Three of the ruling includes the technical requirements for the supply of information for the notification of changes in ownership, whereby the property registrars must send electronically to the Land Registry General Directorate the information on the acts or transactions registered by them. The contents of which imply the acquisition or vesting of the right of ownership or the acquisition or creation of a usufruct, surface area or an administrative concession, whether relating to the whole property or an indivisible share thereof.

4. Role of the Notary in transactions

The Notary plays an essential role in real estate transactions in Spain.

In accordance with current legislation, only public documents may be registered at the Property Registry.

Although the sale and purchase of a property is usually first instrumented in a private document, in order for it to be registered and for its owner to be legally protected *vis-à-vis* third parties, it must be executed in a public deed.

The Notary confirms that the transaction complies with all the legal requirements as the parties' ability, among others.

5. Representations and warranties in real estate transactions

Typical Representations & Warranties for transactions in different asset classes.

Before executing the sale and purchase of real estate, the following issues should first be ascertained:

- ownership of and encumbrances on the property (request for an uncertified extract from the corresponding Property Registry).
- municipal building permits, if any have existed in relation to the property in the last four years.
- municipal opening or first occupancy permits.
- surface area and boundaries of the property (ensuring that the surface area in the Property Registry coincides with that in the Land Registry and that both are correct).
- certificate attesting that the payment of taxes and levies, particularly of property tax, is up-to-date.
- in the case of a property under the commonhold system, a certificate attesting that payment of the contributions relating to the common areas and services is up-to-date.
- in the case of a plot or piece of land, evidence of compliance with the urban planning legislation by means of a request to the corresponding local council for a planning use certificate and the planning classification and category thereof.
- in the case of a plot or piece of land where it is on record that it has been used to carry out potentially polluting activities, an environmental study should be performed.

In accordance with the Civil Code (Article 1,474 et seq.), the seller shall be liable to the buyer for the legal and peaceful possession of the thing sold and any flaws or defects it may have and, therefore, the buyer may seek liability due to breach of the contractual terms of the sale and purchase and due to hidden flaws. As regards hidden flaws, with respect to buildings, reference should be made to Building Law 38/1999, of November 5, and the timeframes it stipulates. The purpose of this Law is to regulate essential aspects of

the building process by establishing the obligations and responsibilities of the parties involved in the process (developer, architect/technical architect and builder). Additionally, it also regulates the guarantees required to carry out the process correctly, in order to ensure quality through compliance with basic building requirements and sufficient protection of the users' interests.

In all other respects, whatever cannot be verified in this regard should be included in the Representations and Warranties; otherwise, unexpected losses could be caused for the buyer. In this case, the buyer will not assume these losses.

From the seller's perspective, as in the case of all Representations and Warranties, an attempt will be made to negotiate the price by restricting or broadening the related clauses of the Representations and Warranties.

6. Mortgage regulations and other guarantees used in RE transactions

In real estate sales and purchases, the seller undertakes to hand over the property and the buyer to pay a price. Although ownership is transferred merely by agreement between the parties, price may be deferred and so, while the buyer immediately becomes the owner, it may take years for the seller to receive the entire price.

There are various systems for securing payment of this deferred price, which most notably include personal guarantees and mortgages.

In personal guarantees the price is secured by a third party.

A mortgage, used very frequently in Spain, is a security interest created directly in others' disposable real estate, enabling the mortgage creditor to realize the value of the real estate in the event of breach of the principal obligation. In this case, the sale and purchase of the real estate, whether it be the real estate on which the mortgage is created or another piece of real estate.

The registration of the mortgage at the Property Registry renders it effective, as compared to other legal transactions.

If the mortgage debtor stops paying his instalments, the mortgage creditor may realize value of the real estate in order to receive the price.

Similarly, before the term of the mortgage expires, the mortgage creditor's guarantees include the following: (i) preference given to mortgage loans, which gives certain creditors priority to collect a debt from an asset of a common debtor and, as a result, the principle of equality between creditors is relegated; and (ii) the assignment of the mortgage loan which enables the creditor to assign and dispose of its loan in accordance with Articles 1,112 and 1,878 of the Spanish Civil Code.

7. Leases of business premises

The legislation governing urban leaseholds is Spanish Urban Leasehold Law 29/1994, of November 24, which was amended by Law 4/2013, of June 4, on measures to increase the flexibility of and encourage the residential housing rental market.

In accordance with this Urban Leasehold Law, there are two types of property leases: (i) a residential housing lease and (ii) a lease for other uses. The latter type encompasses leases of urban properties entered into for periods and those executed to carry on an industrial, commercial, professional or other activity at a property.

One of the main differences between the legal regime governing residential housing leases and leases for other uses is the protective nature of the regulations for housing leases. On the other hand, leases for other uses are governed in general by free will.

In practice, leases entered into in real estate non-destined on housing transactions mostly have the following characteristics:

- they are entered into for a long period in order to recover the investment made and may be renewed easily by means of successive extensions.
- depending on the type of activity carried on in the property, the lessee is frequently required to take out property damage and third-party liability insurance.
- if the lessee changes due to the merger, alteration or spin-off of the lessee company, this shall not be considered an assignment. As a result, the lessor is entitled to raise the rent unless an express waiver is upon agreed.
- a change of control at the lessee company usually results in the termination of the urban lease agreement.



- any repairs to be made, as well as authorizations, building or activity permits are generally the lessee's obligation who must undertake them except, for example, in the event of damage caused by the owner of the property.

In addition, some aspects should be noted, that do not generally arise but which are regulated in the Urban Leasehold Law such as, for example, *mortis causa* transfer by way of subrogation to the heir or legatee who continue to carry on the activity; the lessee's right to indemnification for loss of customers, where the lessor or a new lessor benefits from the customers obtained by the previous lessee; or indemnification for moving costs and related losses.

8. Taxes. Generally, indirect taxes.

The following taxes, which are generally the most significant in real estate transactions, should be noted:

- **Value Added Tax/Transfer Tax: In terms of indirect taxation, a distinction should be made (i) as to whether real estate is transferred as part of a business or professional activity, by a person or entity with the status of business owner or professional or, on the other hand, (ii) it is transferred by a private individual and not as part of a business or professional activity.**

In the first case, as a rule, first transfers of buildings are subject to and not exempt from Value Added Tax ("VAT") at 21%. Second and subsequent transfers of buildings carried out in the course of business or professional activities are subject to but exempt from VAT.

In the second case described above, i.e. where the transferor is a private individual, the transfer of buildings shall not be subject to VAT but instead to Transfer Tax ("TPO") and Stamp Duty ("ITP-AJD"). The tax rate may vary from 2.5% to 11% depending on the characteristics of the building being transferred and the Autonomous Community in which it is located, since the power to establish the rate of this tax has been granted by the State to the Autonomous Communities.

Despite not being conducted by a private individual, second or subsequent transfers of buildings by business owners or professionals in the course of their activity that are exempt from VAT shall be subject to TPO at the corresponding rate according to the location and characteristics of the building in question.

- **Stamp Duty:** The execution of notarial documents to document the transfer of real estate shall be subject to the variable rate of ITP-AJD where the transfer is subject to and not exempt from VAT. On the other hand, where a transfer of property has been taxed for TPO purposes the notarial document executing the transfer shall not be subject to the variable rate of AJD. The buyer is liable for the variable rate of AJD.

- **Property Tax:** Lastly, although it is not an indirect tax like those described above, it should also be noted the Property Tax ("IBI"). This compulsory municipal tax is paid on the value of the real estate.

IBI is based on the Land Registry value of properties in accordance with Land Registry regulations. Thus, the owners of real estate subject to IBI must pay the tax each year to the competent local authority in the territory in which the real estate in question is located. However, IBI is not payable where the real estate has not been given a Land Registry value or the Land Registry value has not been formally notified to the taxpayer.

9. Zoning and planning law and construction law

As abovementioned, regarding zoning and planning law it exists the Royal Legislative Decree 7/2015, of October 30, by means of which the consolidated text of Land and Urban Redevelopment Law is approved.

This state Law establishes the basic regulations regarding urban planning to be developed by the Autonomous Communities and the municipalities on their own powers.

It should also be taken into account the Law 38/1999, of November 5, regarding Building Regulation.

The Building Regulation establishes (i) the technical and administrative requirements applicable on building, (ii) the agents involved in the construction, and (iii) guaranties and responsibilities that should be taken by the agents.

Additionally, there are a series of authorizations and permits in Spain which are required to carry out economic activities and to build the facilities needed to perform them.

Acts which require a planning permit include building and construction works and the installation of all types of new facilities and extensions thereto. In this case, urban planning legislation is the determining legislation

The registration of the mortgage at the Property Registry renders it effective.

when it comes to the granting of these permits by the municipal authorities, as the planning rules included in the municipal plan determine the planning limits (permitted uses, permitted volume, etc.) and construction terms and conditions (facade, distances, etc.) of the facilities to be built.

Once the corresponding building permit has been obtained and the building work completed, a first occupancy permit must be obtained which verifies that the work completed complies with the building permit granted by the municipal authorities.

In order to carry out the activity, it is also compulsory to obtain an activity permit and, according to the type of activity to be carried out, another type of authorization may also be required, such as the integrated environmental authorization granted by the environmental departments of Autonomous Communities, besides other types of authorizations required by industry-specific legislation.

Having obtained the activity permit, an opening permit is also necessary to verify that the activity will be carried out in suitable conditions of habitability and use for the particular activity in question.

Historically, an opening permit was compulsory for the performance of all types of activities. However, since the introduction of Sustainable Economy Law 2/2011, of March 4, this opening permit has been replaced by a prior notice and declaration, which is not automatically applicable to all types of activities but only to those envisaged in the aforementioned Law.

10. Environment Polluted land

There is a variety of legislation on pollution in Spain although, for the purposes of real estate transactions, of particular note is the following legislation, notwithstanding the laws applicable in the Autonomous Communities:

- Royal Decree 9/2005, of January 14, establishing the relationship between potentially polluting activities for

land and the criteria and standards for declaring land to be contaminated. This Royal Decree defines the potentially polluting activities requiring those who carry them out to submit a preliminary report on the state of the land to the environmental department of the Autonomous Community within two years.

- The Royal Decree should be taken into account for certain real estate transactions involving activities covered by this legislation.
- Law 22/2011, of July 28, on waste and polluted land. This Law sets out the order of those responsible for the decontamination and recovery of land and, as a result, for the associated economic cost. The order of responsibility is as follows: Firstly, those who caused the pollution; should the causers fail to be determined, secondly, the owners; and thirdly, those in possession.

This Law is important in transactions because, for example, in a sale and purchase or to build a business park on land where a potentially land polluting activity was carried out, it will be essential for the seller to be able to evidence and guarantee that it has performed all the land recovery activities required under the Law.

11. Energy efficiency certifications.

In Spain, the owner of a property who wishes to sell or rent must obtain an energy efficiency certificate to be issued by a professional with the suitable academic and professional qualifications (architect, technical architect, etc.).

This requirement arises from the European Directives issued in this area (Directive 2002/91/EC of the European Parliament and of the Council, of December 16, 2002, amended by Directive 2010/31/EU of the European Parliament and of the Council, of May 19, 2010).

The Spanish legislation governing this area is Royal Decree 235/2013, of April 5, by means of which the basic procedure for certifying the energy efficiency of buildings is regulated.







SWITZERLAND





Urs Wolf

urwolf@deloitte.ch

1. Real Estate Law: describe main laws that governs property ownership and leases in your Country

Switzerland is a civil law country. Real estate is mainly governed by written laws on a federal level. The most important acts are the Swiss Civil Code ("CC"), the Swiss Code of Obligations ("CO"), the Act on the Acquisition of Real Estate by Personen Abroad ("Lex Koller", formerly "Lex Friedrich"), the Debt Enforcement and Bankruptcy Act ("DEBA") and the Ordinance on the Land Register ("OLR").

Art. 641 ss. CC set forth the general provisions governing property ownership and notably the object, acquisition and loss of real property and the substance and limitation of real property, including provisions regarding condominiums. Leases are governed by art. 253 ss. CO and the corresponding ordinance regarding the lease of housing and office space. The provisions of the Lex Koller restrict the acquisition of real estate in Switzerland by persons abroad and subject certain transactions to an obligation to obtain a permit. The DEBA contain provisions regarding the liquidation of real estate in debt enforcement procedures. The OLR regulates the organization and administration of the land register.

2. Ownership Rights

2.1. Is there any kind of restriction for real estate ownership? (Foreigners, areas of the country, others...)?

The acquisition of real estate in Switzerland by persons abroad is subject to statutory restrictions according to the Lex Koller. Certain real estate transactions may therefore be subject to a permit. The following are considered as persons abroad:

- non-Swiss citizens
- companies domiciled abroad
- companies domiciled in Switzerland that are


controlled by non-Swiss citizens.

Acquisition of real estate is possible, without the need for a permit, in the case of:

Acquisition of real estate for a professional, commercial or industrial activity (excluding the establishment, trade or letting of residential apartments);

- citizens of the EU/EFTA who are resident in Switzerland (permit EU/EFTA B or permanent residency C);
- other non-Swiss citizens who have the right of permanent residency C in Switzerland
- companies domiciled in Switzerland that are controlled by a person in one of the aforementioned categories;
- EU/EFTA commuters for a second home in the region of their place of work (EU/EFTA G);
- non-EU/non-EFTA citizens resident in Switzerland, who are not yet entitled to a permanent residency for an apartment in which they reside on a permanent basis (permit B).

The execution of the Lex Koller is a cantonal responsibility and the cantons determine the authority for granting any required permits. The granting of a permit is possible only for reasons specified in the Lex Koller or in the introductory act of the relevant canton. The approval of the acquisition of a holiday home by a non-Swiss citizen is subject to certain preconditions.

In recent years, and in particular since 2007, it has been heavily debated, if the Lex Koller should be abolished altogether on the one hand, or made even stricter on the other. It is widely recognized that the Lex Koller 

is the only effective measure to reduce the demand for Swiss residential properties.

The acquisition of residential premises by non-Swiss persons remains restricted while the acquisition of business premises is, as a rule, unrestricted under the Lex Koller if the premises are essential to operations. However, the debate regarding the Lex Koller is expected to continue. In April 2015 the Swiss Federal Council announced that it will once again review the Lex Koller and suggest amendments.

2.2. Is there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

Yes, the right to a real estate can be different from the right to a building constructed thereon. This is implemented by means of a building right. In such a scenario, there are two owners: one who owns the land; and the other who owns the building built thereon. A building right can be granted for a maximum duration of 100 years. The land owner receives an agreed interest rate for the building right, while waiving his own use of the property. After the construction is completed, the management of the property is the sole risk and responsibility of the building owner. Building rights are often granted by communities to support subsidized housing. Building rights have become increasingly popular also in other contexts, including business transactions, however, because of the reduced finance requirements and the potential optimization of real estate taxes.

3. Registry System

3.1. Structure of the property registries in your country?

The land register is the register of all real estate lots and any rights and obligations attached to them (e.g. servitudes or encumbrances). The land registry is not one single register but is made up of (i) the daily register (in which all applications are

registered upon receipt), (ii) the main book (i.e. all land registry folios taken together), (iii) the plans according to the official measurements, which describes the area a property occupies based on land surveys, (iv) the supporting documents (purchase-, servitude agreements, etc.) as well as (v) utility registers (register of creditors and register of owners). The Swiss land registry is organized according to real estate lots (so called "real folio system", i.e. for every real estate plot there is a separate land registry file). For every lot it lists the properties, owners, special provisions and liens. The respective owners can be identified by means of a utility register (register of owners).

The land register is governed by two basic principles:

- entry; and
- publication.

In addition to the land registry, buyers may consult additional geo-data including

- survey data;
- land register plans (cadaster plans) based on official surveys;
- national geological data;
- cadaster of ownership limitations and public law (OLPL-cadaster); and
- cadaster of contaminated sites.

Which authorities are in charge of them?

The land register is under the supervision of the federal authorities. The individual land registers, the definition of the districts and administration is the responsibility of the cantons. Therefore, there is no federal land registry. The land registry is managed by the individual land registries in the various cantons. In

The acquisition of real estate in Switzerland by persons abroad is subject to statutory restrictions according to the Lex Koller. Certain real estate transactions may therefore be subject to a permit.

certain cantons there is only one land registry, while others have several organized per political districts or even several per district.

There is a project underway to launch a national geo-data infrastructure (NGDI), which will contain the various geo-data. However, for the moment it is still necessary to collect the information through various channels on communal, cantonal and federal level.

3.2. Is the registration compulsory?

In principle, all privately owned land is registered in the land register. As a rule, the registration in the land register is compulsory to perfect the contractual obligations and close the transaction. The consequence of non-registration is that the title remains with the seller. In addition, all rights relating to the property and relevant to everyone, not just to a contractual party, must be registered in the land register. In few cases, the registration is merely declaratory, e.g. in the case of an inheritance of real property or in case of a merger, the ownership will be acquired before the registration in the land registry. However, before the owner can dispose of the real estate property, the new owner needs to be registered in the land registry.

No rights of private ownership apply to public waters or to land not suitable for cultivation, or to springs rising therefrom, unless proof to the contrary is provided. Immovable property, which is not privately owned and is in publicly used will be recorded in the land register only if rights *in rem* attaching to such property are to be registered or if cantonal law provides for its registration.

3.3. How registration guarantees the rights of the owner?

The land register is assumed to be complete and correct and everyone may rely on it in good faith. Thus, the registration in the land register is subject to the principle of public faith (art. 973 para. 1 CC) and has a positive and a negative publicity effect. The positive

publicity means, that a bona-fide third party may rely on the legal appearance conveyed by the registration. The substantive legal position is not decisive.

Furthermore, the registered owner according to the land registry is deemed to be the legal owner entitled to dispose of the real estate property. The negative publicity means that the third-party only needs to accept the encumbrances, which are registered in the land registry. Encumbrances, which validly exist, but are wrongfully not registered in the land registry, lead to the loss of the respective rights. The respective canton is liable for any losses arising from the maintenance of the land register.

3.4. How registration works in a typical transaction?

The registration is usually executed based on a public deed of transfer and an application for the registration of the new owner. The seller (or the notary public in charge of notarizing the deed, respectively) generally makes the application.

The registration in the daily register will be executed on the application day, i.e. the day, on which the land register receives the duly executed application. Thereafter, the internal review and control processes of the land register start. The time from the application to the definite registration may vary depending on the canton, the time of year and the work-load of the register. It may take a couple of weeks up to several months. However, the effect *in rem* is independent from this duration, as it always refers back to the entry date in the daily register.

4. Notary Role on the Transactions

The notary public is in charge of drafting and notarizing the sale and purchase deed regarding the real estate.

The notary is also obliged to make the parties aware of certain contractual arrangements and make sure they understand the content and consequences of such arrangements and that they properly reflect the resolutions of the parties.



The cantons determine, which principles apply to the notarizations on their territory and how it should be organized. There are three main systems: The free trade notary's offices (e.g. in the cantons of Berne, Geneva, Basel-City and Ticino), the official notary's offices (e.g. in the canton of Zurich) and mixed forms (e.g. in the canton of Solothurn). The fees for the notaries public are also subject to the respective laws of the cantons.

5. Representations and Warranties in Real Estate Transactions

5.1. General legal responsibility of the seller in front of the buyer?

According to the CO, the seller is obliged to transfer the purchased real estate to the buyer free of any rights enforceable by third parties against the buyer. Furthermore, the seller is under a duty to act in good faith, which implies, that he has to reply to questions of the buyer relating to the transaction truly and accurately. If the seller does not disclose important information or gives false information, he/she may be liable for misrepresentation.

Furthermore, the seller is liable to the buyer for any breach of warranty and for any defects that would materially or legally deny or substantially reduce the value of the real estate or its fitness for the designated purpose. Such warranty is, however, in practice often contractually excluded (at least to some extent) in real estate transactions. Any agreement to exclude or limit the warranty obligation is void if the seller has fraudulently concealed the failure to comply with the warranty.

5.2. Typical Representations & Warranties for transactions in different assets class?

Often, when older buildings are sold and/or in smaller settings, the liability is limited to the full extent admissible by law (i.e. the seller is liable only for willful intent and gross negligence).

In larger transactions, the following Reps & W are often found, depending on the appropriate allocation of risk in the specific case:

- title and rights *in rem*: the seller should warrant that he is the rightful owner and notably that there are no additional rights *in rem* other than those listed in the relevant extract from the land register. Furthermore, liens of builders can be registered within a period of three months after they have finished their works. Thus, a provision should be included with regard to such liens due to works, which were commissioned by the seller (tenant or lessee, respectively), but were/will

be registered after the change of ownership.

- polluted areas: the restoration of polluted areas can involve a lot of time and money. Apart from a thorough due diligence, seller and purchaser should include a provision regarding the allocation of responsibility and cost in this respect, so both parties can consider this appropriately in their negotiations.
- defects and repair work: the due diligence generally reveals various minor and larger defects. A list of these should be included in an Annex to the deed. Institutional investors will also request a warranty that no additional open or hidden defects exist. This warranty can be modified in a way that the seller warrants that he/she is not aware of any further defects or that any defects apparent in the due diligence documentation are also considered to be known to the buyer. Furthermore, the parties can include provisions regarding the responsibility and cost allocation of repair works. Especially if third parties are involved, the assignment of rights with respect to defects and repair works can be tricky. In such cases, it generally makes sense for the seller to undertake to do the repair works at his cost or have them done by liable third parties.
- lease Agreements: the rental income is often the most important factor for institutional investors. Warranties regarding lease agreements are therefore generally included to the extent that the listed agreements exist, are not under notice and no other lease agreements exist. Depending on the negotiating positions and interests of the parties' additional warranties with regard to the current rental income, the credit-worthiness of the tenants, their payment practices, the service charge statements as well as the rent guarantees ("Mietsicherheit") will be included.
- conformity of the buildings with the applicable laws and construction permit(s): it can be very complex for the buyer to assess the compliance of a building with the applicable laws and the construction permit. In case the seller was involved in the construction, he/she will be aware of any issues in this respect and it may make sense to include a warranty to confirm, that (at least according to the knowledge of the seller) the buildings comply with the public and private requirements and are in line with the construction permit(s).
- use of the property and land reserves: this may be especially important for foreign investors in the

context of the Lex Koller. Apart from the current use of the property as a business establishment, it is equally important to make sure that there are no land reserves subject to the Lex Koller.

- litigation and administrative procedures: apart from any litigation with tenants and building authorities already mentioned, any litigation with construction companies, neighbors and other parties should be covered. The extent of these warranties will depend on the negotiations between the parties.
- taxes and fees: the buyer will generally ask for a warranty that all due taxes and fees in connection with the property have been duly and timely paid. The reason for this is that in many cantons the communities have the possibility to enforce statutory mortgages typically with respect to real estate taxes and fees and in certain cantons even to other taxes such as income and net wealth taxes.
- complete and correct due diligence documentation: like the previous clause, this is also a standard warranty clause in the context of business transactions, which is also relevant for real estate transactions.
- limitation of additional warranties: to avoid uncertainties, it is recommended to exclude any further representations apart from the items specifically listed. Another option is to refer to the subsidiary legal provisions with respect to further representations.

Furthermore, it should be noted that the CC contains a statute of limitation of 5 years for defects starting from the registration of the new owner in the land register. Also, the CC contains strict examination and notification requirements of the buyer. These deadlines and requirements can be amended by the parties. Notably with respect to polluted areas it may make sense to extend the deadline.

6. Mortgage Regulation and other Guaranties used in RE Transactions

6.1. Common procedures for a mortgage constitution?

The establishment of a new mortgage certificate is to be notarized and a respective application is to be filed with the land register. At the same time, there are no formalities in place as to the entering into a credit facility.

6.2. How is the lender protected on a creditor execution?

If the creditor's debt is secured by a mortgage, the pledged property is generally seized and sold at auction by the debt enforcement office (the respective foreclosure proceedings are governed by the DEBA and its respective ordinances). However, the lender and the borrower may also agree in the security agreement on the private realization of the collateral. In that case, there are no court proceedings to be initiated to realize the mortgaged property.

Mortgages have a certain assigned rank. In general, the claims based on mortgage certificates have a preference over unsecured or unprivileged claims.

7. Leases of Business Premises:


7.1. Applicable laws

The lease of business premises is regulated in the CO and in the Ordinance regarding the lease of Residential and Business Premises. There is no separate act dealing with the lease of business premises only.

7.2. Types

There are various types of business leases. In practice, the main differentiator is whether the lease is fixed term or indefinite and whether the payments are fixed (including indexed) or fluctuating.

7.3. Typical provisions

- business leases typically last for five or ten years, often with an option of one additional five-year period;
- the parties often agree on indexed rents based on the Swiss consumer price index;
- subject to the landlord's approval the tenant is entitled to sublet the premises;
- the tenant is often requested to provide liability insurance;
- change of control does in principle not affect the commercial lease agreement; (ii) in a merger a lease agreement is transferred to the new entity by means of universal succession; the acquiring legal entity shall, however, secure claims of the creditors involved in the merger, if creditors so demand within three months after the merger becomes legally effective;
- the landlord is responsible for major repairs. However, depending on the lease agreement exceptions may apply;
- Modifications of the premises is often allowed based on prior approval by the landlord as well as 

the obligation to rebuild the original state by the termination of the lease.

8. Taxes

The acquisition of real estate or the majority of the shares in a Swiss real estate rich company may be subject to a real estate transfer tax up to 3.3%, depending on the canton of the real estate location. Certain cantons (e.g. Zurich) do not have a real estate transfer tax. The tax is typically payable by the buyer. Often the buyer and the seller are jointly and severally liable for the tax. Contractual agreements are possible with respect to the internal allocation of the tax burden. As advised, the tax laws in certain cantons foresee a lien on the property to secure the transfer taxes.

The gain realized (either directly or indirectly) in a real estate transfer is subject to tax:

For corporate ordinary taxed entities:

- 8.5% on the income after taxes on Federal level
- between 6 to 24% on recaptured depreciations depending on the canton where the real estate is located and the same tax rate for real estate capital gains in cantons that apply the dualistic taxation system (currently 17 cantons).
- in the cantons (currently 9) that apply the monistic taxation system, impose a separate tax on real estate capital gains. The progressive tax rate significantly depends on the period of the real estate ownership, gain realized and the location of the real estate. For instance in the canton of Zurich the real estate capital gains tax rate varies between 20% to 60%.

For individuals owning the real estate as business assets typically the same treatment as for legal entities apply. However, the progressive tax rates for individuals would be applied instead for the items that are subject to income taxes.

For individuals owning the real estate as private assets can benefit of a tax free capital gain on federal level, provided this individual does not qualify as a deemed real estate dealer for tax purposes. On cantonal level, the real estate capital gains are in all cantons subject to a separate real estate capital gains tax (same treatment as for corporate entities with real estate in cantons that apply the monistic system).

Transfers of real estate are, as a rule, excluded from VAT. However, there are two other options available.

First, a waiver of exemption by an option to tax the purchase price of the building(s) is possible, provided that the real estate is not used for private purposes. Thus, the investor will be able to reclaim Swiss input VAT on the purchase price (currently 8%). Second, also a so called notification procedure (T.O.G.C. Transfer of Going Concern) is available if the building is not exclusively used for private residential use. Seller and buyer need always to consider the impact of the selected VAT method. Special attention has to be given to all capitalized input VAT that was paid for opted purchase in the past, for construction work and for major renovations. In case of a change of the model, refund or repayment need to be considered. Furthermore detailed documentations have to be factored in such transactions.

Lastly, it should be noted that the buyer and seller are jointly liable for Swiss income tax on brokerage fees paid to a foreign (non-Swiss) broker involved in the transaction. The tax liability is limited to 3% of the purchase price for direct federal taxes. Such thresholds also exists for cantonal tax purposes, but the percentage varies from canton to canton. In the canton of Zurich the tax liability for cantonal/communal taxes is also limited to 3%.

9. Public Law Permits and Obligations

The Swiss building laws and construction regulations, including zoning and planning, are passed on all three levels of government (federal, cantonal and local). To get reliable information regarding land and building use and occupation and environmental regulation, the respective authorities have to be contacted. Increasingly such information is also available online. Generally, a permit is required to build, modify, demolish or change the use of a building. The time and costs for obtaining these permits depend on the relevant canton and community. The costs may range from several hundred to several hundred thousand Swiss francs.

10. Environment

Before undertaking property transactions, a detailed determination is recommended of the state of a given property and possible liabilities by means of the:

- land Register
- land Register plans
- cadaster of ownership limitations under public law. Such cadaster may not exist or be incomplete. In such a case it is recommended to resort to construction documents available from building permit authorities

The acquisition of real estate or the majority of the shares in a Swiss real estate rich company may be subject to a real estate transfer tax up to 3.3%, depending on the canton of the real estate location. Certain cantons (e.g. Zurich) do not have a real estate transfer tax.

- cadaster of contaminated locations.

Each canton has a public register of contaminated real estate called “cadaster of contaminated locations” (“CCL”). Increasingly these registers are available online.

The CCL is based on the legacy liability cadaster (LLC) dating from the 1990s. Following examination and reassessment of LLC data, the CCL now lists:

- waste deposit locations
- factory locations
- incident locations.

The publicly accessible CCL contains information on:

- whether a site is contaminated (without damaging or potential environmental impact)
- anticipated detrimental effects of a site that warrant examination
- anticipated detrimental effects of a site that warrant monitoring or rehabilitation
- suspect sites requiring rehabilitation are legally considered contaminated

However, the fact that a property is not entered in the CCL does not necessarily mean that the property is not contaminated or polluted. In topographically questionable locations, we recommend consulting national geological data.

If the property is listed in the CCL as being polluted, it must be cleaned up.

10.1. Energy Efficiency Qualifications.

The assessment and management of the energy performance of buildings is regulated on a cantonal level. It is generally not mandatory for owners to perform tests.

The “Energy Strategy 2050” is being heavily debated in the Swiss parliament. In the course of this strategy, the CO2 Act was revised with effect as per 1 January 2013. It sets out targets for reductions of emissions until 2020 and contains measures for buildings, transport and industry. Energy efficient technologies for the renovation of buildings and investment in renewable energies are being promoted, including waste heat recovery and the optimization of building utilities. The existing concept of subsidies shall be replaced by a steering charge. The CO2 Act also aims to reduce the greenhouse gas emissions based on the Kyoto Protocol.

Another part of the Energy Strategy 2050 will be a revised Energy Law. The Environmental Protection law also contains provisions regarding construction works and buildings. Lastly, the Environmental Compatibility Assessment law provides that any construction or building measures, which materially influence the environment need to undergo an environmental compatibility assessment.







THAILAND





Poljun Divari

pdivari@deloitte.com

1. Real Estate Law: describe main laws that govern property ownership and leases in Thailand

In Thailand, the main legislation that provides legal basis for legal rights in relation to real estate is the Land Code Act B.E. 2497 as amended and the Civil and Commercial Code (“CCC”). Rights over real estate can be acquired either by operation of law or by contracts. Rights relating to immovable property or property right over real estate are divided into 5 categories as follows:

- Ownership / co-ownership: Under the CCC, the owner of the real estate perpetually has “the right to use and dispose of it and acquire its fruits; he has the right to follow and recover it from any person not entitled to detain it, and has the right to prevent unlawful interference with it. This is an absolute right which is capable of being transferred by mean of executing written evidence and registration with the competent authority.
- Usufruct: Land may be subject to a usufruct in which the usufructuary has the right to use, possess, and manage land of another person.
- Superficies: The right of superficies is the right to own, upon or under the land, buildings, structures or plantation, which are situated on the land owned by another person.
- Habitation: The right of habitation is the right to occupy buildings owned by another person as a dwelling place without an obligation to pay rent.

- Servitude: The owner of the servient land is bound to burden from the act of the owner of dominant property, and refrain from exercising right deriving from his ownership right over the servient land.

Apart from the aforementioned rights, a person has the right of possession of real estate under the law on a hire of property. This right is a personal right which cannot be enforced against third party, except in case when the title of the rented land is transferred to another person. The lessee is not authorized to sublet or transfer this right to another person without consent of the lessor. Writing evidence signed by liable party is required to enforce the lease agreement. For the lease with the lease term exceeding 3 years, writing agreement and registration on title deed with the competent authority are required, otherwise it can only be enforced for 3 years.

2. Ownership rights: is there any kind of restriction for real estate ownership (foreigners, areas of the country, others...)? Are there ownership structures usually applied in business transactions in which ownership of the land diverges from the right to build?

In general, foreigners,¹ including individual and corporate entities, are not eligible to own land under Thai law unless specifically exempted. Nonetheless, foreigners can acquire the right to own the buildings and structures on the land owned by Thai nationals.

Additionally, foreigners are permitted to own up to 49 per cent of the aggregate unit space of



1. According to Thai law, a foreigner is defined as follows

- A natural person who is not of Thai nationality;
- A juristic entity that is not registered in Thailand;
- A juristic entity incorporated in Thailand with foreign ownership accounting for half or more of the total number of shares or registered capital; or
- A limited partnership or ordinary registered partnership whose managing partner or manager is a foreign national.

condominium under the Condominium Act B.E. 2522 (A.D.1979) as amended. Foreigners who are entitled to hold ownership in condominium in accordance with the Condominium Act have to satisfy any of the following requirements:

- Foreigners allowed to have residence in Thailand under Immigration law;
- Foreigners allowed to enter into Thailand under the investment promotion law;
- Corporates as stated in Section 97 and 98 of the Land Code, e.g. companies with registered shares held by foreigners more than forty nine percent of the registered capital, companies as stipulated in Section 97 holding shares more than 49 percent in other companies as stated in Section 97, and registered under Thai law;
- Corporates which are deemed as foreigner under the Announcement of the National Executive Council No.281 dated November 24, B.E. 2515 and have been granted promotion certificate under investment promotion law;
- Foreigners who have brought in foreign currency into Thailand or withdraw money from Thai Baht account of the person who have residence outside Thailand or withdraw money from a foreign currency account.

The foreigners are required to present documents to the competent official in order to apply for holding the ownership of condominium. Such documents include, for example, evidence of being permitted to have residence in Thailand under Immigration Law, evidence of obtaining promotion certificate, evidence of being registered as juristic person under Thai law, etc.

The foreigners who have brought in money for investment in Thailand are entitled to own land up to 1 Rai for residential purpose if they comply with certain requirements stated in the relevant ministerial regulation and are grant permission by the Minister of Interior

Pursuant to the Investment Promotion Act, B.E. 2520 (A.D. 1977) as amended, the company with a foreign majority shareholders, which is granted investment

promotion from the Board of Investment, is eligible to apply for a permission to own land, to use the land for carrying out their business for which the investment promotion is granted, but is subject to the condition that such land is needed to be disposed when the company no longer uses it for running business.

According to the Industrial Estate Authority of Thailand Act, B.E. 2522 (A.D. 1979) as amended, companies with foreign majority shareholders may be permitted to own land located in an industrial estate for operation of their business under certain factors set by the Governor of the Industrial Estate Authority of Thailand.

In addition, foreign majority owned companies which are granted concession by the Minister of Energy, may acquire an ownership right over the land area on which the concession is granted.

3. Registry system

Under the CCC, the transfer of ownership in real estate executing through commercial transactions requires the registration with the relevant Land Office. Failing to register renders the transaction void. A transfer fee at the rate of 2 percent of the price of the land as appraised by the relevant Land Office needs to be paid upon transfer of title.²

A lease with a lease term of more than three years needs registration, otherwise it can be enforced for 3 years only, according to the CCC. In executing the registration of a lease, the parties to the lease are required to pay a fee at the rate of 1 per cent of the total rental fee for the entire lease term.³

Pursuant to the CCC, the registration of the mortgage is mandatory, otherwise the transaction will be void. To register the mortgage, the registration fee at the rate of 1 per cent of the mortgage amount, but not exceeding an amount of 200,000 baht, will be levied on the parties to the transaction.³

Failure to register security interests or encumbrance will not void the transaction between the parties, but they will not be enforceable against third parties.

The registration of an ownership, a leasehold, or encumbrance, ensures that priority of right over the property resides with the registering party.

2. This rate is currently effective at the time of writing, and is subject to future alteration.

3. This rate is currently effective at the time of writing, and is subject to future alteration.

4. This rate is currently effective at the time of writing, and is subject to future alteration.

4. Notary roll on the transaction

The closing of the conveyance of title and lease can be done either by the presentation of all parties to the contract, or their representatives who are authorized by the power of attorney, at the land office to execute the registration and pay fees and taxes. In case where the power of attorney is made outside Thailand, the notarization of power of attorney is required.

5. Representations and Warranties in real estate transactions

5.1. General legal responsibility of the seller in front of the buyer

The general seller's duties and liability are set out as follows:

- The seller is obliged to execute the registration of the sale agreement with the relevant authority;
- It is the seller's responsibility to deliver the property as specified in the sale contract to the buyer;
- Unless it is stipulated in the sale contract, the seller is liable if the property appears defective causing the deduction in value or the fitness for its ordinary purpose or for the purposes of the contract is impaired; and
- Unless it is stipulated in the sale contract, the seller is held liable if there exists disturbance caused to the peaceful possession of the buyer as a result of third party holding a right over the property sold at the time of the sale, or due to the seller's fault.

5.2. Typical Representations and Warranties

Representations and warranties commonly provided by the seller and buyer at the time of the sale are as follows:

- The seller is a legitimate owner of the property;
- The seller agrees that the property is free from all types of encumbrances, or any other existing rights over the property held by third party. The law on hire of property states that in case when the ownership of the real estate is transferred, the transferee shall be bound to the lease contract entered into by the transferor and the lessee. There are covenants typically given by the seller when the property is

a subject of lease, including indemnities against defaults, no renewal or amendment of the current lease without the consent of the buyer, no third-party liability, etc;

- The seller agrees that no investigation, action, suit or proceedings are pending before any court or by any governmental body that seeks to restrain, prohibit or otherwise challenge the sale of the property;
- Typical seller's covenants would include warranties for compliance with environmental laws and absence of claims, and indemnities against breach thereof; and
- Typical buyer's covenants would be compliance with environmental laws and indemnities for claims against the seller.

Remedies for breach of these clauses include claims for contractual breach against the defaulting party by taking a court action and making a claim for damages.

6. Mortgage regulation and other guaranties used in RE transactions

In Thailand, Security interest in immovable property is limited to the mortgage, mortgages are used to create a lien on real estate to secure indebtedness. The mortgagor assigns a property to the mortgagee as security for the performance of an obligation without delivering the property to the mortgagee.

A contract of mortgage is valid and enforceable only if it is executed in writing and registered with the competent official. The registration fee at the rate of 1 per cent of the amount of mortgage, but not exceeding 200,000 baht, is payable.⁵ There is no ceiling limit on the amount of registration fees imposed on a mortgage of a condominium unit. There is a stamp duty payable at the rate of 1 baht for every 2,000 baht, with a maximum amount of 10,000 baht.⁶ Mortgages are capable of being transferred by mean of registration with the land office, together with payment of registration fee and stamp duty as stated before.

Pursuant to the CCC, a mortgage over land does not extend to buildings erected by the mortgagor upon such land after the date of the mortgage unless it



5. This rate is currently effective at the time of writing, and is subject to future alteration.

6. This rate is currently effective at the time of writing, and is subject to future alteration.

is stipulated in the contract to that effect. A mortgage over building erected or constructions made upon or under the land of another person does not extend to such land, and vice versa.

With regard to the enforcement of the mortgage, prior to enforce a mortgage, the mortgagee must serve a written notice to the debtor requesting the debtor to perform his obligation within a reasonable amount of time which must be 60 days or more counted from the date the debtor has received the notice. If the debtor fails to comply with the notice, the mortgagee may initiate a court proceeding requesting for injunction ordering the mortgaged property to be seized and sold via public auction.

Moreover, in case when the mortgagor has mortgaged his property to secure a performance of obligation by another person, the mortgagee is required to notify the mortgagor within 15 days period from the date the mortgagee has served the notice to the debtor. If the mortgagee fails to comply with this requirement, the mortgagor cannot be held liable for the outstanding interest and compensation owed by the debtor, as well as encumbrances that are accessories of the debt, all of which take place after the 15-day period ends.

Apart from enforcement of mortgage through sale by public auction, the CCC provides ground for enforcing mortgage via claim foreclosure of the mortgage which is conditional on the satisfaction of the following elements: there are no other registered mortgages or preferential rights over the property in question; the debtor has failed to pay interest for five years; and the mortgagor has satisfied the court that the value of the property is less than the amount owed.

To protect the interest of the lender, the loan contract typically includes the covenants in connection with proper authorisations, compliance with laws, *pari passu* ranking, negative pledge over the debtor's assets, restriction on merger and acquisition, not to incur any financial indebtedness subordination of

connected party loan, the requirement to maintain certain accounts, etc.

7. Lease of business premises

Under the CCC, Thai nationals and foreigners have rights to lease the land in which the lessee has the rights to occupy and use the leased property for the limited period of time of no more than 30 years. The lease can be renewed for a period of no more than 30 years. The lease shall be enforceable only if the lease is executed in writing and signed by liable parties. However, if the parties contracted for more than 3-years lease term or for a life of either lessor or lessee, a written agreement and the registration with competent authority are required, otherwise it can be enforceable for 3 years. As stated earlier, the leasehold is not discharged upon the transfer of the title of the land; the new owner of the land shall be bound to the original lease towards lessee.

Pursuant to Hire of Immovable Property for Commerce and Industry Act, B.E. 2542 (A.D. 1999), foreign investors in large-scale investments with a long investment period are authorized to lease the land for 50-year term.

8. Taxes

8.1. Corporate Income Tax

The corporate income tax at the rate of 20 per cent of net profits is payable for capital gain from the transfer of the property. Generally, corporate entities have to pay the corporate income tax rate (20 percent of net profits) calculated on capital gain from the sale of the property. However, small and medium-sized entities, i.e. companies with maximum of paid-up capital of 5 million baht, with net profits no more than 1 million baht, are subject to lower rate of 15 per cent.

8.2. Withholding tax

A corporate withholding income tax at the rate of 1 per cent of the gross proceeds from the transfer is payable on the transfer of immoveable assets. The transferee is obliged to withhold this tax and remit the same to the competent official at the time of registration of

rights and juristic acts. This 1 per cent withholding tax is regarded as an advance tax payment that can be used by the transferor as credit against the corporate income tax payable. Rental payments are subject to a 5 per cent withholding tax.

8.3. Specific business tax (SBT)

The specific business tax is imposed on the transfer of immovable property at the rate of 3.3 per cent of the selling price or the price as appraised by the Land Department, whichever is greater.

8.4. Stamp duty

For a transfer of immovable property, a stamp duty of 0.5 per cent on the selling price or the price as appraised by the Land Department, whichever is greater, is payable. The stamp duty will be exempt if the SBT has been paid for the transfer. Stamp duty at the rate of 0.1 per cent is payable on the lease of immovable property.

8.5. Real estate tax

The house and land tax is imposed annually on the owners of a house, building structure or land that is rented or otherwise put to commercial use, at a rate of 12.5 per cent of the actual or assessed annual rental value of the property. The local development tax, also an annual tax, is imposed on the owner of land or the person in possession of the land, with the rate depending on the appraised value of the property, as assessed by the local authorities. The rate typically ranges from 0.25 per cent to 0.95 per cent.

Note: The above tax rates are currently effective at the time of writing, and are subject to future alteration.

9. Public law permits and obligations

The main pieces of legislation that governs the construction, modification of the building, and the land use in each zone are the Building Control Act, B.E. 2522 (A.D. 1979) as amended and the Town and City Planning Act, B.E. 2518 (A.D. 1975) as amended. The

detailed regulation concerning the land utilization in different zones can be found in ministerial regulations promulgated under the aforementioned Acts.

The Building Control Act establishes a required minimum standard to be met in order that the authorization to construct, modification, or destruction of buildings or structures, can be granted by the relevant governmental authority. The posited minimum standard, which encompasses the prescribed standard for designing the building, ensures that the buildings and structures are safe and can tolerate both natural and man-made disasters to fulfill the objective of the Act in which the safety of the building's users and those living in the surrounding areas can be sustained.

The Town and City Planning Act is a law that regulates the permissible utilization of property. Under this Act, the permissible land use in each area will vary depending on variable elements, such as geography, environmental, social and economic conditions of each area.

10. Environment

Polluted land:

Under the Enhancement and Conservation of the National Environmental Quality Act, B.E. 2535, companies running the designated businesses which have a high potential of causing environmental pollution; for example, a hotel with a number of rooms exceeding 80 rooms; an office building with the internal area of more than 10,000 m²; mining; petroleum plant; steel industry; the production of cement, will be required to prepare a report on Environmental Impact Assessment (EIA). In addition, the businesses which are likely to cause a serious effect on the quality of environment, natural resources, as well as health to communities, such as petrochemical industry; coal fired power plant; metal melting, will be required to prepare a report on Environment and Health Impact Assessment (EHIA).



Energy efficiency qualifications:

The building energy code, which comprises of the Energy Conservation Promotion Act (ECP Act) and the corresponding set of bye-laws, sets the compulsory requirements and procedures for energy conservation in buildings for the purpose to promote efficiency of energy consumption in buildings. The building energy code stipulates mandatory requirements for minimum performance of building envelope system, lighting system and air-conditioning system. The code completely applies to very large new commercial buildings only. To illustrate, a new building with floor area of more than 10,000 square meter defined as very large buildings (NVLB) in accordance with the Building Control Act must abide by the requirements in relation to building envelope, lighting, and air-conditioning prior to the approval of design for construction. Moreover, a large building (NLB)-a new building with an area between 2,000 and 10,000 square meter-must satisfy the requirements on building envelope.







UKRAINE





Dmytro Pavlenko

dpavlenko@deloitte.ua

1. Real Estate Law: describe main laws that govern property ownership and leases in Ukraine

Legal relations on possession, using, disposal of real estate are governed by regulatory legal acts of different legal force. Key provisions which determine the status of real property in Ukraine are established at the constitutional level. In particular, according to Article 41 of the Constitution of Ukraine, no one may be unlawfully deprived of the right of property; the right of private property is inviolable.

Further, the legislative system regulating relations in this field is represented by:

- unified laws, in particular the Civil Code of Ukraine (hereinafter – the “CCU”) and the Land Code of Ukraine (hereinafter – the “LCU”), and
- uncodified laws, which include the following Laws of Ukraine: “On State Registration of Rights to Real Estate and Their Encumbrances”, “On Lease of State-Owned and Communal Property”, “On Land Lease”, “On Land Evaluation”, and “On Privatization of State Property”.

The lowest link in the legislative system of Ukraine in this field includes subordinate legislation, namely, the resolutions of the Cabinet of Ministers of Ukraine: “On State Registration of Rights to Real Estate and Their Encumbrances”, “On the Method of Calculating Rent for State Property and the Proportion of Its Distribution”, “On the Method of Normative Monetary Valuation of Agricultural Land”, “On the Method of Expert Monetary Valuation of Land Plots”, and others.

According to the CCU real estate properties include:

- land plots and objects located on them, the movement of which is impossible without their

depreciation and changes in designation (buildings, houses, etc.);

- air and sea vessels, inland navigation ships, spacecrafts;
- other objects, the rights to which are subject to state registration.

2. Ownership rights

Ukrainian legislation does not prescribe any limitations as to the amount of real estate items owned by one person (including land plots). In other words, the owner owns, uses and disposes of his property at his sole discretion, and no one has the right to restrict the owner in exercising his civil rights.

Land relations are regulated in a different way. Thus, according to the LCU, all land plots are divided into 9 categories according to their designated purposes. The owner of the land plot is obliged to use it only in a way that is consistent with its designated purpose. Failure to comply with the said requirement may serve as ground for (1) invalidation of agreements or decisions on transfer of the land plot into ownership or usage; (2) rejection of or annulment of state registration of the land plot; (3) bringing to responsibility of an individual or entity at fault.

Should the owner of a land plot intend to change the designated purpose of his land, he shall undergo a special procedure prescribed by the LCU.

In addition, the LCU provides for certain limitations as to land ownership of foreign citizens, stateless persons, foreign legal entities and foreign countries. Particularly, foreign citizens and stateless persons can be owners of: (a) non-agricultural land located within the population aggregate; and (b) non-agricultural land located outside the population aggregate,



provided that they are owners of real estate items located on such land, and only in the following cases:

- acquisition under civil contracts (sale and purchase, deed of gift, etc.);
- buy-out of land plots on which real estate items owned by them are located;
- acceptance of an inheritance.

Foreign legal entities can be owners of non-agricultural land:

- located within the population aggregate – in cases of acquisition of real estate items and for the purposes of construction of buildings related to conduction of business in Ukraine;
- located outside the population aggregate – in cases of acquisition of real estate items.

Foreign states can acquire title to land plots only for the placement of buildings for diplomatic missions and other related organizations in pursuance with international agreements.

In addition, the LCU prohibits the transfer of agricultural lands into the ownership of foreign citizens, stateless persons, foreign legal entities and foreign states. The agricultural lands inherited by foreign citizens, stateless persons, and foreign legal entities are subject to alienation within one year.

Land plots can also be leased to citizens and legal entities of Ukraine, foreigners and stateless persons, foreign legal entities, international associations and organizations as well as foreign countries. The term of land lease cannot exceed 50 years. The leasehold interest can be alienated in various ways. Particularly, it can be sold on land biddings, be the subject of pledge and heritage, be transferred into the charter capital by the land plot owner for up to 50 years.

Pursuant to the CCU the owner of a land plot also owns all the buildings constructed by him thereon. At the same time, the owner of a land plot is entitled to transfer it for the use of a third party for construction purposes (superficies). In this case, there are two owners: the first having the ownership of a land plot, the other one – of the building located thereon. The “right to build” arises out of the agreement or testament. As a general rule, superficies may be established for a specified or unlimited period of time, except for the right to build on state-owned or communal land plots, where this term shall not exceed 50 years.

The right to build may be alienated or inherited, except for the right to build on state-owned or communal land plots. At that, under the LCU, a person who has acquired ownership of the real estate item automatically becomes the user of the land plot on which this real property item is located, regardless of the land title (state-owned, communal or private).

3. Registry system

There is the unified State Register of Proprietary Rights to Immovable Property (hereinafter – the “State Register”) in Ukraine. The Ministry of Justice of Ukraine is in charge of the State Register. The state registration is performed by:

- the employees/representatives of state registration subjects (which are executive bodies of local governments, local public administrations, and accredited subjects);
- notaries;
- state or private enforcement officers – in case of state registration of encumbrances which were imposed during the enforcement of court decisions in accordance with law, as well as in case of state registration of the mortgage termination due to the acquisition (transfer) of real estate based on the results of public auctions.

The following rights are subject to the compulsory state registration:

- right of ownership;
- proprietary rights which derive from ownership rights (the right to use, the right to use the land plot for agricultural purposes, superficies, the right of permanent use of a land plot, lease (sublease), the right to use (lease, rent) a building or other capital facilities (their parts) under the lease agreement concluded for a period for not less than three years, mortgage rights, and other rights under the law);
- ownership of the asset under construction;
- restraint on alienation and seizure of real property, tax lien, the subject of which is real property, and other encumbrances.

State registration of property rights is not needed for such objects as minerals, plants, small architectural forms, temporary, non-capital structures which are located on the land plot and the movement of which is possible without their depreciation and changes in designation, as well as the objects which are appurtenant to or constitute an integral part of other property.

Fundamental principle is that property rights to real property and their encumbrances, which are the subject to state registration, arise from the moment of such state registration. In other words, only after the state registration of property rights a person is entitled to exercise these rights in pursuance with the law.

Ukrainian legislation provides for certain peculiarities as to the state registration of rights to a land plot. Thus, each land plot is subject to registration in the State Land Cadaster where it receives a particular cadastral number. The state registration of rights to a land plot in the State Register may be performed only upon state registration of this land plot in the State Land Cadaster.

4. Notary role on the transactions

Notaries certify a number of deals related to alienation or disposal of real estate. Namely, the following agreements are subject to notary certification:


- sale and purchase agreement of land plots, single property complexes, residential buildings (apartments) or other immovable property (except for sale and purchase agreement of property which is the subject of tax lien);
- mortgage agreement;
- gift agreement with respect to real estate item;
- land lease agreement;
- lease agreement of buildings or other capital facilities (their separate parts) is subject to notarial certification, provided that such lease agreement is concluded for period of more than three years;
- trust agreement with respect to real estate item.

Each notary certified agreement comes into force as of the date of its notarization.

If the notary executes notarial action regarding the real property, then particular this notary is required to perform relevant state registration of changes in the State Register.

5. Representations and Warranties in real estate transactions

As general rule, the parties to a contract on real estate disposal may prescribe whichever representations, warranties, and liability terms.

The most common condition in real estate transactions is that the seller (or lessor) guarantees that it has full and absolute ownership of the real estate item, and at the moment of alienation thereof, this ownership is free and clear of any charges, bans, liens, pledge, arrest and/or other encumbrances. 

In any event, the seller (lessor) shall notify the buyer (or lessee) of any rights of third parties to the real estate item (tenant's rights, the rights arisen from the pledge, usufruct, etc.).

If the seller (lessor) fails to comply with these requirements, the buyer (lessee) is entitled to demand price reduction or termination of the agreement, as well as indemnification of all the damages caused by such failure, provided that the latter did not know and could not know of such rights of third parties to the real estate item.

In addition, the seller guarantees that he has duly settled all land or property related taxes, including but not limited to payments for land and real property tax.

6. Mortgage regulation and other guarantees used in real estate transactions

The mortgage arises out of the agreement, law or court decision. In Ukraine, the relations on mortgages are regulated by the Law of Ukraine "On Mortgage". Mortgage rights derive from the principal obligation and are effective until termination of the principal obligation or expiration of the mortgage contract.

The real estate item may be the subject of mortgage under the following conditions:

- the mortgagor has ownership of this item;
- the real estate item may be alienated by the mortgagor and the mortgagee is able to foreclose on it;
- the real estate is duly registered as a separate property item.

The subjects of the mortgage may also include:

- buildings under construction and property rights on them, and other real estate, which will become the property of the mortgagor after the conclusion of the mortgage contract;
- the part of real property, provided that it is allocated and registered as a separate property item;
- the leasehold interest or right of use, which entitles the tenant to build, own and alienate the immovable property item.

The mutual rights and obligations of the mortgagor and mortgagee occur from the moment of state registration of mortgage rights.

In addition, if a land plot is transferred to mortgage, all the buildings which are located thereon and owned by the mortgagor are also the subject of mortgage along with this land plot. In a similar vein, if the mortgaged building is located on a land plot owned by the mortgagor, this land plot is also the subject of mortgage along with the building.

The mutual rights and obligations of the mortgagor and mortgagee occur from the moment of state registration of mortgage rights.

At that, the mortgagor is entitled to dispose of the mortgaged property only upon the prior consent of the mortgagee. If the mortgagor alienates the mortgaged property or transfers it to the subsequent mortgage, joint activity, lease or usage without the mortgagee's consent, such transaction is deemed invalid.

7. Lease of business premises

As a general rule, the lease agreements of non-residential premises shall be entered into in written form. If the lease agreement is concluded for a period of more than 3 years, such agreement is subject to notarial certification alongside with the state registration of leasehold rights.

Ukrainian legislation does not prescribe any special conditions as to the lease agreement of non-residential premises. Thus, general conditions of lease agreements apply to the lease agreement of non-residential premises. All other terms and conditions which the parties consider to be essential shall be stipulated in the agreement at their own discretion.

Generally, such type of agreements prescribe the following conditions: cost of rent (including provisions regarding its revision), all other related charges (utilities and costs of other operational services), procedure for capital and minor repairs, provisions regarding the preparation of premises for transfer, possibility to sublease the premises, responsibility for non-fulfillment or improper fulfillment of obligations, guarantees and dispute resolution procedure, procedure for early termination of the agreement.

The special provisions with respect to the lease of state-owned and communal real estate are prescribed by the Law of Ukraine "On Lease of State-Owned and Communal Property". Thus, this law sets forth the essential conditions of such lease agreements, as well as particular requirements as for the parties thereto.

The general term of such type of lease agreements cannot be less than 5 years, unless the lessee offers to

conclude the agreement for a shorter period. At that, unilateral repudiation of an agreement is prohibited.

8. Taxes issues

Ukrainian tax legislation provides for two types of taxes with respect to real property: payment for land and real property tax.

The payment for land is established in the form of (1) the land tax or (2) the rent payment for lease of state-owned and communal land plots. Accordingly, the taxpayers are (1) the owners of land plots and land shares; and (2) the land tenants. The tax base is determined based on the normative monetary valuation of land plots or the area of land plots (in case if valuation has not been conducted).

Under the Tax Code of Ukraine (hereinafter – the “TCU”), in case the normative monetary valuation of land has been conducted, the local municipal authorities may establish the land tax at the rate of up to 3% of the normative monetary valuation, and for agricultural land – from 0.3% up to 1% of the normative monetary valuation.

The TCU also provides for special rates of land tax depending on the location of a land plot or its designated purpose.

The yearly rent payment for lease of state-owned and communal land plots is established by the respective lease agreement. However, this payment may not be lower than the rate of land tax established for the respective category of land, and may not be higher than 12% of the normative monetary valuation of the land.

The land tax, as well as the rent payment for lease of state-owned and communal land plots are paid on a monthly basis at 1/12 of the total annual amount.

For each of the years following the normative monetary valuation of land the original valuation is subject to adjustment by a certain coefficient of indexation. The said coefficient is calculated and established for the relevant year by the State Agency of Ukraine for Land Resources in pursuance with the formula set forth in the TCU.

9. Real Estate Property Tax

The real property tax is established for residential and/or non-residential real estate, including the parts thereof and is calculated based on the total area of this real estate.

Tax rates for residential and/or non-residential real estate owned by individuals and legal entities are

established by local self-government bodies in the amount not exceeding 1.5% of the minimum wage for the relevant fiscal year per each 1 square meter of the tax base (currently, UAH 48 per 1 square meter).

At that, the tax base of the residential real estate object/objects, including the parts thereof, owned by the individual taxpayer is subject to reduction in the following cases:

- for the apartment/apartments (regardless of their quantity) – by 60 square meters;
- for residential house/houses (regardless of their quantity) – by 120 square meters;
- for different types of residential real estate objects, including the parts thereof (in case the individual taxpayer simultaneously owns an apartment(s) and a residential house(s)) – by 180 square meters.

10. Public law permits and obligations

In general, Ukrainian legislation requires obtaining certain public permits only with regard to the construction of real estate items.

All the building projects are divided into five categories of complexity. Complexity of the construction project is determined according to building regulations and government standards based on consequence class of such construction project.

Depending on the category of complexity of the building project, a person intending to perform construction works shall receive one of the following documents:

- Building passport is required for executing construction works on homestead land, allotment, and garden plot. The building passport identifies a complex of architectural requirements for construction of (1) individual residential house, garden cottage, and country house not more than two floors high (excluding attic floor) with an area not exceeding 300 square meters; and (2) outbuildings, garages, improvements, and elements of plant arrangement.
- Construction permit is issued by the State Architectural and Construction Inspectorate for building projects of IV-V category of complexity.
- Declaration of the beginning of construction works is registered by the State Architectural and Construction Inspectorate for building projects of I-III category of complexity. 

All the abovementioned documents are valid till the completion of construction works. Information on such documents is included into the unified register of documents which entitle to perform pre-construction and construction works.

In case of detection of unauthorized construction without the receipt of the abovementioned documents, the official from the State Architectural and Construction Inspectorate issues an official order on elimination of violations to the person who has made such construction. Should the person fail to comply with the requirements of the order, the State Architectural and Construction Inspectorate is entitled to file a suit with the court regarding the demolishing of illegally constructed buildings and compensation for expenses related to such demolition.

11. Environmental issues

The legislation provides for liability for the following offenses:

- conclusion of agreements in contravention of the land legislation;
- causing damages to agricultural land plots, their pollution by chemical and radioactive substances, industrial, domestic and other wastes;
- deployment, project planning, and construction of the building projects which negatively affect the condition of the land plots;
- non-compliance with legislative requirements on the use of lands in accordance with the designated purposes;
- landmarks destruction;
- other related violations.

The Law of Ukraine “On Land Plots Protection” is a special legal act regulating the process of legal, economic and social fundamentals of land plots protection in Ukraine. This law stipulates that legal persons and individuals, who are guilty of violation of the laws of Ukraine on protection of the land plots, bear disciplinary, civil, administrative or criminal responsibility. Herewith, bringing these persons to responsibility does not relieve them from compensation for damages to land resources in full amount.

The state building regulations require obtaining the energetic passport which shall be drawn up during project documentation development. This document is necessary for new construction, reconstruction, and capital repair of the residential and public buildings. The energetic passport is an integral part of the passport of a building project, which is required to be adopted for acceptance of such building for operation. The building project is assigned a certain energy efficiency class (out of 6 possible) depending on the energy intensity of the building.

It should be noted that as of today the energy classification of buildings has not been yet implemented *de jure*. The respective draft law “On Energy Efficiency of Buildings” has been already created and is currently under consideration in the Ukrainian Parliament. The draft law provides for the introduction of mandatory certification and passportization of energy efficiency of the buildings.



Meet the team



Maximilien van de Werve
mvandewerve@laga.be
Phone: + 32 2 800 71 73
Mobile: + 32 497 521 044
Deloitte Legal
8A Berkenlaan, 1831
Brussels (Diegem)
Belgium



Danny Stas
dstas@laga.be
Phone: + 32 2 800 70 11
Mobile: + 32 476 54 89 02
Deloitte Legal
8A Berkenlaan, 1831
Brussels (Diegem)
Belgium



Cody Zhen Chen
codychen@qinlilawfirm.com
Phone: +8621 2316 6968
Mobile: +86 186 2109 6002
Deloitte Legal
9F Bund Center, 222
Yan An Road East, Shanghai
200002, PRC. China



Mario Andrade
mandrade@deloitte.com
Phone : +57 1 4262188
Mobile : +57 310 2146155
Deloitte Legal
Deloitte Asesores y Consultores Ltda.
Cra. 7 No.74-09, Bogotá D.C.
Colombia



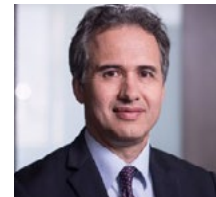
Merit Lind
melind@deloittece.com
Phone: +372 6 406 525
Mobile: +372 55 599 784
Deloitte Legal
Roosikrantsi 2
10119 Tallinn
Estonia



Susanna Tiihonen
Susanna.Tiihonen@deloitte.fi
Phone: ++358 (0)20 755 500
Mobile: +358(0)40 548 7111
Deloitte Legal
Deloitte Oy
Porkkalankatu 24, PL 122, 00181
Helsinki
Finland



Pia Stubb
Pia.Stubb@deloitte.fi
Phone: +358 (0)20 755 500
Mobile: +358(0)40 534 3636
Deloitte Tax
Deloitte Oy
Porkkalankatu 24, PL 122, 00181
Helsinki
Finland



Jérôme Gertler
jgertler@taj.fr
Phone: +33 1 55 61 41 28
Mobile: +33 6 71 49 33 37
Deloitte Legal
Taj - Société d'avocats, 181
Avenue Charles de Gaulle, F- 92524
Neuilly-sur-Seine Cedex
France *



Erdős Gábor
gerdos@deloittece.com
Phone: +36 (1) 428 6813
Mobile: +36 (30) 919 3169
Deloitte Legal Szarvas, Erdős and
Partners Law Firm
Dózsa György út 84/C,
Budapest, H-1068
Hungary



Francesco Brunelli
fbrunelli@deloitte.it
Phone: + 39 0 648 297 820
Mobile: + 39 3 488 898 431
Deloitte Legal
Via delle Quattro Fontane n. 15
00184 Roma
Italy



Gerardy Bochicchio
gbochicchio@deloitte.it
Phone: + 39 0 648 297 801
Mobile: + 39 3 440 978 402
Deloitte Legal
Via delle Quattro Fontane n. 15
00184 Roma
Italy



Ilze Znotina
iznotina@deloittece.com
Phone: +371 67074159
Deloitte Legal
4A Grēdu Street
Riga, LV-1019
Latvia



Juan German Osorio
josorio@deloitte.com
 Phone: +57 1 4262170
 Mobile: +57 316 5295337
 Deloitte Legal
 Deloitte Asesores y Consultores Ltda.
 Cra. 7 No.74-09, Bogotá D.C.
 Colombia



Ivana Dominković Cecelja
idominkovic@deloittece.com
 Phone: +385 (0)1 2351 900
 Mobile: +385 (0)91 1920 091
 Deloitte Legal
 Dominkovic & Partners, Radnicka
 cesta 80
 Zagreb, 10000, Croatia



Martin Bohuslav
mbohuslav@deloitteCE.com
 Phone: +420 724 583 971
 Deloitte Legal
 Nile House, Karolinská 654/2
 186 00 Praha 8 – Karlín
 Czech Republic



Olga Kaizar
okaizar@deloitteCE.com
 Phone: +420 602 344 681
 Deloitte Legal
 Nile House, Karolinská 654/2
 186 00 Praha 8 – Karlín
 Czech Republic



Eric Hicckel
ehicckel@taj.fr
 Phone: +33 1 55 61 41 90
 Deloitte Legal
 Taj - Société d'avocats, 181
 Avenue Charles de Gaulle, F- 92524
 Neuilly-sur-Seine Cedex
 France *



Felix Felleisen
ffelleisen@deloitte.de
 Phone: +49 211 8772-2553
 Mobile: +49 172 8669732
 Deloitte Legal
 Rechtsanwalts-gesellschaft mbH
 Schwannstr. 6
 40476 Düsseldorf
 Germany



Marco Engelmann
mengelmann@deloitte.de
 Phone: +49 30 25468-224
 Mobile: +49 170 659 51 68
 Deloitte Legal
 Rechtsanwalts-gesellschaft mbH,
 Kurfürstendamm 23
 10719 Berlin
 Germany



Dr. Gábor Gömöri
ggomori@deloittece.com
 Phone: +36 (70) 457 1191
 Mobile: +36 70 457 1191
 Deloitte Legal Erdős és Társai
 Dózsa György út 84/C
 H-1068 Budapest
 Hungary



François Lerusse
flerusse@dlaw.lu
 Phone: +352 27047 7011
 Mobile: +352 661 452 626
 Deloitte Legal
 Aerogolf Bloc A, 5e étage
 1 rue Heienhaff
 L-1736 Senningerberg
 Grand Duchy of Luxembourg



Anneleen Hofkens
ahofkens@dlaw.lu
 Phone: +352 270 477
 Deloitte Legal
 Aerogolf Bloc A, 5e étage
 1 rue Heienhaff
 L-1736 Senningerberg
 Grand Duchy of Luxembourg



César Morales
cesmorales@deloittemx.com
 Phone: +52 (55) 5080 6602
 Deloitte México
 Galaz, Yamazaki, Ruiz Urquiza, S.C.
 Río Lerma 232, Piso 9
 Ciudad de México
 Mexico



Pablo Arellano
paarellano@deloittemx.com
 Phone: +52 (55) 5080 6754
 Deloitte México
 Galaz, Yamazaki, Ruiz Urquiza, S.C.
 Río Lerma 232, Piso 9
 Ciudad de México
 Mexico



Thorvald Nyquist
tnyquist@deloitte.no
Phone: +47 9575 3141
Deloitte Legal
Deloitte Advokatfirma AS, Pb 221
Sentrum
0103 Oslo
Norway



Ina Wikborg Todal
iwikborg@deloitte.no
Phone: +47 9342 5238
Deloitte Legal
Deloitte Advokatfirma AS, Pb 221
Sentrum
0103 Oslo
Norway



Justyna Milewska
jmilewska@deloitteCE.com
Phone: + 48 (22) 511 08 51
Mobile: +48 668 322 361
Deloitte Legal | Pasternak, Korba,
Moskwa, Jarmul i Wspólnicy
Kancelaria Prawnicza sp.k.
Al. Jana Pawła II 22
00-133 Warsaw
Poland



Artur Lisicki
alisicki@deloitteCE.com
Phone: +48 515 607 265
Deloitte Legal, Pasternak, Korba,
Moskwa, Jarmul i Wspólnicy
Kancelaria Prawnicza sp.k.
Al. Jana Pawła II 22
00-133 Warsaw
Poland



Miroslava Terem Greštiaková
mgrestiakova@deloitteCE.com
Phone: +421 (2) 582 49 341
Mobile: + 421 903 630 823
Deloitte Legal
Digital park II, Einsteinova 23,
851 01, Bratislava
Slovakia



Dagmar Yoder
dyoder@deloittece.com
Phone: +421 (2) 582 49 427
Mobile: + 421 905 253 844
Deloitte Legal s. r. o.
Advokátska kancelária | Law Firm
Digital park II, Einsteinova 23, 851 01
Bratislava
Slovakia



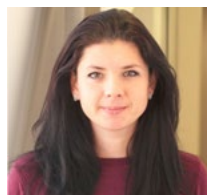
Sanja Savič M.Sc
sasavic@deloittece.com
Phone N: +386 (0) 1 3072 881
Mobile: +386 (0)31 551 513
Deloitte Legal
Deloitte svetovanje d.o.o., Dunajska
cesta 165,
1000 Ljubljana
Slovenia



Juan Martínez Calvo
jmartinezcalvo@deloitte.es
Phone: +34 914 38 19 64
Deloitte Legal
Deloitte Abogados, S.L.U.
Plaza Pablo Ruiz Picasso, 1
Torre Picasso
28020, Madrid
Spain



Dmytro Pavlenko
dpavlenko@deloitte.ua
Phone: +38 (044) 490 90 00 (ext.
4647)
Mobile: +38 050 4648146
PJSC "Deloitte & Touche USC"
Business Center "Prime", 48, 50A
Zhylyanska St.
Kyiv, 01033
Ukraine



Viktoriia Sydorenko
vsydorenko@deloitte.ua
Phone: +38 (044) 490 90 00 (ext.
4676)
Mobile: +38 (050) 910 26 72
PJSC "Deloitte & Touche USC"
Business Center "Prime", 48, 50A
Zhylyanska St.
Kyiv, 01033
Ukraine



João Pinheiro da Silva
jpsilva@cts.pt
 Phone: (+351) 21 924 50 10
 Deloitte Legal
 CTSU, Av. Eng. Duarte Pacheco, 7, 7º
 1070-100, Lisboa
 Portugal



Miguel Ribeiro Telles
mrtelles@cts.pt
 Phone: (+351) 21 924 50 10
 Deloitte Legal
 CTSU, Av. Eng. Duarte Pacheco, 7, 7º
 1070-100, Lisboa
 Portugal



Alexandru Reff
areff@reff-associates.ro
 Phone: +40 (21) 2075 248
 Deloitte Legal
 4-8 Nicolae Titulescu Road, East
 Entrance, 2nd Floor
 Deloitte area and 3rd Floor
 Sector 1,
 011141, Bucharest
 Romania



Irina Dimitriu
idimitriu@reff-associates.ro
 Phone: +40 (21) 2075 297
 Deloitte Legal
 4-8 Nicolae Titulescu Road, East
 Entrance, 2nd Floor
 Deloitte area and 3rd Floor
 Sector 1,
 011141, Bucharest
 Romania



Salvi Pagès
spages@deloitte.es
 Phone : +34 932304939
 Mobile : +34 677559507
 Deloitte Legal
 Deloitte Abogados, S.L.P.
 Plaza Pablo Ruiz Picasso, 1
 28020, Madrid, Spain.



Urs Wolf
urwolf@deloitte.ch
 Phone: +41 58 279 69 33
 Deloitte Legal
 General-Guisan-Quai 38
 8022 Zurich
 Switzerland



Poljun Divari
pdivari@deloitte.com
 Phone: +66 2034 0000 (ext. 11231)
 Deloitte Touche Tohmatsu Jaiyos
 Advisory Co., Ltd.
 Deloitte Legal
 AIA Sathorn Tower, 23rd – 27th
 Floor, 11/1 South Sathorn Road
 Yannawa, Sathorn (Bangkok 10120)
 Thailand



Paradee Jitprapat
Pjitprapat@deloitte.com
 Phone: +66 2034 0000 (ext. 11243)
 Deloitte Touche Tohmatsu Jaiyos
 Advisory Co., Ltd.
 Deloitte Legal
 AIA Sathorn Tower, 23rd – 27th
 Floor, 11/1 South Sathorn Road
 Yannawa, Sathorn (Bangkok 10120)
 Thailand

Deloitte.

Legal

For further information, please visit www.deloitte.com

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

Deloitte Legal means the legal practices of Deloitte Touche Tohmatsu Limited member firms or their affiliates that provide legal services. For legal and regulatory reasons, not all member firms, including Deloitte U.S., provide legal services.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2017. For information, contact Deloitte Touche Tohmatsu Limited.

Designed and produced by the Communications, Brand and Business Development department, Madrid, Spain.