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# Handbook for Real Estate Transactions

October 2022

*The last three years have seen unprecedented change. Companies have been re-evaluating their office stock in light of hybrid working policies, demand for residential properties with outside space increased during lockdowns, and the energy crisis, supply chain issues, along with the conflict in Ukraine, have created new variables for investors, end-users, and developers to consider.*

*With such a challenging economic climate, and continued uncertainty, investor requirements change, and it's no longer possible to look at the domestic market alone. ESG is a good example. It is with these factors in mind that we updated the Deloitte Legal Handbook for Real Estate Transactions. Now in its third edition, it provides an overview of the main real estate regulations regarding transactions of different asset classes in 29 countries.*

*Each chapter has been provided by a senior Deloitte Legal professional with a deep understanding of real estate in terms of the local legal, business, and administrative environment in their jurisdiction. Where possible, it also contains commentary from a local property organization, or the Deloitte sector leader.*

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*For more information on the handbook or our Deloitte Legal services, please contact your local Deloitte Legal practice.*

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# Albania



# Real Estate Law in Albania

## **Latest developments in Albania, and areas to focus on in the future:**

- Development of stadiums in Albania, which has consisted of the construction of Arena Kombëtare (known as the Air Albania Stadium), a multi-purpose football stadium located in the capital city of Tirana, constituting the largest stadium in Albania. These developments have also included reconstruction of other stadiums, such as Elbasan Arena, which is another multi-purpose stadium located in Elbasan, Albania. Nevertheless, developments and reconstructions of stadiums in other cities should be a future target.
- Large multi-purpose buildings are currently being developed in Albania, especially in the capital city of the Republic of Albania, such as, construction of the recently completed “Downtown One Tirana” (under process), the tallest tower in the country or the “Eyes of Tirana”, another large building currently under construction.
- The percentage of construction permits granted and developments in the capital Tirana over the last year has been the highest for at least a decade.
- Large residential developments are in progress in major cities, such as Durrës, Shkodra, etc.
- Seaside investments have increased in the past years, primarily in Albania's south.

By *Sabina Lalaj*, Partner, Deloitte Legal Albania and Kosovo

# Overview of the Albania Legal System

## General introduction to main laws that govern acquisition of assets in Albania-real estate rights

The highest legal act governing property ownership is the Constitution of the Republic of Albania (Constitution), which stipulates the right to private property as one of its essential principles.

According to the Constitution, property may be acquired through donation, purchase, or any other means provided in the Law no. 7850, dated 29 July 1994, "On the Civil Code of the Republic of Albania" ("Civil Code"). The latter Code contains the main provisions regulating property ownership, usufruct, leases (different types of leases), emphyteusis, etc., in Albania.

As per the Civil Code, ownership is the right to possess, enjoy, and freely dispose of objects within the limits defined by the law.

Furthermore, the Civil Code stipulates that the real estate property may be acquired through the means provided therein, such as contract (purchase, donation, etc.), inheritance, adverse possession, acquisition of property rights by prescription, or through expropriation for public interests (which is regulated by a specific law, the law on expropriation, and taking into temporary use of private property for public interests dated 22 December 1999, as amended, along with its sub-legal acts), etc.

In addition, Law no. 111/2018, dated 7 February 2019, "On Cadaster", as amended (Law on Cadaster), establishes the rules for the creation and operation of the National Cadaster Agency, in the capacity of the keeper of the Cadaster Register, where the ownership titles and other rights over real estate are registered.

Despite the abovementioned legislation, there are also other laws and/or additional secondary legislation, governing real estate ownership or other real estate aspects, depending on the type of the property (state-owned property, agricultural land, etc.).

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

The most commonly used form of acquisition of real estate in Albania is the direct transfer of the asset from the owner to the investor/buyer through a sale purchase agreement (SPA), entered in front of a Notary Public and later registered with the

State Cadaster Agency (SCA) for purposes of obtaining the ownership certificate in the name of the buyer.

In addition to the asset transfer, real estate can be obtained through the acquisition of the company owning the targeted real estate. In such a case, an SPA is entered and registered with the National Business Center, and if the transaction results in the change of the company name, the SPA should also be registered with the SCA. While legally possible, the second modality is not used often, unless in the case of major investment, due to the financial and legal burden for the performance of full due diligence on the company, which is more complex than due diligence performed on real estate.

Foreign individuals and entities can freely acquire residential/commercial units, while the Albanian legislation imposes some restrictions in connection with the acquisition of lands located in the territory of Albania. Thus, foreign citizens and entities are not entitled to purchase agricultural land, forest, pasture, and meadows and their right is limited to the lease of such land for a period of up to 99 years. However, such limitations can be overcome, either by establishing an Albanian company, or by the acquisition of an already existing company.

In addition, foreign individuals or entities will be entitled to acquire land located in the territory of Albania only if they have made an investment pursuant to the applicable law on foreign investment that, according to their construction permits, has a value of not less than three times the value of such land, as stipulated by the Council of Ministers. The entitlement to purchase such land becomes available after the investment is finalized in accordance with the construction permit.

Also, the right to acquire the ownership of land is granted to foreign individuals or entities that have acquired or constructed on such land an object with a value exceeding three times the value of such land.

On the other hand, land that comprises museums, archeological and historical, natural parks, flora, and fauna reserves values, as well as lands with special environmental values and military nature are forbidden to be acquired by foreign individuals/entities, in any case.

## Real Estate Registry system

Ownership and other rights over immovable property are registered with the Cadaster Register, being held by the SCA,

a governmental agency under the supervision of the Prime Minister. The Cadaster Register is a public, manual, and digital register, consisting of a set of cadastral cards and maps, which record data on ownership, real rights, geographical position, size, and monetary value of real estate.

The cadastral cards, constituting the Cadaster Register include, inter alia, the following information:

- The geographical position of the property;
- The surface of the property;
- Type of immovable property (building, land, pasture, etc.);
- Identification data of the owner of the property;
- The act by which the title of ownership over the property was issued;
- The rights of third parties over the property and the acts from which they derive;
- The value of the property;
- Any other act that changes the legal regime of the property, or creates rights or obligations over property; and
- Other data stipulated by decision of the Council of Ministers.

The information in the aforementioned register is not publicly available; however, such information may be accessed by public notaries (for the purposes of effecting real estate transactions), the relevant state authorities, prosecutions, or courts based on a valid legal reason.

Further, the Law on Cadaster stipulates that any transaction or legal action which is necessary to be registered with the Cadaster Register, as per the provisions of the Civil Code, or a specific law, should be registered with the SCA within 30 days from the execution of the agreement/action, otherwise, penalties may apply, amounting to 10% of the registration fee, but not more than ALL 300,000 (USD 2,528\*). It is to be noted that the registration is not a precondition related to the validity of such legal actions.

Pursuant to the Civil Code, the following transactions related to immovable properties should be registered with the SCA

- Contracts for the transfer of ownership titles and acts for their voluntary separation;
- Contracts that establish, recognize, amend, or cease real rights over immovable properties, such as usufructs, usage, emphyteusis, easements, and other real rights;
- Legal acts by means of which the aforementioned real rights are waived;
- Court decisions where the heir is recognized, and the inherited property is acquired;

- Legal acts establishing a commercial entity, with ownership of real estate, or enjoys other rights in rem over these properties;
- Court decisions related to real estate matters and bailiff actions for the seizure or sale of real estate at an auction;
- Legal acts which create or cease mortgage over immovable property; and
- Lease contracts with a term of up to nine years and entered in the form of a notarial deed.

Apart from the above-listed transactions, the Law on Cadaster provides certain acts in relation to real estate, which should be registered, such as the construction permits, undertaking agreements with the aim to transfer ownership in the future, of the object under construction, etc.

### Notary role in the real estate transactions

The Albanian legislation has provided an essential role for the Notary Public in real estate transactions, from the initial phase up to the registration of the transaction with the SCA and the payment of the purchase price. This role is regulated, inter alia, by Law no. 110/2018, dated 7 February 2019, "On the Notary", as amended.

Firstly, the Notary Public has the legal obligation to duly verify the title of ownership of the selling party, as well as any liens, restrictions, encumbrances related to the said real estate, by accessing the electronic register of immovable property held by SCA (including herein other needed public registers), before the SPA (or any other agreement for the transfer of ownership, e.g., donation agreement) is signed by the respective parties in front of the Notary Public.

Once verified, and upon signature of the relevant agreement for the transfer of ownership of immovable property, the Notary Public informs the parties about the payment of the purchase price as agreed, to the Notary Public's escrow account. Subsequently, upon payment of the purchase price, the Notary Public will transfer the amount deposited by the purchasing party while deducting applicable bank commissions and the amount of tax due (if applicable) to the seller's bank account, provided, however, that the relevant agreement is registered with the SCA, and the ownership certificate issued by SCA is obtained. To finalize the transaction and based on the obligations stipulated by the relevant legislation to the Notary Public, the latter is obligated to have an escrow account in any second-level bank in Albania, dedicated only for notarial activities, including the transfer of titles for immovable property.

In addition, the Notary Public has the obligation to electronically declare the acts related to real estate matters (e.g., acquisition, change, cease of an ownership right, etc.), with the SCA. Apart from such declaration, the Notary Public should deliver a written

copy of such acts, within 10 days from its conclusion, to the local directorate of SCA.

While it is not provided as a legal obligation, in practice, the Notary Public also assists the parties in registering the relevant agreements with the SCA in exchange for a service fee, in addition to public notaries' fees applicable for the transaction procedure, as stipulated by the relevant legislation and calculated, as a percentage of the sale price.

### Legal responsibility of the seller in real estate transactions—contractual representations and warranties

According to the Civil Code, the seller is under duty to act in good faith and guarantees that they have full and absolute ownership of the real estate, and at the moment of alienation thereof, such ownership is free of liens, burdens and/or any rights enforceable by third parties against the buyer.

Based on such warranties, the buyer may hold the seller liable, in case of misinterpretation of the latter, by exercising the right of opposing such defects, within five years from the moment of handover of the real estate/property.

Based on Article 752 of the Civil Code, in cases when the sale contract of an immovable property indicates the size and price set per unit of measurement of the immovable property, the buyer has the right to a reduction in price, provided that the effective size of the immovable property is smaller in size than shown in such contract. Conversely, when the effective size of the immovable property is larger in size than shown in such contract, the buyer will be required to pay the additional price.

To avoid worsening the position of the buyer, the Civil Code has provided that the buyer has the right to withdraw from the contract when the effective size is greater than one-twentieth of the declared size of the immovable property.

Furthermore, when the price is stipulated in relation to the immovable property itself and not its size, there is no room for a reduction or increase in price, unless the real size is smaller or greater than one-twentieth of the indicated size of the immovable property in the contract. In all cases, where an additional price is to be paid, the buyer has the right to either:

- Withdraw from the contract; or
- Waive paying the additional price.

Both the seller's right to request a price increase and the buyer's right to request a price reduction, or waiver from the contract will become time-barred within two years, from the delivery of the immovable property.

### Mortgages and other usual guarantees adopted in financing assets

The most common form of security taken regarding immovable property in Albania is the mortgage. The Civil Code defines a mortgage as the real right which is placed over the debtor's property in favor of the creditor, in order to ensure the fulfillment of an obligation.

A mortgage deed should be signed in front of the Notary Public and registered with the SCA. The registration is valid for up to 20 years from the date of registration, provided that it has not been renewed. In the latter case, the mortgage is preferred towards third parties based on the new registration date.

Additionally, pledges or securing charges are used along with the mortgage as additional guarantees for creditors in real estate financing. A pledge, in principle, grants to the creditor, or to a third party, possession over movable property or titles.

Securing charges are real rights on intangible property or tangible movable property by a written agreement and perfected through registration with the Securing Charges Registry. A securing charge agreement is an executive title, and, in case of default, the asset may be executed by the bailiff upon an order of the competent court.

Another frequently used method in real estate financing for creditor protection is a personal/real guarantee.

### Lease of assets and lease of business

The Civil Code defines a lease agreement as a contract where one party (landlord) agrees to make available to the other party a certain property item, for temporary enjoyment against a certain remuneration, and does not make a major distinction between the properties leased for commercial reasons and the ones leased for other purposes, such as living purposes. However, it makes a distinction between real estate used for agricultural purposes and other real estate used for different reasons.

The Civil Code provides general rules regarding the term of validity (maximum 30 years except in the case of living premises, the terms of which cannot exceed five years), legal form (written form for lease agreements concluded for a period of more than one year and in case of the lease agreement for real estate over nine years, the notarial deed and registration with the SCA), rights and obligations of the parties, termination clause, etc.

The leased assets can be transferred through a sublease agreement, provided that the parties have not agreed otherwise, and the written consent of the lessor is obtained in advance.

Apart from the Civil Code, the lease of assets is also provided in other legal acts, in particular the lease of forests, pastures, and agricultural lands in state-ownership.

## Administrative permits applicable to construction or restructuring of assets

In principle, there are three types of permits/declarations applicable to construction or restructuring of assets: a development permit, a construction permit, and a preliminary declaration on works performance. These permits are governed by Law no. 107/2014, dated 31 July 2014, "On Territorial Planning and Development", as amended (hereinafter referred to as the "Law on Territorial Development"), accompanied by the relevant sub-legal acts issued for its implementation.

Depending on the type and complexity of the project, the development and construction permits are issued by one of the responsible authorities on territorial development: National Territory Council, or the mayor of the relevant municipality.

A development permit is an act issued by the responsible authority that determines the development conditions for a certain plot/property and serves as a basis for obtaining a construction permit. The development permit is issued for new constructions unless a detailed local plan is approved for the area where the construction will take place. In the latter scenario, the development permit consists of the extracts from the detailed planning document.

A construction permit is an act issued by the responsible authority approving the construction request and setting the rules for carrying out the relevant works. A construction permit is issued in cases of the establishment of new constructions (including temporary ones), reconstruction and restoration that creates partly or wholly a different structure, resulting in the addition of units and/or change of construction area/external appearance, the action of extraordinary maintenance accompanied by changes to the constructive system of the building, and in cases of the demolition of buildings.

The procedure is finalized with the issuance of the certificate of use, which is issued by the responsible development authorities, upon the applicant's request, which certifies the completion of works, in accordance with the conditions of the construction permit as well as the implementation of the criteria of development planning and control documents.

Additionally, in case of a change in the activities and functions of the individual unit, a permit to change the activities/functions is issued by the development authority, provided that the constructive system is not changed.

On the other hand, some construction works do not need to be issued with a construction permit and a preliminary declaration

of works performance is more than sufficient. A preliminary declaration is a declaration filed with the responsible authority on the development of works that do not require a construction permit to be obtained in advance, such as in cases of changes to the organization of space in the building, existing apparatus and equipment are replaced, or in cases where the changes do not affect the sustainability and safety of the object do not change the structural supporting elements. A more detailed list of the construction work that falls under a preliminary declaration is stipulated in the relevant regulation on territorial development.

Depending on the type of the project and the development area, additional authorizations or permits may be required while applying for a construction permit, e.g., prior authorization and/or permit by the relevant authorities in the cultural heritage.

## Environmental and energy-ESG (environmental, social and governance) rules and status of implementation

While there is not a separate set of ESG-related regulations, the Albanian legislation, in general, includes some principles and rules that can be applicable to ESG, especially during the initial phase of construction and performance of civil works.

Therefore, any development/construction permits issued pursuant to the Law on Territorial Development, should follow the principles and related goals, inter alia, to ensure the sustainable development of the territory through the rational use of land and natural resources, create appropriate and fair conditions and equal opportunities for housing, economic, and social activity for all social categories, economic and social cohesion, and enjoyment of property rights.

Certain constructions, depending on the type, size, complexity, and location of the construction, might need to undergo evaluation for environmental impact as a precondition for obtaining the development/construction permit, the absence of which can constitute a valid ground for the refusal of the development/construction permit.

Also, for certain constructions, an environmental permit is required. Both cases, when the project will undergo an environmental impact assessment or when an environmental permit is required to be obtained, are regulated by the legislation in force on the environment. In general, environmental permits are obtained upon completion of the construction, and at the moment when the subject, depending on the type of business activity, will initiate such activity.

In addition to the environmental permits, an energy performance certification must be obtained for:

- All buildings or units of building which will be sold or leased;

- All buildings which will be built, or will undergo significant renovation; and
- All buildings that are in use by a public authority or by institutions providing a service to the public and often frequented by the public, which have a usable area of over 500m<sup>2</sup>.

Furthermore, when a building or a unit of building is sold or rented before it is built, the building owner must obtain, at the design stage, a temporary certificate of energy performance of these buildings or building units. Upon termination of the construction works, buildings/unit buildings will be granted an energy performance certificate.

The energy performance certificate is transferred to the buyer, or the lessee, in case the building or the unit of building is built, sold, or leased. The certificate is valid for up to 10 years from the issuance date and becomes valid upon registration in the Energy Efficiency Agency's registry.

## Direct taxes applicable to sales

Depending on whether the transaction is being carried out by individuals or legal entities, different taxes apply. Individuals are subject to a personal income tax at a rate of 15% applicable to the difference between the registered value of the immovable property and the sale price (capital gain). While parties can freely negotiate the sale price, for tax purposes, the price cannot be lower than the references issued by the relevant authorities.

In the case of legal entities, a local tax on the transfer of immovable properties will be paid. In the case of buildings, such obligation is calculated based on a fixed rate per m<sup>2</sup> for buildings (which differs for different municipalities) while for other real

estate a tax rate of 2% of the sale price is applied. In addition, the legal entity will also be subject to corporate income tax.

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\*According to the 15 September 2022 exchange rate

# Argentina



# Real Estate Law in Argentina

## Emerging opportunities in Argentina

- The construction cost measured in US\$ has reached its lowest point since 2015. This means that early-stage real estate developments can capitalize on the low cost to guarantee a higher return in the future. This presents an opportunity for anybody who wants to bet on a relatively safe investment compared to other alternatives presented today by the market.
- In a highly uncertain and volatile context, where investing in traditional assets such as the stock market or more nontraditional assets such as cryptocurrencies, real estate becomes a safe haven for value preservation. The US CPI has reached an all-time high not seen for the past 40 years which further demonstrates that, simply by saving in dollars, you are losing purchasing power. For those who have Argentine pesos in hand, investing in real estate becomes a huge opportunity as this helps them to preserve the value of their savings and guarantee a future cash flow.
- The excess of real estate offers in Buenos Aires and the falling price tendency shown by the market make it possible to find real bargains in the market. This at other times would have been thought to be impossible when the square meter value in a few of the most prominent Buenos Aires neighborhoods was over USD 5,000. At the moment, prices have stopped falling, which could be seen as an indicator that we have reached a floor, meaning that we can only go up from here. If we expect an economic recovery in Argentina, there is no better time to buy than now.
- The market tendencies show that we are seeing many more foreign investors in the Argentine real estate market that we have ever seen before. The interest for the so-called Argentine Brick or "Ladrillo" has seen considerable growth. Compared to other first world cities, Buenos Aires's real estate prices are very cheap. This is explained by the favorable exchange rate for foreigners and the market sentiment/macroeconomic conditions.
- New market tendencies show that 50% of the rental prices in CABA are in USD, which allows the landlord to have a relative constant cash flow with no need to modify it over time as if it were in Argentine pesos. What we need to be careful with is the new Rent Law that might change this situation and deeply affect the ability of the landlord to adjust rent prices.

## New asset classes

### Agricultural real estate

According to the Argentina Rural Real Estate Association, rural real estate activity has seen a sharp rise over the past few months. Argentine farm prices have reached a tough point. As a point of reference, the Argentine Core zone (BS.AS, Santa Fe and Cba.), which has the best land in the country, has a hectare price of USD 13,500 to USD 15,000. In the United States, a hectare with the same quality and potential is not priced below USD 27,000. With the Russian invasion, Ukraine has seen itself moved

from the center stage of the agricultural market, making way for Argentina to reclaim its place as one of the big players in the industry.

### **Corporate real estate**

Even though corporate real estate is tied to the country's Economic state, after the Covid pandemic many companies have increased the awareness towards the wellbeing of their employees. Many companies have decided to move from older more precarious buildings to newer and more improved ones. These kinds of buildings have shown quite a rise in demand. Previously an employee was assigned about 8m<sup>2</sup>; now this number has increased by 50% to 12 m<sup>2</sup>. Even though home offices have become popular, the square meters per employee is on the rise in the corporate real estate market.

### **Residential real estate**

Amongst the great changes caused by the pandemic, is the shift towards people wanting to live in bigger, more extensive places. People want to have more amenities and green open spaces. This is shown in the rise of the demand for premium residential building and for suburban properties. Suburban developments registered record number sales during 2021 and they only keep on rising. This is reflected by the rise of property and land prices in gated communities throughout the country.

### **Public work housing (Obra Públicas Viviendas)**

Stemming from people's desire to obtain a house of their own and the difficulty of mortgage credits in Argentina, a substantial budget has been put to use by the state in order to develop housing.

## **New alternatives growing**

### **Co-working**

Quarantine and home office approaches have paved a way for co-working alternatives in Argentina. Lots of companies and employers have been forced to restructure their working spaces and rely on co-working to fit their needs. Co-working offers the opportunity to optimize spaces and share costs with other companies. The truth is that companies now pay only for the real time they spend in the office. All these functionalities offered by this new alternative is reflected in the growth in demand.

### **Student housing**

Argentina is recognized in the region for the quality of its educational institutions as well as the easy access to public education in the country. Year after year, this encourages

students from all over the region to move into the country. Student residences are being seen as the new goose that lays the golden eggs. Its returns, over 5.25%, easily exceeding those of retail, offices and even rents. If we add to this the potential of Argentina in education, the near future of this segment of the alternative market looks promising.

### **Elderly care residences**

Senior care facilities are an attractive investment and potentially offer higher and more stable returns than many other real estate asset classes. Nursing homes involve long-term rental terms. In Argentina, where the income of the elderly makes it difficult to afford the cost of renting a home for a single person, there is potential in this segment.

### **Self-storage units**

A storage unit is a safe, dry, and clean space to store your belongings. Depending on the storage facility you choose, you may be able to rent one unit per month, though discounts may be available if you need long-term storage. Urbanization is a major driver for the sector, as larger urban populations mean smaller city living spaces and more renters for these kinds of spaces.

### **Cold storage units**

Available cold storage space is shrinking as a number of factors, such as the rise of e-commerce and grocery delivery services, have increased demand in the sector. Growing global trade in perishables such as meat and dairy, fueled by growing middle-class segments in emerging markets, has driven a rise demand for temperature-controlled storage. Due to these factors, investor interest in cold storage facilities has increased tremendously.

### **Data centers**

Secular and long-term structural trends related to Internet consumption globally are underpinning growth prospects in the data center market. Key drivers include urbanization, the expansion of consumer markets, and technological developments, including the rise of smartphones, cloud computing, and the Internet of Things. These developments indicate that the amount of data that businesses and individuals are creating and consuming will continue to grow. Long-term data center operating leases ensure a steady stream of income for investors, thus presenting a compelling investment case.

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# Overview of the Argentinian Legal System

## General introduction to main laws that govern acquisition of assets in Argentina - real estate rights

Main provisions governing the acquisition of assets in Argentina are set forth in the Argentine Civil and Commercial Code (CCCN), which applies to all real estate located in Argentina. The CCCN came into effect on 1 August 2015, and introduced new categories in the real estate legal regime such as surface rights, indigenous community property, and real estate developments (e.g., country clubs).

Real estate rights are regulated by the CCCN under the *numerus clausus* principle, which limits the number and content of property rights to the forms expressly set forth in the legal system.

The main rights in real estate ownership are: (i) sole ownership right (*Dominio*), which confers all the powers to legally and materially dispose of real property; (ii) joint ownership right (*Condominio*), which is the right over a real estate property that belongs to more than one owner, where each title owner owns an undivided portion of said property; and (iii) real estate developments, which encompass all types of residential developments (e.g., country clubs, gated communities, commercial or nautical parks) In this type of development, common and individual areas coexist.

In addition to ownership rights, there are other alternatives to participate in the real estate market in Argentina, such as: (i) real estate trusts, mainly regulated by the CCCN; and (ii) participation as shareholder or quota holder in companies that own real estate, particularly for long-term commercial purposes.

Argentina is organized politically as a federal country and its provinces have jurisdiction over all matters that have not been delegated to the federal government through the Federal Constitution. Therefore, real estate property is also subject to local regulations related to the organization and use of properties (including zoning and edification regulations and the grant of permits when required), the protection of historic places and environmental regulations, which may vary depending on the relevant jurisdiction.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

### Acquisition structure usually applied in real estate transactions

Under the Argentine legal framework, the creation, transfer, and modification of rights over real estate property must be executed through a public deed before a notary public and must be registered with the Real Estate Registry of the relevant province.

Despite not being mandatory, it is common practice in transactions to acquire ownership over real estate by executing a preliminary purchase agreement (*boleto de compraventa*), which establishes valid and binding obligations between the parties to grant the public deed and complete the transfer of ownership over the property. Among the legal implications of this type of preliminary agreements, pursuant to Section 1170 of the CCCN, a good faith purchaser who has entered into a preliminary purchase agreement has priority over seizure orders (*embargos*) or other precautionary measures on real property provided that: (i) the purchaser contracted with the legal title holder, or may be subrogated to the legal position of such purchaser by means of a perfect chain of title that links successive owners of the relevant property; (ii) the purchaser paid 25% or more of the purchase price before such precautionary measure; (iii) the date of the preliminary agreement can be accredited through sufficient evidence under the provisions of the CCCN; and (iv) the acquisition has sufficient publicity through possession or registration with the relevant Real Estate Registry.

Furthermore, Section 146 of the Bankruptcy Law No. 24,522, as amended (Bankruptcy Law) and Section 1171 of the CCCN also provide protection to good faith purchasers who have paid 25% or more of the purchase price under preliminary purchase agreements, which are considered to be enforceable against other creditors in case of a reorganization or bankruptcy proceeding of the seller.

Before the execution of the public deed, the notary public conducts due diligence that includes obtaining the certificate of title issued by the Real Estate Registry, to prove ownership and the existence of taxes levied on the property or the existence of precautionary measures. More information on the role of the notary public is in section "Notary role in the real estate transactions".

## Restrictions applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

In Argentina, there are certain restrictions on foreign citizens and companies regarding the acquisition of real estate in certain areas considered as "Security Zones", which are mainly located in border zones. In this regard, Decree Law No. 15,385/ 44 establishes limitations on the acquisition, lease, or other types of possession of real estate by foreign individuals or foreign companies in the areas defined as "security zones" by the applicable regulation. Such limitations entail the prior consent of the relevant federal agency.

Another restriction on foreign citizens and companies is related to the acquisition of rural land, pursuant to the Rural Lands Law No. 26,737 (RLL) and its Regulatory Decree No. 274/2012, as amended and restated, which sets forth limits to foreigners in the ownership and possessions of "Rural Lands" as such term is defined by the RLL and its Regulatory Decree.

Pursuant to the RLL provisions, foreign ownership or possession of rural lands is construed as any operation involving acquisition, transfer, assignment of possessory rights and/or the temporary extension thereof in favor of, among other cases: individuals of foreign nationality (with certain exceptions also provided by the RLL, such as individuals who have held residence in the country for over 10 years); legal entities incorporated under the laws of Argentina or abroad, when more than 51% of the capital stock or a portion thereof enough to prevail in corporate decisions is held by foreign individuals or legal entities; foreign public entities; etc.

As an example of the restrictions set forth by the RLL, foreign ownership of rural lands must not exceed 15% of the total amount of "rural lands" in the whole Argentine territory or in the territory of the relevant province or municipality where the relevant lands are located. Additionally, individuals or legal entities of the same nationality will not be able to own or possess rural lands that represent more than 30% of the 15% previously mentioned. Another relevant restriction set forth by the RLL relates to rural lands adjacent to certain bodies of water in which case the RLL prohibits foreign ownership.

## Real Estate Registry system

Confirmed title to real estate requires the execution of a public deed, the transfer of the property, and the registration with the relevant Real Estate Registry.

Due to the federal organization of Argentina's political system, the provinces have exclusive jurisdiction over the organization of the Real Estate Registries. There are 24 Real Estate Registries in Argentina, one for each province and another one for the Autonomous City of Buenos Aires. Each Real Estate Registry has its own particular rules and regulations; however, they must conform to the provisions established in the federal Law No. 17,801 on Real Estate Registers.

The main documents that must be generally filed and registered with the local Real Estate Registries are (i) public deeds that create, transfer, declare, modify, or extinguish property rights; and (ii) judicial rulings that order cessations (embargos) or any other type of preliminary injunction (medidas cautelares) on real property.

The information held in Real Estate Registries is of public access and available to any person with a legitimate interest in discovering the status of a real estate property. However, requests for information can only be signed by certain professionals (e.g., lawyers, notary publics).

## Notary role in the real estate transactions

The Argentine legal framework follows the civil law system, where the notary public is appointed to exercise a public function delegated by the state, which consists in conferring authenticity to all acts that passed before the notary public.

Moreover, in real estate transactions, the deed of conveyance must be executed before a notary public to complete the purchase and effect the transfer of ownership. The notary public is also responsible for (i) conducting title searches of the property before the relevant Real Estate Registry; (ii) verifying that the seller has good title on the property; (iii) verifying that the property is free and clear of liens and encumbrances; (iv) checking the identity of the parties; (v) verifying the source of funds; (vi) withholding the percentage of the sale price subject to stamp tax, income tax and/or property sales tax, as applicable, property taxes and other taxes that remunerate the rendering of public services (e.g., lighting, cleaning services); and (vii) filing the deed of conveyance with the relevant Real Estate Registry for its registration.

Pursuant to Section 20, paragraph 12 of Law No. 25,246 (as amended and restated, the Anti-money Laundering and Counter Terrorism Financing Law), public notaries are informing agents (sujetos obligados) that must collect general information of their clients and report to the Financial Information Unit ("UIF" as per its acronym in Spanish) the activities of individuals or legal entities that may imply an act or transaction that is suspicious of money laundering or terrorism financing, according to the regulation set forth by the UIF.

## Legal responsibility of the seller in real estate transactions – Contractual Representations and warranties

Real estate transactions are customarily negotiated on an "as is" basis. However, the CCCN provides for certain implied warranties on a sale granted by the seller to the buyer. These warranties imply: (i) that the seller has good and valid title, and that the property is free and clear of encumbrances (garantía de evicción);

and (ii) that the property has no hidden defects (garantía por vicios redhibitorios).

### Eviction warranty

It guarantees the existence and legitimacy of the conveyed right. In real estate transactions, the liability extends to any total or partial encumbrance of rights, whether prior to or contemporaneous with the acquisition, and to all disturbances caused by the transferor.

### Hidden defects warranty

The liability extends to all those defects that the purchaser did not know or could not have known about at the time of the transaction, and defects of the good existing prior to the transaction. Likewise, it extends to those defects that make the thing unfit for its purpose, whether by structural or functional reasons, or that reduce its usefulness to such an extent that, if the purchaser knew them, would not have acquired the asset, or its consideration would have been lower (vicios redhibitorios).

The CCCN establishes that liability for hidden defects in real estate expires after three years from receipt of the property.

Among the contractual representations and warranties commonly granted to the buyer by the seller, the more relevant include: (i) the title to the real property is good, valid, and marketable, free, and clear of all encumbrances, other than those permitted; and (ii) the absence of proceedings, claims, disputes, or conditions affecting any real property that might interfere with the use of the property.

## Mortgages and other usual guarantees adopted in financing assets

Mortgages over real estate may secure the principal amount, accrued interest, and other related expenses owed by the debtor to the creditor.

Sections 2188 and 2189 of the CCCN set forth the “specialty” principle, which requires (i) proper identification of the underlying property; and (ii) proper identification of the maximum obligation secured through the mortgage in monetary terms. The principle will be regarded as fulfilled in case of conditional or undetermined obligations if a maximum amount of the guaranty is expressly established in the creation of the mortgage and the term of the guaranty does not exceed 10 years.

Pursuant to Section 2208 of the CCCN, mortgages over real estate must be created through a notarial deed.

In order to be effective vis-à-vis third parties, mortgages must be registered with the public Real Estate Registry of the jurisdiction where the property is located, and such registration expires after 35 years if renewed before.

Priority in case of more than one mortgage over a real estate asset will depend on the chronological order in which each mortgage is registered with the public Real Estate Registry of the jurisdiction where the property is located. The general rule that the first creditor to record it prevails over subsequent creditors. Foreclosure is conducted through a special summary proceeding allowing the property to be sold at a public auction.

## Lease of assets and lease of business

Leases – intended for residential and commercial use – are mainly governed by the CCCN, as amended by Law No. 27,551. Rural leases are subject to a specific legal regime established by Law No. 13,246 (“Rural Leases Law”).

Certain provisions of the CCCN and the Rural Leases Law (which mainly intend to protect the lessee) are considered mandatory (public policy “orden público”), such as the minimum and maximum terms. The CCCN provides for a minimum term of three years for urban commercial leases. Any lease contract entered into for a shorter term than the legal minimum will be considered as executed for the minimum term. Likewise, Law No. 13,246 stipulates a three-year period as the legal minimum for rural leases. The maximum term for commercial leases is 50 years.

Pursuant to the recent amendments introduced by Law No. 27,551, lease agreements, irrespective of their destination, are exempt from the prohibition set forth in Sections 7 and 10 of Law No. 23,928, thus enabling the adjustment of the price of the lease.

## Administrative permits applicable to construction or restructuring of assets

Urban development in Argentina is mainly governed by provincial and municipal zoning regulations and building codes; therefore, they differ in each jurisdiction.

In the Autonomous City of Buenos Aires, the Urban Code (Código Urbanístico) approved by Law No. 6,099/2018 (as amended) and its Regulatory Decree No. 99/2019 provide regulations for the use of land and subsoil, the transfer of public space, the subdivision and the opening of public roads and the application of building standards. Furthermore, the Building Code (Código de Edificación) approved by Law No. 6,100, provides a set of rules that specify the standards for construction in the city. The Building Code requires obtaining several permits and authorizations prior to the commencement of the construction. Additionally, sufficient notice of commencement of construction (Aviso de Obra), with detail of its scope, must be filed with the relevant authority prior to the initiation of the works.

There are also national and local regulations that foresee the protection of historic monuments when a particular property has been declared of "public use".

## Environmental & energy – ESG rules and status of implementation

Pursuant to Section 1757 of the CCCN, damage caused as a consequence of the development of dangerous activities, including environmental damages, is subject to objective liability. Any injured person may seek compensation from the owner or custodian of an asset that produces environmental damage. Similarly, the transferor of an asset that has a defect and later causes environmental damage may be liable even after the transfer.

The federal government sets the minimum environmental standards for the protection of the environment, and the provinces and municipalities establish specific standards and implementing regulations. The provinces have also enacted environmental laws requiring companies to prepare and file environmental impact statements in order to obtain the relevant permits.

The National Environmental Policy Law No. 25,675 ("EPL") establishes that for collective environmental damage caused by legal entities, liability can be extended to their managers, directors, statutory auditors, or other officers who participate in the company's decision. Furthermore, any activity that could affect the environment or any of its components, or affect the quality of life of the population, is subject to an environmental impact evaluation procedure before the relevant authorities prior to its initiation. The environmental impact evaluation must

contain, at least, a detailed description of the project of the work or activity to be carried out, the identification of the consequences on the environment, and the actions intended to mitigate the negative effects.

Within the framework of the EPL, the National Secretariat of Environment and Sustainable Development and the Housing Secretariat issued the Joint Resolution No. 2/2019 dated 2 October 2019 ("Resolution 2/19") which implements the Sustainable Housing Federal Strategy ("Sustainable Housing Strategy"). The Sustainable Housing Strategy aims to promote bioclimatic housing design; expand the scope of existing programs in order to achieve more efficiency, housing comfort and sustainable development; and facilitate access to financing.

Certain local jurisdictions have enacted laws and regulations with the purpose of improving the sustainability of newly constructed and existing buildings, such as: Law No. 13,059 of the Province of Buenos Aires, which establishes thermal isolation conditions in the construction of buildings for a better quality of life and reduction of environmental impact; Law No. 4,428 of the City of

Buenos Aires which establishes a reduction of municipal taxes for buildings that implement green terraces; and Ordinance No. 8,757 of the City of Rosario regarding efficient use of energy in the construction of new buildings.

## Direct taxes applicable to sales

Direct taxes applicable to the sale of real estate are real estate transfer tax ("ITI") or income tax. The applicable tax will depend on the date of prior acquisition of the property as well as whether the seller is an individual or a company.

In case of individuals, ITI will only apply to the sale of those assets acquired before the entering into force of the Tax Reform (Law No. 27,430, 27 December 2017). For the sale of property acquired after the reform, income tax applies at 15% of the sale price minus cost. In both cases, if the property has a housing purpose, an exemption applies and the sale in principle will not be subject to tax.

If the seller is a company, only income tax will apply at the applicable corporate tax rate.

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# Austria



# Real Estate Law in Austria

## **Booming real estate market in Austria**

- Busy construction of high scale residential properties especially in Vienna
- Stricter mortgage financing requirements for bank loans with a minimum of 20% equity
- Increase of purchase prices, especially in the residential market and logistics, and increase of construction prices
- Strong demand for ESG compliant properties and modern spaces in central locations
- Energy-efficient real estate and mixed-use objects are becoming increasingly important

By **Gabriele Etzl**, Partner and Head of Real Estate at Deloitte Legal Austria

# Overview of the Austrian Legal System

## General introduction to main laws that govern acquisition of assets in Austria - real estate rights

The general provisions governing real estate ownership and acquisition in Austria can be found in the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch - ABGB). The General Civil Code determines the legal classification of real estate, such as land or buildings.

It also regulates:

- The requirements for the acquisition of ownership in a real estate as an in rem right; and
- The mandatory provisions of an acquisition deed, such as a purchase agreement, or a donation agreement; and
- The contractual rights and obligations of the parties to such acquisition deed.

For purchase agreements regarding residential properties that are still under construction, the Developer Contract Act (Bauträgervertragsgesetz – BTVG) mandatorily regulates the specific rights and obligations of the contractual parties, in order to protect the purchaser against risks in case of insolvency of a developer.

The Law about Building Rights (Baurechtsgesetz – BauRG) regulates the prerequisites for the right to construct a building on third party's land and the mandatory provisions of a building right agreement.

Special provisions for real estate also exist in specific legal regulations, such as, inter alia, the Land Register Act (Grundbuchsgesetz – GBG) and the Condominium Ownership Act (Wohnungseigentumsgesetz – WEG).

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

Generally, there are two main structures for the acquisition of real estate: Acquisition via (i) asset deal, or (ii) share deal.

### Asset deal

To acquire ownership of a property in Austria, two steps are required. First, a contractual obligation (Titel), e.g., a purchase or donation contract, is required and second, a disposal of the real estate (Modus). The Modus of a real estate acquisition is the registration of the purchaser in the land registry.

Consequently, the legally valid transfer of ownership of a property is only completed upon registration in the land registry. Furthermore, the valid acquisition requires that the previous owner (e.g., the seller of the property) was the lawful owner of the property.

### Share deal

In case of a share deal, the purchase object is not the real property itself, but the legal entity owning the property. For the acquisition of such legal entity, a title deed, such as a share purchase agreement, is required. The transfer of ownership of the shares in a legal entity generally takes place upon fulfillment of the conditions precedent under the share purchase agreement. The registration of the share purchase agreement in the company register is not a prerequisite for the transfer of ownership in the shares. In respect of a limited liability companies (Gesellschaft mit beschränkter Haftung – GmbH) the conclusion of a purchase agreement requires the form of a notarial deed, otherwise the agreement is void.

### Land transfer restrictions

The individual federal state laws in Austria stipulate that the acquisition of real estate by foreigners (non-EU or non-EEA citizens) must be approved by the respective land transfer authorities.

Foreigners (e.g., foreign nationals and legal persons, as well as Austrian companies held by a non-national majority) from member states of the European Union and the EEA are treated equal as nationals. The prerequisites for the approval of a real estate acquisition by the land transfer authorities are regulated in detail in the respective federal state laws of the nine provinces in Austria. In certain cases, this approval is also required for the registration in the land registry of Austrian purchasers regarding acquisitions of land used for construction, agriculture and forestry, and secondary homes. Acquisitions by foreigners who are not subject to equal treatment (non-EU or non-EEA citizens) must generally present a specific interest to receive approval for the acquisition, unless otherwise governed by individual state treaties. Under some federal state laws, the acquisition of shares

of a company that owns real estate by foreigners also requires the approval of the land transfer authority. The duration of the approval process varies and can take up to several weeks.

## Real estate registry system

For the acquisition of a real property in Austria, not only a title deed, but also the disposal (Modus) is required. The Modus is the registration of the acquirer in the land registry. The acquisition of ownership therefore becomes effective only upon the successful registration of the ownership right of the acquirer in the land registry.

The land registry is a public and generally accessible court register where real estate properties and rights in rem are registered. It is maintained at the district court in whose judicial district the real property is located. The land registry is open to public inspection, and register excerpts may be obtained by anyone. An inquiry is subject to fees and may be executed via internet, or obtained from notaries, attorneys, or the land registry courts.

Only entries mentioned in the General Civil Code can be entered into the land registry. Registrable rights and encumbrances are rights in rem (such as ownership, co-ownership, condominium, mortgages, easements, land burdens, etc.), as well as repurchase rights, pre-emption rights and lease rights.

In general, everybody is entitled to rely on the completeness and the accuracy of the entries in the land register. This means that a bona fide purchaser may acquire the title in a property even if the seller is wrongly registered as the owner in the land registry.

The land registry consists of the main register (Hauptbuch) and of the collection of documents (Urkundensammlung). The main register contains all land registry entries of a cadastral municipality. Every single real estate folio for each property is divided into three sections (folios): the A-folio, B-folio, and C-folio.

The A-folio (Gutsbestandsblatt) provides information about the real estate itself (about the land plots, plot numbers and the dedicated use) and about rights connected with the property (e.g., easements) as well as public law restrictions and charges (e.g., building ban, protection of historic buildings and monuments etc.).

The B-folio (Eigentumsblatt) contains information about ownership and the respective ownership quotes.

The C-folio (Lastenblatt) specifies encumbrances connected with the real property. These include mortgages, easements in respect to the servient estate, land burdens, building rights, and other restrictions, such as restrictions on sole or on encumbrances between certain family members, pre-emption rights and registered lease rights.

The collection of documents contains all documents which are mandatory for a registration into the land registry, such as purchase contracts, donation contracts, mortgage agreements, etc.

## Notary role in real estate transactions

For the registration of a right in the land registry a respective document creating the contractual obligation (purchase contract) must be signed by the parties and the signatures have to be notarized by a notary public or by a court. The dates of birth of natural persons as well as the commercial register number of legal entities have to be included in the title deed.

The form of a notarial deed is generally not necessary, except for purchase or donation agreements between spouses, donation agreements without handover, and the sale of shares in a limited liability company (Gesellschaft mit beschränkter Haftung - GmbH).

The attorney drafting the purchase agreement, or a notary public usually acts as an escrow agent for the processing of payments and the registration of the new owner in the land registry in order to safeguard the contractually stipulated payments. The escrow agent also undertakes the self-calculation of the real estate transfer tax and the fee for the registration into the land registry.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

### General

The provisions of the General Civil Code stipulate that the seller is liable for defects that exist at the time of handover irrespective of fault. This means that the seller is responsible for a defect regardless of whether they knew about or caused it.

As warranty remedies of the buyer, the General Civil Code primarily provides for the repair of a defect or the replacement of the defective asset. Only in a next step the buyer - under certain conditions - is entitled to a price reduction or redhibition.

The warranty period for immovable property (real estate) is three years. The contracting parties may shorten this period by contractual agreement (except an entrepreneur vis-à-vis a consumer) or extend it.

The seller's warranty obligation only applies to defects that already existed at the time of handover of the property. The seller is not liable under the warranty provisions for defects that only arise after handover (and were not yet existing at the time of handover) or for visible defects.

### Owed qualities - Definition of "defect"

The seller is responsible for characteristics of the property that are:

- Commonly assumed, or
- Contractually agreed.

A defect within the meaning of warranty law exists if the property does not have the quality and condition which the seller has contractually promised to the buyer; in this respect, it makes no difference whether the seller has expressly promised to the buyer a certain condition or quality or whether such condition or quality is deemed to be usually assumed and has therefore become an implicit part of the contract.

While the expressly agreed qualities or conditions are relatively easy to determine by looking at the purchase contract, the usually assumed qualities or condition of a property are more difficult to determine. They depend on the type of property being sold. Ultimately, it depends on which quality and condition a bona fide buyer may expect.

The decision as to whether the buyer could expect a certain characteristic or quality is dependent on the individual case and is therefore difficult to predict. It is advisable for a buyer to have all the characteristics or quality relevant to the purchase decision promised in writing in the contract as warranted features. Therewith, subsequent disputes whether liability for a defect in the property is to be assumed can be avoided.

Usually, the parties to a real estate purchase agreement agree on warranties or a warranty regime that deviates from mandatory law provisions of the General Civil Code. Save for purchase agreements with consumers, the parties may waive the warranty for commonly assumed qualities or characteristics of a real estate property.

### Quality defects and legal defects

Austrian warranty law distinguishes between quality defects and legal defects. A quality defect exists if the defect is physically inherent in the property. The typical case of a quality defect in a property is the existence of contamination, a crack in the brickwork, or deficient isolation. A quality defect also exists if the property does not have the contractually agreed size or development.

A legal defect exists if the seller does not provide the buyer with the legal position owed under the contract. A legal defect exists when the seller is not the owner of the property, if the building permit does not exist, or if there is a mortgage or an easement.

The seller is equally responsible for quality defects and legal defects, but there is an important difference which makes the distinction relevant: The three-year warranty period for a quality defect starts upon handover of the property, whereas for a legal defect it starts at the time the defect becomes apparent. In case

of a hidden defect of an explicitly contractually assumed quality, the defect starts at the time it becomes apparent.

### Judicial enforcement

The legal consequences of the warranty do not occur automatically if the acquired property has a defect. The buyer of a property must assert the warranty rights in court within the warranty period by filing a lawsuit or raising a defense. If the buyer fails to assert the warranty rights in court within the warranty period, the claim is time barred.

The extrajudicial notification to the seller that a defect exists or an extrajudicial request to remedy the defect is generally not sufficient to preserve warranty rights. Save for purchase agreements with consumers, the parties can agree on shorter warranty periods, and a specific warranty regime in the purchase agreement.

### Mortgages and other usual guarantees adopted in financing assets

Mortgages are the most important collateral used in connection with real estate transactions in Austria. The establishment of a contractual mortgage right on a property requires not only an incorporable document (e.g., the mortgage agreement) but also the actual registration of the mortgage in the land registry. Mortgages, like ownership rights, are only established upon their registration. The basis for the mortgage is the mortgage agreement, which must provide a precise identification of the real property, the legal grounds of the mortgage, the secured and numerically stated amount, and an unconditional statement (*clausula intabulandi*) by the party whose rights are thereby restricted.

With respect to a fixed amount mortgage (*Festbetragshypothek*), a specifically granted loan or credit amount, plus defined interest, late interest, and a determined amount of ancillary costs are registered in the land registry. The fixed amount mortgage may only be used once.

The maximum amount mortgage (*Höchstbetragshypothek*) does not secure a specific loan or credit amount, but a specific relationship between creditor and debtor up to a specific amount. The maximum amount mortgage may recurrently be exercised up to the agreed amount.

The mortgage is accessory, which means that it is generally dependent on the existence of the underlying secured debt. Obligatory proceeds from the real estate, such as rental income or insurance proceeds are not pledged with the property. Thus, such proceeds have to be pledged or assigned separately as a security, which is usually the case in real estate finance transactions.

## Lease of real property (“Mietvertrag”) and usufructuary lease (“Pachtvertrag”)

### General

The most important categories of lease agreements under Austrian law are the lease of real property (Mietvertrag) and usufructuary leases (Pachtvertrag). The law provides that, in the case of a lease agreement of real property, the leased object is merely the space (e.g., a retail area, an apartment or an office), whereas for a usufructuary lease, the leased object is both the space and the undertaking performed therein (such as, for example, a farm or a business). The decisive factor is the purpose of the lease agreed upon by the contracting parties. The distinction is important because the very tenant-friendly Austrian Tenancy Act (and above all the mandatory tenant-friendly restrictions on termination) does not apply to usufructuary lease agreements.

### Usufructuary lease (Pachtvertrag)

The provisions of the General Civil Code apply to legal relationships between landlords and tenants in usufructuary lease agreements that are, to a certain extent, not mandatory.

Among all usufructuary lease agreements, agricultural leases and commercial leases are the most noteworthy (i.e., lease of business). According to prevailing opinion, a lease agreement is considered to be an usufructuary lease if the object of the lease is an entire operating company and not merely business premises. In addition to the rented premises, all that is essential for the company's operation (e.g., good will, stock, customer base and business license, interior furnishing, etc.) has to be provided to the tenant by the landlord. Court decisions also determined that agreements on turnover-rents and/or obligations to operate the business would indicate that the lease was granted as a business lease agreement. Consequently, leases of the operation of a hotel, or restaurant, or businesses established in station halls, are often considered to be usufructuary leases.

### Lease agreements

In Austria, residential and commercial leases are primarily subject to the tenant-friendly provisions of the Austrian Tenancy Act. The regulations of the Austrian Civil Code apply subsidiarily and, unlike the Austrian Tenancy Act, are to a certain extent not mandatory.

The Austrian Tenancy Act regulates the lease of apartments, parts of apartments, business premises of all types, and of land leased together with apartments or business premises. The Tenancy Act is not applicable to certain leases, for example flats provided by an employer, leases with a term not exceeding six months, secondary residences, and premises in buildings with not more than two separately lettable units. The Tenancy Act is only partially applicable to, for example, new buildings erected without public funds after 30 June 1953, newly constructed properties in an attic after 31 December 2001, and condominium

units constructed after 8 May 1945. In this case, generally, only the termination restrictions apply, so that the landlord may only terminate a lease agreement for explicitly listed severe grounds, or upon expiry of the lease term.

The full scope of the Austrian Tenancy Act applies to leases of apartments and business premises situated in old buildings (constructed before 1945), or for subsidized buildings.

In case the full scope applies, the Tenancy Act protects tenants primarily with far-reaching limitations to the landlord's right to terminate the contract and by stipulating maximum amounts for rent with mandatory provisions concerning utility and service charges, as well as maintenance, and sub-letting.

## Administrative/building permits applicable to construction or restructuring of assets

Generally, a building permit is required for the construction of a building. In Austria, each of the nine provinces has a separate building code with different regulations for the requirements of the building permit.

Minor renovations or additions require either a simple notification to the building authority (e.g., the construction/modification of bathrooms) or a building project may not require any notification or permits at all (e.g., for erecting antennas or garden sheds).

A building permit must be applied for in writing or digitally with the relevant building authority (in larger cities: the magistrate; otherwise: usually the mayor). Certain documents must be submitted with the application, such as e.g., a land registry excerpt, specifications of the building, plans, and an energy certificate.

Construction works that require a building permit may only begin once a final and binding building permit has been issued. If construction works begin without a building permit, fines and, in a worst-case scenario, the demolition of the unlawful construction can be imposed.

Some provinces have simplified procedures for granting building permits. In such case, it is sufficient that an independent civil engineer submits a confirmation that the architectural plans and other necessary documents comply with the written construction specifications. Shortly after submission of the necessary documents to the building authority, the applicant may commence with the construction works.

Upon completion of the building, either a notice of completion or an application for the issuance of a use permit must be submitted to the building authority, depending on the regulations of the respective applicable Building Code of the province concerned. In case a notice of completion is sufficient,

the notice must contain the confirmation by an independent civil engineer that the building was constructed in compliance with the permit and the regulations of the Building Code. If a permit for use is required, the building authority examines whether the building was constructed according to the building permit and the conditions imposed therein. The building may not be used before a notice of completion has been submitted to the building authority or before a permit for use has been issued.

## Environmental & energy

In Austria, the seller of a real property is obliged to hand over an energy certificate (Energieausweis) to the purchaser. This certificate may not be older than 10 years. If the seller does not fulfill this obligation, they are liable for an energy performance that usually corresponds to the age and type of the building. A lawsuit can be filed due to the omission to hand over the energy certificate in the course of conclusion of the purchase agreement. Furthermore, the issuer of the energy certificate can be held liable for the correctness of such certificate. Administrative fines may be imposed in case the seller does not fulfill their obligations.

Also, for tenancy agreements, a landlord is obliged to hand over an energy certificate to the tenant. Otherwise, the landlord is liable towards the tenant for an average energy performance of the premises, considering the age and type of the building.

Several Building Codes provide for a prohibition of fossil energy resources and obligatory photovoltaic facilities for newly constructed buildings.

Austria has a register of suspicious areas that is maintained with the Federal Environment Agency. The register contains sites that are supposed to contain significant environmental hazards due to previous forms of use. The register is, however, neither complete nor does it document whether the property actually contains an environmental hazard.

Furthermore, ESG and the EU Taxonomy Regulation are playing an increasingly important role in the domestic real estate market. Although the Taxonomy Regulation is primarily aimed at the construction industry, investors and financial companies are also indirectly affected and must therefore ensure that real estate investments are also taxonomy-compliant when they offer sustainable products. In the real estate sector, construction of new properties and the renovation of existing properties are particularly affected. For example, newly constructed buildings must exceed the minimum threshold set for low energy building requirements by 10%. Thus, investors, developers, but also financial companies already have to deal with the requirements for sustainable real estate projects and, when purchasing or financing real estate investments, now also have to assess compliance with the requirements of the Taxonomy Regulation

as part of their due diligence checks if they advertise ecologically sustainable investments.

## Direct taxes applicable to sales

### Real estate transfer tax and registration fee

The disposal of a property triggers a real estate transfer tax of 3.5% of the purchase price. In the case of a gratuitous transfer and the gratuitous part of a "partly gratuitous" transfer, a staged rate is applied (0.5% for the first EUR 250,000/USD 249.847,836\*, 2% for the next EUR 150,000/USD 149.908,701\*, and 3.5% above that); transfers within the family circle are always considered gratuitous and are taxed according to the staged rate. In the case of certain changes under company law (share deal), the tax rate is 0.5%. The tax is calculated on the higher of the consideration, or the value of the property.

The real estate transfer tax is due upon the conclusion of the transfer agreement, or occurrence of the conditions precedent. In case of a rescission or the occurrence of a condition subsequent within three years, an application for a refund or non-assessment of the tax can be filed.

The registration of the ownership right in the land register triggers a registration fee of 1.1% of the purchase price.

### Real estate income tax

Profits from the sale of real estate are subject to income tax. Capital gains of corporations (and also private foundations) are subject to income taxation of 25% in accordance with the general income tax regime.

The real estate income tax (Immobilienvertragssteuer - ImmoEST) introduced for private individuals generally only applies to legal transactions for consideration. In the case of gratuitous legal transactions (inheritance, bequest, gift, etc.), no real estate income tax is due. Capital gains, i.e., the difference between the proceeds of the sale and the acquisition costs, are taxed at 30%. If the previous sale of the property took place prior to 1 March 2002, the real estate income tax is a flat rate of 4.2% of the purchase price. An exemption from the real estate income tax duty applies, inter alia, to the sale of the real estate on which the taxpayer had their principal residence, if this principal residence is relinquished at the same time.

### Other costs

Additional costs are incurred for the certification of signatures by a notary public. These are regulated in the Notaries Act, which provides for a sliding scale of costs depending on the value of the property or the purchase price. It is also possible to agree on an individual fee agreement with the notary.

Furthermore, one of the contracting parties often commissions a lawyer or notary public to draft the purchase agreement and to

confirm the acquisition in the land registry for which the costs are to be considered accordingly.

If a real estate agent has mediated the acquisition of the property, the contracting parties must expect that the agent's fee will be incurred. The statutory maximum fee is up to 3% of the purchase price per party.

\*According to the 15 September 2022 exchange rate

## Contact



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Gabriele is a Real Estate Partner at JWO (Deloitte Legal Austria) with over 20 years of experience. Gabriele joined JWO in Vienna as partner in 2017. Prior to JWO, Gabriele was a partner for 14 years in the real estate team of Austria's largest law firm. She is fluent in German and English.

Gabriele and her team advise clients in large scale and complex national and cross border real estate transactions, especially real estate acquisitions, financing and restructuring projects, real estate project developments, public and private building law, as well as residential and commercial lease law.

Gabriele is a lecturer for real estate law at the law school of the University of Vienna for real estate law, and author of several real estate

# Belgium



# Real Estate Law in Belgium

## **At present, we see three significant real estate trends in Belgium:**

### **Focus on sustainability (ESG)**

Today's climate crisis urges policy makers to rethink and reinvent our economy. Given the share of buildings in total carbon emissions, sustainable real estate constitutes an integral part of this. The National Relance Plan for Belgium foresees EUR 2bn (almost USD 2bn\*) of investments in climate and energy between 2021 and 2026, of which 50% is foreseen for building renovation. Given the increasing focus of real estate players on sustainability – in particular, forced by the financial institutions (i.e., in turn obliged by the European Legislator) and in order to obtain cheaper financing (a hot topic as we speak) – sustainable real estate services (next to the traditional real estate services) is becoming increasingly important in order not to be disrupted. For example, we see a trend in real estate players establishing their own energy service companies to address this problem.

### **Search for affordable housing**

As a consequence of changing financing parameters, rising property prices, the prolongation of the average period to obtain a building permit (from two years a few years ago to almost four to six years (depending on the location/region), the aging of the population, demographic growth, a lack of qualitative housing stock and a trend towards smaller households, the real estate market is looking for solutions to (try to) make housing more affordable. Initiatives in that regard include limiting the number of square meters per unit, a cooperative model, co-living, co-housing, mixed residential projects, split ownership, and delayed ownership.

### **Dealing with cost increases**

The global economic downturn (recession) as well as geopolitical problems have resulted in a cocktail of increased building and energy costs, supply constraints and substantially more expensive financing both for investors, developers, and buyers. As a result, all parties involved have become more prudent and selective. Among others, for new and ongoing development projects, we see increased discussions and questions concerning the rights and restrictions regarding the indexation or modification of agreed prices. Also, various developers canceled their building plans or postponed tenders with general contractors. In turn some general contractors face liquidity problems and decreasing order books.

Moreover, we see a direct correlation between the abovementioned toxic cocktail and a series of broken deals with international and national real estate parties during the summer.

In comparison with the previous crises in 2001 and 2008, we spot a trend in certain sectors of sale-and-lease-back structures initiated by the owner-end user and a lack of liquidity with some high leverage real estate players. Cash is (again) king.

*By **Jan Lambertyn**, Managing partner of Triginta Real Estate Fund, a Belgian real estate fund specialized in socially relevant real estate projects*

# Overview of the Belgian Legal System

## General introduction to main laws that govern acquisition of assets in Belgium - real estate rights

The main provisions that govern the acquisition of assets in Belgium can be found in the Belgian Civil Code (more in particular in new Book 3 entitled "Assets" that entered into force on 1 September 2021), which contains provisions regarding property ownership and other rights in rem including usufruct (usufruit/vruchtgebruik), long leases (emphytéose/erfpacht), and building rights (superficie/opstalrecht), which are often seen as alternatives for property ownership or classic leases.

As for leases in Belgium, the applicable legislation is laid down in the (old) Belgian Civil Code as well as in separate laws, as adopted by the Federal and/or competent regional legislators, regulating one or more specific types of leases.

For instance, retail leases are governed by (i) common law principles laid down in the (old) Belgian Civil Code, which apply to all types of leases to the extent specific laws do not provide for deviating provisions and (ii) by the (Federal) Retail Lease Act dated 30 April 1951, which is incorporated into the (old) Belgian Civil Code, as the case may be amended by regional legislation on retail leases. For more information on leases in Belgium, please see "Lease of assets and Lease of Business" section".

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

The rules on real estate registry can be found in Book 3 of the Belgian Civil Code.

Lastly, the acquisition of an asset in Belgium cannot be done without respecting the general rules of contract law, which are incorporated in the (old) Belgian Civil Code (new legislation on contracts will come into force soon and will be incorporated in a new Book 5 entitled "Obligations" of the Belgian Civil Code). In addition, separate laws on various subject matters (e.g., asbestos, soil, town-planning, etc.) may provide for specific rules to be respected in the case of transfer of assets and/or when establishing rights in rem thereon.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

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 favor of public entities, entitling its beneficiary/beneficiaries to match the terms offered by a candidate buyer and to pre-empt the property or right in rem put for sale.

Belgian Property Law experienced a thorough reform with the new Book 3 "Assets" of the Belgian Civil Code that came into force on 1 September 2021. The most commonly 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 "numerus clausus" principle was reaffirmed in the new Book 3 of the Belgian Civil Code. In addition, for the first time, a clear enumeration of rights in rem was provided. Following the new Book 3 of the Belgian Civil Code, rights in rem can be divided into four categories: ownership, co-ownership, in rem rights of use (droits réels d'usage/zakelijke gebruiksrechten) and security rights. The rights in rem recognized by Book 3 of the Belgian Civil Code are the easements (servitudes/erfdienstbaarheden), the usufruct (usufruit/vruchtgebruik), long leases, and building rights (superficie/opstalrecht).

Despite the closed system of Belgian Property Law, in principle all provisions of the new "Book 3" of the Belgian Civil Code are suppletive. There are two exceptions to this autonomy of will, namely (1) the definitions and (2) where the law provides otherwise.

### **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). Such a contract is enforceable against third parties after transfer in the registers of the competent office the General Administration of the Patrimony Documentation (Administration Générale de la Documentation Patrimoniale/Algemene Administratie van de Patrimoniumdocumentatie) as far as immovable property is concerned.

Forced co-ownership (co-propriété forcé/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).

### **Forced co-ownership (co-propriété forcé/gedwongen mede-eigendom)**

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### **Usufruct (usufruit/vruchtgebruik)**

The right of usufruct is the right to have use and enjoyment 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 – for legal persons for a period up to 99 years) 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). The bare owner has now the right under the new Book 3 of the Belgian Civil Code to claim from the usufructuary a proportional contribution to its costs with regard to the execution of the major works, proportionately with the remaining value of the usufruct.

### **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. A right to build is an exception to the right of accession. A right to build involves a, in principle temporary, division of the right of ownership to immovable property and a building right grants a right of ownership to a volume within which the building right holder may acquire or install buildings or plants. A building right can now have a term of 99 years (instead of a maximum of 50 years), there is no minimum duration. In some exceptional cases a building right can be “eternal”. A building right can be eternal (1) for the purposes of public domain, or (2) the creation of different volumes that each have a different destination and independent use and do not share any common parts. 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 buyer 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.

### **Long lease right (emphytéose/erfpacht)**

Is a form of long lease which confers, for a maximum period of 99 years and with a minimum of 15 years (instead of a minimum of 27 years – the new Book 3 of the Belgian Civil Code reduces the minimum term to 15 years), the use of a building/a land belonging to another. The condition that an annual payment called the canon had to be paid to the landowner no longer applies. This also puts an end to the symbolic euro that was used as an alternative to the canon. The beneficiary of a long lease right (i.e., the long leaseholder) has the same rights and privileges as the landowner, which is the object of its right, unless the destination of the property is contractually restricted. Furthermore, the long leaseholder may not reduce the value of the object of its right. They are consequently obliged to pay all charges and taxes related to the use of the building/the land for the duration of the right, but benefit from the income from the property, such as, for example, rents resulting from a lease agreement. Finally, the new Book 3 of the Belgian Civil Code provides for an obligation of the landowner to compensate the long leaseholder for the buildings/plantings made by the latter at the end of the long lease.

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 aforementioned rights in rem will recover the full ownership of the underlying property upon expiry of the relevant right in rem. This “accessory” building right is now enshrined in Book 3 of the Belgian Civil Code to increase legal certainty. 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.

## Real estate registry system

### Structure of the property registries

Belgian law provides for a system of title recording.

Within four months from the date of signing the private sales 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 in principle only accept authentic deeds drawn up by Belgian civil law notaries for transcription. Other types of documents which are accepted for transcription into the mortgage register are court judgements of equivalent status and private deeds recognized in court or by a Belgian civil law notary. It is only following transcription in the mortgage register that the transfer will be effective against third parties acting in good faith. The mortgage register is open to the public and is a mean of checking the entitlement by a particular entity (either an individual or a company) with respect to all immovable properties located in the mortgage register’s jurisdiction.

### The responsible authorities

The mortgage office (Bureau Sécurité Juridique/Kantoor Rechtszekerheid), which is part of the General Administration of Patrimonial Documentation (Administration générale de la Documentation Patrimoniale/Algemene Administratie van de Patrimoniumdocumentatie) is the public institution in charge of the mortgage register.

### Connection with the cadastral-tax registries

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 imposed on a property.

### Compulsory registration

All deeds related to the transfer of real property, all lease agreements with a term exceeding nine years or including a discharge of rent payment of more than three years of rent and all deeds relating to the establishment or transfer of rights in rem, preference rights, pre-emption rights and option rights pertaining to immovable property rights, must be registered in the mortgage office (Bureau Sécurité Juridique/Kantoor Rechtszekerheid) where the assets concerned are situated. If one of the deeds is not registered, the immovable property rights contained therein will not be enforceable vis-à-vis third parties acting in good faith.

The transcription of immovable property rights into the mortgage register is not free. Registration duties are typically paid by the buyer, 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.

### How registration guarantees the rights of the holder of immovable property rights

If one of the deeds mentioned above is not registered the immovable property rights contained therein will not be enforceable vis-à-vis third parties acting in good faith.

### 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 a Belgian civil law notary.

The signing of the private sales agreement entails binding commitments for the parties, amongst others, for the buyer 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 buyer 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 sales 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 sales 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 civil law notary in charge of the authentication of the sale will carry out various searches and will obtain a certificate from the mortgage register showing whether the property is encumbered

by an existing mortgage or any other immovable property rights granted to third parties. The civil law notary reviews the vendor's title to the property and recites or at least refers to all specific conditions and/or easements (*servitudes/erfdienstbaarheden*) to the extent these are still relevant and applicable to the property sold, in the notarial deed. In the 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 the occasion of a transfer of property held by the taxpayer.

## Notary role in the real estate transactions

The only documents the mortgage register will accept for registration are authentic deeds passed before a civil law notary (or court judgements of equivalent status or private agreements recognized in court or by a civil law notary).

A civil law notary offers a public service, they are not one of the parties to the contract, nor do they negotiate any terms of the contract.

A civil law notary is responsible for the validity of the transfer deed, for checking the identity and capacity of the parties, 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 civil law notary's responsibility also extends to other matters which might affect the land, e.g., they have 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 civil-law notary will also collect the registration duties applicable to a specific transaction.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

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*). From 1 July 2018, architects,

building contractors and other service providers in the construction sector are required to take out insurance that covers their 10-year liability.

It is also market practice for the buyer 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.

## Mortgages and other usual guarantees adopted in financing assets

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 hypothecair mandaat*). The new "Book 3" of the Civil Code also refers the following security rights: (1) special privileges, (2) pledge and (3) a retention right.

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% of 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 Office of Legal Security (*Bureau Sécurité Juridique/Kantoor Rechtszekerheid*) 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.

## Lease of assets and Lease of Business

Belgium has four different types of leases, being (i) common leases (*lex generalis*), and three specific types of leases: (ii) retail leases (*bail commercial/handelshuur*), (iii) residential leases (*baux de residence principale/woninghuurovereenkomsten*) including student leases (*baux pour le logement d'étudiants/huurovereenkomsten voor de huisvesting van studenten*), 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 amended by regional legislation on retail leases) 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 legislation on retail leases by simply declaring it 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 on qualification of the lease in the lease agreement.

The Retail Lease Act (as amended by regional legislation on retail leases) 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. One of the main elements is the direct contact with consumers.

The Retail Lease Act (as amended by regional legislation on retail leases) provides that a retail lease must have a minimum duration of nine years, with the possibility of termination by the tenant at the end of the third, sixth, or ninth year subject to a six-month prior notice. 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 nine-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.

All regional legislators (in the Brussels capital, the Walloon, and the Flemish regions) have adopted specific legislation on retail leases which are concluded for a period of one year or shorter, this in order to facilitate the lease of premises e.g., for use as so called 'pop-up store'. This type of lease may be terminated by the tenant at any moment subject to a one-month prior notice.

Other leases, such as offices, parking spaces, warehouses, industrial buildings, etc., do (in principle) not entail premises primarily used by the tenant for a retail or craftsman's activity in direct contact with customers and are therefore not subject to the strict mandatory legislation on retail leases. The general provisions of common leases apply which are in general non-mandatory provisions.

## Administrative permits applicable to construction or restructuring of assets

The construction or restructuring of assets is regulated in Belgium at the regional level (Flemish region, Walloon region and Brussels region). In principle, mainly two permits are relevant: a building permit and an environmental permit. In the Flemish region and the Walloon region these two permits can be applied for in one procedure and together form the 'integrated environmental permit'. Carrying out activities for which a permit is required without the necessary permit is subject to criminal sanctions in each region.

A building permit is in principle required for all types of larger works to and around a construction, such as building, rebuilding, digging, and felling trees, for modifications to the designated use of a building or part of it. The permit is valid for an indefinite period, but it may expire if the works have not been started within a certain period after its issue or if the works have been interrupted for too long.

In addition, an environmental permit is required for certain types of installations or activities with a 'significant environmental effect' (e.g., operation of a petrol station). Environmental permits have a validity period of 15 years (Brussels region) or 20 years (Flemish and Walloon region), but the permit can expire earlier if the exploitation of the licensed installation or activity has not commenced within a certain period of time since the granting of the environmental permit.

Other permits, such as the socio-economic permits for retail activities from a certain number of m<sup>2</sup>, are required in specific circumstances.

## Environmental and energy – ESG rules and status of implementation

In Belgium, a growing trend towards ESG compliance is becoming increasingly relevant in real estate. For example, in commercial transactions this is expressed in the appetite of real estate investors to prioritize green investments (buildings rated with high scoring sustainability certificates). On the basis of various parameters, buildings are evaluated, and this assessment is translated into a certificate. Examples of such certificates are the BREEAM and LEED certificate that give an indication of the sustainability of the building and the WELL certificate that focuses

additionally on the wellbeing of the people in the building.

Furthermore, the number of ESG regulations with respect to real estate has increased significantly in recent years, both due to the influence of European Union (EU) and international initiatives such as the “Renovation Wave” and the “Fit for 55 package” as well as the Belgian national objective of making all buildings energy and carbon neutral by 2050.

ESG compliance is a matter that is regulated in Belgium at the regional level. The implementation of ESG regulations therefore occurs at a different pace in the three regions. For example, all three regions have legislation on Energy Performance and Indoor Climate (Energieprestatie en Binnenklimaat (EPB)) requirements that determine the minimum energy requirements for buildings and legislation on charging points for electric vehicles. Furthermore, in the Flemish region, there is already an obligation for new buildings to obtain a minimum amount of energy from renewable energy sources and soon there will be an obligation to use electric heat pumps and a ban on natural gas connections. For existing buildings in the Flemish region, there is an obligation to renovate within a certain period of time after the acquisition of a building, depending on the type of use of the building. This renovation obligation involves roof insulation, insulation of windows, heating, and cooling. On the other hand, the Brussels and Walloon regions are also developing a renovation strategy, but there are currently no standards with binding effect.

In addition to ESG implementation in the strict sense, Belgium has historically had rules on energy and energy saving which relate to soil pollution, EPC, and asbestos.

The transfer of real estate properties and rights in rem triggers certain soil obligations for the transferor to be performed prior to the transfer. A transferor of land (or rights in rem) 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 – or the soil condition database (BDES) – if the land is located in the Walloon region, authorizing the proposed transfer transaction. 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.

In addition, 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. The certificate informs potential buyers or tenants in advance about the energy efficiency of the building. This certificate must be:

- Published in any advertisement relating to the sale or letting of a property;
- Communicated by the seller, transferor, or landlord before the completion of the proposed property transaction; and
- 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. Federal labor law requires every employer to prepare an asbestos inventory for all buildings where they employ staff, regardless of the year of construction. In the Flemish region, from 23 November 2022, the transferor of a building constructed before 2001 must hand over an asbestos inventory certificate to the buyer. In the Walloon and Brussels regions, there is no such obligation. Of course, the seller must still report the presence of dangerous asbestos at the time of the sale.

## Direct taxes applicable to sales

Investors wishing to invest in Belgian real estate will have various options for structuring their acquisition. 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 standard rate for real estate located in Wallonia and the Brussels region is 12.5% and 12% in Flanders. However, there are lower rates that may apply in certain circumstances (e.g., a reduced rate in case of the acquisition of a first residential property, a reduced rate in case of a commitment to perform a substantial investment in energy efficiency, the acquisition of social housing, etc.)

Professional real estate traders (corporate entities or individuals, whose business activities mainly consist of buying and selling real estate) who meet certain conditions may benefit from a reduced rate of 4% in the Flemish region and 5% in the 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 they qualify 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 ultimately by 31 December of the eighth (Flanders) or 10th year (Walloon region and Brussels region)

following the date of the purchase agreement with application of the standard registration duty (12.5% or 12% in Flanders).

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

\*According to the 15 September 2022 exchange rate

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# Bosnia and Herzegovina



# Real Estate Law in Bosnia and Herzegovina

## Overview of the Bosnia and Herzegovina Legal System

### General introduction to main laws that govern acquisition of assets in Bosnia and Herzegovina- real estate rights

#### About Bosnia-Herzegovina

Bosnia and Herzegovina (hereinafter "BiH") is composed of two entities:

- Federation of Bosnia and Herzegovina ("FBiH") and
- Republika Srpska ("RS")

and one district:

- Brčko District ("BD").

Furthermore, the FBiH consist of 10 cantons.

Each of the above-mentioned administrative units (i.e., state, entities, districts, and cantons) is considered as a political-administrative jurisdiction with its own legislative, executive, and judicial competences. Indirect taxes and general rules related to foreign investment policy are regulated and administrated at the

state level, whereas direct taxes are regulated and administrated at the level of entities, districts, and cantons. Regulations related to incorporation of companies, transfer of shares, real estate, etc. are regulated at the level of entities, districts, and cantons.

The main regulations governing real estate are the laws on property rights of FBiH/RS/BD. Laws on property rights regulate, in general, the acquisition, use, disposal, protection and termination of property rights, possession, etc. Other applicable laws, inter alia, are Law on Obligations, Law on Land Registry, Law on Survey and Real Estate Cadaster, and Law on Expropriation.

### Acquisition structure usually applied in real estate transactions; restrictions-if any- applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

The same rules apply for both natural and legal persons. However, foreign (legal and natural) persons acquire the right of ownership of real estate on the condition of reciprocity, except when the right is acquired by inheritance or, if otherwise is

provided by law or an international agreement. Therefore, reciprocity is a precondition for acquiring real estate ownership rights by a foreign. The existence of reciprocity is presumed and the Federal Ministry of Justice, with the previously obtained opinion of the Ministry of Foreign Affairs of BiH, publishes a list of countries with which there is no reciprocity. In addition, foreign persons may be restricted from owning real property in certain areas due to the reasons of protecting public interests and security.

These areas must be specifically designated as such by the competent authorities.

However, foreign persons (natural and legal) can generally freely establish local legal entities (companies) in BiH which can, in practice, then be used for the purchase of real property. However, the structure and implementation of such transactions would depend on specific circumstances.

### **How does a person acquire the right of ownership in BiH?**

The right of ownership is acquired based on a legal transaction, law, decision of a court or other competent authority, and by inheritance, with the fulfillment of conditions as prescribed by the applicable legislation.

When it comes to real estate, registration in the land registry is the final entry of real estate rights and has a constitutional effect (like all entries in the land register). This means that ownership rights and other real estate rights are legally considered as established at the time of registration in the land registry, regardless of when the purchase agreement was executed, with certain exemptions (e.g., inheritance).

### **What about establishment of flat ownership (condominium)?**

Acquisition of flat ownership (condominium) is regulated in the same manner as acquisition of ownership over other real property and, in general, the same rules apply. Acquisition of ownership over a flat (condominium) also grants the owner a co-ownership right of the common spaces of the building.

However, flat ownership first must be established, as it is not established automatically during the construction of a house or building. This means that after construction, the house or building has to be divided into separate flats over which flat ownership can be established. Such divisions can be made by a decision of the property owner (statement of division) or by an agreement with the co-owner of the entire property (division agreement). The form of a notarized document is required for the validity of the statement of division/division agreement.

For the registration of condominium rights, it is necessary to submit a statement of division/ division agreement and a plan of the separate units (flats) of the building to the court.

## **Real Estate registry system**

There are two public real estate registries in BiH—the Land Registry and the Cadaster. In FBiH, the Land Registry is responsible for registering ownership rights and other real rights on real estate. Its importance is reflected in the fact that the buyer legally becomes the owner of the real estate only by entering it into the Land Registry. The Cadaster contains descriptive records that contain data on cadastral plots, buildings, and other objects that are permanently present on the land or under its surface, as well as the special legal status of the land surface. However, registration in the Cadaster is not a prerequisite for the acquisition of ownership.

In Republika Srpska, the Land Registry and the Cadaster have been unified into a single cadaster registry, which includes both the ownership rights and records on cadastral plots. Harmonization and unification of these registries are still ongoing in some places. This means that in RS, ownership of real estate is generally acquired by registration in this unified registry.

### **Land Registry**

- Real estate must be entered in the Land Registry.
- Provides overall data on the real estate, specifically the description, area, real estate rights, registered burdens (if any), and all entries made in the Land Registry (pre-registration, note, registration).
- Each person has a right to request a land registry excerpt that serves as a proof of ownership of a real estate, as well as proof of existence of other real estate rights.
- One of the main principles of the Land Registry is the principle of public confidence—it is presumed that an entered right on real estate is correct; this principle protects conscious third parties in legal transactions.
- There are also other principles on which Land Registry is based, such as constitutional effect ("please see section "Acquisition structure usually applied in real estate transactions; restrictions—if any—applicable to foreigners or to specific areas of the country or others, in real estate acquisitions").
- Online land registries are accessible via following links FBiH/ RS/BD, but data retrieved online can be used only for information purposes.

### **Cadaster**

- Real estate must be entered in the Cadaster.
- A real estate cadaster is collective documentation of data on the cadaster of land, buildings, and other facilities, with recorded rights to real estate.
- The Cadaster contains the following: data on cadastral plots and buildings on them in terms of their location, shape, use, cadastral class, cadastral income for land under cultivation,

etc.; data on buildings (year of construction, number of floors, purpose of use, number, and type of rooms); data on real estate rights and real estate owners or possessors, etc.

- A Cadaster for buildings in condominiums and for all buildings on city construction land also contains data on the area of residential, business, and auxiliary premises as well as special parts of the building.
- The principle of public confidence applies to data entered in the Cadaster and protects third conscious parties in legal transactions.
- Online cadaster registries are accessible via following links FBiH/RS.

Please note that the harmonization of data entered in the Land Registry and in the Cadaster is currently in process in Bosnia and Herzegovina.

By collecting the data kept in both registries above, a potential buyer of a real estate can find the:

- Real estate description and area;
- Real estate rights entered in the land register, e.g., ownership rights, pledge (i.e., mortgage), etc.;
- Cadastral data of a real estate, etc.

## Notary role in the real estate transactions

All legal transactions involving the transfer or acquisition of ownership and other property rights over real estate must be concluded in the form of notarial deed. Hence, legal transactions that are not made in the required form are considered null and void, and registration with the relevant authorities cannot be performed.

Notaries in BiH charge their fees pursuant to the applicable notary tariff. With respect to real estate, the notary fee is determined on the purchase price.

## Legal responsibility of the seller in real estate transactions—contractual representations and warranties

### The role of Notary Public

The fact that all legal transactions concerning the real estate must be concluded in the form of a notarial deed grants an additional level of legal certainty and protects both parties in the transaction. Representations and warranties are a common part of real estate sales contracts, and the notary makes sure that they are properly addressed.

Pursuant to law, the ownership right is transferred based on a validly expressed will of the owner (registered as such in the Land Registry (FBiH) or unified Cadaster Registry (RS)) to transfer their ownership right to the buyer (*clausula intabulandi*). This statement can be granted either in the sales contract or a separate document, but in each case, it must be in the form of a notarial deed.

Besides processing the legal transaction, notaries may implement the contract as well as submit and withdraw the land registry application.

### The principle of public confidence

It is considered that the land register is true and fully maintains the facts and legal status of the property. Therefore, the buyer or even the seller, who in *bona fide* acted with confidence in the land books, not knowing that the off-book situation is different, still enjoys protection. Therefore, persons are not obliged to investigate the off-book situation. In the event that several persons have concluded legal transactions with the seller to acquire ownership of the same real estate, the property will be acquired by the person who, acting as a conscientious person, first submitted the application for registration in the land register. Conscientiousness must exist at the time of application.

### Liability of the seller and protection from eviction

Pursuant to the FBiH/RS/BD Obligation Law, the seller is liable for defects in the real estate it had at the time of the transfer of risk to the buyer, regardless of whether the seller was aware of them. Additionally, the seller is responsible for those defects that appear even after the transfer of the risk to the buyer—if the defect is a consequence of a cause that existed before that. The seller is also responsible for hidden defects if certain conditions are met.

The law also regulates protection from eviction, meaning that, as a rule, the seller is responsible if there is a right of a third party on the sold real estate that excludes/reduces/limits the buyer's right, on whose existence the buyer was not informed, or did not agree to take the real estate burdened with that right.

## Mortgages and other usual guarantees adopted in financing assets

Mortgage, i.e., pledge over real estate, is regulated by the Law on Property Rights. It is the most common instrument in BiH for securing financing (e.g., for a bank loan).

Pursuant to law, mortgage is established on the basis of a legal transaction, a court decision, or in other cases, regulated by applicable laws. To establish a mortgage, it is necessary to conclude an agreement (unless it is established by a court or in other cases) in the form of notarial deed, and to register it in the

land register, and this is the most common way of establishing mortgages.

The mortgage is terminated by deletion from the land register.

## Lease of business premises

The main piece of regulation governing the lease of business premises in BiH is the Obligations Act, while the Law on the Lease of Business Buildings and Premises also generally applies as *lex specialis*. Specifically, the referred law regulates the conditions and methods under which commercial buildings and premises can be leased.

However, the Law on the Lease of Business Buildings and Premises originate from the period of the Socialist Federal Republic of Yugoslavia, which had a different economic and social system, and therefore, they are quite outdated. In practice, parties often do not follow the provisions of these laws, especially e.g., in respect of mandatory court termination of contracts and only apply the provisions of the Obligations Act, although the provisions of the Law on the Lease of Business Buildings and Premises formally apply.

Pursuant to the Law on the Lease of Business Buildings and Premises, a commercial building is considered a building intended for the performance of business activities, if it is mainly used for that purpose. Business premises, regardless of whether located in a commercial or residential building, are considered as one or more premises intended for carrying out business activities that, as a rule, form a building unit and have a separate main entrance.

Lease agreements for business premises are concluded in writing; otherwise, it has no legal effect. The lessor is obliged to hand over the business premises to the lessee in a condition in which it can be used for the purpose determined in the lease agreement and to maintain it in that condition (unless otherwise agreed). On the other hand, the tenant has the right to use business premises only for the purpose and in the manner as regulated in the lease agreement.

### Termination of the lease agreement

Pursuant to the Law on the Lease of Business Buildings and Premises in Bosnia and Herzegovina (concerning the lease of business premises), a lease agreement is unilaterally terminated via court. The date of moving out and handing over the premises should be stated in the termination letter. If the conditions for termination are met, the court will instruct the tenant to move out (on the date stated in the termination letter) and hand over the premises to the landlord. Should the court decide that the conditions for termination are not met, it instructs the landlord to file a complaint, and if the complaint is filed (pursuant to instruction), the landlord is considered the plaintiff. Disputes

concerning the termination of lease agreement are considered urgent.

On the other hand, if the lease is terminated due to the expiration of lease agreement and if the tenant won't hand over the premises, the landlord can file a lawsuit and request the handover of premises from the court. Such a procedure is considered urgent. A similar procedure also applies when the lease agreement is terminated based on the withdrawal from the contract.

Apart from these provisions, there are also laws concerning the lease of business premises rendered on other levels (e.g., cantonal) which should be considered.

For example, in the Sarajevo Canton:

- The landlord has the right to evict the tenant with the assistance of the Ministry of Internal Affairs if the tenant has not paid four or more periods of rent and there is a respective judicial proceeding in process (eviction can take place before the courts judgement);
- The landlord has the right to evict the tenant if they have not commenced with their business activity within three months from the handover of premises; etc.

As stated above, these laws originate from the period of the Socialist Federal Republic of Yugoslavia, which had a different economic and social system, and are therefore quite outdated. In practice, parties often do not follow the provisions of these laws, especially e.g., in respect of mandatory court termination of contracts.

## Administrative permits applicable to construction or restructuring of assets

Since real estate is regulated at lower levels in BiH (i.e., at entity/district level), different laws and regulations apply depending on the place where the real estate will be constructed.

In general, there are three main permits required for building real estate: an urban permit, a construction permit, and a use permit. Other permits that may be required during the construction (e.g., to obtain a construction permit) include the environmental permit, water permit, electricity permit, certificate of occupancy, etc.

### Urban permit

An urban permit is issued by the municipality/office responsible for urbanism. The purpose of the permit is to check whether a construction can take place on a certain location and if it is in accordance with the spatial planning of the area. Along with the request for the issuance of an urban consent, the applicant must submit information on the respective land plot. The urban consent is usually obtained within 15 to 30 days. Depending on

the complexity of the facility an entity plans to build, the municipality may request additional documents.

### Construction permit

A construction permit is issued based on the urban permit and a detailed construction project submitted along with the accompanying documentation. In FBiH, each municipality publishes the list of required documents to be submitted. To obtain a construction permit, a buyer must first submit a proof of construction right or property rights (such as an excerpt from the land register, or concession agreement, etc.). Upon obtaining a construction permit, prior to commencing with any construction works, it would be necessary to inform the municipal construction inspection. The inspection visits the construction site and checks if all conditions for the construction are met.

### Use permit

A use permit is issued by the same institution that previously issued the construction permit, e.g., competent municipal service for geodetic affairs. After the construction work is done, the abovementioned authority will perform a technical inspection of the building and determine whether the building was constructed in accordance with the construction permit that was submitted earlier. If all conditions are met, the person acquires the right to a use permit for the building.

## Environmental protection

In BiH, environmental protection is regulated at entity level. For building certain facilities, environmental permit is required in both entities (FBiH and RS).

The main piece of regulation that governs environmental protection, the issues of resource efficiency, and pollution prevention and control in FBiH is the Law on Environmental Protection (passed in 2021), although other sectoral laws in the field of water and environment may also contain relevant provisions. There are several bylaws that regulate if it is necessary to carry out an environmental impact assessment, to obtain an environmental permit, etc.

An environmental permit is issued for the purpose of full environmental protection by providing measures to prevent and reduce industrial emissions into air, water, soil, reduce the impact on population, flora and fauna, and prevent the generation of waste and noise to achieve a high level of environmental protection.

BiH, with the assistance of stakeholders, is making significant efforts to harmonize the legal framework on environmental protection with the respective EU regulations.

## Direct taxes applicable to sales

The different tax jurisdictions of BiH are considered as independent units with clearly divided competencies. Although the different tax jurisdictions are considered as independent units, there is a certain level of interaction given that the jurisdictions are within the same state.

### Property tax in the Federation of Bosnia-Herzegovina ("FBiH")

Property tax in the FBiH is levied at the level of cantons. Property for rest and recreation, business and residential buildings that are leased (cottages, buildings, apartments, business premises, garages, etc.) are subject to property tax. Property tax is paid in a fixed amount per square meter for which the cantonal laws stipulate a range, and each municipality determines the fixed amount payable per square meter.

Revenue realized from the lease or sale of property is subject to personal income tax or corporate income tax depending on the ownership of property. In both cases, the applicable tax rate is 10%. This is governed at the level of the FBiH.

### Real estate transfer tax

Real estate transfer tax exists only in the FBiH and is regulated at the level of 10 cantons within the FBiH. The general tax rate is 5% of the value of the property but may differ from canton to canton. The taxpayer is either the seller or the buyer as stipulated within the cantonal laws. No real estate transfer tax is charged on the first sale of newly constructed and unused real estate, provided that VAT is paid on the purchase of such real estate.

### Property tax in Republika Srpska ("RS")

Property tax in Republika Srpska is paid annually by the owner of the real estate. This means that every real estate owner is considered a taxpayer unless exempted by the law. Property tax is paid annually, in two installments. The Property Tax Law (Law on Real Estate) determines the range for taxation at 0.10-0.20% of the value of the property and each municipality within the RS determines every year the fixed tax rate within this range that applies to taxpayers who own real estate located within the municipality.

Revenues realized from the lease or sale of property is subject to personal income tax or corporate income tax depending on the ownership of property. In both cases, the applicable tax rate is 10%.

### Value Added Tax

Value Added Tax applies only in the case of the first transfer or ownership of a newly built and unused real estate. This means that newly built real estate that has not been used yet is subject to VAT in case of a first transfer of ownership. Any subsequent

transfer of any real estate or of a newly built real estate that was already used would not be subject to VAT. If a transfer is not subject to VAT, the transaction should be reviewed carefully because there might be an obligation to correct input VAT deducted when constructing the real estate.

### **Tax on inherited or gifted property**

In the Federation of BiH, the tax on inherited and donated real estate is regulated at the level of the cantons. The taxpayer is the person who inherits or receives property as a gift.

## **Contact**



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# Bulgaria



# Real Estate Law in Bulgaria

## Emerging Markets and new asset classes in Bulgaria

- According to our Deloitte Property Index 2022, the main factors affecting the Bulgarian residential market in 2022 are mortgage interest rates, which had recently risen, savings, and increasing inflation.
- People and businesses look for ways to protect their money and one way to achieve this is through investment in real estate. Conversely, the war in Ukraine could force some sellers and purchasers to move away. There may also be instability in the construction market due to the rise in the price of materials.
- As also noted in the Deloitte Property Index 2022, purchase prices continue to increase but the rental market remains stable, which could make buying and renting apartments less attractive.
- Commercial real estate is improving after the COVID-19 pandemic.
- Shopping malls are in stable positions, with limited vacant rental spaces. Improvements to the legal framework concerning court procedures for the vacation of premises by tenants with terminated leases and their different treatment in comparison to individuals who have rented premises for residential purposes would be welcomed by the shopping mall owners. However, such legislative changes are not expected soon. Moreover, new early parliamentary elections will be held in Bulgaria in October 2022.
- Retail parks in Sofia have full occupancy and specialists envisage further expansion.
- The office market showed its first signs of recovery during the second half of 2021 and continues to move up slowly.

By **Kaloyan Yordanov**, Managing Associate at Deloitte Legal Bulgaria, Head of Real Estate legal team

# Overview of the Bulgarian Legal System

## General introduction to main laws that govern acquisition of assets in Bulgaria-real estate rights

### Main real estate laws

The Bulgarian Ownership Act is the main act governing the rights that individuals and legal entities can have over real estate. The Obligations and Contracts Act regulates the preliminary and final contracts for the purchase and sale of real estate and sets out the general legal framework in Bulgaria with respect to leases.

Other laws regulating real estate in Bulgaria include the State Property Act, Municipal Property Act, Agricultural Land Ownership and Use Act, Condominium Ownership Management Act (governing the management of residential buildings with more than three units, property of at least two different persons), Forestry Act, Spatial Development Act (regulates spatial development, project designing, construction, and entering into operation), Cadaster and Property Register Act, Code of Civil Procedure (with respect to notary procedures), among others.

### Real estate rights

Property rights under Bulgarian law include: (i) the right of ownership; and (ii) limited property rights, such as (a) the right to build; (b) right of use; and (c) property easements.

#### *The right of ownership*

The right of ownership is an absolute title to the property, containing (i) the right of possession; (ii) the right of use; and (iii) the right of disposal.

The ownership rights may be acquired through a legal transaction (purchase-sale, barter, etc.), after the expiry of a prescription period (the prescription period is five years if the possession over the property is exercised in good faith or 10 years if it is not exercised in good faith) or through other methods determined by law (restitution, enforcement, in-kind contribution of real estate in the capital of a company, insolvency proceedings, etc.) as well as through inheritance.

Co-ownership and condominium ownership also exist under Bulgarian law.

### *Limited property rights*

Such rights are derived from the rights of ownership, and are constituted by the owner over the property for the benefit of another person. The limited property rights are as follows:

- The right to build/construct a building is granted to the owner of the respective plot as well as to the holder of the real estate interest to construct.
- A transfer of the right to construct given to a third party by the landowner makes the third party an owner of the building constructed based on this right. The landowner may also transfer the ownership of an existing building separately from the land. Ownership of a building independently from the underlying land may also be created through voluntary partitioning. When the right to construct is created with a fixed period, after the expiration of this fixed period, ownership of the building will automatically pass to the owner of the land. If the building is destroyed, the person holding the right to construct may construct it again, unless the notary deed granting the right states differently. The landowner has pre-emptive rights in a transfer of the right to construct.
- The right of use is a limited property right to use another's property in accordance with its intended purpose and to receive yields thereof, without substantial alteration. The right of use is a self-limited property right over another's property. In order to use the property, the user is required to also exercise de facto power over it, i.e., they should be entitled to possession. Therefore, the right of use includes two powers (i) the right to possess the property and (ii) the right to use, including to obtain the yields thereof. Ownership rights do not cease to exist with the establishment of the right of use by another person over the same property. The owner can request their property from any person who possesses or holds it without grounds to do so and may still dispose of their property, as well as restore their possession. On the other hand, the right to use is a temporary right established for the specific user and therefore, it is not transferable by the holder to another person.
- An easement right is the right to use the real estate, owned by a different person, for a specific aim, which is a kind of an encumbrance over the third party's property, tied to real estate rather than a specific person. Easements can be legal

and voluntary (contractual). Legal easements are established by a legislative provision. They entitle the owner of the beneficiary estate to request unilaterally the establishment of a specific easement from the competent public authority. The owner of the servient estate is obliged to bear the burden of the so-incurred easement relationship. Voluntary easements are established by the will of the property owners. They freely specify the content of the easement, provided it does not contradict the imperative norms or morals.

Easements can be positive or negative depending on the actions to be carried out on the servient property. Positive easements give the right to carry out certain actions, while in the case of negative easements, the holder does not impact the other person's property—they are only entitled to ask the owner not to carry out certain actions on their property. There are various types of easements under Bulgarian law, such as the right to build temporary roads, right of passage, and easements under the Water Act, the Energy Act, and the Forest Act.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

### Real estate transaction structure

There are different options to structure a transaction for the sale of real estate. If a purchaser acquires the real estate (asset deal) directly, the transaction is performed by a notary deed.

The parties to a real estate asset deal can enter into a preliminary agreement. However, the title is transferred only with the signing of the final contract in the form of a notary deed and its registration with the property register in order to be opposed to third parties. A preliminary agreement for the acquisition of real estate properties must be concluded in writing to be valid. The preliminary agreement must contain the essential terms and conditions of the final contract (the notary deed). Each of the parties to the preliminary agreement (the seller and the buyer) has the right to claim, before the court, the announcement of the preliminary agreement as a final contract, as if the notary deed was signed. The contract is considered concluded when the court decision enters into force (the court decision replaces the notary deed).

If the contract is for voluntary partitioning of jointly owned real estate, it must be in writing with notary certified signatures of the parties (not a notary deed). The notary deed is also not required for transactions involving private state or municipal property, where the written form of the document is sufficient.

Share deals are also used in real estate transactions in Bulgaria. By acquiring a company's shares but also the liabilities, the new shareholder will acquire all the company's assets, including any

real estate owned by the company. Depending on the type of company (limited liability company—OOD or joint stock company—AD), different formalities with respect to the share transfer should be met (including notary certification and registration with the commercial register for OOD).

If the property is owned by a company, another option is the acquisition of the entire or part of its going concern (as a pool of rights, obligations, and factual relations), which includes the property. A going transfer agreement is concluded with notarized signatures and content, and the transfer is registered with the Commercial Register.

Real estate can also be contributed in-kind to the capital of a company, through a specific procedure, which includes the notarized consent of the owner, valuation by three independent experts appointed by the Registry Agency, registration with the Commercial Register and registration of the company's articles with the Property Register. In this case, the capital of the company will be increased by the value of the property (as per the above valuation). After registration of the capital increase with the Commercial Register, the ownership of the property is considered transferred to the company. Subsequently, the going concern transfer agreement must be registered with the Property Register for the transfer to be valid vis-à-vis third parties.

Other options for real estate transfers are also possible, such as a corporate reorganization through demerger or spin-off.

### Restrictions to foreigners with respect to nationality of the potential real estate owner and the type of real estate asset acquired

In general, legal entities and individuals can have title over any real estate, except for those which, under the Constitution of the Republic of Bulgaria, are exclusive state property or, under the law, are public, state, or municipal property.

However, there are some limitations to the acquisition of land by foreigners:

- Individuals and legal entities from the European Union (EU) and the European Economic Area (EEA) can acquire ownership over land in accordance with the requirements by law and the treaty concerning the accession of the Republic of Bulgaria to the EU. This limitation is no longer applicable, as the transition period following Bulgaria's accession to the EU, which provided a five-year restriction on ownership over land for EU citizens not residing permanently in Bulgaria and a seven-year restriction on ownership over agricultural land and forest land, expired at the end of 2011 and 2013, respectively.
- Any other foreign (non-EU/EEA) individual and legal person can only acquire ownership of buildings and limited property rights on real estate in Bulgaria, but cannot acquire land, unless otherwise stipulated by law.

- A foreign country or an inter-governmental organization may acquire title to land, buildings, and limited in rem rights in Bulgaria pursuant to an international agreement, by virtue of law, or on the grounds of an act of the Council of Ministers of Bulgaria. However, a foreign country cannot acquire the right of ownership over real estate in Bulgaria by inheritance.

Foreign individuals and legal entities may be shareholders in a Bulgarian company (usually a limited liability company or joint stock company) which owns real estate (including land) in Bulgaria. Nevertheless, there are restrictions with respect to the acquisition of agricultural land by foreigners under Bulgarian law. Foreign individuals and legal entities that have been resident or registered in Bulgaria for more than five years are entitled to acquire agricultural land. Legal entities registered under Bulgarian law for under five years can acquire agricultural land if the shareholders of the company have been resident or registered in Bulgaria for more than five years. Commercial companies in which the shareholders are directly or indirectly registered in jurisdictions with preferential tax regimes are also not entitled to acquire agricultural land.

## Real estate registry system

There are currently two property related registers in Bulgaria: a) the Cadaster Register and b) the Property Register.

- The Cadaster Register aggregates the basic data regarding the location, boundaries, and total area of real estate land plots within the territory of Bulgaria. Real estate which must be entered into the Cadaster Register include any plot of land; all buildings, including those completed to a core-and-shell (rough construction) stage, as well as any technical infrastructure installation comprising a self-contained property; and separate units in a building or in a technical infrastructure installation.
- Transactions concerning ownership and encumbrances with respect to real estate in Bulgaria are registered with the Property Register. The Property Register provides data regarding the right of ownership and other legal interests (limited property rights) in real estate. The Property Register comprises the accounts of all immovable properties. The information is based on the personal files of the transacting parties – the individuals and entities – and/or files of the respective land and/or buildings constructed. The register provides information on the condition of the circumstances specified after the latest entry and enables chronological monitoring of the changes to registered circumstances as well as registered acts. The Property Register holds a record of who owns the land and any rights or encumbrances established over the property, including the specific restriction of the owner's ability to deal with its title.

All notary deeds for the transfer of ownership or the creation, amendment, transfer, or termination of another limited property rights over immovable property, as well as all deeds recognizing such rights, must be registered with the Property Register. Registration consists of giving publicity to the above-mentioned deeds in order to make them opposable to any third party, thus providing the owner with a specific protection (priority/ranking is established from the date of registration of the respective deed).

The registration itself does not necessarily represent a guarantee of title. However, the right of the registered owner is assumed until the contrary is proven. The registration of securities is relevant in that the registration date ensures the effectiveness of mortgages and distrains, as well as their priority ranking against other subsequent creditors.

## Notary role in the real estate transactions

Every notary deed for the transfer of ownership or the establishment of a limited property right over real estate is issued by a notary in the region where the real estate is located. The notary must register the notary deed with the respective local office of the property register on the same day the notary deed is signed.

Upon issuing the notary deed, the notary has the obligation to identify: (i) the parties and their capacity; (ii) whether the grantor owns the respective real estate (their title over the property and/or other property rights); and (iii) whether the special requirements for the transaction are fulfilled. However, the notary is not obliged to review the title history.

As a general rule, the title of the current owner depends on the rights of the predecessor, while the right of the predecessor, in turn, depends on the title of their predecessor. If one of the previous owners did not have undisputable title, this may allow an entitled third party to make a claim against the current owner. The possibility of a third party to challenge the current owner's title successfully is precluded by a prescribed period of possession (five years of continuous possession of the property if it is exercised in good faith or 10 years of continuous possession without any good faith requirement). It is therefore highly recommended that the buyer undertakes a full review of the current and historic titles before purchasing real estate.

## Legal responsibility of the seller in real estate transactions—contractual representations and warranties

In an asset deal, the seller is liable for:

- Eviction (i.e., total, or partial loss of title) – if the sold property belongs entirely to a third party, the buyer may declare the sale invalid.

In such a case, the seller must return the price paid to the buyer and cover the costs incurred by the latter for the transaction execution, as well as the necessary and useful costs for the real estate. Should only part of the sold property belong to a third party, or should the real estate be encumbered with rights of a third party, the buyer may bring an action for invalidation of the sale and claim compensation for damages. If invalidation fails, the buyer may ask for a reduction of the price and incurred damages.

- Defects of the real estate—the seller is liable if the sold property possesses defects which significantly reduce its price or its expected use or as envisaged in the sale-purchase contract. The seller is not liable for defects which were known to the buyer at the time of the sale. The seller is also liable if they were unaware of the defect as an agreement discharging the seller from liability is considered invalid.

Generally, the seller gives the following representations and warranties: (i) validity of title; (ii) lack of litigation; (iii) conditions of the asset; (iv) local taxes, fees, utilities, etc. paid.; (v) disclosure of due diligence information; (vi) technical situation of the asset (including equipment); (vii) environmental obligations; (viii) fiscal registration; (ix) validity of its corporate approvals; and (x) lack of insolvency/over indebtedness, bankruptcy, and liquidation procedures initiated against.

Before the transfer of ownership, establishment of encumbrances, or other limited property rights, a declaration regarding the lack of due and payable taxes must be provided by the transferor, the person who establishes the right, or the mortgagor.

## Mortgages

The mortgage's constitution is effective upon the conclusion of a mortgage notary deed (or the application for registration of a legal mortgage) and registration of the mortgage with the property register.

The notary deed for establishment of a mortgage must contain a description of the real estate, the mortgagor and mortgagee, the owner of the real estate if it is established for a third party's debt, the secured receivables, its maturity date, the amount of the interest and the amount of the secured debt, among other requirements.

The mortgage contract is necessary because it presupposes a secured debt. The mortgage follows the secured receivables when they are transferred and is terminated if the receivables are terminated. To have effect, the assignment of receivables secured by a mortgage, pledging of such receivables, novation, and substitution of obligations secured by a mortgage must be in writing, with the signatures certified by a notary public and registered with the Property Register.

The registration of a mortgage is valid for 10 years, but may be extended if the registration is renewed before the expiration of the term. If the renewal is registered after the expiry of the 10 years, the legal effect of the mortgage will be restored, but it will have a new priority/ranking from the date of its renewal.

## Lease of assets and lease of business

The general framework applicable to lease agreements is given in the Obligations and Contracts Act (OCA).

### Lease term

Commercial leases (for example retail leases) can have terms exceeding 10 years. Non-commercial leases cannot have terms longer than 10 years. Whether a lease is commercial is determined by the classification of the parties to the lease agreement—if the parties are traders/commercial entities and if they act in this capacity, then the lease is deemed to be commercial.

Under the law, if after the expiry of the lease term the tenant continues to occupy the leased premises with the knowledge and without the objection of the lessor, the lease agreement is deemed to have extended for an undefined term but may be terminated by either party by giving a one-month written notice. If the lessee continues to use the leased premises despite the lessor's objection to the use, the lessee must compensate the lessor and perform all of their obligations as per the terminated lease agreement.

### Form of the lease and protection of the lessee in case of transfer of ownership of the leased real estate

Bulgarian law does not require a specific form for lease agreement. The lease agreements are often simply signed. They could be also notarized with certifications of the signature of the lessor and the lessee, in which case the parties can register the lease agreement with the Property Register.

In the event of a transfer of the ownership of the leased real estate and if the lease agreement is notarized, the lease agreement will be binding for the transferee of the leased real estate until the end of the lease term, but not for more than one year after the change of ownership. If the lease agreement is registered with the Property Register, the lease agreement will be binding for the transferee of the leased property for the full period agreed under the lease as per its terms and conditions. However, if the lease agreement is simply signed, in the event of a transfer of the ownership of the leased property, the lease agreement will be considered as active for an indefinite term and the transferee of the real estate will be entitled to terminate it with a one-month notice.

## Sublease

If not agreed otherwise, the lessee may sublease parts of the leased property without the consent of the lessor. Nevertheless, even in this case, the initial lessee is not discharged from its obligations under the lease agreement.

## Typical conditions that may be included in a lease agreement

The parties to a lease agreement are free to determine their rights and to undertake other obligations beyond the main ones under the OCA. Typical provisions of the lease agreement may include: (i) an arrangement on the frequency of the lease payments (usually monthly, but any other arrangements are possible); (ii) a guarantee for the obligations of the lessee (the most common are bank guarantees and cash deposits); (iii) indexation of rent; (iv) maintenance and repair (unless agreed otherwise, non-material internal and external repairs due to normal wear and tear are at lessee's expense, and all other repairs (if they are not the lessee's fault) are at the lessor's expense); and (v) insurance.

## Administrative permits applicable to construction or restructuring of assets

All constructions and restructuring of real estate assets are done in accordance with the Spatial Development Act (SDA). The initial stage of the project development process is an effective Detailed Development Plan (DDP). The existence of a proper DDP is a prerequisite for drawing up the project design, changing the purpose of the land (where necessary), signing preliminary agreements with utility companies, executing the investment design, obtaining a construction permit, and starting construction works. A DDP transforms the unregulated land into regulated land by fixing its borders and providing access (in the form of a road, street, or other access). The DDP also determines the requirements for construction, such as the general and specific designation of the land, and the building indices (e.g., density, intensity, green yard area, and height of the buildings).

The beginning and the realization of the construction is to be carried out in accordance with the approved investment projects, DDPs, and under the conditions specified in the SDA. On the basis of the approved designs, the investor may apply for a building permit. To obtain a building permit, the investor must apply to the relevant authority, along with the following documents: (i) ownership title/construction right documents; (ii) design visa (if applicable); (iii) preliminary agreements with utility companies; (iv) copies of the valuated project design; (v) environmental assessment (if necessary); and (vi) approvals from the controlling authorities (if applicable), etc.

The permit should be issued within seven days from the application submission. The permit expires if construction has not started within three years of the issue date or if the core-and-

shell construction has not been completed within five years. However, it can be re-validated within three months prior to its expiry for a fee of 50% of the initially paid building permit fee. This re-validation may only be performed once.

After the building is constructed, it has to be put into operation. Buildings can only be used if the conditions envisaged in the construction permit have been met. Permits for the use and occupation are related to the real estate and are not personal. Acceptance trials may also have to be successfully completed for the construction of manufacturing facilities or other buildings with specific uses to be deemed completed. The official document that proves that the construction has entered into operation is the use permit or certificate for entering into exploitation, depending on the category of the construction.

## Environmental and energy

### Environmental requirements

Among the primary legislation governing environmental protection, the following legal acts regulate environmental issues: Environment Protection Act; Protection of Agricultural Land Act; Water Act; Forestry Act; Biological Diversity Act; Protected Areas Act, etc. There are also a significant number of secondary legislation in operation. The authority responsible for environmental protection and pollution prevention at national level is the Regional Inspectorate for Environment and Water with the Ministry of Environment and Water of Bulgaria.

The liability for pollution of real estate and respective waste removal is regulated according to the principle of causal responsibility (or "polluter pays" principle). Environmental legislation generally provides for administrative liability for violation of environmental protection legislation and ecological requirements. The individual/entity that has committed the violation (i.e., breached the legislation/requirements) is liable for these fines. The legislation also provides for general civil law liability for damages by referring to the rules of tort.

### Energy requirements

The assignors of the new building must obtain an energy performance certificate for the new building prior to entering into operation in accordance with the Energy Efficiency Act.

The energy performance certificate of a building already in operation must be updated if the building has gone through major reconstruction or renovation which has resulted in a change to the energy performance of the building.

New environmental, social and governance (ESG) regulations are gradually coming into effect in the EU. The European Commission (EC) adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD), replacing the EU's Non-Financial Reporting Directive (NFRD). The CSRD covers all relevant ESG elements and

aims to increase investments in sustainable activities across the EU. The CSRD imposes more reporting obligations, but also expands the list of entities and areas covered by reporting. A significant change will be the obligation for all large companies that meet certain financial and employment criteria, and not only for listed companies. The new directive should be adopted by the member states and implemented into the national legislation.

## Taxes and expenses applicable to sales of real estate

The following fees and taxes must be paid if a purchaser acquires the real estate (an asset deal) directly: (i) a notary fee at a special tariff, capped to approximately EUR 3,000\* (USD 2,998,174\*), net of VAT; (ii) a state fee for registration with the Property Register of 0.1% of the purchase price or the tax value as determined by the municipality if it is higher; and (iii) local transfer tax ranging from 0.1% to 3% (the exact rate depends on the municipality where the respective real estate is located) on the agreed price or on the tax value as determined by the municipality if higher. In principle, the sale of buildings less than five years old, the land adjacent to them, and a regulated plot of land are subject to 20% VAT. The sale of buildings older than five years, the land adjacent to them, and of land other than regulated plots of land are exempt from VAT. The seller is given the option to charge VAT.

In the event of a share deal, a notary fee at a special tariff, capped to approximately EUR 3,000\* (USD 2,998,174\*), net of VAT for certifying the share transfer agreement with respect to a limited liability company–OOD and a relatively small fee for registering the share transfer with the Commercial Register must be paid, but payment of state fees for the registration of the real estate transfer with the Property Register and local transfer tax will not be due. The sale of shares in OOD and AD will be a VAT exempt supply.

\*According to the 15 September 2022 exchange rate

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# Chile



# Real Estate Law in Chile

## Overview of the Chile Legal System

### General introduction to main laws that govern acquisition of assets in Chile-real estate rights

In Chile, ownership over a real estate property can be obtained through one of four methods provided by law, which are regulated in the Civil Code ("CC") in its Article 588 and follow: (i) transfer; (ii) inheritance; (iii) accession; and (iv) adverse possession. Each is briefly explained below.

#### **Transfer**

The main method of acquiring ownership of real estate property is by transfer (Article 670 CC), which is performed or completed with the registration of the relevant deed in the Property Registry in the area where the real estate is located. The transfer of real estate property requires a previous contract capable of justifying it, which is usually a purchase agreement (although it could be a donation, capitalization into a company or other), which must be executed by public deed. The public deed is a requirement that generates the contract or solemnity itself, and therefore, if missing, the contract will be absolutely null and void (Articles 1682, and 1701 CC), or even non-existent, since for the legislator, the public deed is the only way to express consent for these types of agreement. All agreements regarding real estate must be executed by public deed.

In summary, ownership is not created by the mere fact of having signed the deed of sale (which must be granted by public deed), but upon registration in the corresponding Property Registry (Transfer). Once registered, i.e., once the transfer (the way of acquiring the domain) has been completed, ownership is established.

#### **Inheritance**

Real estate property is also acquired through inheritance, whether by cause of a testament or a mandatory legal provision. In this case, the successors must register their acquisition in the Real Estate Registry before disposing of it. This ensures that the registry is kept up to date.

#### **Accession**

Accession is a method of acquiring ownership of goods that have been subsumed into others. The basic principle in accessions is that the minor or accidental good is subsumed by the main or principal, and thus the owner of the latter acquires ownership of the former through accession, after paying the relevant compensation according to the circumstances. Building on someone else's property is a typical scenario in which accession applies. Accession rules can be amended by a contract.

#### **Adverse possession**

Real estate can also be acquired through adverse possession, by continuously occupying the property for a period of 10 years. This period can be shortened to five years if the occupation has been initiated in good faith.

It is important to note that in the case of real property, occupation to these effects requires having registered the property under the occupant's name, notwithstanding if an actual occupation has occurred.

Adverse possession is a key feature in analyzing real estate titles, as an ownership certificate from the Registrar that shows registration for a period of 10 years is enough to certify ownership. Therefore, any title analysis will require registration and title for transfer for the last 10 years.

## Acquisition structure usually applied in real estate transactions; restrictions—if any—applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

The “structure” in transactions involving the acquisition of real estate refers mainly to the title and the mode of acquisition. One of the most common modes regarding the title of ownership is the contract of sale, which is granted through a public deed (this means that it is executed before a notary public). The purchase and sale are defined in Article 1793 of the CC as “a contract in which one of the parties undertakes to give an item and the other to pay for it in money. The former is said to sell and the latter to buy. The money that the buyer gives for the item sold is called price”. However, it is not simply the contract of sale that creates ownership, but the previous antecedent will enable acquisition of ownership.

On the other hand, there are two very important moments in this type of transaction (referring to the mode), which are: the real agreement and the transfer itself, which is completed in Chile with the registration of the purchase/sale in the Property Registry. In summary:



As for restrictions, Chile is not known for restricting the acquisition of real estate. Moreover, Forbes magazine ranked Chile in 2019 among the four best places to buy a house abroad. According to the Internal Revenue Service instructions, “in order for a foreign tourist to buy real estate in Chile, they must first obtain a RUT number.” This document is a tax identification number that, together with the passport, will allow the person to act before the various institutions involved in the process of buying and selling the property: notary’s office, Property Registry, brokers, among others. There are other stipulations that, although not legal, may be required by the financial entity that grants a mortgage, such as the accreditation of income in the country or the certificate of definitive residence. Notwithstanding, there is a prohibition in Chile on the acquisition of real property rights by foreigners in frontier areas, pursuant to Article 7 of Decree Law No. 1,939 of 1977, nationals of countries bordering Chile (Peru, Bolivia, and Argentina) are prevented from acquiring ownership and other real property rights, or exercising possession, or holding of real property located totally or partially in the areas of the national territory declared frontier areas. This prohibition extends to companies or legal entities whose principal place of business is in the bordering country, or whose 40% or more of capital is owned by nationals of the same country or whose effective control is in the hands of nationals of those countries.

## Real Estate Registry system

Real Estate Registries are institutions that keep the registry system of properties in Chile. These institutions oversee lawyers who serve as ministers of faith (Article 446 Código Orgánico de Tribunales or “COT”), safeguarding and updating the real estate conservatory records in order to maintain the history of the real estate property and provide complete publicity to the encumbrances that may affect the real estate.

This system has produced a complete registry of land ownership in the country, which enables analysis of the history and titles of any real estate and be guaranteed about the rightfulness of its ownership. The registration alone, however, is not complete proof of ownership, as there could be shortcomings on the titles which may lead to eviction.

In them, a team of officials study the legality and grant validity to the property titles, considering the registration as a requirement, proof, and guarantee of possession.

## Notary role in the real estate transactions

Notaries are described in Article 399 of the COT as “ministers of public faith in charge of authorizing and keeping in their files the instruments that are granted before them, of giving the interested parties the testimonies they request, and of practicing the other diligences that the law entrusts to them”. One of the functions of the notaries, according to Article 401 N°1 of the COT, is to issue public instruments and as mentioned above, one of the solemnities of the purchase and sale contract in Chile is that it is granted through a public deed. The public deed is the public or authentic instrument granted by the competent notary in a legal manner and incorporated into its protocol or public registry. This is where the main role of the notary lies in the purchase and sale of real estate in Chile; it is the notary who extends and before whom the public deeds containing the purchase and sale contract are executed. In addition, they are the ones who keep and preserve “in strict chronological order the instruments that are granted before them, in order to prevent any loss and make their examination easy and expeditious” (401 N°7 COT) and facilitate any person who requests it, “the examination of the public instruments that are granted before them and documents that they notarize” (401 N°9 COT).

Usually, notaries do not draft the public deeds, although they can, but they are instead drafted by the lawyer responsible for the transaction.

## Legal responsibility of the seller in real estate transactions—contractual representations and warranties

The seller's essential obligations are:

- the delivery or transfer, and
- to cure concealed defects or eviction of the item sold (Article 1824 CC).

### Obligation to deliver the item sold

The delivery of the item sold is made by transfer, the purpose of which is to confer to the buyer the legal and material possession of the item referred to in the contract. In the case of real estate, as stated above, the transfer is completed with the registration in the respective Property Registry. This registration gives the dominion and legal possession of the item, which only ceases with the cancellation of the registration. For the Chilean legal system, this is the only accepted form to acquire or transfer the ownership of real estate, and if this registration is not made, the legal delivery of the item is not carried out.

On the other hand, it is necessary to distinguish when the material delivery of the item is understood to be completed, since it may not be at the same time as the legal delivery. For the obligation to deliver that the contract of sale imposes on the seller to be deemed fulfilled, it is required that: 1) there is a real intention to deliver the item to the buyer and an intention on the part of the latter to acquire it; 2) the registration of the contract is verified, that is, that the seller divests themselves of all the rights they have over the item; 3) the seller abandons it completely so that the buyer can use it; and 4) the buyer is in a position to exercise over it all the functions of an owner, that is, they receive the real, de facto, effective possession of the item.

The legal transfer of the real estate, therefore, is not enough; the seller must also put the item at the disposal of the buyer, which means that the seller abandons the property and stops performing acts of lord and owner over it.

### Cure of concealed defects or eviction of the item sold

This obligation is based on the fact that if someone buys an item, it should be useful to them, i.e., they should be able to use it according to its nature and possess it with the peace of mind, without being disturbed from its possession. Basically, this obligation consists of guaranteeing the buyer a peaceful and quiet possession of the item being sold and a useful possession. That is to say, the buyer must not see their possession disturbed by legal actions brought by third parties with respect to the item sold and that the item does not have hidden defects that make its use by the buyer impossible. It is precisely these two aspects to which Article 1837 CC refers when it establishes that the obligation of cure includes: cure of eviction and cure of concealed defects.

## Mortgages and other usual guarantees adopted in financing assets

The most common method used in Chile for the acquisition of real estate is financing through mortgage loans granted by financial institutions, such as banks or authorized financial institutions.

Naturally, these institutions need to guarantee the payment of such credits and for that purpose the most used figures are: The mortgage and the prohibition to encumber and alienate.

The mortgage (Article 2407 CC) is especially important because it is the most frequently used security, and it is considered the one that provides the creditor with the most guarantees, since real estate is difficult to destroy and generally does not lose value.

On the other hand, all real estate mortgaged in favor of financial institutions must be backed by an appraisal or certification of its value, carried out and signed by persons who are qualified in the matter, preferably outside the bank and, in any case, independent of the debtor. In this way, the banks ensure that the price of the mortgaged property is sufficient to guarantee the value of the loan in case of a foreclosure due to non-payment.

In addition to the mortgage, the banks and financial institutions that grant these loans register a prohibition to encumber and alienate the real estate. In practice, these are impediments to transfer or sell a real estate property without the prior consent of the bank or financial institution in whose favor the prohibition is granted.

Both the mortgage and the prohibition must be registered in the corresponding Real Estate Register; in the Registry of Mortgages and Encumbrances, and in the Registry of Interdictions and Prohibitions of Disposal, respectively.

## Lease of assets (“Contratto di Locazione”) and lease of business (“Contratto di affitto d’azienda”)

Lease agreements are regulated by Article 1915 and following the CC, by Act 18,101 about the lease of urban property and by specific laws regulating leases in rural areas.

The lease agreement is defined as an agreement through which two parties undertake reciprocal obligations, one to concede the use of an item, and the other to pay a price for it.

The obligations of the lessor are:

- To deliver the leased property;
- To maintain the property in a state for its proper use; and

- To pay the rent; and
- To return the property at the end of the lease agreement.

The lease agreement may terminate:

- By the destruction of the property;
- By the expiration of the stipulated time of lease;
- By the extinction of the right of the lessor; and
- By court decision.

### Formalities and enforceability toward third parties

Ground lease contracts for urban areas do not require a special formality for their enforcement. However, executing a ground lease through a public deed has an important effect, as any third party that acquires the ownership of the property will be bound by the lease. Furthermore, if the lease contract is registered in the Real Estate Register, then even creditors guaranteed by mortgages created after the lease are obliged to recognize the agreement.

On the contrary, if the lease has not been executed through a public deed, then a third party acquiror is not bound by the contract and is entitled to eject the tenant. The tenant will have no more recourse than to claim damages from the original landlord.

In rural areas, the law requires ground leases to be executed through a public deed or before two witnesses. In both cases, a possible acquiror is bound by the contract.

### Administrative permits applicable to construction or restructuring of assets

Chile's smallest administrative divisions are communes, which are locally governed by a municipality. The head of a municipality is the mayor or *alcalde*, which is an elected position.

Municipalities, and specifically their construction departments (DOM), are responsible for managing construction permits within their limits. The rules for construction permits are set, in general, in the General Law of Urbanism and Construction, but each municipality is entitled to specify detailed requirements within its urban area through a specific body (*Ordenanza Municipal*).

Pursuant to the General Ordinance of Urbanism and Construction Act, the construction, reconstruction, repair, alteration, extension and demolition of buildings, and urbanization works of any nature, whether urban or rural, will require a permit from the relevant DOM, at the request of the owner, with the exceptions indicated in the General Ordinance. The Director of Municipal Works will grant the permit or the required authorization if, according to the accompanied antecedents, the projects comply with the urban development

regulations, upon payment of the corresponding fees (Article 116 OGUC).

After finishing the works, the municipality certifies that the actual building matches the construction permit, and in such case, issues a final approval certificate (*recepción definitiva*).

### Environmental and energy

Currently, for the construction of houses and apartments, real estate and construction companies must submit to the Environmental Impact Assessment System (SEIA), which is an environmental management instrument for the evaluation and prediction of the environmental impacts that may be generated by projects and activities carried out in the country and that is legally required to be evaluated. In other words, any project or activity likely to cause an environmental impact, including its modifications, can only be executed or modified after an evaluation of its environmental impact through the presentation, as appropriate, of an Environmental Impact Statement (EIS) or an Environmental Impact Assessment (EIA).

The Environmental Impact Statement is the descriptive document of an activity or project to be carried out, or of the modifications that will be introduced, given under oath by the respective owner, the content of which allows the competent agency to assess whether its environmental impact complies with the environmental regulations in force.

The Environmental Impact Statement is part of the Environmental Impact Assessment System (SEIA), which is a management instrument designed to prevent environmental deterioration due to the execution of investment projects in the country. The Environmental Impact Statement is addressed to the owners of those investment projects that are likely to cause environmental impact. These projects are specified in Article 10 of the Environmental Bases Law, without prejudice that the owners of those projects that are not included in the lists may voluntarily submit for environmental assessment.

In the case of EIAs, we are also allowed to determine whether the project or activity is responsible for the environmental effects it generates, through the application of appropriate mitigation, repair and/or compensation measures.

After the evaluation process, the Evaluation Commission of the respective region, or the executive director of the Environmental Evaluation Service (SEA), depending on whether it corresponds to a regional or interregional project, issues a resolution that environmentally qualifies the project.

## Direct taxes applicable to sales

### Value added tax ("IVA" in Spanish)

With the Tax Reform of 2014, the tax treatment between furniture and real estate was equated, which resulted in a redefinition of concepts such as "sale" or "seller", in the sense that now a seller would be someone habitually engaged in the sale of tangible property, whether movable or immovable. Habituality is presumed to exist when a period of less than or equal to one-year elapses between the acquisition or construction and the disposal. However, the application of the VAT on older properties must be studied for each transaction.

### Income tax

The tax reform partially limits the exemption to the profits obtained in the sale of real estate, which will be available only to individuals with domicile or residence in the country. In these cases, the tax would be applied on the difference between the sale price and the cost, considering the improvements, with a total and cumulative limit of 8,000 UF/USD 239,382.42 (the value of 1 UF, amounts to 33.099,99 Chilean pesos/USD 990.47\*), regardless of the number of disposals made and the number of real estate properties of the taxpayer, with the excess being taxed according to the general rules, or with a single and substitute tax of 10% on the basis of the income received, as per the selection of the taxpayer/seller. Simply put, any sale of real estate that generates profits in excess of UF 8,000 (USD 239,382.42\*) must pay tax. If the gain is less than this amount, it will be registered and added to the gains obtained in a new operation. The UF 8,000 (USD 239,382.42\*) cap is not limited to the sale of a single house but is accumulated during all the sales made by the person. Upon reaching UF 8,000 (USD 239,382.42\*) or more, the income tax must be paid.

### Stamp tax

Considering that most of the real estate sales and purchases in Chile are financed through mortgage loans, it is important to point out that with the tax reform, the rates of this tax were increased, with its maximum rate being 0.8% of the value of the loan. That is to say, the operations that were financed through mortgage loans will have to pay "mutual tax", which can be reduced depending on whether the property is economic or social housing.

\*According to the 15 September 2022 exchange rate

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# Croatia



# Real Estate Law in Croatia

## Emerging Markets and new asset classes in the Croatia

### Investment market overview

- The total transaction volume of commercial real estate was around EUR 700 million (USD 730,621,666\*) in 2021, a year-on-year growth of 40%. Volumes, though robust, failed to underscore the true scope of demand, as investor interest is meeting limited supply.
- Geographically, transaction activity was strongest in Dalmatia with approximately 40% of the total volume, while Zagreb accounted for approximately 25% of total CRE transaction volumes. Core and core+ properties were most sought after; however, a substantial share in 2021 volume was taken by value-add properties.
- Office and logistics assets are still the primary focus for many investors, but the majority of the transaction volume was recorded in the hotel and retail sectors where there was more supply. The retail sector was especially vibrant in the second half of the year, with several portfolio and single-asset deals.
- Resilience and quick recovery of Croatian tourism was reflected in high demand for hotels, albeit at highest bid-ask spread among all property types. Achieved prices remained similar to pre-COVID levels, showing disconnect to stock market prices and proving strong investor confidence in the hospitality, travel, and leisure sector.
- Foreign capital accounted for 75% of transaction volume. The largest transaction in 2021 was the acquisition of Sunce Hoteli (BlueSun Hotels and Resorts brand) by UAE-based private real estate investment and development company, Eagle Hills. Domestic institutional investors (pension funds and insurance companies) continued increasing their allocation to commercial real estate. Last year, they made up almost 20% of total market transaction volume, with several deals in the office, hotel, and logistics sectors.

By **Vedrana Likan**, Managing Partner, Colliers (Croatia, Slovenia, BiH)

# Overview of the Croatian Legal System

## General introduction to main laws that govern acquisition of assets in Croatia - real estate rights

The main act governing property title in Croatia is the Act on Ownership and Other Real Rights ("Ownership Act"). It defines the right of ownership and other real estate related rights (such as servitudes, real burdens, the right to build liens); restrictions and termination of ownership; acquisition, protection, and termination of ownership, as well as of other rights in rem. This act introduced a novelty into the Croatian real estate system in 1997 - the principle superficies solo cedit, i.e., that the plot of land and everything permanently attached to it (either on the surface or beneath it) forms one real estate. There are some practical exceptions to this rule, specifically a building built based on a right to build (in Croatian: "pravo građenja") or a concession right is considered to be separate from the land on which it is built for as long as such right to build or concession exists.

Apart from the above, the (i) Land Registration Act primarily governs the title registration procedure and mortgages, (ii) the Civil Obligation Act regulates lease agreements in general, while (iii) the 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.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

Real estate transactions are commonly structured as share and asset purchase deals, mostly depending on the tax treatment and specific circumstances of each transaction. Real estate is also often converted into a company's share capital, i.e., the owners of the real estate may trade their ownership of the real estate for a portion of company's shareholding structure.

The general rule regarding ownership over real estate is that its owner is authorized to use the real estate (and all benefits arising thereof) as the owner deems fit and to exclude any other person from it unless it is contrary to the other person's rights or limitations imposed by law. However, all owners are bound by the

duty of care while exercising their ownership rights and are not allowed to exercise their ownership rights with the sole purpose of damaging others.

Additionally, the owners of real estate are limited as follows:

- No owner may prevent a third party's acts on such a height or depth of its real estate, where the owner has no reasonable interest to exclude such undertakings;
- Certain types of real estate that are generally exempt from private ownership (the so-called common things, e.g., air, water in rivers, lakes, sea, and maritime domain as defined by the respective law) and cannot be an object of the ownership right;
- Owners of certain types of land (identified as goods of interest for the Republic of Croatia) can be limited in their ownership rights by corresponding regulations, e.g., owners of agricultural land, cultural goods, or forests;
- 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; and
- Foreign natural persons and legal entities (not being citizens of the European Union (EU) or entities from the EU) may acquire ownership of real estate in Croatia under the condition of reciprocity, subject to obtaining prior approval of the Croatian Minister of justice. Generally, in terms of the latter, citizens of the EU and EU legal entities are considered as equal to Croatian citizens, subject to certain exceptions (e.g., regarding agricultural land).

## Real estate registry system

Croatian properties are registered dually, both in (i) the cadastral registry and (ii) the land registry.

The cadastral registry, under the jurisdiction of the State Geodetic Administration, is a land plot registry containing data about the surface area, buildings and other monuments that are built on or under the plot, information on the special legal status of the plot (if any), and the data about possessors of the registered plots.

The land registry, held by the local municipal courts, is the registry of the land plots and their legal status. As for the timing of the acquisition of real estate, (i) the title over real estate acquired in a transaction is confirmed (i.e., legally effective) only once it is registered in the competent land registry, whereas (ii) in case the real estate is acquired based on a decision of a court or some other authority, the transfer of title is effective from the day the decision became legally valid and binding (in Croatian: "pravomoćna"). Generally, land registries are publicly available and the only relevant source of information on the legal status of a real estate, meaning that if the data from the land registry are not aligned with the data from the cadastral registry, data from the land registry will be considered relevant.

### Notary role in the real estate transactions

According to the Land Registry Act, registration in the land registry may only be permitted based on a (i) public deed or (ii) a private deed including a notarized signature of the transferor. This is subject to certain exceptions when the law requires the registration to be made based on a notarial deed (e.g., disposal of real estate owned by a minor, in case the transaction is entered by a deaf person who cannot read or mute who cannot write, or if the real estate is given as a gift but the possession is not transferred simultaneously).

If a transaction is made via a proxy authorized by a power of attorney (either on the side of the transferor or the acquirer), the signature on such a power of attorney also needs to be notarized.

Notaries will also notarize the owner's signature on a mortgage agreement, or even certify the whole agreement if it contains an enforcement clause which enables the creditor to go directly into an enforcement procedure in case of breach by the debtor. The same goes for the power of attorney if the mortgage agreement is concluded through a proxy. If there is no such clause in the agreement and the debtor is disputing the payment due, the creditor will have to go through the civil proceedings prior to being able to enforce over the real estate to settle its receivable.

### Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

Regarding the general legal responsibility of sellers towards buyers, the main principles are in the Obligations Act — the duty of cooperation, duty to act in good faith and prohibition to cause damages. The seller is also liable to the buyer for the material and legal defects of the real estate as in any other sale and purchase transaction.

Historically, it was not customary to have any specific representations and warranties in real estate purchase

agreements, presumably as the seller is always liable for legal and material defects under the law, so that the parties relied on that liability. The practice is still followed for the sale and purchase of apartments where it is quite rare to see any provisions regarding the seller's liability other than general liability under the law.

Contrary to the above, commercial real estate transactions now usually include a set of more or less extensive representations and warranties (e.g., warranties on the sellers' authority to enter into the subject transactions, no pending litigation, no environmental contamination etc.). This is triggered by the need to regulate the contractual relationship in a clear and straightforward way considering that if the purchaser is aware of any defect, the seller should not be liable for it unless it specifically warrants for such a defect. In other words unless the seller specifies it as a warrantee, and claims that the buyer knew about the defect through due diligence, the seller can be released from liability. Moreover, if there are representations and warranties, it is easier to prove which features of real estate are expressly agreed between the parties, thus triggering the seller's liability under the law which could, in the absence of such provisions, be left for interpretation by the court.

### Mortgages and other usual guarantees adopted in financing assets

Under Croatian law, a mortgage is constituted by its registration in the competent land registry. The mortgage may be included in the loan agreement or executed as a separate agreement. If the loan agreement is a separate document, it is in principle delivered with the mortgage agreement to the competent land registry. In addition, the mortgage agreement usually contains an enforceability clause which enables the mortgage lender to initiate enforcement procedure before a competent court without having to obtain a judgement beforehand in separate judicial proceedings.

Another common form of a guarantee is a debenture bond, a private document of a debtor certified by a notary public by which the debtor gives permission to the creditor to collect the amount owed in case of non-fulfillment of obligations from the contractual relationship provided by the debenture bond. As such, the debenture bond is an enforceable document, meaning the creditor can directly submit the debenture bond to the Croatian Financial Agency for collection purposes.

### Lease of assets and lease of business

The general act regulating lease agreements is the Civil Obligations Act, while there are several regulations governing lease agreements for special types of items (e.g., agricultural land, business premises, ships).

The primary act regulating business premises is the Lease and Sale of Business Premises Act. The definition of business premises includes business buildings, business rooms, and garage space. To be valid, a lease agreement should be concluded in writing. If the business premises are under the ownership of the Republic of Croatia (or its local/municipal government), it is leased through a public tender.

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.

### Administrative permits applicable to construction or restructuring of assets

The main laws governing zoning and construction are the Building Act, Zoning Act, and Illegal Buildings Act. The Building Act regulates the design, construction, use and maintenance of buildings, implementation of administrative and other procedures in connection with environmental protection, and 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. The Zoning Act regulates zoning plans (adoption and implementations), formation of building plots, and supervision, while the Illegal Buildings Act regulates the legalization of illegally constructed buildings.

The following permits are required for the use of real estate: (i) 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); (ii) building permit; (iii) use permit; (iv) and minimal technical conditions (e.g., for hospitality, commerce, and tourism).

For a building in Croatia to be considered legally built, it should have a legally valid building permit and a use permit confirming that the construction was done in line with the corresponding building permit. Conversely, an illegally built building is one built fully or partially (e.g., by dimensions in excess of those stated in the building permit issued by the public authority) without an adequate building permit or without a use permit. Additionally, 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 another act prescribed by the rulebook.

### Environmental & energy – ESG rules and status of implementation

An investor is obligated to ensure that a new building obtains an energy certificate prior to putting it into use. The same obligation is imposed on the owners of used apartments or buildings, who are obligated to provide such a certificate when entering into a sale and purchase or lease agreement.

However, there are exceptions to this obligation, e.g., an energy certificate is not needed for the lease of real estate to a spouse or a close relative, for the lease of real estate with a useful surface area of less than 50m<sup>2</sup>, or for forced sales.

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

### Direct taxes applicable to sales

Supply of real estate in Croatia is subject to either VAT or real estate transfer tax (RETT). The applicable tax depends on the terms of the transaction, the seller's and purchaser's VAT status, and the features of the real estate concerned. If the seller of the real estate is not a VAT payer, RETT at 3% rate is applicable on the transaction, irrespective of other criteria. RETT is payable by the buyer and calculated on the market price at the time of sale. As an exception, RETT is not due on certain transfers of ownership specified in RETT legislation (e.g., transfer of real estate as part of the statutory change recorded in the court register, such as mergers, acquisitions, demergers, etc.):

If the seller is a VAT payer, VAT is paid on the supply of (a) building land, and (b) a building or its parts and land on which it stands, provided that the time from the first ever occupancy until the next supply is less than two years. VAT exemption applies to (a) supplies concerning any land, apart from the building land and (b) buildings (or their parts) and land they stand on, provided they have been used for longer than two years. In that case, RETT is due by the purchaser, unless the option to tax (by VAT) the supply which is normally VAT exempt is exercised at the moment of sale. This option is available to the seller of the real estate, provided that the buyer is a taxpayer with the right to fully deduct input tax incurred in relation to the purchase of the real estate concerned.

In accordance with the provision of the RETT legislation, any transfer of property must be reported to the tax authorities. Should the transfer involve a public notary (by way of

solemnization of the agreement of drafting a public notary act), the notary is required to report each document that relates to such a transfer to the competent authorities (based on the location of the property) within 30 days. Courts and other public bodies are required to deliver their decisions concerning the transfer of the property to the competent tax authorities within 15 days, following the end of the month in which the decision became final. Irrespective of this, the VAT payer still needs to duly report the transaction in their VAT return.

If the document concerning the transfer of a real estate has not been notarized or issued by a court or other public body, the taxpayer (buyer or seller, depending on the VAT/RETT treatment applied) is obliged to report the transfer to the competent branch office of the tax administration within 30 days.

If the seller is private individual, personal income tax implications should also be considered. The disposal of real estate is subject to property income tax when the seller is a private individual who has disposed of (a) real estate within two years from the acquisition date and/or (b) more than three pieces of real estate of the same type (e.g., more than 3 apartments, plots of land, etc.) during a five-year period. The five-year period is calculated from the disposal date of the first real estate. The personal income tax legislation, however, envisages some exceptions from the taxation of disposal of real estate (e.g., disposal of real estate that the individual used for living purposes). The taxpayer is a private individual who disposed of the real estate. The tax is charged at 20%, increased for surtax on the tax base that is the difference between sales price (i.e., market value) and purchase (acquisition) price, increased for the growth of prices of industrial products. The surtax is assessed based on the city/municipality where the private individual resides.

\*According to the 15 September 2022 exchange rate

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# Czech Republic



# Real Estate Law in Czech Republic

## Emerging Markets and new asset classes in the Czech Republic

The recovery of the Czech economy after the pandemic is slow. The economy is hampered by problems in the global supply chain and rising energy prices. In 2021, the economy grew by only 3.3%. In 2022, the Russian invasion of Ukraine delivered another shock to the Czech economy, resulting in further increases in energy and food prices. We estimate the growth of the economy to be only around 1% this year. These factors affected all real estate segments.

Overall, we can say that logistics and the industrial sector have become the “winners” throughout the foregone pandemic, which caused the increase in demand for warehouses by logistics and e-commerce companies. The corporate world has prevailed through the implementation of hybrid work in both middle-and-large-sized companies, which has affected occupancy and demand.

The residential market has seen a rapid development in recent years. Prices have risen significantly, which was caused by a combination of high demand driven by low interest rates and relatively low supply. Currently, rising interest rates in combination with high prices have led to the growth of the rental market, which attracts many investors.

The conflict in Ukraine has caused considerable uncertainty and caution in the market, which will likely be reflected in the number of transactions and volume during the year. For now, the market does not support a decompression of yields because of the conflict.

So far, after two years of decline, the Czech market has seen strong investment activity during Q1 2022, recording transactional volumes of EUR 912 million (USD 910 million exchange rates\*), which is 57% above Q4 2021 results and more than three-fold higher than Q1 2021.

By **Miroslav Linhart**, Partner, Deloitte Czech Republic

# Overview of the Czech Legal System

## General introduction to main laws that govern acquisition of assets in the Czech Republic. Real Estate Rights

There is a complex legal system of maintaining real estate property in the Czech Republic. The Czech legal system is divided into two main subsystems—public law and private law—which are independent of one another. The application of private law is independent of the application of public law and vice versa.

Public law determines public regulation regarding the preparation and realization of construction, respectively permitting procedures and stipulation of use for construction, while private law modifies relationships among private individuals concerning property rights and the preparation and realization of construction. Private law is the governing law for determining real estate transactions.

### Private law aspects regarding the realization of construction

After 50 years, as a result of Czech private law recodification, the Czech Civil Code<sup>1</sup> (CC) was published, replacing the communist-era civil law, which treated construction as independent objects, and paved the way for the return of the superficies solo cedit principle<sup>2</sup> to the Czech legal system. The real estate practice is still acclimating to using the CC.

It is necessary to consider each building as part of the plot of land where it is located so, legally, these structures are considered one object. Regulations address situations where, due to historical reasons, the construction and the plot of land have different owners. In such a scenario, the statutory pre-emption right of the owner applies. However, since the application of the recodification, it is possible to recognize the rights of a third-party owner. Parties might arrange for the developer to exercise the right of construction and allow them to build on another owner's plot of land. Importantly, the right of construction is temporary and can only be established for up to 99 years.

### Restrictions to ownership

An individual's right to ownership may be restricted by the rights of third parties related to the real estate property or in the public interest. Restrictions, such as easements, pledges, pre-emption

rights, and other rights of third parties to the real estate property may be stipulated. For these rights to be effective, they must be registered in the Cadastre of Real Estate, held in the Cadastral Office. Regarding public restrictions, these could be set up based on public acts or special laws, including expropriation, if the legal conditions are met or a legal pre-emptive right of the state for certain property due to the public interest.

### Restitution of property

Due to over 40 years of Communist rule, the settlement of the injustices committed during this time has been implemented into Czech law. The so-called restitution of real estate within the Czech Republic is bound to property that was unlawfully escheated by the Communist regime between 1945 and 1989. Restitution is provided for and primarily governed by the Restitution Acts. The restitution process is still ongoing, such as restitutions in favor of the Church.

Due to the various restitutions, it is necessary for investors to thoroughly check the legal status of their intended property acquisition to assure that the property is not the object of restitution from the Czech State Land Office ("Státní pozemkový fond") or the Office for Government Representation in Property Affairs ("Úřad pro zastupování státu ve věcech majetkových").

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

Real estate transactions may be performed as a (I) direct sale of real estate property ("asset deal"), (II) sale of the share of the real estate SPV ("share deal"), or (III) sale of business as a going concern. Presently, in the Czech Republic, share deals are more frequent. In case a transaction is realized via an asset deal, the parties must be careful to transfer the whole set of rights embodied to the property, including licenses, permits, etc. If they choose the share deal, the whole company is transferred, and there is a higher level of certainty that nothing was left behind. Another option 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.

<sup>1</sup> Act No. 89/2012 Coll., Civil Code, as amended.

<sup>2</sup> Under this principle, constructions connected to the plot of land are considered as being part of the plot of land.

In the Czech Republic, no general restrictions are currently applicable to foreigners or to specific areas of the country regarding the ownership of the real estate property.

## Real estate registry system

Rights to real estate must be registered in the Cadastre of Real Estate, a public register which has a publicly accessible database. The effectiveness of agreements concerning real estate property is bound to the registration of the agreement in the Cadastre of Real Estate. Transfer of an individual's ownership rights, or the establishment, change and termination of an individual's property rights are effective as of the delivery of the motion to the Cadastre of Real Estate based on the decision of the respective Cadastral Office. Further, registering an individual's rights with the Cadastre of Real Estate is important because of the principle of good faith or the material publicity principle to the Cadastre of Real Estate. If there is a discrepancy between reality and the entry in the Cadastre of Real Estate, then the protected entry is the one made by the individual who acted in good faith to demonstrate that the entry is right and true.

## Notary role in the real estate transactions

The notary can be very important once the share deal or sale of business as a going concern takes place. According to Czech law, if the transaction is in the form of a share deal or sale of the business as a going concern, the transfer must be registered in the Commercial Register. Registration can be done through an application to the register court or directly through a public notary. Registration by the notary is preferable for all parties since this method allows all parties to avoid any possible issues that may occur during court registration and is the fastest since notaries proceed with registration within one business day.

## Legal responsibility of the seller in real estate transactions: contractual representations and warranties

### General liabilities of contractual parties

Unless otherwise stipulated in the contract, the seller and buyer of a property have rights that they are owed and duties that they owe each other. Also included are the warranties on the property, as stated in the CC. The CC provides the buyer with a five-year Statute of Limitations to bring in a latent property defect claim and, if proven, requires the seller to provide adequate compensation.

A special kind of liability is the pre-contract liability under the CC. Pre-contract liability applies whenever the party of a transaction is responsible for damages arising from the termination of ongoing negotiations without proper reason, abuse of

confidential information, and breach the duty to disclose the information. This situation may be prevented by stipulating on any preliminary agreements that will be legally enforceable in case of breach and assures parties that their claims will be fulfilled without any back out by the other party.

Lastly, proper due diligence should be considered as a necessary step during real estate transactions.

### Examples of a standard representations and warranties (R&W)

There are various R&Ws used during a transaction. The seller (and, to a very limited extent, the purchaser) should always stipulate regarding the R&W below. On some occasions, there may be some exceptions to the claim ("other than as disclosed").

#### Asset Deal

- R&Ws concerning the legitimate ownership of the property for a period of at least 10 years;
- R&Ws concerning the absence of any challenges, litigations, arbitrations, and execution proceedings regarding the ownership of the property;
- R&Ws concerning the absence of encumbrances on the real estate property other than those disclosed;
- R&Ws concerning the absence of contamination, pollution, or any environmental damage to the real estate property.

#### Share Deal

- R&Ws concerning the legal capacity to sell and transfer the shares to the purchaser;
- R&Ws concerning the accounting and tax obligations of the target company;
- R&Ws concerning the absence of any litigations, arbitrations, execution proceedings or administrative proceedings;
- R&Ws concerning the employees and obligations towards former employees;
- R&Ws concerning the property of the company in the extension mentioned above.

## Mortgages and other usual guarantees adopted in financing assets

Acquisitions of real estate property or shareholders' purchase agreements are very often financed by the banks; therefore, loans are mostly secured by the property through a mortgage, and by pledges over business shares and bank accounts.

When the mortgage affects the real estate property, it is necessary to have the written contract with officially verified signatures. Real estate mortgages are created by recording the

mortgage in the Cadastre of Real Estate. Therefore, their priority is assessed according to the time of the submission of the proposal for registration of such mortgage to the Cadastre of Real Estate. Mortgages recorded sooner are prioritized over the later ones in case of realization, which occurs when the debtor is unable to service the debt. To establish a pledge over the business share, a written contract with the officially verified signatures of the parties to be bound is obligatory. The pledge is effective after it has been recorded in the Commercial Register.

Besides a mortgage and a pledge, the prohibition of a disposition or encumbrance on the real estate property can be established in favor of the creditor. Those rights must be also registered in the Cadastre of Real Estate.

## Lease of assets and lease of business

### Leases of business premises

Czech law guarantees substantial freedom at the conclusion of a lease agreement for business premises. Except for a few mandatory provisions pursuant to the CC that cannot be excluded, there is a wide berth for individuals to formulate their own provisions. No stipulation regarding mandatory lease agreement forms for business premises is required. On the contrary, the lease of a residential apartment or house needs to be concluded in writing.

A lease may be stipulated for a definite or indefinite period. If not stipulated, then the legal assumption is that the lease has been agreed for an indefinite period. The same legal assumption applies for a period exceeding 50 years. Subleasing is possible only with the consent of the lessor. Unless renewed by implication or notice was sent by one of the parties, the lease in such scenarios would expire according to the original lease agreement. The notice period is three months in case of leases for definite period and six months in case of leases for indefinite period, unless stipulated otherwise.

### Break options

There are no legal limits for arranging any form of termination clauses. However, the termination clause cannot be against good manners. Further, the CC determines an individual's legal options as to when the lease agreement can be terminated, including when there is a physical on-site defect, usage of the premises breaches the conditions of the lease agreement, or breach of obligations otherwise stipulated in the lease agreement.

### Eviction of the tenant

The lessee could be evicted after a legally valid termination of the contract and based on prior notification (save for special exceptions or extenuating circumstances). It is common for

eviction clauses within standard arrangements to allow the landlord to, for example, store the property of the tenant off-site. If the tenant refuses to co-operate or physically obstructs the landlord to exercise their right to evict, then the landlord may file a lawsuit to evict the individual from the property. The lease agreement is enforceable and governed by the action of the respective civil court, meaning, after a court decision, the lessee could be evicted by state authorities. Other damages or unpaid rent are also enforceable after a court decision.

### Usufructuary lease

The Czech legal system has a long history of using usufructuary leases. These are a special form of lease that relinquishes an item to be used by an individual. Unlike a regular lease, the usufructuary lessee is also entitled to derive profits from the subject of lease. This kind of relinquishment has typically been used for farming and other agricultural land use; however, parties can also agree on using an usufructuary lease on a fully equipped hotel, restaurant, or operation of utility networks, all of which are more common.

## Administrative permits applicable to construction or restructuring of assets

### Public law and regulation

The most important public regulation for the preparation and realization of construction projects within the Czech Republic is the Building Act<sup>3</sup> and its associated and implementing legislation. The Building Act regulates construction, land-use planning, and development strategy for the whole region.

In 2021, a new Building Act<sup>4</sup> was adopted and is planned to take effect on 1 July 2023. The new Building Act will, among others, speed up the permitting processes, digitize the administrative proceedings, and unify the administration under one proceeding and one building authority. However, the new Building Act is still subject to changes even before its effectiveness.

### Land use planning

The first step for every intended real estate project should be the proper examination of a land use plan. The land use plan determines areas that are available for building and specifies further requirements to develop those areas. The land use plan is issued by the municipal authorities and is legally binding for the builder and the building. Trying to change the land use plan is a quite time-consuming process with uncertain results; however, it is possible. The public has equally substantial rights in this process, and it may cause project delays since they may initiate changes and hinder preparations for the new land use plan.

<sup>3</sup> Act No. 183/2006 Coll., on town and country planning and building code (Building Act), as amended.

<sup>4</sup> Act No. 283/2021 Coll., Building Act, as amended

## Permits

The next step is obtaining a permit from the Building Authority. Firstly, a developer is obliged to obtain a land-use permit containing conditions on the location of the building. Secondly, the developer applies to the Building Office for a building permit. The developer must attach documents proving their rights to the land in order to be entitled to proceed with the construction, project documentation, control plan, binding assessments requested by a special regulation, like 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 (EIA) procedure is needed.

## Construction

A construction may be realized only by a building entrepreneur, who is an individual authorized to lead construction projects or assemble work as a scope of business pursuant to special regulations. Contractors are building entrepreneurs, and they ensure expert management of the building process through a site manager. Simple construction projects may be realized by the self-help of a developer.

After successful completion of the project, the developer must obtain an occupancy permit. The occupancy permit is issued by the Building Office after the fulfilment of the criteria set for the building by the Building Act, Building Permit, and other stipulated criteria, such as environmental and health protection, and fire protection. Operation of the construction project is possible only after obtaining relevant environmental permits. For larger construction projects, the developer can ask for an integrated permit, which can substitute all the other sectorial permits, like air and water protection permits and waste treatment<sup>5</sup>.

## Cultural heritage

There are many buildings located within the city centers of the Czech Republic that are designated cultural heritage sites. These buildings have stronger protections, and their reconstruction (or even demolition) are a serious and time-consuming issue for developers due to their special status.

## Environmental and energy-ESG rules and status of implementation

Real estate property in the Czech Republic is subject to various environmental legislation. As such, it is crucial during real estate transactions to devote the necessary care to environmental

issues to avoid any possible future problems that may arise once the transaction is completed.

## Energy Performance Certificate of buildings

Due to European Union (EU) law requirements (transposed into Czech law through the Energy Management Act<sup>6</sup>); there is a duty to have an Energy Performance Certificate assigned to all new buildings. The certificate is valid for 10 years and contains important information about the energy consumption of that particular building and provides a quick summary of energy operations costs. The duty of having one also affects major reconstructions (exceeding 25% of the building area), every sale or lease of an already-existing building (the seller/lessor should hand over the certificate to the other party) and all building property owned by public authorities. The Energy Performance Certificate is not mandatory 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.

## Ecological burdens on the property

An integral part of doing one's due diligence when surveilling a property should be the proper examination of land and buildings for the possibility of an 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 include contaminated land, dangerous asbestos placed in old buildings, or installment of inappropriate air conditioners. There are substantial costs to the purchaser, especially concerning the maintenance of former industrial properties. A land and building examination is usually carried out.

## Environmental, Social, and Governance (ESG) criteria

ESG has become an increasingly important driver across industries, including real estate. The most notable of the ESG regulations is the EU Taxonomy and Sustainable Finance Disclosure Regulation (SFDR). EU Taxonomy is, primarily, a classification system that establishes a list of sustainable activities. Both the EU Taxonomy and SFDR introduce new sustainability-related obligations for financial institutions and other financial market participants, such as real estate asset managers, that encourage transparency.

Under Article 8 of the EU Taxonomy, large public interest entities are obliged to report selected non-financial information in their annual reports. According to the SFDR, financial market participants must disclose how sustainability risks are integrated into investment decisions. In the Czech Republic, a new act came into effect on 29 May 2022<sup>7</sup>, which amends acts governing the

<sup>5</sup> [https://www.mzp.cz/en/integrated\\_pollution\\_prevention\\_and\\_control](https://www.mzp.cz/en/integrated_pollution_prevention_and_control)

<sup>6</sup> Act No. 406/2000 Coll., Energy Management Act, as amended

<sup>7</sup> Act No. 96/2022 Coll., amending certain acts in the area of financial market especially in connection with the implementation of European Union regulations regarding the capital markets union.

financial market and establishes offences and penalties for breaching the transparency obligations set out by the EU Taxonomy and SFDR.

ESG obligations are coming into effect gradually and real estate market participants should take the new regulations into consideration when planning new projects. It is likely that due to the ESG regulations there will be better financing conditions for investments and projects fulfilling the EU Taxonomy criteria.

## Direct taxes applicable to sales

### Real estate tax

A real estate tax is levied on a plot of land, building or unit, both residential and non-residential. The taxpayer must submit the real estate tax return based on the conditions existing on 1 January of the given year, no later than on 31 January. As long as the conditions for the assessment of the real estate tax do not change, the taxpayer does not need to submit the real estate tax return again throughout the following years.

### Value Added Tax (VAT)

Generally, the basic VAT rate of 21% applies to the sale of real estate by the VAT payer, unless the conditions for a tax exemption are met. The first reduced VAT rate of 15% applies to the sale of a real estate property related to the social housing (building, plot of land, unit, etc.) as defined by the VAT Act. The 15% VAT rate also applies to the provision of building and assembling work connected with the construction of a structure for social housing as well as 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 applies 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 to VAT, such as the sale of selected immovable property after the expiration of five years and others.

\*According to the 15 September 2022 exchange rate

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

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# Denmark



# Real Estate Law in Denmark

## The Danish real estate market

The Danish real estate market is currently undergoing an interesting development; it has performed well and proved resilient compared to the rest of Europe on the back of the COVID-19 outbreak.

In 2021, transaction volumes increased to record high levels and yields came down on residential, logistics, and high-quality offices, however, retail properties were challenged due to the threat of e-commerce which was even more prevailing with COVID-19, and hotel properties were strongly affected by travelling restrictions-flight to quality and safe haven was more dominant than ever before.

In Q1 2022, transaction activity continued its high pace from 2021 – and prices remained stable. However, now we have a whole new macroeconomic environment with high inflation and increasing interest rates. With the increasing financing costs combined with lower loan-to-value ratios, certain investors have been challenged and prices have been put under downward pressure. Increasing construction cost is a major challenge to developers—hence, it is likely that development activity will ease off in the next 24 months, which will, on the other hand strengthen appetite for existing cash-flowing assets.

Despite the obvious macroeconomic obstacles, market activity remains high, which is supported by high Q2 figures, in particular within residential, logistics, and high-quality offices. In general, we continue to see strong investor demand for inflation-linked assets, such as real estate, however, at lower price points than in 2021.

By **Mads Skaarup**, Corporate Finance Partner and Head of M&A Real Estate, Deloitte Denmark

# Overview of the Danish Legal System

## General introduction to main laws that govern acquisition of assets in Denmark-real estate rights

Acquisition of real estate in Denmark is primarily regulated by the uncodified principles of property law, i.e., the freedom of contracts in combination with the Danish Contracts Act (in Danish: aftaleloven).

For residential acquisitions, the Danish Consumer Protection Act on Acquisition of Real Estate (in Danish: lov om forbrugerbeskyttelse ved erhvervelse af fast ejendom) provides consumers and non-commercial parties with certain rights regarding the purchase and right of withdrawal if the property has been used for residential purposes by the seller, or if the property will be used for residential purposes by the buyer.

Other rights in relation to the acquisition of real estate is regulated by the Land Registry Act (in Danish: tinglysningsloven), among other things, regarding the protection from rights invoked by third parties.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

### Restrictions

The Danish Acquisition of Real Estate Act (in Danish: lov om erhvervelse af fast ejendom) restricts individuals who are not resident in Denmark and who have not previously resided in Denmark for a period of at least five years from acquiring real estate unless permission is granted by the Department of Justice. The act applies to all types of real estate, although additional restrictions apply to holiday homes under the Holiday Home Act (in Danish: sommerhusloven).

An exception to the restriction has been made for citizens of the European Union (EU) and for legal entities established within the European Union.

For agricultural properties (in Danish: landbrugsejendomme), there is a requirement of residence according to the Agricultural Properties Act (in Danish: landbrugsloven). This means that the

property in question must be inhabited by a physical person in a period of 10 years from the time of purchase. The person taking residence at the property does not have to be the same person as the acquirer of the property. Thus, the acquirer can be a legal entity if the legal entity ensures that a physical person takes residence at the property.

## Real Estate Registry system

In Denmark, rights over real estate must be registered in order to be protected against agreements regarding the said property and against prosecution. Registration must be made in the Danish Land Register (in Danish: tingbogen), which is available online for registration.

This applies not only to the right of ownership, but also for other rights and obligations, such as easements and encumbrances.

For ownership of a property to be confirmed, a deed must be registered. Registration of a deed in the Danish Land Register will incur a registration fee. Currently, the registration fee is calculated as a fixed fee of DKK 1,750 (USD 235.184\*) plus a variable fee of 0.6% of the purchase price.

Registration of easements or the like will currently incur a fixed registration fee of DKK 1,750 (USD 235.184\*).

## Notary role in the real estate transactions

In Denmark, notarization is not a requirement in any part of a process regarding the acquisition of real estate.

## Legal responsibility of the seller in real estate transactions—contractual representations and warranties

The responsibilities of the seller are regulated partly by the uncodified rules of property law and partly by the Danish Consumer Protection Act on Acquisition of Real Estate.

In a real estate transaction, it is the primary responsibility of the seller to provide the property in question in a condition

corresponding to what is agreed and what is to be rightly expected by the buyer. If the seller fails to do so, they will be in breach of contract and can thus incur liability.

In real estate transactions, the seller can often be liable for defects found in the property. A defect in real estate law is defined as when the property suffers from conditions that should not be found in similar properties of the same age and type.

If the sold property has a defect, the seller can be found liable, and the buyer may have a claim for a reduction in the purchase price. Any deviation from normal construction standards and errors in craftsmanship will normally be considered defects. However, the applicable test for what is considered a defect will vary depending on the age, type, and overall character of the property being sold.

Claims for damages from the buyer against the seller can in certain circumstances be directed towards the previous seller. This could, for example, be the case if the original builder of the property has acted in contravention to normal construction standards.

A property will quite often be subject to hidden defects, and the seller's liability for such defects depends on a case-by-case assessment. Generally, the seller has a duty to disclose all known material facts of interest to the buyer. By doing so, the seller cannot be liable for defects disclosed to the buyer. Likewise, claims by the buyer cannot rely on defects already known to him or that should have been known to him.

This is linked to the principle of caveat emptor. In the Danish context, the principle of caveat emptor, however, does not apply to hidden defects in a property, as the buyer does not necessarily have the opportunity to discover such defects. The seller of a property can therefore be met with claims for latent defects several years after the sale has been finalized. To minimize both the risk of being met with later claims, and the risk of discovering latent defects, the seller and the buyer can initiate a professional examination of the property with the purpose to disclose any latent or potential defects.

As non-commercial real estate transactions are common among residential owners, the Danish Consumer Protection Act on Acquisition of Real Estate was implemented in 1995 to further regulate and provide legal predictability, thereby protecting the interest of both the seller and the buyer. The act applies to non-commercial real estate transactions between consumers in cases where a property has been used for residential purposes by the seller, or if the property is to be used for residential purposes by the buyer and provides the parties with a solution consisting of a property condition report, an electrical installation report, and a change of ownership insurance. The act also provides the buyer with a right of withdrawal in exchange for a compensation of 1% of the purchase price. This buyer's right of withdrawal must be invoked no later than six business day after entering into the purchase agreement.

## Mortgages and other usual guarantees adopted in financing assets

The most common means of financing an acquisition of a property in Denmark is a credit mortgage (in Danish: realkreditlån). If a credit mortgage is obtained, the mortgage lender will demand that a credit mortgage deed (in Danish: realkreditpantebrev) be registered on the property in the Danish Land Register.

As other examples of financing the following can be mentioned:

- Owner's mortgage deed (in Danish: ejerpantebrev), and
- Mortgage deed (in Danish: pantebrev).

As a general rule, registration of any mortgage deed will incur a registration fee calculated as a fixed fee of DKK 1,750 (USD 235.184\*) and a variable fee of 1.45% of the mortgage secured amount. However, registration of a mortgage deed is exempt from the variable fee of 1.45% of the purchase price of that part of the mortgage secured amount that does not exceed the registered principal of an existing registered mortgage deed on the same property (in Danish: stempelrefusion).

## Lease of assets and lease of business

### Lease of residentials

Lease of residentials is governed by the Danish Lease Act (in Danish: lejeloven). In general, the Danish Lease Act contains mandatory provisions in favor of the tenant.

### Lease of commercial properties

Lease of commercial properties is governed by the Danish Commercial Lease Act (in Danish: erhvervslejeloven). The Danish Commercial Lease Act contains mostly provisions that can be derogated by the parties. However, the act also contains mandatory provisions, for example, regarding the landlord's right to terminate a commercial lease agreement that is restricted.

### Other commercial leases

Lease of areas that are not defined as rooms or properties, for example, lease of a parking lot, is not governed by the Danish Commercial Lease Act or any other acts except for uncodified principles of property law, i.e., the freedom of contracts in combination with the Danish Contracts Act.

## Administrative permits applicable to construction or restructuring of assets

A building permit is required for the construction of a new building and is often also required for modifications to existing buildings. Such building permits are issued by the building

authorities. The basis for issuing building permits is regulated in local planning. For several buildings, a commissioning permit is needed before the building can be legally used.

## Energy

As a general rule, a building must have an energy label (in Danish: energimærkning) in connection with a transfer or lease of a property. The seller or the landlord must ensure that the energy label is prepared.

Several properties are exempt from the requirement of an energy label. This includes, among others, holiday homes and certain commercial properties.

## Taxes applicable to real estate

All commercial and residential property is subject to yearly taxation based on the public value of the property. For commercial properties, the relevant applicable taxes are land value tax and, for certain uses, service charge, while residential properties are subject to land value tax and property value tax if the owner is using the property for residential purposes.

In Denmark, a new real estate valuation system is currently being implemented. The current real estate valuation system has been suspended since 2013, and therefore all Danish properties' current valuation levels are in the price level of 2012 for commercial properties.

Commercial properties were assessed for the first time using the new valuation system on 1 March 2021. However, the valuations

have been delayed due to a delay in the preparation of the valuations as well as technical issues. It is expected that the new valuations will be sent out in 2022-2024. However, there is a considerable risk that the valuations will be delayed further. For 2021, the real estate taxes for residential properties will be calculated based on the new real estate valuation as of 1 January 2020. In 2022, the real estate taxes for commercial properties will be calculated based on the new real estate valuation as of 1 March 2021.

If there is a discrepancy between the estimated market value and the public valuation of the property, it is possible to appeal the valuation to the Danish Tax Authorities under certain circumstances.

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\*According to the 15 September 2022 exchange rate

# Finland



# Real Estate law in Finland

## Emerging Markets and new asset classes in the Finland

- Social infrastructure where municipalities seeking development partners for public services portfolios (hospitals, emergency services buildings, care facilities and others).
- Residential remains buoyant, with Finland remaining solid in payment behavior and one of the best environments for collection.
- Conversion of industrial complexes (paper mills, other factories) with a strong energy infrastructure to multi-use.

By **Lars Björknäs**, M&A Partner, Deloitte Finland

# Overview of the Finnish Legal System

## General introduction to main laws that govern acquisition of assets in Finland-real estate rights

Under Finnish legislation, real estate refers to a land ownership unit entered into the cadastre. There may or may not be buildings located on the real estate. Real estate may either be owned by natural persons or legal entities, e.g., by real estate companies, mutual real estate companies or housing companies. 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 Code of Real Estate regulates, among other things, the sale and purchase of real estate, registration procedures as well as real estate rights and encumbrances.

Hence, the provisions of the Code of Real Estate are crucial when ownership of real estate is transferred. However, where the ownership of shares in a company possessing the ownership of a real estate (and not the real estate itself) is transferred, the provisions on the sale and purchase of the Code of Real Estate will not apply to the transaction as such. Instead, the provisions of the Finnish Limited Liability Companies Act (21.7.2006/624, as amended) or the Limited Liability Housing Companies Act (22.12.2009/1599, as amended) will become relevant for this type of transaction, depending on the company's form and the articles of association of the target company. Furthermore, the Finnish Contracts Act (13.6.1929/228, as amended) also applies to most contractual relationships as it is the general law in the field of contract law in Finland. In addition, there are various regulations in place governing, e.g., land use, building and environmental matters, as well as laws regulating the lease of real estate and premises, which usually are highly relevant in real estate transactions, irrespective of the structure applied.

In terms of the sale and purchase of real estate, the Code of Real Estate particularly states that the principle of freedom of contract applies to the transfers of real estate, unless otherwise specifically provided by law. Thus, the parties may determine the

terms and conditions of the transaction 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 direct transfer of real estate valid, the requirements of which have been itemized in the Code of Real Estate. In essence, the due diligence and the potential findings made in connection therewith play an important role when negotiating and determining the final terms and conditions of the sale and purchase agreement for each particular transaction, regardless of whether the transaction constitutes a direct transfer of real estate or an indirect transfer by the transfer of company shares.

## Acquisition structure usually applied in real estate transactions; restrictions—if any—applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

### Acquisition structures usually applied in real estate transactions

Real estate transactions in Finland are usually structured in a way that either an ordinary real estate company (REC) or mutual real estate company (MREC) owns and possesses the real property, the latter alternative having been the most commonly used structure in recent years. An MREC differs from a REC to some extent. A REC is an ordinary limited liability company owning real estate, whereas an MREC is a limited liability company but with some specific characteristics typical for housing companies. MRECs operate in the same way as housing companies, i.e., in MRECs, the shares entitle a shareholder to control specific premises in the building(s) owned and possessed by the MREC, or another part of the company's building or the real estate under its possession, as laid down in the articles of association.

By contrast, shareholdings in RECs are, by their nature, similar to other limited liability companies, i.e., shareholders own a

proportional share of the company corresponding to their shareholding. Another important character of the MREC is that rental income deriving from the property owned by the MREC is not paid to the company but directly to the shareholders, whereas in the case of RECs, rental income goes directly to the company and may (if all legal requirements for the distribution of assets are met) be distributed as dividends to the shareholders. These options naturally have important tax implications and should therefore be carefully assessed when determining the transaction structure. Further, in contrast to RECs, MRECs typically receive their income from their shareholders through monthly maintenance charges, which are intended to cover expenses of the MREC, such as costs for maintenance, taxes, and insurance.

### **Restrictions applicable to foreigners and specific areas of the country**

The principal rule is that there are no restrictions on real estate ownership by foreigners as such in Finland. Thus, foreign individuals or foreign legal entities may, as a rule, acquire and own real estate in Finland on the same basis as Finnish persons and entities. However, from 2020, foreign purchasers (both private individuals and legal entities) from outside the European Union (EU) and European Economic Area (EEA) are required to obtain a permit from the Ministry of Defense to acquire real estate in Finland, except for real estate acquisitions on the Åland Islands, which are governed by separate rules due to Åland's special status: The Åland Islands is a self-governing province located southwest of Finland. In order to give effect to the right of the people of Åland to own land on the Åland Islands, the acquisition and possession of real estate have been restricted by law and are subject to certain authority proceedings, which not only applies to foreigners but also Finnish individuals and entities. Additionally, in Finland, municipalities may, in certain situations, have the right to redeem real estate sold if the land is required for civil engineering, recreational, or protection purposes.

### **Real Estate Registry system**

The National Land Survey Authority of Finland maintains registers concerning real estate, such as the cadastre and 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 information included in the cadastre (mainly property details and information on the location of properties) and in the title and mortgage register (mainly information on ownership, real estate mortgages, special rights and restrictions concerning properties) covering the entire country. In the field of real estate, registrations typically have major legal consequences, as most of the real estate rights are established only at the moment when relevant registrations take place. Hence, it is important that all

required registrations are duly completed post-transaction and that deadlines provided by law are adhered to.

### **Notary role in the real estate transactions**

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. A public purchase witness is required only in the case of a direct ownership change of real estate. Hence, there is no need for a public purchase witness for the sale and purchase of shares in a company possessing the ownership of a real estate. If a real estate transaction has not been duly witnessed, it is considered invalid, and the purchaser cannot be granted title to the property. Only a public purchase witness can witness a real estate transaction. However, if real estate is transferred using the Property Transaction Service administered by the National Land Survey of Finland, a public purchase witness would not be necessary.

### **Legal responsibility of the seller in real estate transactions—contractual representations and warranties**

#### **Legal responsibility of the seller**

The principle of freedom of contract is, as a rule, applied to real estate transactions in Finland. Hence, the responsibility of the parties, including the seller's responsibility towards the purchaser, may be agreed upon rather freely between the parties of the transaction. Typically, the seller would not be liable for matters which have been fairly disclosed to the purchaser in connection with the due diligence process, unless otherwise specifically agreed between the parties in the sale and purchase agreement. There are, however, certain provisions defining the legal position of the parties. For example, the seller is by law responsible for any payment obligations that are regarded as public in nature (i.e., obligations towards authorities) and created prior to the transaction.

#### **Contractual representations and warranties**

As with other transactional contracts, representation and warranties (R&W) are typically an essential part of real estate sale and purchase agreements. R&Ws in real estate transactions are strongly dependent on the outcome of the due diligence review and findings. Also, the value of the transaction and the previous use of the real estate are typically relevant when determining how extensive R&Ws are necessary and reasonable in the transaction at hand. R&Ws are typically included with respect to, e.g., ownership and authority, mandatory permits and inspections, mortgages, easements, and encumbrances in relation to the property in question. When a real estate transaction is structured in the form of a sale and purchase of shares in a company holding the ownership of real estate, the

R&Ws are, in many aspects, similar to those of typical share deals. R&Ws on corporate and compliance related matters would, for instance, typically be included in such share sale and purchase agreements in addition to those R&Ws relating to the actual asset.

## Mortgages and other usual guarantees adopted in financing assets

In Finland, there are several ways to secure financing for 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 to an enforcement procedure as well as has value as a subject of exchange. Typical forms of securities in the field of real estate include, but are not limited to: pledge over real estate or leasehold (mortgage); pledge of movable property (e.g., shares, receivables, bank accounts, rental income); floating charge and; contractual commitments, such as covenants and letters of comfort. The most common security arrangement used and relating directly to real estate is the mortgage, which may be registered over the relevant asset through a mortgage application process with the National Land Survey Authority.

## Lease of assets and lease of business

### Land leases

The lease of real estate property is regulated in the Land Tenancy Act (29.4.1966/258, as amended). The law applies in situations where a property or a part of it is let out by the landowner(s) against consideration. Typically, land lease agreements are very long, fixed-term agreements; the length also being dependent on the type/purpose of the relevant property, as the legislation includes certain rules on maximum and minimum durations depending thereon. Land lease agreements must, as a rule, be made in writing and include all terms and conditions. Such terms and conditions that have been left out of a written agreement are, by law, considered void. Furthermore, the agreements must *inter alia* be dated and signed by the parties and include detailed information on the object of lease, purpose of use, and the lease term. Although the freedom of contract is a strong principle, land lease agreements are, by their nature, more restricted contracts as the legislation is mandatory in many aspects, meaning that the contracting parties may not by contract deviate from the legal provisions.

A land lease agreement can be registered as a special right in the title and mortgage register. The entry is applied for from the National Land Survey of Finland. Once registered, the lease right always binds the new owner of the property that is the subject of the right. The registration also gives protection against the property owner's creditors in accordance with its priority order. Certain types of land lease rights are, however, subject to mandatory registration. These are fixed-term leases that can be

transferred to a third party without hearing from the landlord, provided that buildings exist on the leased area, or that buildings may be constructed and/or appliances exist that are owned by the tenant. The registration requirement also applies to transfer of such rights. A registered leasehold may be used as security for debt.

### Lease of business premises

The lease of business premises in Finland is regulated by the Act on Commercial Leases (31.3.1995/482, as amended). The act applies to leases of buildings or parts of buildings (premises) for other than residential purposes (commercial leases). Such leases may also comprise land areas which are to be used in connection with the business premises. The contracting parties may, in the lease agreement, deviate from the provisions of the act, unless otherwise provided for therein. When negotiating on a commercial lease agreement, it is therefore crucial to keep in mind that the provisions of the Act on Commercial Leases will apply to the tenancy as such, should the parties not specifically have agreed otherwise in the lease agreement. If a matter is not regulated in the act, the general principles of contract law will apply.

Commercial leases may be entered into for a fixed term or until further notice. As a rule, commercial lease agreements are made in writing to ensure that the contents of the tenancy are properly documented, which is highly advisable. Oral agreements are not, as such, prohibited, but these agreements are by law considered valid until further notice, although the parties would in fact have agreed on a fixed term. Commercial lease agreements typically tend to include provisions on the rent and its payment, rent adjustment, term of lease and termination, property maintenance, lease collateral, insurance, subleasing, and dispute resolution. Further, it is crucial to specify the object of the lease as precisely as possible as well as agree on the purpose of use, as the premises may only be used for such agreed purposes.

## Administrative permits applicable to construction or restructuring of assets

The most significant act regulating construction work and other developments is the Finnish Land Use and Building Act (5.2.1999/132, as amended). Prior to starting any construction work, a building permit or an action permit must be obtained from the municipal building authorities. A building permit is required when constructing a new building and, for instance, when making major renovations and other alterations and repairs that correspond to new construction. For minor repairs and the construction of small outbuildings, an action permit, or a notification to the municipal building authority, as the case may be, is usually sufficient. In some cases, an environmental permit will also be needed if the activities to be carried out on the property may lead to, e.g., pollution or contamination of the environment. In addition, some other permits may be required depending on the location of the property (e.g., depending on

the zoning situation on the specific area) and the specific operations that will be carried out on the same.

## Environmental and energy

### Environment

With respect to the environment, the Finnish legislation *inter alia* sets out a framework for the treatment of contaminated areas. The prohibition of actions that may contaminate soil and groundwater and the general principles set out in the Environmental Protection Act (27.6.2014/527), aim to prevent contamination. Should full prevention not be possible, minimizing the environmental impact of harmful substances is the key principle.

The legislation also sets out provisions on the assessment of contaminated areas and the requirements for remediation of such areas, allocation of the responsibility for the remedial measures, permits required for such measures, as well as notification of obligations when selling or renting out property. Typically, specific environmental due diligence is carried out on site by experts in the field in connection with real estate transactions in Finland. Hence, the legal due diligence tends to focus primarily on reviewing potential documentation in relation to environmental permits and authorizations, environmental violations as well as environmental investigations and audits, to mention some key areas.

### Energy

Energy-smartness and energy efficiency have become increasingly important in society in recent years. Naturally, this has also had implications for the energy requirements for real estate and buildings. Regulations on energy efficiency in respect of buildings are mainly set out in the Land Use and Building Act (5.2.1999/132, as amended). Buildings should, by law, be constructed for their intended use in such a way that energy and natural resources are used sparingly. The legislation also provides for the use of renewable energy for new buildings and extensively renovated buildings. An energy account may, depending on the project, be required for the building permit application.

In Finland, there is also a specific act on energy certificates. Energy certificates are, as a rule, mandatory for all buildings. The certificates constitute, *inter alia*, tools for comparing and enhancing the energy efficiency of buildings as well as promote the use of renewable energy in buildings. Typically, on-site technical due diligence is carried out by experts in the field in connection with real estate transactions in Finland to verify that the target property is technically compliant with the prevailing legislation and building standards.

## Taxes

### Transfer tax

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 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.

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 the transfer tax return is due within two months of the share acquisition (including shares of RECs) or within six months of the real estate acquisition.

### Value added tax (VAT)

The sale of real estate is VAT exempt in Finland. The VAT exemption also applies to the sale of shares of an MREC or REC. Further, the input VAT on transaction costs related to the sale of real estate or shares of a real estate company is typically not deductible in Finland, according to the Finnish tax authorities' guidance. Also, the leasing of real estate property is VAT exempt 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 for VAT for leasing of real estate property provided that certain conditions are met, e.g., the real estate or a part of it is used continuously for activity which is entitled to VAT recovery. When the lessor opts for VAT and the leasing of real estate property is subject to VAT, the input VAT on costs directly relating to this activity is also deductible.

Real estate investments, i.e., new construction or major renovation works, are subject to a 10-year VAT adjustment period. The adjustment period starts at 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 is 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 should be monitored constantly during the 10-year adjustment period. When real estate is sold, the adjustment liabilities and rights are, as a main rule, transferred to the purchaser of the real estate. The seller must provide a 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.

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# France



# Real Estate law in France

## New asset classes and emerging opportunities in France

### Office

The new way of working is materially impacting the relationship corporates have with their real estate tools.

Seeking to optimize fixed costs, corporates have now embedded Work from Home as a stake of the working environment of their teams, accelerating the reduction of their office footprint, booming the space surrendered to landlords. In counterpart, corporates are reconsidering their real estate policy to “take less but better” both in terms of location, in more central districts, as well as top quality premises. Letting activity over H1 22 shows that downtown Paris - and La Defense - are heading towards a record level for take-up, whereas outskirts are winding down.

Our bi-annual “Grand Paris Office Crane Survey” shows the scarcity of available new office accommodations inside Paris, which has led to significant rise in headline Market Rents, now in excess of EUR 1,000/m<sup>2</sup> p.a. excl. taxes and service charges for the best properties.

The next challenge is the rise of energy costs, further accelerating the optimization of real estate footprint.

### Retail

Following the strong recovery of turnover in all types of retail premises (shopping centres, high street retail and out of town retail parks) after Covid-19, letting activity and investment volumes picked-up since late 2021 and still stand at high levels.

On the letting sides, less prime main streets of Paris (e.g. rue de Rennes) suffered from high vacancy rate which went quickly down over the first half of the year, enabling a rebound on Markets Rents hardly hit in 2020-2021.

As to investment, in spite of high level of transaction (e.g. Decathlon portfolios and UWR's Carré Senart), demand is still focused on quality premises (e.g. 150 Champs Elysées) and putting prime yields under downward pressure, but leaving secondary assets (non-prime shopping centres) unsold.

## Hotels

The willingness of European citizens to enjoy traveling this summer has erased Covid's downturn. RevPAR in France are now ahead of where they stood in 2019, i.e. before the sanitary crisis, thanks to very strong progression in room rates.

The recovery of Occupancy Rates is extremely strong although not fully matching previous levels. All categories reflect this recovery and super-economy are virtually at 2019's level. Luxury shows also a very good performance, only 15% below previous levels.

In terms of Average Daily Rates, the rise is impressive as a result of this strong demand from leisure customers. All hotel categories show figures ca. 10 to 25% above 2019's year to July results according to In Extenso.

*By **Pascal Souchon**, Partner in charge of the Real Estate and Hotel Financial Advisory Practice at Deloitte France*

# Overview of the French Legal System

## General introduction to real estate rights in France

Real estate rights are governed by the French civil code, also known as the Napoleon code, and generally include:

### 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, etc.) (fructus), and the right to dispose of the asset (abusus). It is a title with full rights.

### Subdivision of ownership (“démembrement de propriété”)

Ownership is divided into two rights: bare ownership (“nue-propriété”) and usufruct (“usufruit”), which includes the right to use the property and the right to collect any proceeds. These two rights belong to different persons. This structure is used for asset management purposes.

### Co-ownership (“copropriété”)

Governed by the French law dated 10 July 1965, it is a way of organizing the ownership of a building consisting of several units. Each unit comprises (i) a privately owned area (e.g., an apartment) with full ownership rights and (ii) a proportional right over the common areas (e.g., staircases and corridors). The co-owners are required to abide by co-ownership rules and regulations relating to the use, maintenance, and costs of the property.

### Ownership of volume units (“division de propriété en volumes”)

This type of ownership pertains to a property that is legally divided into volume units of different sizes and shapes (horizontally, vertically, or both; or into three dimensional units i.e. cubic meters). Each owner is entitled to build within the limits of their unit, subject to any easements. The principal difference with co-ownership is the independence of each volume unit and the absence of common areas.

## Long-term leases

Long-term leases grant to the lessee the equivalent of real property rights or rights in rem (“droit réel immobilier”). The two main types of long-term leases (both granted for a term of 18 to 99 years) are: (i) construction leases (“bail a construction”) and (ii) long-term leases (“bail emphytéotique”) with or without an obligation for the lessee to build. Under both leases, the lessee enjoys a right in rem over the land and full ownership of any built premises until the end of the lease. Upon expiry of the lease, the land, as well as the constructions, revert to the landlord. The lessee’s right in rem may be freely transferred or mortgaged.

## Acquisition structure usually applied in real estate transactions

### Usual acquisition structures

French real estate may be acquired through limited liability companies or unlimited liability and transparent special purpose vehicles (SPVs) such as SCIs (Société Civile Immobilière), usually depending on tax considerations.

French REITs also exist in the form of OPCI (Organisme de Placement Collectif en Immobilier) regulated investment funds. These funds may be used to acquire or build real estate assets with a view to lease them. They cannot be used to acquire and sell real estate. OPCIs are eligible for a preferential tax treatment.

Investments may also be made through listed property companies (SIIC), which are also subject to a preferential tax treatment.

No restriction on foreign investments.

Foreign-registered or foreign-controlled entities are free to carry out real estate investments in France, but they must file a declaration.

### Specific restriction on acquisitions

Under French planning regulations, the direct sale of real estate assets most often gives rise to the application of a pre-emptive right on the part of the municipality or other public authorities. This right may also apply to the sale of shares in a transparent SCI company and to certain other real estate transfer transactions. As a result, clearance of such a pre-emptive right is

required before the acquisition of a real estate asset may be completed, failing which the acquisition would not be valid.

### Real estate registry system

To be enforceable against third parties, transfers of real estate ownership must be registered with the local land registry ("services de la publicité foncière"). Only notarized deeds of transfer authenticated by a French public notary can be registered.

Registration with the land registry is not an ascertainment of the validity of title of the registered owner. In other words, there is no state guarantee of title. Any interested third party can challenge the title in court.

Information available at the land registry includes the identity of the current and former owners, acquisition date, registered easements, registered mortgages and encumbrances, leases, and finance leases lasting over 12 years.

Since the land registry is a public register, information is available to third parties.

### Notary role in the real estate transactions

In asset deals, the parties and the notary execute a notarized transfer deed. The notary authenticates and stamps the deed and must register it with the local land registry ("services de la publicité foncière" see above) within 1 month of its execution to make the title transfer enforceable against third parties.

French notaries are public officers. They are liable for the legal efficacy of the transaction made through a notarized deed. As a result, they are responsible for verifying that there is no obstacle to the transaction, including verifying the root of title over a 30-year period.

A real estate transaction is usually a two-step process: First the execution of a conditional sale and purchase agreement or sale option or purchase option agreement. The sale of a real estate asset is most often subject to a pre-emption right on the part of a public authority. The agreement may also contain other conditions precedent, such as the buyer's obtainment of the necessary financing. Upon signing, the buyer usually pays a deposit guarantee (except in the case of a sale option), which remains in escrow with the notary, pending completion of the transaction.

When the conditions are met, the final notarized deed of sale may be executed, and the transaction is completed. The transfer of ownership is usually expressly deferred to the date of execution of the deed and simultaneous payment of the price.

Payment of the purchase price is made through the notaries' accounts. The latter are responsible for the payment of transfer

taxes to the tax authorities and publication costs upon completion, such amounts being paid out of the funds transferred to the notaries. No transaction will be completed if the notary has not received in advance the price and any additional funds needed to pay the costs and taxes.

Notarized deeds apply to mortgages, restrictions on sale, easements, and leases of more than 12 years. Registration is extremely important for tenants as it renders the lease enforceable against a new owner of the property.

Share deals are completed by private agreement.

### Seller's responsibility - Contractual representations and warranties

The seller of real estate is bound by law to a compliant delivery obligation and a warranty obligation.

It is however market practice in investment transactions for the seller to exclude any warranty and provide for a sale of the asset "as is". This negotiation position is limited in (i) a compulsory eviction warranty ("garantie d'éviction") which applies by law whatever the terms of the sale agreement, (ii) the seller's obligation to provide information under environmental laws and (iii) any express warranties granted by the seller in the agreement. Usually, the seller provides that the matters raised in the data room to which the buyer was given access exclude any warranty. The exclusion of a specific warranty is admissible provided that the information provided is accurate. The same applies to the seller's representations in the deed of sale (relating to mortgages, encumbrances, easements, building and operational permits, works, authorized use, and so on).

In asset deals, sellers must provide certain compulsory information and documents. Regarding environmental matters, the seller is generally bound by an obligation to inform the buyer about the environmental condition of the asset to be sold. No exclusion of warranty may apply if this obligation is breached.

In the case of share deals, it is market practice to require from the seller the same information and environmental/technical reports and diagnoses.

The seller's obligation of indemnification may be limited. It is market practice to exclude any such limits regarding the subject matter of the deal, such as title to the shares and real estate. The seller's liability is usually excluded if the buyer's claim relates to any matter disclosed in the due diligence process (in particular in the data-room) or in the transaction documentation. Title insurance is developing in the French real estate market, notably among professional real estate investors.

## Mortgages and other usual guarantees adopted in financing assets

### Usual security interests

New legislation (25 September 2021) on security interests is applicable from 2022.

- Contractual mortgages: Granted under a notarized deed, which is subsequently registered with the local land registry.
- Assignment of receivable For receivables such as rent, a Dailly (from the French Monetary and Financial Code) assignment is usually required by the bank; the borrower must fill out a Dailly assignment forms in order for the assignment to be effective.
- Specific legal mortgages: Specific security interests of benefit to the seller of real estate when the price is not fully paid upon completion of the sale and to the lender who finances in whole or in part the acquisition of real estate.
- Pledges of the borrower's shares and pledges of the borrower's bank accounts are also market practice.
- Another type of security interest is particularly relevant for real estate financing: the "fiducie" which is similar to the concept of trust in Anglo-Saxon countries. It is a very efficient security interest since the real estate asset is excluded from the debtor's assets (and risks) during the security term. It remains an expensive security to create.

### Protection of the lender

As a condition precedent, lenders typically require from the borrower a valuation report on the financed assets; in accordance with the financing documentation, the borrower must comply with financial ratios and specific covenants.

In addition to the mortgages and assignments of receivables referred to above, the lender may require additional guarantees from another guarantor (e.g., joint and several guarantee, autonomous guarantee, letter of intent, cash reserve, etc.). If the debtor defaults under the loan, a mortgage entitles the lender to:

- Require the sale of the property by public auction or on an amicable basis to a transferee and be reimbursed from the proceeds; or
- Obtain a court order transferring title to the secured property as payment of its claims.

## Leases

Civil leases: Unless a compulsory legal regime applies to a lease due to the tenant's activity or use, or to the type of property, the lease is governed by the French Civil Code and there are no compulsory provisions.

Residential leases are governed by specific legislation with significant protection of tenants and potential limits on rent depending on the municipality where the residence is located. Such limits are applicable in Paris for example.

Commercial leases: leases of premises for most professional activities have a specific status as commercial leases.

### Duration of the lease

The minimum term of a commercial lease agreement is nine years. In principle, the tenant has a break option, which may be exercised at the end of each three-year period. However, in certain conditions, the parties may agree on a fixed term, even for the whole term of the lease and/or other break options.

### Renewal of commercial leases

Under certain conditions, the tenant has a right to require the lease renewal. Accordingly, if the landlord refuses to renew the lease, the latter must pay an eviction indemnity to compensate the damage suffered by the tenant. The lease is normally renewed under identical terms and conditions, save for the rent, unless otherwise agreed upon by the parties.

### Rent

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 tenant's turnover (e.g., for retail space).

### Indexation of the rent

Indexation clauses are market practice and subject to strict legal requirements. Rents cannot be indexed directly on the general cost of living or level of salaries.

### Works and repairs: Since the Pinel Law

- A complete inventory of charges and taxes must be attached to the lease and clearly specify, for each category of charges and taxes, whether they are borne by the landlord or the tenant. This list relates to works, repairs, maintenance and replacement of equipment/the premises.
- Major repairs governed by Article 606 of the French Civil Code must be borne by the landlord.

### Assignment

Generally, the tenant may not transfer the lease agreement without the prior authorization of the landlord, except as part of the tenant's ongoing business in case of direct transfer to a purchaser.

## Sale of the property

Since the Pinel Law came into force, the tenant enjoys, under certain conditions, a pre-emption right should the lessor decide to sell the leased commercial premises.

## Administrative permits applicable to construction or restructuring of assets

Building permits are required to:

- Construct new buildings; or
- Undertake construction works on existing buildings if such works result in a change of function of the various parts of the premises or the creation of additional surface area.

In addition, in the Ile-de-France region, a specific authorization ("agrément") is required from the competent authorities if the building is dedicated to certain activities (office, industrial, commercial, professional, administrative, technical, scientific, or educational uses). Separately, authorizations (or registration/notification) to operate on-site facilities subject to environmental protection regulations (ICPE) may also be required.

## Environmental and energy – ESG rules and status of implementation

Because of the ambitious and overreaching scope of the EU's Green Deal a number of new policies, and new legislative acts, will be gradually implemented. Consequently, the ESG rules will be evolving and should be closely monitored.

### Protection of the environment

Classified Installations for the Protection of the Environment ("ICPE") regulations apply specifically to facilities likely to cause nuisances, hazards, and pollution (including land pollution). As a consequence, a specific authorization (or registration or notification) delivered by the Préfecture is required for the installation of an ICPE. Specific obligations/requirements may be imposed on the ICPE operator. Changes in the operator and discontinuation of the facility's activity are also regulated. Beyond this specific legislation, operators responsible for pollution are liable for its remediation.

In accordance with the ALUR Law of 24 March 2014 the seller or landlord of a property located in a specific "soil information zone" has the obligation to inform the purchaser or tenant of this situation in writing. The purchaser or tenant 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 the pollution makes the land unsuitable for the use stipulated in the agreement. Subject to the approval of the

Préfecture, the ALUR Law expressly authorizes the transfer of the rehabilitation work to a third party (such as a purchaser).

### Green leases

French law requires that leases of premises dedicated to professional activities exceeding 2,000m<sup>2</sup> contain a "green appendix" under which the parties must exchange information on overall consumption and waste removal and must cooperate to improve the energy and environmental performance of the premises. They should also work to develop a program of works to be carried out. This is more an incentive than an obligation to reach certain objectives.

### Energy performance

Following the Grenelle 1 and Grenelle 2 Laws, and more recent legislation, buildings are subject to strict requirements with respect to their future energy performance. Under the ELAN law of 23 November 2018, specific targets were assigned to buildings where more than 1,000 m<sup>2</sup> are used for professional activities. Compared to a chosen reference year (which cannot be prior to 2010), energy consumptions in a building must be reduced by 40% by 2030, 50% by 2040, and 60% by 2050.

A specific decree of 23 July 2019 sets out various obligations affecting the landlord and tenant, starting with an obligation to record the building's energy consumption on a government web platform by the end of September 2022, and annually after that; an obligation to set up a plan of works to achieve the legal objectives and to carry out the said works.

## Taxes applicable to real estate transactions

The following developments cover the regime applicable to corporate investors.

### Sales and acquisitions of French real estate assets

- **Direct taxes**

Capital gains on the sale of French real estate assets are subject to French Corporate Income Tax (CIT) at the standard rate applicable at the time of the sale. The CIT rate is currently set at 25% plus the social surcharge of 3.3% levied on the part of the CIT liability which exceeds EUR 763,000 (USD 796,378\*) Tax losses that are available at the level of the entity disposing of the French real estate assets can be offset against the taxable capital gain. As a general rule, tax losses can be carried forward without any time limit (except in case of change of activity or in certain cases of restructuring). However, carry-forward tax losses can only be used to offset in a given financial year up to EUR 1 million (USD 1,043,745\*) plus 50% of the taxable profit of that year exceeding €1 million (USD 1,043,745\*). Upon proper election, tax losses may also be carried back but only up to EUR 1 million (USD 1,043,745\*) and offset against the taxable profit of the preceding year.

- **Indirect taxes**

Upon acquisition of French real estate assets, transfer taxes should be due at circa 5.8%, plus additional duties and notary fees, unless certain commitments are taken by the purchaser to rebuild or to resell the property within a certain timeframe. These charges are a liability of the purchaser, but the seller may be held jointly liable.

Acquisitions of French real estate assets may also be subject to VAT when the seller is subject to VAT. The standard VAT rate is 20%. Reduced rates may be applicable to certain residential buildings. Certain transactions are VAT exempt. However, the seller may waive the exemption. VAT is, in principle, due on the price. Under certain circumstances, VAT is due on the margin (sale price less acquisition price). A "Transfer of Going Concern" VAT exemption is applicable, under certain conditions, when the sale of the real estate assets occurs in the context of a transfer of activity, e.g., the asset is sold with a lease subject to VAT by the lessor to another lessor, who will continue to rent the asset with VAT.

## Sales and acquisition of shares in real estate companies

### Direct taxes

Subject to the provisions of applicable double tax treaties, if any, capital gains on the sale of the shares in a company qualifying as French real estate company for capital gain taxation purposes is, in principle, subject to French CIT at the standard rate applicable at the time of exit (i.e., currently 25% plus the social surcharge of 3.3% levied on the part of the CIT liability which exceeds EUR 763,000 (USD 796,378\*)).

Under French domestic law, a French real estate company is defined as any French or foreign unlisted company, the assets of which, at the closing of the three fiscal years preceding the disposal (or at the closing of the financial years for which it existed if it has closed less than three financial years at the time of the disposal), derive more than 50% of their value from French real estate properties or shares of an unlisted company which itself is a "real estate" company. The assets that are used by a company or its parent company for the purposes of its operational commercial or industrial activities are disregarded for the appreciation of the 50% threshold.

If the company the shares of which are sold is a French tax transparent entity, capital gains arising from the disposal of its shares should be calculated following the specific rules provided by the "Quemener" Case Law. Under this case law, capital gains or losses on the disposal of shares in a tax transparent subsidiary must be calculated taking into account several adjustments.

### Indirect taxes

The acquisition of shares in a company qualifying as a French real estate company for transfer taxes purposes is subject to transfer tax at the rate of 5% applied on the sale price (or fair market value if higher). This is a liability of the purchaser, but the seller may be held jointly and severally liable.

A French "real estate company" is defined for transfer tax purposes as a non-listed French or foreign company whose assets are comprised more than 50% in value of French real estate or rights in rem or shares in companies qualifying themselves as French real estate companies. The test is applied either at the time of the transaction or any time during the previous year.

### Some tax considerations regarding lease agreements

Lease agreements of more than 12 years in duration are subject to registration duties. Registration duties will apply at the rate of 0.715% (plus "CSI" at 0.1%) and be assessed on the estimated total amount of the rents and service charges over the rental period (broadly limited to 20 years). This is in principle a tenant's liability, but the lessor can be held jointly and severally liable.

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Corinne is the Deloitte Global Real Estate Leader for Deloitte Legal, and a partner in Deloitte Legal France, responsible for the legal real estate practice. Prior to Deloitte, she was a partner in an international law firm where she was head of the legal real estate department. Her core expertise is transactional, and mainly advises French and foreign investors on their real estate investments (including portfolios, sale and leaseback), structuring, security and guarantees aspects, and asset management including all types of leases and real estate contracts.

She has significant experience of cross-border transactions.

\*According to the 15 September 2022 exchange rate

# Germany



# Real Estate Law in Germany

## Emerging markets and new asset classes in Germany

The last years have underlined the fact that the German real estate market was and will continue to be in the focus of German and non-German investors. While recent developments led to a situation in which looking into the short-term future is more challenging than it has been for a long time, investors will continue to invest in German real estate. Not only because real estate assets tend to hold their value, including in times of crisis, but also because investors expect a positive development and certain catch-up effects in the long term. In order to avoid unnecessary risk, however, it is recommended to proceed with caution, continuously monitoring the market, thoroughly examining any potential investment opportunity, and ensuring that in any potential transaction, sufficient diligence is applied, and appropriate safeguards are implemented.

By **Michael Müller**, Real Estate Industry Leader, Deloitte Germany

# Overview of the German Legal System

## General introduction to main laws that govern acquisition of assets in Germany - real estate rights

### Private law

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

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.

In addition, there are numerous other laws regulating specific real estate-related issues, such as – for example but not limited to – the German Hereditary Building Rights Act (in German: Erbbaurechtsgesetz), regulating details with respect to hereditary building rights, and the German Residential Property Act (in German: Wohnungseigentumsgesetz), regulating the legal relationship within a condominium/community of owners of apartments and/or commercial units in a specific building.

### Public law

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

One of the cornerstones of public constructing regulations is the German Federal Building Code (In German: Baugesetzbuch, "BauGB") and the German Land Use Ordinance (in German: Baunutzungsverordnung) which deals with building zones and different types of usage. The provisions in these acts are supplemented by building regulations for each individual German Federal State regulated in the corresponding Federal State Building Codes (in German: Landesbauordnungen), which determine the rules for building permits.

Apart from setting the rules for zoning and building permits, public law also regulates many other relevant aspects, such as the permit to operate certain businesses (e.g., hotels or restaurants) or laws dealing with contaminated sites.

### Types of property rights in real estate

The strongest right in rem is the ownership of real estate. German law follows a general principle by which the ownership in a building is, at least in principle, inseparable from the ownership in the land that the building is built upon. In other words, save for specific property rights as e.g., hereditary building rights, the ownership in the land also comprises the ownership of all buildings on the land as well as the essential integral parts of these buildings. The ownership in real estate (including the buildings located on real estate) is transferred by notarial deed and registration of the new owner in the land registry (which is compulsory in order for the ownership to transfer). In Germany, the land registry is administered by the local civil law courts (in German: Amtsgerichte).

The hereditary building right (in German: Erbbaurecht, "HBR") creates an ownership-like position with regard to the building erected on a certain plot of real estate for the building owner, which is typically not identical to the owner of the plots of real estate, which is limited in time (but usually entered into for a term of 60 to 99 years). The HBR must be granted by the owner of the real estate. HBRs used to be quite common in residential real estate, used by municipalities to enable less wealthy parts of the population to become home owners, and in commercial or infrastructure projects. In principle, HBRs can be sold, inherited, and encumbered in the same way as ownership rights to real estate. The beneficiary of an HBR usually pays the owner remuneration (in German: Erbbauzins) for the HBR, which is typically calculated per annum. Upon expiry of the HBR term, 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 their right to the building.

Easements (in German: 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 a right can either be 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 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 be tied to another plot of real estate rather than a specific person (in German: Grunddienstbarkeit) or be of subjective nature and tied to a specific person (individual or entity) (in German: beschränkte persönliche Dienstbarkeit).

Certain transfer restrictions apply to the latter. For an easement to come into existence, it must be registered with the land registry. 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, the so-called Register of Public Easements (in German: 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 of existing encumbrances, one will not only have to look into the land registry but also in the register of public easements. The exception is the federal state of Bavaria where, rather than in a special register, public easements are registered in the land registry.

### **Transfer of title/asset deal/registration of owner**

In Germany, direct ownership in a plot of land (and the building erected on such a 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 by means of a notarial real estate sale and purchase agreement (SPA, in German: Grundstückskaufvertrag).

In real estate transactions, an alternative route is to acquire (the shares in) the legal entity owning the respective plot or plots of real estate, mostly a special purpose vehicle (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 on the basis of an SPA (in German: Anteilskaufvertrag).

Germany follows the separation principle, pursuant to which one must distinguish between the obligatory part of a transaction and the in rem part of a transaction. To transfer the ownership in/the title to real estate, the parties must declare the conveyance (in German: Auflassung). The conveyance of property is a specific in rem 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. The conveyance of ownership is most commonly declared within the notarial sale and purchase agreement, and mostly does not require the execution of a separate notarial deed.

The entry in the land registry 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 buyer being entered as the new owner of the real estate in Section I of the land registry (administered by the local civil law courts, Amtsgerichte, see above), the transfer of title is complete and effective.

The process of registration in the land registry can take several weeks or even months to be finalized. In-between signing the purchase agreement and registration of the transfer of title in the land registry, the buyer's claim to become owner of the real estate is generally 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 claims for compensation by the buyer against the seller). To protect the buyer in this interim period, the purchase agreement will normally provide for the immediate registration of a so-called priority notice (in German: Auflassungsvormerkung) for the buyer in the land registry.

### **Share deal**

Besides an acquisition by 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 90% of the shares are acquired, an acquisition by share deal can also be used to avoid real estate transfer tax (in German: Grunderwerbsteuer, "RETT"). The German legislator recently brought about changes to the relevant provisions in the RETT Act (in German: Grunderwerbsteuergesetz) and thereby considerably limited the avoidance of paying RETT through share deals and also considerably increased the scenarios in which RETT can be triggered. Tax advice is invaluable also in these cases.

The acquisition of real estate by means of a share deal also entails some risks:

- The buyer of shares in an entity holding real estate cannot be secured by means of a priority notice (in German: Auflassungsvormerkung, see above), because the legal entity will remain the direct owner of the real estate before and after the share deal 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 should provide for alternative mechanisms protecting the buyer's legitimate interest, such as for example clauses protecting the buyer, preventing the owner from selling the real estate to a third party prior to the transfer of the shares to the buyer.
- Furthermore, unless otherwise agreed by the parties, the buyer 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 due diligence should be undertaken and representations and warranties to be granted by the seller discussed as part of the negotiations of contractual arrangements. In that context, the buyer 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 considered that in case of a share deal, the real estate asset cannot generally be used as collateral for financing the purchase price because the buyer (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

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

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 (in German: Aktiengesellschaft, "AG") limited liability companies (in German: Gesellschaften mit beschränkter Haftung, "GmbH") or partnerships (mostly in the form of a German limited partnerships with a German GmbH acting as sole general partner, i.e. a so-called GmbH & Co. KG, "KG") as well as legal entities under public law.

The so-called civil law partnership (in German: Gesellschaft bürgerlichen Rechts, "GbR"), which is a partnership with unlimited liability of its partners, also has legal capacity to own real estate. However, at least pursuant to current legislation, i.e., *de lege lata*, in the land registry, it must be registered with both the name of the GbR itself as well as the names of all its partners. Changes in the composition of the partners must also be registered in the land registry, as these unlimited partnerships are not currently registered in the commercial register. However, due to changes to the applicable provisions of German law coming into force in January 2024, civil law partnerships can also be registered in a special register and thus acquired the status of a so-called "registered civil law partnerships" (in German: eingetragene Gesellschaft bürgerlichen Rechts). While, generally speaking, civil law partnerships can opt for acquiring that status, those civil law partnerships who act as acquirers/owners of real estate will not have that choice, but will be under an obligation to become registered in the special register and acquire the status of a registered civil law partnership, which will also make the process of becoming registered as an owner of real estate easier and avoid the need for having any changes in the composition of the partners registered with the land registry.

Foreigners and legal entities with a foreign domicile can become owners of real estate in Germany as well; however, there are some practical hurdles (see notarization below).

The structure in which investors acquire real estate is to a large extent tax driven, most common vehicles are limited liability companies and limited partnerships domiciled in Germany or corporations and partnerships from other EU member states, often domiciled in Luxembourg or the Netherlands.

## Real estate registry system

### Land registry/structure

The legal status in rem of real estate located in Germany is registered in the land registry (Grundbuch). The land registries (Grundbuchämter) are located at and administered by the German (civil law) local courts (Amtsgerichte).

### Form and sections

The particulars of plots are registered on so-called folios. Each folio of the land registry is divided into three sections (Abteilungen) and a reference list (Bestandsverzeichnis). The reference list contains a detailed description of the plots registered on the particular portfolio and corresponds with the cadastral plan indicating the size and location of the plots. 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. which encumber the plots. Finally, Section III lists the former and current land charges and mortgages encumbering the plots.

The land registry does not list public easements (with the exception of Bavaria, see above) and does not list "defects" with respect to the real estate, such as contamination, etc. Therefore, prior to acquiring real estate, research should be undertaken into the information available in other registers, such as the register of public easements (Baulastenverzeichnis) or the register for contaminated soil (Altlastenkataster) and/or other public registers.

### Compulsory nature of registrations

Registration with the land registry is compulsory for in rem rights to come into existence or be transferred. If the creation or transfer of in rem rights have not been registered, they are not effective (exceptions apply to certified land mortgages and land charges which can be transferred without registration, by a certified agreement and handover of the certificate).

### Public reliance

The land registry is a public register granting public reliance (in German: öffentlicher Glaube). This means that everyone can rely on the registrations in the land registry. Consequently, it is possible to acquire a plot of real estate from a person or entity registered as owner in the land registry, even if this person or entity is in fact not the legal owner of the respective plot of land because the land registry entries were not correct, provided the buyer was not aware of the incorrectness. Given the public reliance on the land registry, parties to any real estate transfer agreement should always review the content of a recent excerpt from the land registry 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. In specific circumstances it may also be advisable to have the notary public

verify with the competent land registry whether there are any pending applications.

## Notary role in the real estate transactions

### Sales and purchase agreement/formal requirements

Purchase agreements related to real estate located in Germany require the form of a notarial deed if the real estate is the purchase object (i.e., in an asset deal). A private written agreement is not sufficient to constitute legally binding and enforceable obligations to transfer real estate, or to bring about the transfer itself. The notarial deed contains the contractual obligations of parties as well as the conveyance in rem – “Auflassung” (although this could be done in a separate deed which might be recommendable under certain circumstances, e.g., if the purchase object still needs to be measured out of several plots). The deed will also contain the necessary applications to the land registry which the notary will then file and execute.

Whereas a legally binding agreement to transfer real estate by asset deal might be validly notarized by a foreign notary (provided that the foreign rules on notarization and the status and competences of the notary are comparable to the German rules), the conveyance as pre-condition of the registration of the new owner can only be notarized by a German notary (and by German consulates abroad), but not by foreign notaries.

The notarization requirement does not apply to share deals, provided that the transfer of shares of the particular entity does not require notarization which will be the case for the transfer of shares in German limited liability companies. The transfer of shares in stock corporation or interests in (limited) partnerships does, however, not require notarization.

### Extended reach of formal requirements

If an asset deal 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 would not be subject to specific formal requirements executed on a standalone basis.

### Notary fees

Notarial costs in a German real estate transaction depend on the value of the land and buildings and can be considerable.

### Requirements pursuant to Anti-Money Laundering legislation

The notary is obliged before notarization to gather information from the parties on their corporate structure and their beneficial owners. If such information is not provided or contradictory to

information available from the transparency register (the register of the beneficial owners of companies and partnerships which has been established due to EU-legislation 2017), the notary is obliged to refuse notarization. The notary also has to inform the competent authority in certain circumstances which indicate unlawful transactions and has to postpone notarization and may only proceed if the authority has not prohibited the transaction within certain delays.

### Requirements in case of non-German entities acting as buyers

A foreign purchasing entity needs to be registered in the transparency register (see above) of Germany or an EU member state, otherwise the notary has to refuse notarization.

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. For example, 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 legalized (to the extent the country of origin is a signatory to the Hague Convention by a so-called Apostille). Furthermore, the persons acting as signatories will have to render proof of their authority to act on behalf of the foreign company acting as acquirer.

If the company acting as acquirer originates from other 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 consulates or embassies can be required.

### Notification to tax authorities

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. If such notification duties are not complied with, the parties might not be able to recover RETT in case of the exercise of a rescission right by one of the parties or an abrogation of the purchase agreement.

German notaries public are also under an obligation of informing the competent tax authorities of any transfer of ownership stipulated in any deed that they execute, however the information by the notary does not substitute the duty of the parties to notify.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

### General

German statutory law obliges the seller of real estate to transfer full legal title to the property to the buyer and to deliver the plot of land and building free from defects.

### Individual liability concept

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

### Scope

The exact scope of the representations and warranties, as well as the consequences of a breach of these, 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. When markets are overheated, as they were until recently in many regions of Germany, there is a certain tendency by 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 overarching customary practice or market standard.

### Common representations and warranties – Land

Representations and warranties that are commonly provided for would generally *inter alia* include:

- Title (i.e., the guarantee that the transferor holds full and unrestricted legal and beneficial ownership and title to the property);
- No encumbrances (i.e., that the property is not subject to easements and encumbrances other than those specifically disclosed); and
- That the transferor is not aware of any contamination of soil (regulations dealing with contamination are often a hot topic and heavily debated during the negotiations).

### Common representations and warranties

#### *Buildings*

Where the acquisition of the real estate relates to and includes one or several buildings, additional representations and warranties often include that:

- Apart from normal wear and tear, the building is in normal condition and that the transferor is not aware of any specific grave defects; and

- 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.

### 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); and
- The actual net rent per annum generated under the existing lease agreement.

### Knowledge

The representations and warranties are often 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 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”).

Also, unless regulated otherwise, a buyer is generally limited in exercising rights for a breach of the representations and warranties to the extent the underlying circumstances were known to the buyer or should have been known to the buyer. This general concept is often deviated from as part of the corresponding agreements.

### Environmental issues

Environmental insurance is usually taken out if the acquired property is burdened with an elevated environmental risk (such as a petrol station). In that context, German environmental legislation stipulates that, 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 buyer’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 section 10.1.3).

## Disclosure obligations

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

## Mortgages and other usual collateral adopted in financing assets

### General

The "classic" means of providing collateral for financing real estate purchases are the creation of land charges (in German: Grundschulden) or mortgages (in German: Hypotheken). If a loan is secured by that type of collateral and the borrower does not fulfil their obligation under the loan, the lender can satisfy the debt by enforcing and realizing the collateral, e.g., in the case of mortgages or land charges finally by having the land sold (by auction). In the past, the legislator had thought of the mortgage as the primary instrument to be used. In practice, land charges have become more commonplace.

### Mortgage

The mortgage (in German: Hypothek) is one of the instruments 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 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 and interest repayment) and Interest Only Loans structure (in German: Zinszahlungsdarlehen). There are also supporting programs like the Bank Home Ownership Program (Kreditanstalt für Wiederaufbau, KfW).

To grant a mortgage, the mortgagor has to register the mortgage with the land registry. 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.

## 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 (in German: Grundschuld) 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 registry. The land charge may be used to secure other, also future obligations.

While in practice many land charges take the form of a security land charge (in German: Sicherungsgrundschuld), where the exact scope of secured claims and other terms and conditions for its enforcement are regulated in a separate contractual arrangement, the so-called security agreement (in German: 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 defenses of the debtor if the buyer was in good faith, the owner may now resort to pleas or defenses 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 security land charge, 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.

## Lease of assets and lease of business

### Applicable laws/types of leases

#### 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), §§ 535 ff. BGB.

**Other sources**

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

The Ordinance on the Calculation of Heating Costs (In German: 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 (in German: II. Verordnung über wohnungswirtschaftliche Berechnungen = II. BV) contains a full set of rules on the calculation and allocation of costs, charges, encumbrances etc.

Special regulations concerning stable-value clauses, as contained in the German Price Clauses Act (in German: Preisklauselgesetz), operating costs, as contained in the Operating Costs Ordinance (in German: Betriebskostenverordnung) and so forth, must also be taken into consideration, but cannot be described in further detail, here.

**Distinction between various classes of users/classes of use**

Some general rules related to lease agreements are applicable to virtually all asset classes, but 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 on one hand, and the rules applicable to commercial real estate, i.e., regulating the relationship between landlords and businesses, on the other hand.

**High level of protection in residential tenancy law**

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. That said, it must also be considered that the percentage of self-owned, self-used residential real estate in Germany is much lower than it is in other EU member states.

**Lease agreements general**

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

**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. A wide range of court decisions deals 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.

**Freedom of contract**

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

**Standard agreements/GTC**

Making use of standard agreements and/or general terms and conditions is generally allowable; however, particularly in residential tenancy agreements, where the vast majority of tenants are individuals, but also 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.

**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.

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 are to 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.

**Residential lease agreements****Tenant protection**

German law provides for a high level of tenant protection. In particular, residential lease agreements cannot be freely terminated by the landlord, the amount of rent payable by residential tenants is regulated and, in order to have tenants effectively vacate dwellings after a justified termination of the lease agreements, can require going through potentially tedious (court) procedures.

**Recent developments**

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

More than five years have already passed since the legislator introduced these new rules related to caps on residential rent, which puts statutory restrictions on increases in rent in certain regions. In regions with a so-called tightened/overheated residential real estate market (in German: Gebiete mit angespannten Wohnungsmärkten) the initial rent due under newly concluded residential lease agreements may not exceed the comparative local customary rent (in German: 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 not exceeding five years - establish those regions with tightened/overheated residential real estate markets, to which the respective rules apply. In fulfilment of the respective authorizations and following the entering into force of the Act on 1 June 2015, many ordinances have already been enacted in several federal states or have already been abolished. Currently, regions with tightened/overheated residential real estate markets include Berlin, Bremen, Düsseldorf, Frankfurt a.M., Hamburg, München, Potsdam and Stuttgart. On the contrary, the federal states Saxony, Saxony-Anhalt and Saarland have not yet introduced those ordinances (status as of June 2022).

### **Common problems**

Common problems between landlords and tenants involve security deposits and the termination of the lease.

the tenant usually has to pay a security deposit which serves the purpose of securing proper fulfilment of its obligations by the tenant. Security deposits often equal two or three months' 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, they must provide the tenant with a list of the damages and repair estimates within a reasonable period of time after the tenant moves out. In the case of a real estate transaction, i.e., the acquisition of real estate with existing lease agreements, the buyer would have to ensure access to these security deposits, as they may be held liable for repayment by the tenants.

In Germany, a landlord cannot freely terminate a residential lease agreement. They are only entitled to terminate where sufficient cause exists. German law describes several acceptable reasons: A landlord who needs to use the rented premises personally, or for family, or for a member of their 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.

A landlord wishing to terminate a lease, must give the tenant a written termination notice. For leases of up to five years, 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.

Therefore, it is difficult for a landlord to terminate any residential tenancy agreements.

## **Commercial lease agreements**

### **General**

Unlike residential leases, the statutory regulations governing commercial leases do not cover every relevant aspect and provide for a higher degree of freedom of contract for the parties.

### **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.

### **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 as a unilateral option, by which a preliminary contract or a conditional contract of sale 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.

### **Fixed term**

In contrast to 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, commonly combined with extension options for the tenants.

### **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 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".

### **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.

#### ***Frustration of contract/*clausula rebus sic stantibus (Wegfall der Geschäftsgrundlage)**

Following the outbreak of the COVID-19 pandemic and the consequences associated with the pandemic and the measures taken by governments to limit its spread, the issue arose as to whether a tenant, who, because of state imposed restrictions, cannot make use of the leased space at all or only to a limited extent, can claim a reduction of the rent for those periods in time in which usage was limited. Where landlords and tenants were unable to find an amicable solution for the issue, the German courts were called in to decide on the matter, often on the basis of court actions initiated by landlords for payment of rent that the tenant had refused to pay or withheld. German courts took deviating decisions on the matter. In a court ruling issued in January 2022, the German Federal Supreme Court (in German: Bundesgerichtshof) ruled that the pandemic and its consequences can entitle a tenant to reduce the rent, based on the concept of the so-called Wegfall der Geschäftsgrundlage, the German variant of the *clausula rebus sic stantibus* developed in Roman law. As regards both, the general existence of a corresponding claim for a reduction of the rent as well as the amount by which the rent can be reduced, the German Federal Supreme Court indicated that this would need to be established on the circumstances of the individual case and that there is no rule of thumb, pursuant to which a 50/50 solution could per se be considered appropriate.

## Administrative permits applicable to construction or restructuring of assets

### **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 building regulations. While the exact requirements for obtaining a building permit are contained in building regulations issued by each individual German federal state, building regulations are fairly standardized throughout Germany.

Each project involving construction, change, or demolition must comply with the specifications of zoning laws 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 (in German: Flächennutzungsplan) which is a preparatory plan; the second level is the development plan (in German: Bebauungsplan) which is the legally binding plan showing the permitted use of land.

### **Development plan**

The development plan (Bebauungsplan) is the decisive regulation for building permits. 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 built-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 built-up area and if there is no local development plan, then a building project is only permitted if 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.

### **Building permit**

Once the plans for a building project have been drawn up and prior to its implementation, a building permit (in German: 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 (in German: Bauaufsichtsbehörde). This involves coordinating 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 (in German: 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. Neighbors may file objections and/or initiate legal proceedings against the building permit within a statutory term on the grounds that neighbor interests might be violated. This may hinder progress of construction work.

## Environmental and energy – ESG rules and status of implementation

### Environmental issues

The Building Energy Act (in German: Gebäudeenergiegesetz, "GEG") is a German federal law. It brings together the Energy Conservation Act (in German: Energieeinsparungsgesetz, "EnEG"), the Energy Conservation Ordinance (in German: Energieeinsparungsverordnung, "EnEV") and the Renewable Energies Heat Act (in German: Erneuerbare Energien Wärmegesetz, "EEWärmeG"). It was enacted as Article 1 of the Act to Unify the Energy Conservation Law for Buildings and to Amend Other Laws, which unifies the energy conservation law for buildings and amends other laws.

With few exceptions, the GEG applies to almost all new buildings. Owner-occupied homes and public buildings are particularly affected by the requirements of the GEG. However, there are also important requirements for heating systems, insulation, and modernizations for existing buildings.

### 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.

### 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 recommended/ essential component of due diligence to be undertaken by the buyer, at least when the real estate in question is known to have been used for industrial purposes.

Liability for inherited environmental obligations is mainly governed by the Federal Soil Conservation Act (in German: Bundesbodenschutzgesetz). That act states that contamination must be avoided and 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 been or is aware of any contamination of soil.

There are many areas in Germany 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 is frequently a major topic in negotiations. It is recommended that the buyer 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.

### ESG status of implementation

At the level of the individual federal states, state-specific climate protection and energy transition laws have already been enacted in some cases, such as the Berlin Solar Act, which has been in force since mid-July 2021 and provides for an obligation to install photovoltaic or solar thermal systems for all new buildings (from 50m<sup>2</sup> of usable building area) for at least 30% of the gross roof area from 1 January 2023. Other German states are following suit.

The Federal Climate Protection Act (in German: Bundesklimaschutzgesetz, KSG), the Building Energy Act (GEG) and the Act on the Digitization of the Energy Transition apply. The introduction of the apportionment of the CO<sub>2</sub> price under the Fuel Emissions Trading Act (BEHG) based on a tiered model according to building energy classes is imminent. From 1 January 2025, every newly installed heating system is to be operated on the basis of 65% renewable energies. Also from 1 January 2025, all new buildings are to comply with the Efficiency House (EH) 40 standard. As early as 1 January 2024, the parts to be replaced in major extensions, conversions and extensions to existing buildings are to comply with an EH 70 standard. There are plans to introduce a "Federal subsidy for efficient heating networks (BEW)" for the expansion and decarbonization of heating networks, as well as a "Federal subsidy for energy and resource efficiency in industry (EEW)" for the use of industrial waste heat.

## Direct taxes applicable to sales

### 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 90% of the shares in a company holding German real estate.

In a direct transfer of real property, RETT is calculated on 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 typically be similar to its fair market value.

Since September 2006, the federal states have been free to set their own rates (prior to which RETT was levied at a standard rate of 3.5%). Consequently, there has been an ongoing trend to increase the RETT rate to improve the state budgets. The following table summarizes the RETT rates in all the German states as of 31 December 2021:

Federal state	RETT rate	Valid from
Baden-Württemberg	5%	5 November 2011
Bavaria	3.5 %	1 January 1997
Berlin	6%	1 January 2014
Brandenburg	6.5%	1 July 2015
Bremen	5%	1 January 2014
Hamburg	4.5%	1 January 2009
Hessen	6%	1 August 2014
Mecklenburg-Vorpommern	6%	1 July 2019
Lower Saxony	5%	1 January 2014
North Rhine-Westphalia	6.5%	1 January 2015
Rhineland-Palatinate	5%	1 March 2012
Saarland	6.5%	1 January 2015
Saxony	3.5%	1 January 1997
Saxony-Anhalt	5%	1 March 2012
Schleswig-Holstein	6.5%	1 January 2014
Thuringia	6.5%	1 January 2017

Although pursuant to the law, RETT is owed by both the seller/transferor and the buyer/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.

Because 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 (in particular: Preemptive rights, option rights) and/or when entering into agreements incorporating so-called designation rights, where discussions about the entity to act as final purchaser, for example an SPV are still ongoing.

### 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 (in German: Geschäftsveräußerung im Ganzen) on which no VAT is levied. In addition, the buyer enters 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 also applies. 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 qualifying as a transfer of a business unit, the sale is generally VAT-exempt. However, the seller may waive the exemption and opt to charge VAT. In this case, the buyer 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.

### 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, (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.

By passing the legislative package to reform the real property tax within the deadline set by the Federal Constitutional Court by the end of 2019, the federal legislature has fulfilled its responsibility to maintain the real property tax as a significant source of revenue for municipalities beyond 2019. Based on the reformed property tax and valuation law, new assessment bases are to be

determined for all of the approximately 36 million economic units of real property for property tax purposes from calendar year 2025.

The majority of the federal states implement the new property tax according to a federal model, which was introduced with the Property Tax Reform Act. In the area of the so-called Grundsteuer A (agricultural and forestry assets/agricultural and

forestry enterprises), most of the states implement the federal model. In the area of the so-called Grundsteuer B (real property/land), the states of Saarland and Saxony deviate from the federal model only in the amount of the tax assessment figures. The states of Baden-Württemberg, Bavaria, Hamburg, Hesse, and Lower Saxony, on the other hand, apply their own property tax model.

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# Greece



# Real Estate Law in Greece

## **New asset classes and emerging opportunities in Greece**

- Large residential development opportunities in the South region of Attica and the city center of Athens.
- Significant investment opportunities in coastal regions of Greece and especially in the islands, with huge profit margins and low risk real estate investments (given the relatively low purchase prices).
- Significant demand for commercial leases in Athens, for offices and stores.
- Purchase, renovation, and lease of residential real estate properties (especially in Attica), offering double-digit percentage yields.
- Numerous fix-and-flip opportunities of real estate properties in Athens (especially apartments) offering significant profit margins, in comparison to other EU capital cities.

By **Maria Chalioti**, Head of the Real Estate department, KBVL Law Firm - Deloitte Legal

# Overview of the Greek Legal System

## General introduction to main laws that govern acquisition of assets in Greece - real estate rights

Real estate asset acquisition in Greece is mainly structured either via (a) direct real estate asset purchase (asset deal transaction); or (b) indirect acquisition of a company that owns the real estate assets (share deal transaction). The rationale behind the decision often lies on the tax treatment and the business model of each investor.

The framework of asset deal transactions is set out by the Greek Civil Code, while the framework of share deal transactions is set out by the Greek Law 4601/2019, in conjunction with the respective law governing each type of target/company (e.g., Law 4548/2018 for a Société Anonyme, which is the most common type of company in Greece, equivalent to a limited company under common law).

Other real estate rights under Greek law, including the lease of a property, usufruct, adverse possession, etc., are mainly regulated by the Greek Civil Code. However, more specific rules may apply on certain types of transactions, e.g., P.D. 34/1995 in conjunction with Law 4242/2014 for commercial leases.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

The acquisition of real estate property rights in Greece can take several forms:

- Full ownership: The most common scenario is that an investor acquires full ownership over a real estate asset. Full ownership is often acquired on the divided part of a property (horizontal or vertical properties). This means that the investor can assume full proprietary rights over a distinct

part of a bigger property along with a participation percentage on the rights and obligations over it.

- Co-ownership: It is also common that co-ownership is acquired over a real estate asset. In that case, all the co-owners have full proprietary rights and obligations up to the corresponding percentage of co-ownership that each one holds. In addition, co-owners in Greece retain their right of “distribution”, irrespective of their percentage. This means that each co-owner (even with only a 10% stake) has the right to claim (amicably at first and then judicially) the physical sale/separation of part of the property that corresponds to the acquired percentage (e.g., in case of two co-owners holding 50% each over a property of 1,000m<sup>2</sup>, each may request separation into two properties of 500m<sup>2</sup> each). However, physical separation is allowed only if it does not contradict the rights of the other co-owners, and it is subject to the construction and town planning regulations in force. Alternatively, the court may order the sale via auction and, in that case, each co-owner receives the auction proceeds up to the percentage that it holds over the property.
- Bare ownership and usufruct: In such case, the rights that derive from full ownership are divided in two categories, i.e., bare ownership and usufruct. The bare owner has the main right of disposal of the real estate asset. However, when selling the asset, the latter will be transferred to the new bare owner encumbered with the existing usufruct. Conversely, the usufructuary, has the main right of exploitation and development of the real estate asset, acquires the proceeds, and bears the obligations and costs that arise. While the usufructuary cannot transfer the real estate asset, as such, it can transfer the right of usufruct to a third party.

Greece strongly encourages real estate acquisition by foreign investors. As such, despite the quite bureaucratic process, there is no actual limitation in real estate acquisition by foreigners. A minor exception to keep in mind is that the purchase of a property in regions located near the Greek borders requires the prior approval of the competent public authority.

## Real Estate Registry system

The Greek real estate registry system is managed by the Greek Land Registry, gradually substituted by the National Cadaster, which keeps track of the ownership, encumbrances, claims and enforcements of real estate properties in Greece.

Any transfer of ownership of a real estate property (including usufruct) and any setting up of a mortgage must be registered with the Land Registry or the competent Cadastral Office in order to be completed and opposed against any third party. Accordingly, third parties are also obliged to file with the Land Registry or the competent Cadastral Office any claims that they might have over a real estate property. Finally, all enforcements of real estate properties because of mortgages, must also be registered.

All the above-mentioned information is publicly disclosed, and any investor may legally access it and perform an inspection of the status of the property through their lawyer. This provides the investors with the required legal certainty about the status of the real estate property in question. Additionally, inspections allow investors to retrace the historical chain of ownership titles for the property to ensure they acquire valid ownership.

The whole process of registration does not come without extra cost and time, though. The fee for each registration amount to a fixed percentage of the value, which varies according to the type of the transaction (e.g., transfer of ownership, lease, mortgage), but does not exceed 0.6% of the value of the transaction. Fees typically burden the beneficiary of the right in question (e.g., the purchaser, the lessee, the debtor in case of a mortgage, etc.).

## Notary role in the real estate transactions

The Notary Public in Greece assumes the role and powers of a public authority. Almost all actions pertaining to real estate rights can be notarized, either mandatorily or voluntarily, as an extra layer of safety (e.g., in long-term leases). Notarial deeds must then be registered with the Land Registry or the National Cadaster in order to be confirmed.

The involvement of the Notary Public in Greece is mandatory for the set-up and a share capital increase of a company that is conducted via property contribution. For instance, a Société Anonyme in Greece (equivalent to a limited company under common law) can be established directly from the commercial registry. If, however, its shareholders wish to form its share capital by contribution of a real estate property (either starting share capital or after a share capital increase), the establishment must take place through a notarial deed.

The involvement of the Notary Public adds to the security of real estate transactions, as all the information regarding the status and the ownership title of a real estate property, included in

notarial deeds, is deemed as valid and true. There are standard notarial fees, provided by law, that are normally borne by the beneficiary of the right in question (e.g., the purchaser, the lessee, the debtor in case of a mortgage, etc.).

## Legal responsibility of the seller in real estate transactions – Contractual Representations and warranties

In principle, Greek transactions are based on contractual freedom between counterparties, while only the main obligations derive directly from law (mainly from Greek Civil Code).

In this respect, both parties can freely agree on responsibilities and limit their liability accordingly, to the extent that they will mutually decide. However, as a matter of Greek law, liability cannot be contractually excluded for gross negligence or willful misconduct. Therefore, there is much room for negotiating representations, warranties, and legal liability of each party.

Regarding contractual representations and warranties of the seller in real estate transactions, these are mainly focused on the status of the asset in question and its properties (e.g., the seller warrants that the asset has no hidden defects, or that it is free of any liens, encumbrances, or enforcements).

Of course, almost any declaration related to the real estate asset can be inserted as representation or warranty on a contract. If the seller does not comply with its representations and warranties, they will be liable for any direct or consequential damages or, if these are set as events of default, the buyer may terminate the contract as well.

Any declaration that cannot be inserted as representation or warranty, it can be set as either condition precedent or subsequent. In the first case, the ownership remains with the seller up to the fulfilment of the condition. If the condition is fulfilled, then the ownership is transferred to the buyer. A relevant deed attesting the lifting of the condition takes place, while there is no obligation for registration of the lifting deed to the land registry or cadastral office.

In case of a subsequent condition, the ownership is transferred to the buyer. However, if the condition is not fulfilled, then the sale contract is automatically terminated, and the ownership returns to the seller. This condition is usually added if a portion of the purchase price is credited as a security for the due and timely payment. Upon fulfillment of the condition, a relevant deed attesting the lifting of the condition is signed by the parties. Contrary to the condition precedent, the relevant deed must be registered with the competent land registry or cadastral office.

## Mortgages and other usual guarantees adopted in financing assets

A mortgage can be established in favor of a creditor for securing a loan by setting the real estate asset as collateral that can be enforced in case that the loan defaults. Upon repayment of the loan, the debtor can ask for the mortgage to be lifted. Both the establishment and lifting of the mortgage must be registered with the Land Registry or the National Cadaster in order to be confirmed, so that any third party can be informed about the encumbrances of a real estate asset.

Under Greek law, a pre-notation of a mortgage can also take place by virtue of a judicial decision and must be registered with the Land Registry. The pre-notation only grants a right of first refusal to acquire a mortgage. When the claim of a creditor is finally adjudicated, the pre-notation is converted into a mortgage, which is deemed to have been registered as the day of the pre-notation. In this way, a creditor may save the cost and time of registering a mortgage and have its claim secured at the same time.

The same asset can be encumbered with multiple mortgages or pre-notations, with different ranks, depending on the day of registration. Those registered on the same day are of the same rank.

Should a loan default, the creditors may enforce the mortgage and achieve the sale of the collateral by means of an auction, in order to satisfy their claims against the debtor by the auction proceeds. Creditors get paid in order according to their rank. Those of the same rank get paid on a pro rata basis.

## Lease of assets and Lease of Business

The rights, obligations, and the framework of the lease of assets are governed by the relevant agreements concluded between the lessor and the lessee, and the provisions of the Greek Civil Code, in conjunction with Law 4242/2014 in commercial leases.

Both domestic and commercial leases have a minimum duration of three years and, in principle, are governed by more stringent rules when it comes to rights and obligations of the parties, as they want to provide a safer environment for the lessee and ensure the security of the transactions.

While the lease agreements are concluded privately, they can also be concluded by means of a notarial deed, as an extra layer of safety for long term leases. Especially for those exceeding a 9-year term, a notarial lease offers the lessee the right to claim the continuance of the lease against any new owner of the leased property in case of sale. This rule, however, does not apply to new owners that received ownership by means of an auction, in case of enforcement.

## Administrative permits applicable to construction or restructuring of assets

The issuance of a building permit is a prerequisite for the construction on a plot. Small scale exercises are excluded from this rule.

The building permit is a document which certifies that the required prior approval has been granted by the competent building service (town planning) for the construction of a new building or for the installment of additions over an existing one. For obtaining of a building permit, a specific procedure needs to be followed which requires quite heavy supporting documentation.

A construction permit is based on specific conditions for each area (construction conditions). In essence, these are numerical quantities that describe the maximum permitted height that can be built, the maximum square footage that can be built, the maximum volume, the maximum permitted coverage of the plot and the minimum distance of the construction from its boundaries.

If a structure has been constructed without a building permit, it is automatically considered arbitrary and the owners are prosecuted by law and forced to pay large fines on an annual basis, for as long as they maintain the arbitrary construction. In addition, its transfer of ownership of the real estate asset is rendered invalid.

## Environmental & Energy – ESG rules and status of implementation

The protection of the environment and construction have become interconnected during the last few years, in a sense that the latter cannot be completed without following certain environmental rules and issuing the necessary permits (where applicable).

For instance, the issuance of a building permit for properties located outside the city planning area require a solemn declaration by an engineer, attesting that the location of the property, depicted on the forest map, does not fall in an area subject to provisions of the forest legislation. Therefore, several regions in Greece cannot be used for construction or exploited due to the special environmental conditions in this area (e.g., public forests, nature zones, reforested areas, etc.).

In addition, the issuance of an “Energy Performance Certificate” (EPC) is also often mandatory. It depicts the energy rating of a building and reports, among other, the calculated annual total primary energy consumption of a building, the actual annual total final energy consumption, the calculated and actual annual carbon dioxide emissions, etc. The Notary Public, in the cases of real estate asset transfers, must refer to the protocol number of

the EPC and attach an official copy of the EPC to the relevant notarial deed. Accordingly, in case of leases, the EPC protocol number must be completed in the relevant fields of the submitted electronic lease declarations.

### Direct taxes applicable to sales

In every sale of property, a tax is charged on its value and the buyer is liable for its payment. Prior to the execution of the relevant notarial deed, the seller and the buyer submit a joint “Real Estate Transfer Tax” return.

This tax is calculated as 3.09% of the value of the transaction or the objective value of the property (whichever is higher). It is, however, reduced in certain cases (e.g., reduced to a quarter in cases of distribution among co-owners). Exceptions to the abovementioned tax can be made under certain conditions, for the purchase of the first (main) house of an individual.

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Maria leads the Real Estate and Construction group in KBVL Law Firm, Deloitte Legal Greece. She is a qualified lawyer in Greece more than 10 years’ experience in real estate matters. She has advised high profile clients on various real estate transactions, including the largest Greek shipyard, one of the largest mining companies in Europe, banks, well-known tourist complexes, and development companies on strategic projects. Maria holds an LL.M. from the City University of London and an LL.B. from the National & Kapodistrian University of Athens.

# Hungary



# Real Estate Law in Hungary

## **New asset classes and emerging opportunities in Hungary**

- According to our 2022 Deloitte M&A study, development and leasing activity in the logistics sector accelerated in the first half of 2022, demonstrating continuous positive market sentiment in the industrial sector. A strong demand has emerged for modern industrial properties, including warehouses, logistics centers, and plots suitable for industrial utilization.
- Our most recent Deloitte Property Index shows that residential rental fees in Hungary have surpassed the pre-COVID level.
- A general overriding trend across the real estate market is the heightened focus on ESG transformation, with major players seeking clarity and universally set standards to meet the requirements of the capital market and the regulators.

By **Gábor Kóka**, Real Estate Industry Leader, Deloitte Hungary

# Overview of the Hungarian Legal System

## General introduction to main laws that govern acquisition of assets in Hungary - real estate rights

The general rules on the acquisition of assets in Hungary are set out in Act V of 2013 on the Civil Code. The acquisition of real estate is regulated by several specific laws and government decrees, depending on whether the acquirer is a foreign or domestic person, a natural or legal person, and on the type of the real estate.

The most important specific laws are:

- Act CXLI of 1997 on the Real Estate Register;
- Decree 109/1999 (XII. 29.) FVM on the implementation of Act CXLI of 1997 on the Real Estate Register;
- Act CXXIX of 2007 on the protection of agricultural land;
- Act CXXII of 2013 on the transfer of agriculture and forestry land; and
- Government Decree No. 251/2014 (X.2.) on the acquisition of real estate by foreigners other than agricultural and forestry land.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

Companies can acquire real property if it is provided by an investor as an in-kind contribution, or if it is purchased by the company. Companies that own real properties in Hungary are generally allowed to make unrestricted use of their real property: they can sell it, utilize it (e.g., rent it out) or take out loans secured on it (e.g., mortgage it), or sell the rights associated with it.

The acquisition of real property (with the exception of land used for agricultural or forestry purposes) by foreign individuals or legal entities is subject to a permit granted by the Budapest or county government office, based on the location of the real property. No permit is needed if the acquisition occurs through inheritance/succession. Special prohibitions apply to the acquisition of agricultural lands by foreign nationals (see below).

A permit is granted by the competent government agency if the acquisition of the real property does not constitute an injury to local government or other public interests, or if the foreign person wishes to live permanently and to pursue economic activity in Hungary for which the acquisition of real property is required, and the acquisition of real property does not constitute an injury to public interests. If the permit is denied, the decision can be appealed before the court.

### Acquisition of agricultural land

The acquisition of agricultural land by foreign nationals is highly regulated and several restrictions are applicable. Hungarian private persons as well as private persons of the European Economic Area (EEA) can acquire agricultural land. However, legal persons are not allowed to own agricultural land, except for the Hungarian state, the municipalities, the church, and mortgage institutions under circumstances set by the law.

Both Hungarian and EEA private nationals are required to fulfill several strict conditions to acquire agricultural land. The owner of such property must be a registered farmer in Hungary, with a specific agricultural or forestry qualification, or have been continuously residing and performing farming, forestry, or ancillary activities in Hungary for at least three years. The acquiring person must also undertake to cultivate the land autonomously for at least five years. The area of such land is also limited.

### FDI rules

During the state of emergency introduced by the Hungarian Government with respect to the COVID-19 pandemic, new rules were implemented for the purpose of monitoring foreign investments in Hungarian companies (FDI Act). The FDI Act imposes a notification obligation on foreign investors as a precondition to their planned investment in certain strategic sectors in Hungary which includes real estate-related activities. The FDI Act requires foreign investors to file a notification with the Ministry and to obtain an acknowledgement of such notification by the Ministry as a pre-condition to their investment into a strategic company, or in certain cases, strategic assets, in Hungary. A foreign investor is (i) a company or organization domiciled in, or a citizen of, a state outside of the European Union (EU), the EEA or Switzerland, or (ii) a company or organization whose majority owner is domiciled in, or a citizen of, a state outside of the EU, the EEA or Switzerland.

## Real estate registry system (Hungarian Land Registry)

All real properties located in Hungary are registered in the centrally organized land registry system. The land registry system separately maintains local land registers for each village, town, and for the Budapest districts.

The land registry is responsible for registering, maintaining, and updating the physical and legal data of all Hungarian real properties, including their basic physical characteristics, their cadastral maps, the rights and obligations as well as the relevant legal facts related to the properties. All real properties are given a so-called “topographical lot number”, by which they are registered in the land registry system.

Important principles of the land registry include the principle that it is open to the public (i.e., “public access”) and that it authentically proves the accuracy of the registered information/rights/facts (i.e., “public credibility”), and as a result, it protects the rights of a good faith buyer who purchased the real property based on the information registered in the land registry. The main data kept by the land registry on the so-called “property sheets” for all real properties is accessible for anyone in a paper-based or digital format.

Certain rights, including the acquisition of ownership through sale and purchase, easement rights, as well as mortgages, require registration in the land registry to become legally effective.

### The new act on the land registry

On 15 June 2021, the Hungarian parliament adopted the new land registry act, which will introduce comprehensive changes in the Hungarian land registry system. Most provisions of the new land registry act are scheduled to enter into force on 1 February 2023.

The main goal of the new legislation is to upgrade the land registry to an electronic database and fully digitalize the land registration procedures. Based on the new act, the current paper-based procedure will be replaced by an electronic online procedure.

## Notary role in the real estate transactions

The public notary usually participates in transactions if the transaction is financed through bank loans. It is common practice in the market for the project financier to have the loan agreement, the mortgage agreement, and other security agreements incorporated in the notarial deed form. This ensures the enforceability of any potential claims by the financing bank.

In Hungary, the public notary might also participate in a transaction by drafting and countersigning the real estate sale

and purchase agreement itself. Nevertheless, this task is usually undertaken by an attorney-at-law.

The public notary is generally involved with lease agreements by issuing eviction deeds. The eviction deed is a declaration of the tenant incorporated into the notarial deed by the public notary, in which the tenant declares that in case of the termination of the lease agreement, they will move out of the premises. As the eviction deed is in notarial form, it can be directly enforced, i.e., any potential possession protection procedures by the tenant can be avoided.

## Legal responsibility of the seller in real estate transactions – contractual representations and warranties

The contractual representations and warranties depend mainly on the type of real estate to be purchased and the specific circumstances of such real estate. Common examples are as follows:

### Status and authority of the seller

The seller has the authority and power to enter into an agreement and perform the arising obligations.

### Status of the property

- The property is in the lawful and exclusive ownership of the seller, and there are no lawsuits, encumbrances, options, claims, or any other third-party property rights that are unknown to the purchaser;
- There are no rights, obligations, facts, or pending applications for registration that are not duly recorded on the land registry sheet;
- Whether the properties comply with the applicable regulations (including building and environmental permits).

### Legal responsibility of the seller

The seller must indemnify the purchaser against any loss, liability, claim, or damage which arises from the breach of any of the seller's representations and warranties.

## Mortgages and other usual guarantees adopted in financing assets

It is a standard market practice that the purchaser of the property enters into a credit facility agreement with one or more creditors for the financing of a project. For the security of the loan, the purchaser may establish a mortgage (usually with a prohibition of alienation and encumbrance) on the property once the title to the property has been transferred to the purchaser.

The law prescribes the registration of mortgages in the land registry.

The project financier may, in addition to mortgaging the real estate, also pledge other rights and claims as additional security for the financing. Typical mortgages include mortgages on shares in businesses and mortgages on movable property. While a mortgage on real estate is registered in the land registry, a mortgage on a business share is registered in the Company Registry, and other liens are registered in the Registry of Credit Securities.

## Lease of assets and lease of business

Apart from certain mandatory legal regulations, the principle of freedom of contract is applicable to leases of real properties, particularly if the contracting parties are business associations and the subject of the lease is other than living premises.

The lease agreements of real property must be in writing. Hungarian language is not a requirement for such agreements. The law does not prescribe the registration of leases in the land registry.

Lease agreements are concluded for a definite or an indefinite period. Unless otherwise agreed, lease agreements with a definite term can only be terminated prior to the expiry of such term for a reason set out in the laws or in the agreement. Lease agreements with an indefinite term can be terminated by notifying the other party in advance, in accordance with the relevant notice period specified in the given lease agreement.

Lease agreements generally require the provision of security by the lessee, ranging from a three to six-month amount of rent, depending on the real property's function and the parties' agreement. The security is generally provided in the form of a cash deposit, bank guarantee, mother company or a third-party guarantee undertaking.

Lease agreements do not terminate automatically if the ownership of the real property subject to the lease is transferred. In such a case, the purchaser automatically becomes the lessor of the lease under the same conditions as set forth in the lease agreement and may not terminate such an agreement except if the lessee provided false information to the purchaser in respect of the existence or the material terms of the lease.

## Administrative permits applicable to construction or restructuring of assets

In addition to general legal regulations, construction activity must conform to the local zoning plans of local municipalities.

Construction activity may be carried out depending on the type of building—either upon the completion of the permitting procedure by the competent construction authority, or upon the notification of the competent construction authority.

Government offices serve as general construction authorities. However, other state offices also act as construction authorities with regards to real properties subject to special regulations, such as buildings under cultural protection. During the permitting procedure, other authorities such as the competent fire department as “specialized authorities” are also involved.

If a building permit is required for the construction activity, then the construction activity might be carried out only upon a final and binding building permit. The building permit is valid for four years from the date of becoming final and binding, or for six years from the start of the construction activity, provided that the building becomes suitable for occupancy permit within such six years.

Any subsequent extension or alteration of a building is subject to a building permit in general, but in certain cases specified by law, certain construction works may be carried out without a building permit.

The occupancy permit is issued if the building conforms to building regulations and to the prescriptions of the building permit, and is suitable for proper and safe use. If a building does not conform to regulations and the building permit, but the defects do not impede proper and safe use, the construction authority prescribes additional work to be carried out for the given building.

## Environmental and energy–environmental, social, and corporate governance (ESG) rules and status of implementation

### Energy efficiency certificate

The owners of certain real properties are obliged to have an energy efficiency certificate prepared should they wish to sell or lease the real property. The identification number of the certificate is a mandatory part of real estate sale and purchase agreements, as well as of lease agreements in Hungary. The energy efficiency certificate is a private document that details the characteristics of the energy consumption of the property and also gives recommendations to improve the energy efficiency.

### ESG rules

Real estate developers or funds can issue green bonds to the market. As per the Hungarian National Bank's (MNB) guidelines, the issuer has to create its own framework with the company's sustainability goals and KPIs. For the framework, a second-party opinion (SPO) has to be issued as assurance that the bond framework is aligned with accepted market principles (e.g., the Green Bond Principles or the Green Loan Principles) and that the

proceeds of the bond or loan, as set out in the framework, are aligned with market practices and expectations from the investment community. With the company on the stock exchange—even if it's an individual or a regulated real estate investment company (local REIT)—it is obligated to do its annual sustainability report as a non-financial reporting tool.

Due to the MNB recommendations, it is strongly suggested for the banks that financed project's GHG (greenhouse gas) emissions should be measured and publicized.

Currently, SFRD and EU Taxonomy alignment are at pre-implementation status. With the taxonomy screening, construction of new buildings, building renovation, acquisitions and ownerships, and individual measures and professional services related to real estate will be enhanced with the taxonomy eligibility check.

### Direct taxes applicable to sales

Those acquiring real property (or a quota-share-of a real property holding company) are generally required to pay a property transfer tax of 4% of the first HUF 1 billion (approximately USD 2,478,350\*) of the commercial value of the real property, and 2% thereafter, but no more than HUF 200 million (approximately USD 495,670\*) per property.

However, preferential tax rates and tax exemption titles are available in several cases, such as, inter alia, related party transactions (if certain conditions are met) or an acquisition for

the purpose of developing residential properties (within four years).

### Contact



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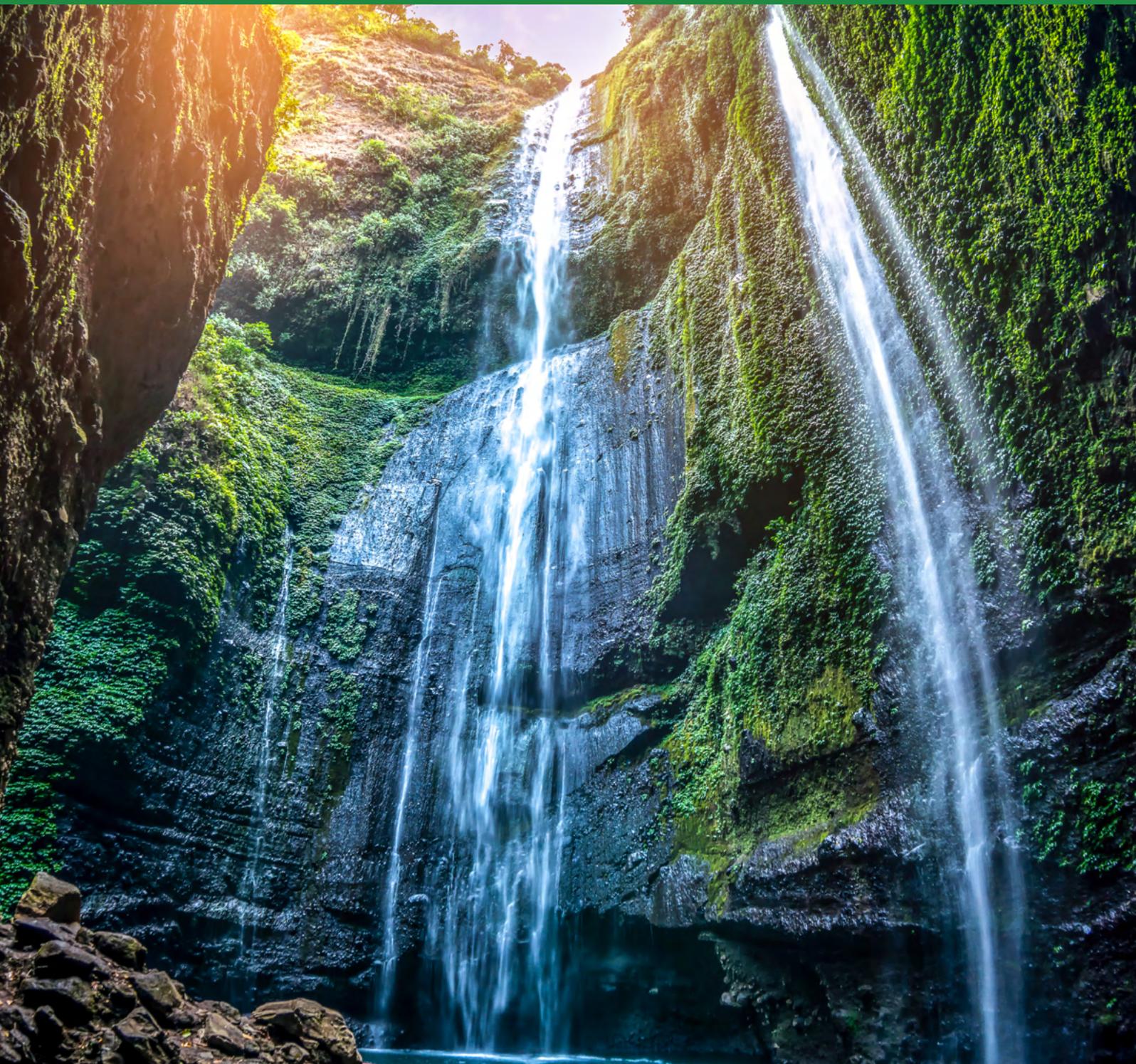
Magdolna is the leader of the Real Estate and Construction Law practice group in Deloitte Legal Hungary.

She has over 14 years of experience in real estate and mergers and acquisitions (M&A), advising on major acquisitions of significant office buildings, shopping centers, hotels, and manufacturing plants. She has a breadth of experience in large volume project financing, real estate and M&A transactions, development, and operations.

Before joining Deloitte, Magdolna worked at an international law firm in the area of real estate. She is fluent in Japanese and has multiple law degrees from Kobe University of Law (Japan).

\*According to the 15 September 2022 exchange rate

# Indonesia



# Real Estate Law in Indonesia

## New asset classes and emerging opportunities in Indonesia

As one of the most populous countries in the world, Indonesia, with its 273 million population, has been supported by lucrative property sector development for decades. The property market in Indonesia is still largely concentrated in Java Island, predominantly in Jakarta and its greater area, as the main financial and industrial hub of Indonesia, its large population, and stronger buying power compared to the other cities. Jakarta, as the flagship for business set-up, has been supported by commercial property sectors including office, retail, hotel, rental apartments, and industrial sectors that boost the economy of this capital city.

### Office

Local and multinational companies consistently select Jakarta as their headquarters, mostly in the central business district (CBD) area, particularly within the Golden Triangle e.g., MH Thamrin, Jenderal Sudirman and Rasuna Said and the surroundings, as well as the TB Simatupang corridor for outside the CBD. Jakarta currently has 11.25 million m<sup>2</sup> of office stock. The pandemic has brought much pressure on this sector over the past two years, bringing the occupancy rate down to 74.3%, leaving 2.9 million m<sup>2</sup> of vacant space, while the rental rate dropped by 4.5% in the CBD and 1.6% outside the CBD since 2020, equating to IDR 334,400 per m<sup>2</sup> per month (USD 22.3\*) and IDR 243,400 (USD 16.23\*) per m<sup>2</sup> per month, respectively. The condition is further pressurized by the continuous oversupply of forthcoming new stock, and therefore, this sector is still a tenant market. Furthermore, demand was significantly reduced as occupiers tended to implement work-from-home policies and held off on their expansion for efficiency reasons. Since the PPKM (Imposition of Restriction on Community Activities) was lifted and full work-from-office capacity returned this year, business space enquiries started to rebound as many landlords started receiving more enquiries. Essential industries such as start-ups, mining, oil and gas, information technology, and trading, have been actively seeking office space, although not to pre-pandemic high levels yet – some industries are still allowing hybrid working (from the office or from anywhere). With the expected future supply of 279,000 m<sup>2</sup> for Jakarta overall by the end of this year, rental rates are anticipated to continue softening. Businesses outside Jakarta are usually owner-occupiers and normally operate in shop houses, especially in second- and third-tier cities.

### Retail

With a population of around 32 million, the greater Jakarta area is deemed a large captive market for the retail sector. The retail sector was severely hit by the pandemic in 2020. Since then, many retailers in shopping malls shut down their outlets as they experienced a huge drop (of more than 60%) in sales turnover. With a total stock of 3.47 million m<sup>2</sup>, Jakarta's retail market has seen a decreased occupancy rate. Up until now, occupancy rate has been hovering at 88.1%, leaving around 388,000 m<sup>2</sup> unoccupied. The market saw downward pressure on rent of 2.0% over the past two years, to around IDR 434,100 (USD 28.94\*) per m<sup>2</sup> per month for all of Jakarta. During such times, outdoor and drive-through lifestyle retail concepts are more favorable. Since the PPKM in this sector was lifted earlier this year, shopping malls have been getting more crowded and back to normal. The number of shopping malls is predicted to continue growing outside Jakarta, in second- and third-tier cities.

## Hotels

This property sector was the hardest hit during the pandemic, especially in Bali which relies heavily on tourism. Jakarta hotel market occupancy rate fell to 20-30% in 2020. According to PHRI (Indonesian Hotel and Restaurant Association), there was an increase in willingness to dispose of hotel assets by property owners in some cities during the pandemic. However, the occupancy rate started to grow after the government imposed a quarantine mandate in 2021, bringing the occupancy rate to 50-60%, although room rates remained competitive. We have seen room rates bouncing back this year, especially during school holidays, and MICE activities are busy again. By now, room rates of 3-star, 4-star, and 5-star hotel classifications have grown by 8.7%, 6.0%, and 8.0%, respectively, achieving approximately IDR 373,000, IDR 540,000, and IDR 1.7 million per night (USD 24.87\*, USD 36.00\*, USD 113.34\*). Notably, Bali hotel occupancy has also shown significant improvement to 60% and room rates are back to their normal pre-pandemic levels.

## Rental apartments

As an expatriate-driven sector, the Jakarta rental apartment market, with a total stock of 9,328 units, currently registers an occupancy rate of 58%. This is a modest improvement on the low occupancy rate of 54% in 2020 when many expatriates were leaving Indonesia for an uncertain period of time, and because many corporations implemented cost efficiencies. After experiencing a drop in rental rates during the pandemic, the figure has now grown by 6.5% since the pandemic hit in 2020, bringing the figure to USD 21.3\* per m<sup>2</sup> per month. There are currently around 503 units of slated to be completed in Jakarta by the end of this year and oversupply is still anticipated. Ultimately, as Indonesia has opened its borders and lifted the entry restrictions for foreigners, the Jakarta rental apartment market should see more opportunity for recovery.

## Industrial

This sector has been the resilient one until now, which is the same as in other countries. There has been demand for 200 hectares of industrial land since 2020, showing stability and consistency despite the pandemic. In the meantime, there is stock of around 13,035 hectares of industrial land in Greater Jakarta with a selling rate record of 91.4%. Demand comes from various sectors and is mainly driven by data centres, manufacturing, logistics.

*By **Hendra Hartono**, CEO of PT Leads Property Services Indonesia, a leading property consulting company in Indonesia that offers a comprehensive and integrated range of real estate services. The company was awarded The Best Property Consultant in Indonesia in the Asia Pacific Property Awards for five consecutive years since 2018*

# Overview of the Indonesian Legal System

## General introduction to main laws that govern acquisition of assets in Indonesia - real estate rights

Law No. 5 of 1960 on Basic Agrarian Act (Law 5/1960) sets out the framework of land law in Indonesia and serves as the implementation of the principal of Indonesia's 1945 constitution. Law 5/1960 regulates the basic principles and provisions of Agrarian; rights of land, water, and space and land registration, and criminal provisions. Other relevant regulations governing the land or real estate in Indonesia are:

- Law No. 4 of 1996 on Security Right On Land And Objects Related To Land (Law 4/1996);
- Government Regulation No. 24 of 1997 on Land Registration (GR 24/1997);
- Law No. 11 of 2020 on Job Creation, also known as Omnibus Law (Law 11/2020);
- Government Regulation No. 18 of 2021 on Right to Manage, Land Rights, Flat Units, and Land Registration (GR 18/2021);
- Government Regulation No. 38 of 1963 on the Appointment of Legal Entities Allowed to Have Right of Ownerships on Land (GR 38/1963);
- Government Regulation No. 20 of 2021 on Control of Derelict Area and Land (GR 20/2021);
- Government Regulation No. 21 of 2021 on Spatial Planning Implementation (GR 21/2021); and
- Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Office No. 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights (Permen ATR/BPN 18/2021).

Under Indonesian law, the state, as the sovereign of all land in the Republic of Indonesia's territory, has the authority to grant as well as to revoke land rights that have been given to the citizens.

There are several recognized rights over land (land title), including:

### Right of ownership (Hak Milik - HM)

The right of ownership may only be obtained by Indonesian citizens, and special legal entities appointed by the government, which means that such property rights cannot be obtained by foreign nationals and legal entities, whether established in or outside Indonesia, with the exception of certain legal entities

under the conditions that are regulated in GR 38/1963. This right has no period limitation yet could be annulled or deleted if: (i) the land falls back to the state; (ii) the owner transfers it voluntarily; (iii) the land is lying fallow; and (iv) the land is demolished.

### Right to cultivate (Hak Guna Usaha - HGU)

This is the right to cultivate land which is directly controlled by the state for a period of time. This right can be obtained by Indonesian citizens and legal entities established under Indonesian law for a certain period of time and can be extended and renewed upon expiry. This right is granted for a period of no longer than 25 years. For certain enterprises that need a longer period, this right may be granted for not longer than 35 years. At the request of the rights holder and considering the situation of their enterprise, the period of time may be extended for no more than 25 years.

### Right to build (Hak Guna Bangunan - HGB)

The right to build can be obtained by Indonesian citizens and legal entities established under Indonesian law for no longer than 30 years and can be extended and renewed upon expiry by a period of no more than 20 years.

### Right to use (Hak Pakai - HP)

The right to use can be obtained by Indonesian citizens, legal entities established under Indonesian law (including foreign investment companies), government departments, regional governments, religious/social organizations, foreigners domiciled in Indonesia, and foreign legal entities and/or representatives of a foreign country and/or international agency that have representatives in Indonesia, for certain periods of time or as long as the land is used for a specific purpose and for free, against payment, or against service in whatever form. This period of time can be extended and renewed upon expiry.

### Right of ownership over condominium units (Hak Milik Atas Satuan Rumah Susun - HMSRS)

HMSRS adheres to the horizontal separation principle which means that an HMSRS is an ownership over the condominium unit of a personal nature that is separated from the common right over the common sections, common objects, and common land. The common right over the common sections, common objects, and common land will be calculated based on the proportional value (nilai perbandingan proporsional) and will be attached to the HMSRS certificate. HMSRS can be obtained by Indonesian citizens, legal entities established under Indonesian

law, foreigners domiciled in Indonesia, and foreign legal entities and/or representatives of a foreign country and/or international agency that have representatives in Indonesia.

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Other than the above, the unregistered land can usually be found in Indonesia and is called “*tanah adat*” or “*customary land*”. In order to evaluate the title of any unregistered land, there must be a physical inspection of the land as well as meetings with the head of the village, district, regent, and mayor in order to discern the unregistered land rights applicable to the piece of land in question. Typically, this involves review of any documentary evidence of land rights, such as evidence of payment of land tax (*girik*) and village records. Villages may be subject to collective rights over the land (known as *tanah bengkok* or *tanah wakaf*).

In order to solve the issue of unused, unutilized, and uncultivated land and areas, Law 11/2020 stipulates that any rights or concession on any land/area that are not used within two years from its issuance would be revoked by the government. Furthermore, GR 20/2021 was enacted to serve as the implementation of Law 11/2020, which carries the goal of increasing land usage effectiveness to enhance Indonesia’s national economy (for a detailed explanation, please see <https://www2.deloitte.com/content/dam/Deloitte/id/Documents/legal/id-legal-client-alert-government-regulation-no.20-of-2021.pdf>).

Further, although Indonesian law through Indonesia Civil Code (ICC) previously acknowledged a vertical boundary principle (*verticale accessie beginsel*), which means that the land and all objects attached to it are an inseparable unit (this law always attaches the building to the land where the building stands). Law 5/1960 acknowledges the horizontal separation principle (*horizontale scheiding beginsel*), which separates the land and the buildings, structures, or plants on the land. Therefore, it is possible to find two land titles over a land, e.g., right to build and right of ownership.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

The acquisition of real estate transactions in Indonesia are usually completed by:

- Sale and purchase;
- Exchange (*tukar menukar*) through an exchange agreement between the acquired asset and another object belonging to the party making the acquisition;
- Grants (*hibah*) in the form of land and/or buildings, which must be done through a written deed made by the land deed official;
- Income to the company (*inbreng-pemasukan dalam perusahaan*), defined as transactions that include non-cash assets, such as land from shareholders to be used as company capital; or
- Other legal acts for transfer of rights.

Prior to acquiring a certain piece of land, a person/company must investigate the title of the land, the willingness of the relevant land right holder(s) to sell the land, and the feasibility of obtaining the necessary licences related to the target land. Basically, the transfer of land rights can be carried out by sale and purchase, exchange, grants, auctions, inheritance, transfer of rights due to merger or acquisition, and other rights transfers.

Foreign nationals or legal entities cannot own land in Indonesia under the Law 5/1960. However, since the issuance of Law No. 1/1967, foreign direct investment (*Penanaman Modal Asing-PMA*) is governed and as a result, foreigners can have land in Indonesia through a PMA company. In relation to business use, under the Law 11/2020 jo. GR 21/2021, in order for a foreign investment company to acquire its target land, it needs to secure approval on the conformity of the business location with the relevant Detailed Spatial Plan (*Rencana Detail Tata Ruang-RDTR*) through the Online Single Submission (OSS) Institution, and is required to fulfill the suitability of spatial utilization activities (*kesesuaian kegiatan pemanfaatan ruang*) requirements:

- Location coordinates;
- The need for land area for space utilization activities;
- Land tenure information;
- Business type information; and
- Number of plan of the bulding; and
- Floor area plan of the building.

The transfer of land rights must be registered with the national land agency by enclosing a deed made by an authorized land

official as a valid proof. The creation of such a deed is made between the contracting parties before an authorized land official and witnessed by at least two witnesses who are qualified to act as witnesses in such legal proceedings.

Following a recent change, a foreigner can now hold a HMSRS over a condominium that is built on land under the right to use or right to build or right to manage over a state land, or right of ownership. However in such a case, the common right over the common land will not be calculated. Apart from the most essential restriction on land ownership in Indonesia regarding the type of entities allowed to hold certain rights, Indonesian land law also limits ownership of foreigners' housing by:

- Minimum price;
- Land area;
- The number of land plots or flat units; and
- For residence and residential purposes.

The land plots area limit in Indonesia depends on the use of the land. Based on the Permen ATR/BPN 18/2021, the land plots area limit for the residential house is one plot of 2,000m<sup>2</sup> land per person/family at most. However, in certain circumstances, if the foreign nationals have positive economic and social impact, they may own a residential house with more than one plot of land or a land area of more than 2,000m<sup>2</sup> with the permission of the Minister of Agrarian Affairs and Spatial Planning/National Land Office.

Digital transformation in land administration has highlighted the transparency of the land ownership system. In this respect, in an effort to address the overlapping issues of land ownership, and to combat the "land mafia"-related problems, the Minister of Agrarian Affairs and Spatial Planning/National Land Office issued guidelines for checking electronic certificates and issuing land registration certificates.

The guideline sets out a set of technical guidelines for all of the land and spatial planning information services provided by the Ministry. These guidelines have changed the landscape of the land management system in Indonesia, from which the public will benefit from the quality of the land and spatial planning management services enhanced through digitalization. The public can now secure land and spatial planning information through an electronic information service. This service encompasses certificate checking, the issuance of land registration certificates (Surat Keterangan Pendaftaran Tanah-SKPT), and information on land-value zones, coordinate points, data package information for global navigation satellite systems/continuously operating reference systems, land ownership histories, land histories, and spatial planning. For a detailed explanation, see:

<https://www2.deloitte.com/content/dam/Deloitte/id/Documents/legal/id-legal-client-alert-electronic-regime-jun2022.pdf>

## Real estate registry system

### Overview on the registration of title

Law 5/1960 adopted the registration of title system. In Indonesia, land registration has to be a continuous, sustainable, and regular series of activities conducted by the government of Indonesia, including collection, processing, bookkeeping, and presenting and maintaining physical data and juridical data, in the form of maps and lists, on the plots of land and condominium units, including the provision of a certificate of title to the existing landrights and the ownership rights over the condominium units and certain rights encumbered therein.

The object of land registration includes:

- The plots of land owned by the right of ownership (hak milik), the right to use (hak guna usaha), the right to build (hak guna bangunan) and the right to use (hak pakai);
- Land with right to manage (hak pengelolaan);
- Waqf land;
- Right of ownership over condominium units;
- Mortgage right; and
- State land.

Land registration is completed through:

- Collection and processing of physical data;
- Verification of their rights and bookkeeping;
- Issuance of a certificate;
- Presentation of physical data and juridical data; and
- Storage of public registers and documents.

In the current regime, land registration can also be done electronically, the result of which must be in the form of data, electronic information, and/or electronic documents.

### Negative publication system with a positive tendency

In practice, Indonesia uses two models of land registration:

- Initiative of the government of Indonesia, which will bear the cost for land registration and select the areas for the land certification; and
- Land registration at the initiative of the landowner, the cost of which will be paid by the landowner through the local National Land Office.

These two models of land registration will result in a land certificate comprising the land book (juridical data) and the measurement document (physical data).

Indonesia also adopts a negative publication system that contains positive elements related to the practice of the land registration. Therefore, the negative publication system adopted is not “completely” negative as the land registration produces documentation (land certificate) that serves strong evidence of ownership. In addition, Article 19 of Law 5/1960 sets out that the government implements the land registration throughout the whole territory of the Republic of Indonesia to guarantee a legal certainty in accordance with the provisions that are stipulated by the relevant government regulation. The legal certainty power of a certificate is further strengthened by the elucidation of Article 32 of GR 24/1997 which sets out that a certificate will be considered as strong evidence, in the sense that it cannot be proven otherwise, the physical data and juridical data contained therein must be deemed as correct. The physical and juridical data contained in the certificate must be in accordance with the data stipulated in the land register and the corresponding measurement document.

## Notary role in the real estate transactions

Based on the Indonesian Law on Notary Profession, a notary has the authority to authenticate all deeds (including deeds related to land affairs), agreements, and stipulations required by law and regulations and/or desired by the person concerned to be stated in an authentic deed, to guarantee certainty of the deed preparation date, to keep the deed, to provide access to the full deed, copy, or excerpt from the deed, all to the extent that the preparation of such a deed is not assigned to or exempted from another official or another person stipulated by law.

However, Indonesian law mandates that the land rights must be transferred through a deed made by a Land Deed Official (pejabat pembuat akta tanah-PPAT), not a notary. PPAT is a public official authorized to make authentic deeds on certain legal acts on the land rights or rights of ownership over condominium units, who usually graduated with a master level degree in notarial education with a PPAT specific education program. The creation of land rights and rights to ownership of condominium units through sale and purchase, exchange, grant, income in company, and other legal transfer rights, except the transfer of rights through auction, can only be registered if evidenced by deeds made by PPAT authorized in accordance with applicable laws and regulations. Whereas, under certain circumstances, as stipulated by the Minister of Agrarian Affairs, the Head of the Land Office may register the transfer of rights to the plot of land among Indonesian citizens as evidenced by a deed not made by the PPAT, unless the truth is considered sufficient to register the transfer of the related rights.

In relation to the above, a notary is authorized to make deeds of supporting documents on real estate transactions, i.e., conditional sale and purchase agreements, statements of representations and warranties, but the deeds to transfer land rights must be done with a deed made by PPAT.

## Legal responsibility of the seller in real estate transactions—contractual representations and warranties

A seller in a real estate transaction can be an individual or a company. To sell assets, there are obligations that must be fulfilled by the individual seller or director who represents the company. Under Law No. 1 of 1974 on marriage, a husband or wife who has no prenuptial/postnuptial agreement to separate the assets on their marriage must obtain approval from their spouse to release or transfer their property rights (e.g., selling assets). A limited liability company, however, must comply with the provisions in its articles of association to sell its assets. If the sale/guarantee of the asset is above 50% of the company's net worth, the director must seek approval from the general meeting of shareholders based on Law No. 40 of 2007 on limited liability companies.

There is no law or regulation which stipulates the specific legal responsibilities of the seller in real estate transactions. However, in the deeds made by PPAT, it is mandatory for the seller to represent and warrant that the land is legally and validly owned by the seller and is not disputed and/or encumbered with certain rights.

Notwithstanding the aforementioned, we are able to rely on the general provision of seller responsibility postulated within ICC. Based on the ICC, the seller has two basic obligations:

- To deliver the sold assets; and
- To safeguard them.

The ICC further elaborates the obligation of safeguarding the object into:

- The safe and peaceful ownership of the assets sold; and
- The security against any hidden defects in the assets, or those hidden defects which may cause cancellation of the sale.

Hidden defects, even those which are not known to the seller, will become the responsibility of the seller. In principle, there is an obligation for the seller to guarantee that the object of the transaction is able to be used for normal objectives under the agreement. However, the law also provides that the seller and buyer can regulate the extent of the seller's responsibilities or even release the seller from any responsibility.

In practice, the seller and the buyer can formulate the representations and warranties, as well as undertakings, from the seller in relation to the sale of the land in a written agreement. As such, it is highly recommended that both the seller and buyer obtain express and written agreement regarding the extent of their obligations and responsibilities.

In Indonesia, generally, the representations and warranties in the written agreement regarding the sale of land cover that:

- The land is legally and validly owned by the seller and is not disputed and/or encumbered with certain rights;
- The seller has not hidden any facts and has disclosed all the information regarding the land;
- The seller has the authority to sell the land and has obtained the necessary approvals to perform the sale of the land; and
- There is no option agreement or similar arrangement that has been made by the seller with a third party to sell the land.

## Mortgages and other usual guarantees adopted in financing assets

The sole guarantee or security of real estate in Indonesia is a mortgage (*hak tanggungan*) which is regulated under Law 4/1996. The security interest under a mortgage will normally cover the immovable and fixtures over the encumbered land automatically (whether or not these buildings or fixtures exist on the date of the mortgage, provided that such a mortgage is governed by the deed made by the land deed officials).

A mortgage may be established over the land with the following title:

- Right of ownership;
- Right to cultivate;
- Right to build; and
- Right to use (subject to a requirement that the relevant right to use is transferable).

PPAT will submit the application for the registration of a mortgage to the relevant National Land Office (*Badan Pertanahan Nasional*). In addition, Law 4/1996 stipulates the reconveyance (known as *roya*), which is a write-off or the removal of the mortgage from the land book of the mortgage due to the void of such a mortgage.

The mortgage will be void if:

- The debt secured by the mortgage is void (debt settlement);
- The holder of the mortgage releases the mortgage;
- The mortgage is released pursuant to the stipulation of ranking by the Head of District Court (*penetapan peringkat oleh Ketua Pengadilan Negeri*); or
- The land title secured by the mortgage is void.

In respect to such a debt settlement, the reconveyance of a mortgage can be done with a note by the relevant creditor that the mortgage is void since the debt secured by the mortgage has

been settled, or a written statement from the creditor stating the same information/clarification. In addition, Law 4/1996 enables the partial reconveyance (*roya parsial*) in which the mortgage is removed for certain parts of the mortgage objects, hence the mortgage only applies to the remaining party of the mortgage object as the security for the remaining debt which has not been settled.

*Roya* can also be conducted in the event of a transfer of mortgage from the existing creditor to a new creditor (due to the transfer of the secured loan). Upon conducting *roya*, PPAT will conduct a re-registration process of such transferred mortgage by submitting the required underlying documents for the transfer (i.e., underlying financing agreement evidencing the loan transfer, original land certificate, as well as other documentation that may be required from the relevant National Land Office). The registration of the transfer will be conducted by the National Land Office after receiving the application from PPAT by recording it in the land book of land mortgage (*buku tanah hak tanggungan*) and copying the same information to the land mortgage certificate as well as to the land title certificate.

In addition to the above, Law No. 42 of 1999 on Fiduciary Security stipulates that buildings on land which is owned by other party that cannot be secured with mortgage based on Law 4/1996 may be used as the fiduciary security object. This approach is an implementation of the horizontal separation principle (*asas pemisahan horizontal*) under Law 5/1960, where this principle allows for the separation of ownership between land owners and building owners. Thus, a fiduciary security can be secured to a building, while the land can still be secured with a mortgage.

## Lease of assets

Specific regulations regarding the lease of assets are stipulated in Law 5/1960 which regulates the right of lease of buildings. The right of lease of buildings is a type of lease that can be completed by Indonesian citizens, foreigners domiciled in Indonesia, legal entities established under Indonesian law, and/or foreign legal entities that have representatives in Indonesia. The right of lease of buildings can only occur on land with a right of ownership title. The bearer of the right of lease of buildings is entitled to build buildings on the land by paying a certain sum of money as a rent for the land. The payment of the rent can be made (a) either on a one-off basis or on a certain-interval basis, and (b) either before or after the use of the land in question. The lease agreement should not contain elements of extortion.

Notwithstanding the aforementioned, the mutual arrangement between the lessor and lessee will be based on a contract subject to the ICC. At the outset, the ICC accommodates the basic principle of freedom of contract (agreement) between the contracting parties (i.e., lessor and lessee), provided that the agreement fulfil the general conditions regulated under Article 1320 ICC, namely the subjective requirements (i.e., consent and

capability of contracting parties to enter into the contract/agreement) and objective requirements (i.e., certain (specific) allowable object(s) and lawful purposes). When the conditions mentioned above are fulfilled, the mutual arrangement of rights and obligations between the lessor and lessee is complete and valid.

Generally, the provisions under the lease agreement consist of the lease period as well as its option for extension, fees as well as its term of payment, repair and insurance, termination, etc. The provisions under a lease agreement are generally freely negotiable and as such, specific provisions under a lease agreement are subject to the contractual agreement between the lessor and the lessee.

### Administrative permits applicable to construction or restructuring of assets

The Indonesian government issued a series of implementing regulations on 2 February 2021 following the enactment of Law 11/2020. Law 11/2020 amends 76 laws across a wide range of business sectors, including the construction business, and the implementing regulations thereof consist of 45 government regulations and four presidential regulations.

On the licensing regime, the Indonesian government enacted Government Regulation Number 5 of 2021 on Risk-Based Licensing (GR 5/2021), which requires all business actors to fulfill risk-based licensing requirements under the OSS system.

The development and the marketing of real estate are mainly led by the developer, who as the user of construction services may appoint a contractor or construction company for the construction of such real estate through an Engineering Procurement Construction (EPC) agreement. A construction company (Badan Usaha Jasa Konstruksi or BUJK) may be established with foreign shareholders, and is referred to as a foreign construction company (Badan Usaha Jasa Konstruksi Penanaman Modal Asing or BUJK PMA). As for the main licensing requirements, prior to providing construction services in Indonesia, a BUJK PMA must first obtain a Foreign Investment Business License (Izin Usaha Penanaman Modal Asing or PMA License) from the Ministry of Public Works and Housing. Following the provisions of risk-based licensing under GR 5/2021, the BUJK PMA must also obtain a Business Identification Number (Nomor Induk Berusaha or NIB) and a Standard Certificate (Sertifikat Standar), of which the Standard Certificate for the construction activities comprises:

- Construction Business Entity Certificate (Sertifikat Badan Usaha Konstruksi or SBU-K);
- Construction Work Competency Certificate (Sertifikat Kompetensi Kerja Konstruksi or SKK-K); and
- Relevant license relating to the actual activities, e.g., construction services business license which may further be

divided into several categories (including actual/physical construction license, construction consultant license and/or planning and supervision for construction license) based on the Construction Services Law.

Incidentally, regardless of the presence of BUJK or BUJK PMA, construction can also be done through individuals, especially for low-rise buildings (i.e., houses). In addition, the Indonesian government enacted Government Regulation Number 16 of 2021 on the Implementing Regulation to Law Number 28 of 2002 on Buildings (GR 16/2021), which establishes a set of detailed guidelines for the construction of buildings and replaces several frameworks on licensing, specifically related to buildings (i.e., Building Construction Permit (Izin Mendirikan Bangunan). As of the enactment of GR 16/2021, it is mandatory to secure Building Approval (Persetujuan Bangunan Gedung or PBG), of which the PBG is the required license to construct, alter, expand, shrink and/or maintain buildings and its facilities. To obtain the PBG, the applicant must undergo a planning consultation process through the Management Information System for Buildings (Sistem Informasi Manajemen Bangunan Gedung) along with the applicant's data, building data, and technical plan document.

Further, Law 11/2020 has revoked Staatsblad of 1926 No. 226 jo. Staatsblad of 1940 No. 450 on Nuisance Law (Hinderordonnantie), thus, any business entity that engages in the construction of buildings is no longer required to obtain a nuisance permit (izin gangguan). Previously, the Ministry of Internal Affairs (MoIA) issued MoIA Regulation No. 19 of 2017, which revoked the obligation to obtain a nuisance permit as stipulated under MoIA Regulation No. 27 of 2009 on the Guidelines for the Stipulation of Regional Nuisance Permits as amended by MoIA Regulation No. 22 of 2016.

### Environmental and energy-ESG rules and status of implementation

Indonesia's environmental law requires business activities with an environmental impact to complete an environmental impact assessment, known as AMDAL (Analisa Mengenai Dampak Lingkungan). AMDAL is composed of an Environmental Impact Statement (Analisis Dampak Lingkungan-Andal), Environmental Management Plan, and Environmental Monitoring Plan (Rencana Pengelolaan Lingkungan Hidup dan Rencana Pemantauan Lingkungan Hidup-RKL/RPL). The submitted Andal and RKL/RPL are assessed by the Environmental Feasibility Test Team in relation to the administrative and substantive matters.

The Minister of Environment and Forestry established categories of business activities that require an AMDAL. Business activities that do not require an AMDAL may require either documentation of Environmental Management Efforts and Environmental Monitoring Efforts, known as UKL/UPL, or delivery of a Letter of Undertaking of Environmental Management and Monitoring, known as SPPL.

Under the Law 11/2020, the environmental permit has been replaced by environmental approval (persetujuan lingkungan). Depending on the types of business activities, the environmental approval serves as an environmental feasibility decision (if granted based on AMDAL) or a statement of environmental management capability (if granted based on UKL-UPL).

The Indonesian government also commits to managing the climate change crisis as reflected in the Presidential Regulation No. 98 of 2021 on the Implementation of Economic Carbon Value to Achieve National Contribution Target and Greenhouse Gas Emission Control in the National Development (PR No. 98/2021) and commits to lowering greenhouse gas emissions by as much as 29% by 2030. In certain regions, a permit to dump liquid waste into certain water resources is subject to a user fee, collected by the local government. Furthermore, through Governor Regulation No. 93 of 2021 on the Groundwater Exclusion Zone, DKI Jakarta prohibits the use of fresh groundwater in certain areas from 1 August 2023.

The Ministry of Environment and Forestry, alongside the Ministry of Public Works and Public Housing, issued regulations to set the standard of a legal framework on green buildings in Indonesia. A building certified as a green building (Bangunan Gedung Hijau-BGH) could be given incentives by the local government, such as:

- Relief on building approvals retribution and/or service;
- Compensation in the form of floor area ratio;
- Technical support and/or expertise in the form of technical advice and/or green building expert service assistance on a pilot period;
- Awards in the form of certificates, plaques, and/or tokens of appreciation; and/or
- Other incentives in the form of publications and/or promotions.

## Direct taxes applicable to sales

There are several taxes applied in property acquisition in Indonesia:

### Land and building tax (Pajak Bumi dan Bangunan-PBB)

The PBB rate is calculated by multiplying the tax rate with the sale value of the tax object (Nilai Jual Objek Pajak-NJOP) that has been deducted by non-taxable NJOP (minimum IDR 10 million/USD 668.05\*). PBB is set at a maximum of 0.5% of NJOP.

\*According to the 15 September 2022 exchange rate

### Duty on the acquisition of land and building rights (Bea Perolehan Hak atas Tanah dan Bangunan-BPHTB)

The duty on the acquisition of land and building rights is imposed on the buyer at 5% of the transaction value, which has been deducted with the non-taxable tax object acquisition value (Nilai Perolehan Objek Pajak Tidak Kena Pajak-NPOPTKP).

### Income tax (Pajak Penghasilan-PPH)

Income tax is imposed on the seller and is set at 2.5% of the transaction value. However, the income tax for transfers of simple houses and/or simple condominiums conducted by taxpayers engaged in a property development business is set at 1%.

### Value added tax (Pajak Pertambahan Nilai-PPN)

PPN on property sales only applies to primary properties, which are residential properties sold directly to the end-customers by the developers. PPN is imposed on the end-customer and is set at 11% of the transaction value.

### Sales tax on luxury goods (Pajak Penjualan atas Barang Mewah-PPnBM)

PPnBM is imposed on the end-customer who acquires property that meets the luxury criteria from the developer. PPnBM is set at 20% of the transaction value.

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# Italy



# Real Estate law in Italy

## Overview of the main asset classes in Italy

- Speaking about the Italian market, the tourism sector has rapidly recovered after having been severely affected by COVID-19: year 2022 surpasses 2019 in terms of occupancy and is in line with pre-pandemic figures, in terms of income; the trend is in robust growth, especially for the arts cities, for Milan, and for similar cities with global visibility.
- The residential sector has substantially cancelled the “green and country” trends generated by the pandemic and is showing resistance to the increase of interest rates of banking loans. Prices are stable in the main cities, but with a good level of liquidity in terms of transactions. Milan confirms its robust and dynamic demand which continues to increase prices and permits a wide regeneration of the pre-existing urban context. Rome shows signs of recovery, after almost ten years of flat or declining demand.
- The office sector is moving between opposite strengths: on one side, high demand for modern spaces, commensurate with the new organizational format of businesses and, on the other side, a reduction of spaces following the increasing digitalization of services and, partially, following the “mix/flexible” organization, with rotation of presence in office and remote working. The net effect is minor surfaces (but slightly) with more flexible requirements. The take-up remains strong in Milan and stable in the main business cities of the country. Rome is expected to return to more dynamic levels.
- The retail sector has also found the right balance after the shock of the pandemic and has included e-commerce in the multi-channel model (the only one which is giving good results). Prices and rents are not yet at pre-pandemic levels, due to the fear of recessions caused by the war in Ukraine. In any case, some consumption behaviors are changing due to access to the market by the new generations (less constant, more opportunistic, more orientated towards “pay for use” rather than “pay for own”). In this sector too, Milan and the art cities are over performing relative to the rest of the country.
- The logistics sector is in constant growth in terms of transactions and - although less than in other countries - also in terms of rents. Italy has firmly restarted its trend of modernization of the logistic infrastructures, especially in the north and center of Italy.
- The drivers linked to ESG policies – introduced at European level and fully absorbed by the Italian market - have entered powerfully into all real estate sectors of our market and will have a strong impact on them, as it is happening in Europe. All the Italian real estate asset managers are demonstrating strong favor in implementing ESG factors into their existing portfolios.

By **Aldo Mazzocco**, CEO and General Manager of Generali Real Estate & Head of Private and Real Asset

# Overview of the Italian Legal System

## General introduction to main laws that govern acquisition of assets in Italy - real estate rights

The Italian legislator has improved significantly recently –the legal rules applicable to the acquisition of real estate assets (the assets), following the rationale that the sale of an asset is not only a private transaction between seller and buyer, it also constitutes an opportunity to check of the legal compliance of the asset with public laws.

For this reason, while the Italian Civil Code remains the main sources of law for the protection of the private interests of the parties (e.g., the right to damages in case of defects of the asset sold), new laws have been approved to ensure legal compliance of the asset with public interests and to impose the utmost transparency. The main laws, which aim to impose the delivery of documents or information in the real estate contracts of sale are:

- “Testo Unico Edilizia n° 380/2001” requiring the seller to disclose to the buyer – in the notarial deed of sale – all Urbanistic Authorizations obtained for the construction of the asset; this so-called “Dichiarazione Urbanistica” is aimed at ensuring the urban regularity of the asset sold;
- “Legislative Decree n° 122/2010” requiring the seller to provide the buyer with the “Attestato di Conformità Catastale”, i.e., a declaration confirming the compliance of the physical status of the asset with its cadastral description at the Catasto, for tax purposes;
- “Legislative Decree n° 195/2005” introducing the compulsory delivery by the seller to the buyer of the “Attestato di Prestazione Energetica - Certificate of Energy Consumption”, in order to increase transparency on the actual energy consumption of the asset;
- “Law 4 August 2006, n. 248” mandating the disclosure of (a) the registration number of the real estate agent – if any – involved in the transaction (to prevent the abusive exercise of this profession) and (b) the bank references of all the payments made to the seller, for anti-money laundering purposes;
- “Legislative Decree 20 June 2005 n° 122” regulating the entire process of sale by a construction company to private consumer, of an
- asset “under construction”, in order to protect the non-professional buyer;
- “Legislative Decree 22 January 2004, n. 42” (“Codice dei beni culturali e del paesaggio”) granting the government the right of pre-emption for the sale of an asset qualified a “cultural asset”.

The main estate rights over an asset regulated by the Italian Civil Code, in the usual real estate transactions between professional investors are:

- Right of ownership (Diritto di Proprietà), which grants to the owner (Proprietario) the full and exclusive rights to use, to construct, transform or restructure, and to dispose totally or partially, at any title, of the asset; in all these cases, the owner may exercise its “full and exclusive” right of ownership, “within the restrictions and obligations deriving from the legal system”; these restrictions and obligations are those introduced by the special laws mentioned above, such as planning and urban rules, cadastral regulations, or others, such as distance, prohibition against causing damages to third parties, etc. (art. 832 of Italian Civil Code “ICC”);
- Right of surface (Diritto di Superficie, i.e. “right to build over”), in which the owner (Proprietario Concedente) grants a third party (Proprietario Superficiario) the right to construct, to maintain and to become the owner of a building built on land owned by the Proprietario Concedente; this right has the business purpose to ease construction of a new building without imposing the costs for the acquisition of the land; this right is also adopted when an energy company intends to build its own facility on a third party’s asset and use it as energy provider;
- Right of usufructs (Diritto di Usufrutto), which grants to the beneficiary the right to use and to draw fruits, without limits, from an asset, but with the obligation to respect the intended use of the asset (art. 981 ICC);
- Right to plant over (Diritto di Enfiteusi), which grants the beneficiary (Enfiteuta) the right to plant and use a plot of land, with the obligation to improve the land and to pay rent to the landowner (art. 957 of the ICC); this right has the purpose of promoting the productivity of agricultural lands;
- Right of easement (Diritto di Servitù), which grants to the owner of an asset (Fondo Dominante-Dominant Estate), the right to impose – over a confined land or asset (Fondo Servente-Serving Land) – obligations or burdens (such as passage, water drainage, passage of electrical conduits), necessary for the complete use of the dominant estate.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

Real estate transactions between professional investors are usually structured as an asset deal, share deal or, for more sophisticated transactions, as a fund deal.

In asset deals, the acquisition structure is divided in three phases, each with different types of legal documents, form, content, and legal effects.

### Phase 1 – Proposal of Purchase

The first phase comprises the Proposal of Purchase (Proposta di Acquisto), prepared by lawyers, containing all the essential elements of the prospective transaction: a concise description of the asset, the range of price and modes of payment, conditions precedent of the acquisition (due diligence, board approvals, bank financing), timing of closing and exclusivity; in case of violation by either party of its obligations to negotiated in good faith (i.e., obligation of transparency vis-à-vis the counterparty and obligation of confidentiality vis-à-vis third parties) during the negotiation, the relevant party may be held liable for damages.

### Phase 2 – Preliminary Agreement

If the seller accepts the Proposal of Purchase from the buyer, the parties sign a preliminary Sale & Purchase Agreement (Contratto Preliminare di Compravendita), drafted by lawyers, which regulates, in detail, all the terms and conditions of the prospective sale, already mentioned concisely in the Proposal of Purchase (urban and cadastral description of the asset, agreed price and final modalities of payment, etc.); as well as the structure of contractual representations and warranties released by the seller in favor of the buyer. It is advisable that the Preliminary Agreement be signed before an Italian Notary who will register the Preliminary Agreement with the Real Estate Registry called Conservatoria: this process of “Trascrizione” of the preliminary agreement with Conservatoria guarantees – to the accepted buyer – priority to purchase the asset with respect to (i) any registration of subsequent preliminary agreements fraudulently executed by the seller with new buyers or (ii) against easements or seizures registered by third parties against the sellers, after the Trascrizione of the Preliminary Agreement.

### Phase 3 – Notarial Deed of Sale

The final contract of sale is a notarial deed, prepared by the notary (usually chosen and paid by the buyer); the notarial deed of sale - negotiated and reviewed by the parties and their lawyers - contains not only the final asset of interest agreed by the parties of the Preliminary Agreement, but also compulsory clauses imposed by the special laws mentioned above, as a requirement for a valid legal transfer of the asset, such as the

Urbanistic Declaration, the Attestato di Conformità Catastale and the Attestato di Prestazione Energetica.

For a share deal, after the preliminary exchange of the Proposal of Purchase, the acquisition structure is mainly divided in two phases:

- Execution of a Share Purchase Agreement (or a Quota Purchase Agreement, depending on the type of financial instrument of the target), in the form of a private contract, where the parties agree on all the terms and conditions of the transaction: price, mode of payment, conditions precedents, representations and warranties; and
- Execution of the transfer – in notarial form - which results in the endorsement of the shares and delivery to the seller (or signing of the notarial deed of sale of the quota), upon payment of the price.

In a share deal, since the ordinary legal rules set forth by the Italian Civil code for the sale of goods apply exclusively to legal defects over the shares or quotas (and do not cover automatically the assets and liabilities nor the business of the target), the buyer’s lawyers must pay close attention to negotiate contractual representations and warranties to protect the buyer against defects directly referred to the target.

If the transaction involves the acquisition of portfolios of assets or several assets in different countries, with professional investors involved, it is advisable to consider the structuring of a real estate fund, which offers high transparency and tax efficiency.

Concerning cross-border transactions involving a foreigner (i.e., a non-Italian citizen), the foreign party is entitled to buy assets in Italy if (i) they are a European Citizen or (ii) they have a “Permesso di Soggiorno”, an administrative document released by the police or (iii) their home country permits Italian buyers to purchase assets on the same terms and conditions (“Condition of Reciprocity” under international laws).

## Real estate registry system

The real estate registry system in Italy is composed of two registries, Conservatoria dei Registri immobiliari with civil effects and Catasto with tax effects:

- Conservatoria dei Registri immobiliari is a real estate registry with civil purposes, as it renders any real estate transaction of rights over immovable assets legally public and known to third parties, in order to guarantee undisputed acquisition and to prevent “double sales” by the seller to multiple buyers: the first buyer who registers the acquisition with Conservatoria, prevails legally.
- Catasto is a real estate registry with tax purpose: it contains a full mapping of the Italian real estate assets in order to

determine the tax regime and the relevant levy on each asset.

## Notary role in the real estate transactions

The notary is the public official entitled to:

- Ascertain – before closing - the legal title of ownership of the seller and the absence of burdens over the immovable asset;
- Notarize – during closing – the signatures of the parties and date of execution of the deed of transfer and,
- Register – following closing - the notarial deed of transfer with Conservatoria and with Catasto.

Only one notary is required per single transaction in Italy (not one notary for each party, like in other countries).

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

For an asset deal, the Italian Civil Code sets forth specific protections in favor of the buyer:

- Against legal defects, such as (i) eviction, i.e., claims by a third party purporting to be the owner of the asset transferred or (ii) presence of legal burdens over the asset in favor of third parties, unknown to the buyer. In these cases, the buyer has the right, between signing and closing, to suspend the transaction as a precautionary measure and, after closing, the right to damages; and
- Against material defects of the asset (Vizi occulti, such as the right of the buyer to (i) terminate the agreement and the right to damages or, alternatively, to the termination of the sale agreement, as well as (ii) the right to a reduction in the price.

In addition to the legal protections mentioned above, the parties usually negotiate contractual representations and warranties in order to guarantee certain areas of business not covered by legal protections, such as (i) conformity between actual use and authorized use of the asset, pursuant to administrative law (in particular, for assets destined to high street retail or hotels), (ii) the absence of hazardous material, (iii) the absence of illegal occupation, and (iv) the absence of unpaid taxes. While legal protection set forth by the Italian Civil Code have a one-year statute of limitations period, the contractual representation and warranties may have longer periods, depending on the agreement of the parties.

## Mortgages and other usual guarantees adopted in financing assets

When purchasing an asset, the buyer releases in favor of the financing bank a set of guarantees which usually include (i) the “Ipoteca”, first degree mortgage over the asset, granting the beneficiary the right to expropriate an asset owned by debtor (ii) assignment of the rents, and (iii) assignment of the indemnifications under the insurance policy. If the asset is “under construction”, the bank will also require the assignment of any down payments (Caparra Confirmatoria or Acconto) paid by the prospective buyers to the seller, during the construction phase.

## Lease of assets (“Contratto di Locazione”) and lease of business (“Contratto di affitto d’azienda”)

The Italian law 392/78 contains two sets of rules for lease agreements:

- Rules for the so-called “Grandi Locazioni”, applicable when the rent above EUR 250,000 (USD 249.847,836\*) per year; and
- Rules for the so-called “Locazioni Ordinarie”, applicable when the rent is equal to or below EUR 250,000 (USD 249.847,836\*) per year.

In case of Locazioni Ordinarie (rent equal to or below EUR 250,000/USD 249,847,836\*), Law 392/78 provides the following mandatory rules, all in favor of the tenant (therefore, in case of violation of these mandatory rules, the relevant clause or the entire agreement may be declared null and void):

- Minimum duration of the lease: six years plus six years for commercial leases and nine years plus nine years for hotel leases;
- Right of withdrawal for just cause, exclusively in favor of the tenant;
- The base rent – as freely agreed by the parties – may be adjusted exclusively based on 75% of Index Istat (“ISTAT - indice dei prezzi al consumo per le famiglie di operai ed impiegati”): this implies that, for the Locazioni Ordinarie, the “step up rent” may be subject to risk of invalidity;
- For the lease agreements of an asset intended for commercial businesses open to the public (i.e., excluding private offices and similar), the right of pre-emption in favor of the tenant for the new lease of the asset, if the landlord – after expiration of the precedent lease – intends to lease it to a new tenant, and the right of pre-emption in favor of the tenant for the purchase of the asset, if the landlord intends to sell it to third parties;
- For the same lease agreement of assets intended for commercial businesses open to the public, in case of

termination, upon the initiative of the landlord, the tenant is entitled to an indemnification for loss of goodwill (indennità per perdita d'avviamento); the indemnification is equal to 18 months of the latest rent for commercial leases and 21 months of the latest rent for hotel leases.

While – as indicated above – the Locazioni Ordinarie provides mandatory rules, imposed directly by the Law 392/78 in favor of the tenant, conversely, in case of the Grandi Locazioni, the parties may freely negotiate all the terms and conditions of the agreement: the rationale of the rules of Grandi Locazioni is that, since the tenant is able to pay a rent above EUR 250,000 (USD 249.847,836\*), they are a professional entrepreneur and therefore, both the tenant and the landlord have similar negotiating powers, so that they are able to protect themselves autonomously, without need for the legislative protection of the tenant as imposed by the Law 392/78 for Locazioni Ordinarie.

## Administrative permits applicable to construction or restructuring of assets

The Italian legislator has recently simplified and deregulated the process of authorization of construction and restructuring of the asset significantly. Testo Unico Edilizia d.P.R. n. 380/2001 currently provides the following alternative regimes:

- “Permesso di costruire” is a formal authorization released by the municipality for a new construction or major restructuring of existing assets;
- SCIA (segnalazione certificata inizio attività) is a unilateral notification sent by the owner to the municipality, in case of extraordinary maintenance or light restructuring (or, alternatively CILA Comunicazione Inizio Lavori Asseverata, when the works do not concern structural parts of the asset): SCIA or CILA must be duly accompanied by a formal report of a technician confirming that the works are consistent with the planning documents, as well as national and local laws. Once the notification is sent to the municipality, the works can start immediately. In any case, the municipality has the full right to verify that the works are consistent with the notification and with public laws.
- Edilizia libera: there is no need for any authorization or notice for ordinary maintenance and the instalment of energy (e.g., solar panels), heating equipment, light or temporary constructions, or similar activities.

## Environmental and energy

ESG rules and the status of implementation: The Italian real estate market is becoming increasingly sensitive regarding recent criteria of ESG Environmental, Social & Governmental issues. The main Italian Funds' Asset Managers are starting to include indicators of ESG criteria in their acquisition process of new assets with sellers, in the periodical reports sent to their

investors, in the lease agreements with their tenant (especially in the hotel sector) and in the property management agreement with the property management companies. Some real estate companies have also started a process of “labelling” their assets adhering to ESG criteria, in terms of energy saving or environmental compliance. Hotel operators –to comply with the “Social” criteria – are starting to increase their dialogue with municipalities, public associations or nonprofit organizations located close to the hotel, to adapt the use of the hotel to public service and public activities to the benefit of the community.

## Direct taxes applicable to sales

The tax regime applicable to the acquisition of an asset varies significantly depending on the acquisition structure adopted: (i) asset deal (in this case it also depends on the type of asset and the nature of the seller (private or professional); (ii) share deal or (iii) fund deal. For this reason, in the initial phases of negotiation, it is advisable to obtain a preliminary tax analysis of the different scenarios to compare the tax impact of each structure.

## Contact



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\*According to the 15 September 2022 exchange rate

# Japan



# Real Estate Law in Japan

## Overview of the Japanese Legal System

### General introduction to main laws that govern acquisition of assets in Japan - real estate rights

Transfer of the title to a property is governed by the Civil Code. In addition, in relation to the conclusion of the transfer of the title to the property, the Real Estate Registration Law is applicable.

Under the Civil Code, the title to the property may be legally transferred/conveyed by simply expressing the intent to transfer it. No formality is required (for example, no written sale and purchase agreement is required.). In addition, no instrument (separate from the contract) is required to transfer/convey title to the property (for example, no title deed is required to effect the conveyancing).

However, to assert such a transfer of title against a third party, confirmation is required under the Civil Code.

In case of real estate, registration is the way to confirm the title transfer. Such a registration is governed by the Real Estate Registration Law. More detail of the registration is discussed in section 3.

Under the Civil Code, the land and the building on it are regarded as separate real estate and independent from each other (while in some other countries such as the US, the building on the land is deemed as "improvement" of the land and accordingly, the building is not regarded as the subject of ownership interest separate from the land.) If the buyer wants to acquire the land and the building(s) on it, the sale and purchase agreement

should specify that both title to the land and the building(s) will be transferred to the buyer.

### Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

An outright sale and purchase agreement of real estate between the seller and buyer is usually used.

However, for commercial property, the real estate is occasionally put in a trust, and the beneficial interest representing such real estate is traded to save registration tax as well as the real estate acquisition tax.

It is rare to use escrow in closing the transaction and hard to find an escrow agent or title insurance company.

While it is not legally required, a real estate broker is often used to find the property (for the buyer or lessee), potential buyer (for the seller), or potential lessee (for owner). Real estate brokers are legally regulated under the Real Estate Brokerage Act and must be licensed.

Japanese real estate brokers are unique in that they are allowed to represent both the seller and the buyer in the same transaction. The real estate broker may be paid fees by both the seller and the buyer. The maximum fee that a licensed real estate broker can charge is restricted under the act.

There are no specific restrictions currently applicable to foreigners, but the Foreign Exchange and Foreign Trade Law is applicable in relation to the trade between residents and non-residents.

There is a statute that grants the government the power to restrict land acquisition by foreigners (Foreigner Land Law). Under the statute, the Japanese government can issue orders to restrict the land acquisition by foreigners to procure the reciprocity between Japan and such a foreign country or ensure national security. However, no order under such a statute has been issued to date.

Under the Foreign Exchange and Foreign Trade Law, if a non-resident acquires the right to the real estate, the non-resident has to report to the Japanese government.

The Act on the Review and Regulation of the Use of Real Estate Surrounding Important Facilities and on Remote Territorial Islands was enacted on 23 June 2021. While this Act has not come into force fully, the RESIF Law intends to restrict the use of land surrounding important facilities (such as military facilities, coasts guard facilities, and other facilities fundamental to the people's life) and on remote territorial islands to protect national security, and if the owner of such land gives up such land, the Japanese government will purchase it.

## Real estate registry system

The Japanese real estate registration system is governed by the Real Estate Registration Act.

Under this Act, the registration book is prepared for each piece of the real estate – as the land and the buildings on it are separate real estate, a book of registration is prepared for the land and building.

In case of land, the registration book is prepared for each parcel of the land. A parcel can be divided and merged with other parcel(s) and such a division and merger will be reflected in the front page of the book.

Conversely, for the building, the registration book is prepared for each building. Ancillary buildings (such as barns) are included in the book of the main building.

Each registration book is divided into two sections: one is the ownership section, and the other is the encumbrance section. The chain of title can be searched in the ownership section. In encumbrance section, searches can be made on the mortgage, pledge, lease, superficies, easement, lien, judicial attachment, or other kind of encumbrance on the property. Anyone can access the registration book for a small fee. Title insurance is not common in the Japanese market.

The registration book is usually in a digital format.

In order to file the registration documents, the filer must submit the documents/information showing the intent to transfer the title. The sale and purchase agreement is usually used for this purpose, but the filer can prepare separate documents strictly for filing purposes.

In practice, a judicial scrivener is often retained for filing purposes. The judicial scrivener must have a license to engage in its business under the Judicial Scriveners Act.

## Notary role in the real estate transactions

As discussed in the first section above, no formality is required to effect the title transfer/conveyancing. Accordingly, involvement of a notary is not required, for contracts or for registration.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

Under the default rule of the Civil Code, the seller of real estate owes warranties of non-conformity of transferred right to the terms of the contract. Under this warranty, the buyer may request to cure the unconformity, a reduction of price, indemnity for loss, and cancellation. If the real estate delivered by the seller does not conform to the terms of the contract with respect to the kind or quality, and the buyer fails to notify the seller of such non-conformity within one year from the time when the buyer becomes aware of it, the buyer may not exercise such a warranty, provided, however, that this does not apply if the seller knew or did not know due to gross negligence the non-conformity at the time of the delivery.

There is a statutory exception for this default rule under the Act on Promotion of Quality Control of Residence. Under this act, for newly built residences, the seller owes a warranty to cure and to reduce the price for 10 years from the delivery in respect of the substantial, structure-bearing part of the residence.

In commercial transactions, it is often seen that seller does not owe any warranty (in other words, the sale is on an as-is basis) to eliminate the statutory warranty. In general, such an agreement is legal, valid, and binding on parties, but there are two major statutory exceptions for this.

The first is that even if the contract sets forth that the seller does not owe a statutory warranty, the seller is still liable for (a) the target real estate's non-conformity to the terms of the contract that seller is aware of but failed to tell the buyer, and (b) any encumbrance that the seller has granted or created.

The second is that the seller – if a real estate broker – is still liable under the statutory warranty for at least two years, regardless of the language in the contract to the effect that the seller does not owe the statutory warranty.

If the seller insists on an as-is basis transaction, due diligence of the property is recommended. For this purpose, if a real estate broker is retained, the real estate broker is legally required to prepare a document explaining substantial matters on the target real estate. This document usually describes the concerns the buyer should have.

## Mortgages and other usual guarantees adopted in financing assets

If all or part of the purchase price of real estate is financed by a bank, the bank usually requires a mortgage on the real estate. Banks usually require full recourse on their loans. Thus, in theory, all assets of the borrower/buyer will be subject to the attachment by the bank. If the borrower's credit is not sufficient, the bank may also require a guarantee from other parties, such as the parent company.

For commercial property, the bank may accept the limited recourse loan that can be enforced on the limited assets relevant to the real estate to be purchased (e.g., lease contracts of the real estate, insurance payment on the real estate, bank account into which the rent will be paid by the lessee). However, in case of limited recourse loans, the monitoring by the bank will be more stringent than full recourse loans, such as monitoring of financial tests (e.g., LTV test, DSCR test) and the periodical submission of an appraisal report.

As discussed in the above sections "General introduction to main laws that govern acquisition of assets in Japan" and "Real estate registry system", unless the mortgage is registered in the encumbrance section of the registration book of the relevant real estate, such a mortgage cannot be asserted against third parties.

In addition, since land and the buildings on it are regarded as separate real estate, the mortgage should be created on both the land and the building on it (and registered in each of the registration books).

## Lease of assets and lease of business

For leased real estate, the rights of the lessee are well protected by the Act on Land and Building Leases in addition to the Civil Code.

For land leases, the Act is applicable if the purpose of the lease is to own buildings on it, not for temporary use.

Under this Act, the minimum period for the lease is 30 years, and at the expiration of the lease term, the contract is renewed at the request of the lessee for another 10 years (in case of the first renewal, 20 years) as long as the building is standing. The landlord may refuse the renewal if they have justifiable cause to refuse it, such as the landlord needing to use such land. However, the court will seldom grant such a justifiable cause.

The leasehold on land cannot be asserted against third parties unless it is registered in the registration book (encumbrance section) of the relevant land. However, under this Act, such a registration is deemed to be made if the lessee owns the building on it and such ownership is registered in the registration book of the building on the land.

In addition, when the leasehold on the land is terminated, the lessee may request to buy the building from the landlord at the market price under such Act. In other words, the lessee has put option of the building.

In this Act, a fixed-term land lease (not less than 50 years but not subject to renewal) and the land lease for owing commercial property (not less than 30 years but less than 50 years and not subject to both renewal and putting an option on the building) are stipulated as well. If the intended lease falls within these types of leases, the provisions of this Act should be looked into.

As for the building lease, the Act is applicable if the purpose of the lease is not temporary.

Under this Act, there is no minimum period of lease; however, at the expiration of the lease term, the contract is renewed with the same terms and conditions. The lessor may refuse the renewal if they have justifiable cause to refuse it, such as needing to use such a building. However, the court will seldom grant such a justifiable cause.

The leasehold on a building cannot be asserted against third parties unless it is registered in the registration book (encumbrance section) of the relevant building. However, under this Act, such a registration is deemed made if the lessee occupies the building.

In addition, when the leasehold on the building is terminated, the lessee may request from the lessor to purchase the fixtures on such a building at the market price under the Act. In other words, the lessee has put an option on the fixtures.

In this Act, a fixed-term building lease (i.e., building lease without renewal) is also stipulated. Since this is unfavorable to the lessee, the contract must be notarized.

## Administrative permits applicable to construction or restructuring of assets

The main permit for construction is the building certification under the Building Standard Act. Through this certification, compliance with various legislations such as the City Planning Law, is checked. The application for this certification is usually filed by specialists such as a construction company or an architect on behalf of the owner.

## Environmental and energy – ESG rules and status of implementation

The main relevant laws are the Soil Contamination Countermeasures Act (under this act, the owner is responsible for cleaning the contaminated soil), the Act on Special Measures Concerning Promotion of Appropriate Treatment of Polychlorinated Biphenyl Waste (under this act, the holder of polychlorinated biphenyl waste must report to the government and properly dispose of it), and the Industrial Safety and Health

Act (only provisions relevant to asbestos), the Landscape law, and local regulations relating to the environment.

Compliance with these laws is often provided as representations and warranties in the sale and purchase agreement, and the seller must indemnify the buyer for the losses incurred by its breach. In addition, if the purchase price of real estate is financed by a bank, the bank usually requires the same representations and warranties as the buyer/borrower.

In commercial property transactions, a service provider for environmental due diligence is often retained, and satisfaction of the buyer to the environmental due diligence report is one of the conditions precedent to closing. In some cases, an engineering report on the building may include some of the environmental issues (such as asbestos), and in some transactions, the engineering report satisfies such a contract requirement.

The study of environmental research consists of two phases. Phase one is only documentary and phase two includes an onsite study.

## Direct taxes applicable to sales

The main taxes for real estate transactions are (i) capital gain tax (both national and local) for the seller, (ii) real estate acquisition tax for the buyer, (iii) registration tax (in respect of the registration of ownership or mortgage) for the buyer, (iv) stamp duty on the sale and purchase agreement of real estate for both the seller and buyer (stamp duty will be also imposed on the loan agreement to finance the purchase price, usually borne by buyer/borrower), and (v) consumption tax on the building for the buyer.

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# KOSOVO



# Real Estate Law in Kosovo

## **New asset classes and emerging opportunities in Kosovo**

- According to our 2022 Deloitte M&A study, development and leasing activity in the logistics sector accelerated in the first half of 2022, demonstrating continuous positive market sentiment in the industrial sector. A strong demand has emerged for modern industrial properties, including warehouses, logistics centers, and plots suitable for industrial utilization.
- Our most recent Deloitte Property Index shows that residential rental fees in Hungary have surpassed the pre-COVID level.
- A general overriding trend across the real estate market is the heightened focus on ESG transformation, with major players seeking clarity and universally set standards to meet the requirements of the capital market and the regulators.

By **Vegim Kraja**, Senior Associate, Deloitte Legal Kosovo

# Overview of the Kosovan Legal System

## General introduction to main laws that govern acquisition of assets in Kosovo-real estate rights

Laws governing matters of acquisition of assets in Kosovo include:

- Law No. 03/L-154 on Property and Other Real Rights;
- Law No. 08/L-013 on Property Rights of Foreign Citizens in the Republic of Kosovo;
- Law No. 06/L-010 on Notary;
- Law No. 04/L-013 on Cadaster;
- Law No. 04/L-077 on Obligational Relationships;
- Law No. 2002/4 on Mortgages.

## Acquisition structure usually applied in real estate transactions; restrictions—if any—applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

For real estate transactions, the contract for the acquisition of the structure must be concluded in writing before the public notary, and the ownership title must be registered with the Register of Real Property Rights, administered by the Cadaster Agency of Kosovo.

Furthermore, for transaction of an immovable property to be valid, the approval from the seller's spouse is required if the property transacted is under joint ownership.

In terms of the restrictions, the transaction cannot be completed if the spouse of the title holder does not provide approval for the sale.

Additionally, under Article 32 of the Law on Prevention of Money Laundry and Combating Financing Terrorism, it is an obligation for parties that if the purchase price of the immovable property exceeds EUR 10,000\* (USD 9.993,913\*), payment must be made through bank transfer.

In relation to the acquisition of property by foreign persons, based on Article 4 of the Law on Property Rights of Foreign Citizens in the Republic of Kosovo, foreign natural and legal persons have the right to be holders of property rights in the

territory of the Republic of Kosovo, based on the principle of reciprocity and the requirements specified by this law or international agreement.

Under Article 5 of the present law, reciprocity exists when a citizen of the Republic of Kosovo or a legal person with a presence in Kosovo can acquire the right to immovable property in a foreign country under the same conditions as the foreign citizen can acquire the right to immovable property in the Republic of Kosovo.

As per the restrictions for acquisition of property by foreign persons, Article 7 of the Law on Property Rights of Foreign Citizens in the Republic of Kosovo states that a foreign person does not have a right to acquire public properties, such as:

- Natural resources;
- Public goods for general use;
- Agricultural land in public ownership;
- Forests and forestry lands in public ownership;
- Movable or immovable public property announced as cultural heritage of special significance;
- Immovable property which is located within the radius of one kilometer from the state border;
- Immovable property which is in an area where the interest and security of the state are protected, and to which, by a separate law, foreign citizen cannot have an ownership right; and
- Immovable property in public ownership which, based on the applicable laws, cannot be transferred to private ownership of Kosovan citizens.

Other than the above, a foreign natural person can acquire ownership rights over agricultural properties, forests, and forestry lands with an area of up to 5,000m<sup>2</sup> only if the agreement relates to residential buildings located in that area.

## Real Estate Registry system

In Kosovo, the Real Property Rights Register is organized and managed by the Kosovo Cadastral Agency, which is responsible for registering real property rights. The Kosovo Cadastral Agency

was established as an executive agency within the ambit of the Government of Kosovo's Ministry of Environment and Spatial Planning.

The Kosovo Cadastral Agency is the responsible authority for cadastral activities at the state level and is responsible for the guidelines for cadastral activities. It is also responsible for supervising the municipal cadastral offices which are established under the ambit of each municipality. The municipal cadastral offices are responsible for the functionality of the cadaster, including registration of real property rights in the jurisdiction of cadastral zones where the property transacted is located. Along with registration of ownership titles, the validity of other real rights, including pre-emption rights, mortgages, servitudes, and usufruct are conditional on their registration with the cadaster.

### Notary role in the real estate transactions

Under Article 40 of the Law on Public Notary, for the transactions related to the acquisition of real property rights to be valid, it is a compulsory requirement to be concluded by notarial deed before the public notary.

The public notary is obliged to create the notary deed in accordance with the compulsory form and it must identify the parties to the transaction, real property that is being transacted, verify the will of parties, and notify them of the content and effects of their agreement. Moreover, the public notary is obliged to notify the buyer of the existence of securities and encumbrances over the immovable property being transacted.

### Legal responsibility of the seller in real estate transactions—contractual representations and warranties

Based on the provisions of the Law on Obligational Relationships, the seller is liable for both legal and material defects in the real estate transaction and must protect the buyer from any defects.

Pursuant to Article 491, paragraph 1 of the Law on Obligational Relationships, the seller is liable for any claim by a third person over the real estate that excludes, reduces, or restricts the buyer from using and owning such a property, if the buyer did not consent to taking the real estate encumbered with any right in favor of any third party.

In case of any third-party claim, including a registered or any unregistered claims over the sold property, the buyer is entitled to terminate the contract or to request a reduction in price proportionate to the obstacles created as consequence of the legal defects.

Moreover, the seller is liable for latent and patent defects of the item. Such liabilities may be subject to contractual limitations,

meaning that the seller may limit the liability towards the buyer in relation to defects of the item.

In relation to the building contract, a buyer also has a recourse against the architect and/or the construction contractor for any major defects affecting the structure of the building (defects concerning the solidity of building) for a term of 10 years, generally starting at provisional acceptance.

### Mortgages and other usual guarantees adopted in financing assets

According to Article 172 of the Law on Property and other Real Rights, a mortgage means the creation of an interest in immovable property by an agreement or by law, which gives the mortgage lender the right to initiate foreclosure proceedings for such immovable property for the purpose of satisfying the sufficiently identifiable obligation that is secured by the mortgage and has fallen due.

The mortgage is created by an agreement between the owner of immovable property unit and the mortgage lender and by registering it at the Real Rights Registry (cadastral office in the municipality).

Pursuant to Article 174(1) of the Law on Property and other Real Rights, the mortgage agreement must be concluded in writing before the public notary in the form of a notary deed. The law provides for the mandatory elements of a mortgage agreement.

Similarly, as with a pledge agreement, the right of priority can be established in a mortgage by registering it with the Immoveable Property Registry.

The Property Law provides that in the case of default of a debtor or any other breach of contract, the mortgage creditor acquires the right to sell the immovable property encumbered by a mortgage based on the Law on Execution Procedure.

Moreover, the Property Law recognizes that the commercial mortgage, also known as the "trade association mortgage," can be enforced by extra-judicial means, i.e., without the initiation of enforceable procedure before a private enforcement agent. The mortgage qualifies as a trade association mortgage if: (i) the owner of the immovable property unit is a merchant or a business enterprise, and (ii) the mortgage creditor is a financial institution.

The trade association mortgage can be subject to foreclosure with consent of the owner of the encumbered property as expressed in the corresponding power of attorney.

The official tariff for mortgage registration varies from EUR 20.00 to EUR 400.00 (USD 19,987-USD 399.756\*), depending on the value of the loan secured with the mortgage.

## Lease of assets and lease of business

Kosovan legislation recognizes two types of leases: (i) general lease and (ii) lease of agricultural land.

The general lease is governed by the provisions of the Law on Obligational Relationships, and the lease of agricultural land is governed by the provisions of the Law No. 03/L-026 "On Agricultural Land".

Kosovan legislation does not include specific provisions for business leases, meaning that the general rules governing lease agreements apply also to the business lease.

The validity of a lease under the general lease agreement is not conditioned by formality, meaning that the lease agreement is not required to be concluded in a certain form, in written or before the public notary, unless the parties to the lease agreement agree on a specific form of lease agreement and its amendments.

Contrary to the general lease agreement, the lease of agricultural land is based on provisions of the Law on Agricultural Land, which must be concluded in writing and must be registered with cadastral municipality office.

## Administrative permits applicable to construction or restructuring of assets

In terms of permits for the construction or restructuring of assets, the Law on Construction stipulates that a construction permit is required for:

- New constructions (including, prefabrication);
- Reconstruction of existing construction works;
- Demolition of existing construction works;
- Repair of construction works, if a substantial change is made to the construction works in comparison to its condition prior to the event of damage to the construction works caused by natural disasters, wars, and similar events; and
- Interventions on facades and structure (repair) of an existing building.

Moreover, the construction permit must be obtained with an environmental permit, which is issued by municipalities or by the Ministry of Environment and Spatial Planning. For projects that are required to undergo an environmental impact assessment, the competent authority for issuing the environmental permit is the Ministry of Environment and Spatial Planning. Additionally, the environmental permit is a mandatory requirement for the commencement of works for the holder of a construction permit.

Furthermore, construction objects that require construction permits before their use or commencement of works also need a certificate of occupancy.

## Environmental and Energy–ESG rules and status of implementation

The construction permit is conditional on obtaining an environmental permit which is issued by the relevant municipality or the Ministry of Environment and Spatial Planning. If the construction project requires an environment impact assessment, the competent authority for issuing the environmental permit is the Ministry of Spatial Planning.

In relation to energy, a certificate of occupancy for new buildings is conditional on meeting energy efficiency and saving measures as determined by the construction code.

## Direct taxes applicable to sales

As the notary deeds for transactional work is mandatory, the tariffs of Public Notary for compiling notary deeds are determined based on the value of the transaction, such as:

- From EUR 0.01 to EUR 2,500– EUR 20 (USD 19,987 for transactions of USD 0.01 to USD 2,498,478\*)
- From EUR 2,501 to EUR 5,000– EUR 30 (USD 29,981 for transactions of USD 2,499,477 to USD 4,996,956\*)
- From EUR 5,001 to EUR 20,000– EUR 50 (USD 49,969 for transactions of USD 4,997,956 to USD 19,987\*)
- From EUR 20,001 to EUR 60,000– EUR 80 (USD 79,951 for transactions of USD 19,988 to USD 59,963\*)
- From EUR 60,001 to EUR 100,000– EUR 120 (USD 119,927 for transactions of USD 59,964 to USD 99,939\*)
- (EUR 1 = USD 0,999\*)

For notarial documents exceeding EUR 100,000 (USD 99,939\*), for the fee increases by EUR 20 (USD 19,987\*) for every EUR 20,000 (USD 19,987\*), however it cannot exceed a value of EUR 1,000 (USD 999,391\*).

Moreover, the applicable official tariffs for the registration of acquisition of real estate are determined based on the value of property which is subject to transaction, such as:

- Up to EUR 10,000 - EUR 30; (up to USD 9,993 - USD 29,981\*)
- From EUR 10,001 to EUR 50.000 - EUR 50; (USD 9,994 to USD 49,969 -USD 49,969\*)
- From EUR 50,001 to EUR 100.000 - EUR 70; (USD 49,970 to USD 99,939 - USD 69,957\*)
- From EUR 100,001 to EUR 200.000 - EUR 90; (USD 99,940 to USD 199,878 - USD 89,945\*)
- From EUR 500,001 to EUR 1,000.000 - EUR 240; (USD 499,696 to USD 999,391 - USD 239,853\*)
- Above EUR 1,000,000 the fee is EUR 500; (above USD 999,391 - USD 499,695).

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\*According to the 15 September 2022 exchange rate

# Latvia



# Real Estate Law in Latvia

## Emerging markets and new asset classes in Latvia

### Investment in commercial real estate

Investment in commercial real estate in Latvia reached new record levels in 2021, more than EUR 650 million were in total invested, twice exceeding the average yearly investment volumes. Historically largest office transaction in Latvia of EUR 131 million also took place end of 2021. In 1HY 2022 investment volume reach EUR 175 million, which is in line with last year's figures. The main investment targets by the investment made are retail, office and industrial, with residential increasing their share year by year. Prime investment yields currently are 5.5% for office, 7.0% for shopping center, 6.5% for grocery-led retail and 6.5% for industrial.

### Office market

The largest ever office stock of gross lettable area (GLA) 159,000m<sup>2</sup> (20% from existing office stock) is currently under construction in Riga, which is expected to boost take-up speed and offer new good-quality, energy efficient office premises in central parts of the city. Most of the office projects under construction are built according to BREEAM or LEED standard, with some also being nearly Zero Energy Buildings. Take-up reached a historic high in 2021, exceeding GLA 62,000 m<sup>2</sup> with 40% of all take-up deals being pre-leases. For new class A buildings, rent rates are currently between €14-18/m<sup>2</sup>/month (approximate USD 13.98-USD 17.97\*).

### Retail market

2021 marked the end of the second active retail development stage that started in 2018 with IKEA opening, and was followed by two new shopping centers, and several expansions and reconstructions, and in total added to the retail market more than GLA 244,000 m<sup>2</sup> of premises. The retail market has now entered re-concept stage with several retail objects improving their tenant mix and doing refurbishments. Even during the pandemic, new brands continued to enter Latvia, with the most notable market entries being LIDL, SPAR, Burger King, KFC, and Decathlon. Shopping center vacancy levels are improving after the pandemic and are currently around 6.8%. Also, the street retail market is recovering with the tourists and office employees returning to the city center.

### Industrial market

The industrial market has showed high resilience throughout the pandemic and increasing interest from investors. There has been significant activity both in speculative and built-to-suit development during the last several years. In 2021, more than GLA 84,000m<sup>2</sup> were added to stock and another GLA 150,000 m<sup>2</sup> are expected in 2022. Despite the large pipeline, vacancy remains low (1.6%) and several of the speculative projects enter the market fully pre-leased. This has also affected the rental rates that are currently around EUR 4.50- EUR 5.00/m<sup>2</sup>/month for class A premises (approximately USD 4.49-USD 4.99\*). For smaller tenants that cannot find places within current stock, a new concept Stock Office is slowly entering the market. The total stock office area is expected to reach GLA 40,000m<sup>2</sup> by the end of 2022.

## **Hotel**

During last 5-7 years, the Riga hotel market has become more professional with several international operators entering the market. The hotel market now is recovering after the pandemic—not only through tourists returning, but also because of conference tourism. Following other city examples, the first airport hotel finally opened in Riga in 2022 – Hampton by Hilton Riga Hotel – adding additional 189 rooms to hotel stock.

## **Rental residential**

In May 2021 a new rental law finally came into force in Latvia and is expected to boost rental housing development significantly. There are currently fewer than 5,000 apartments in professional rental projects. Several well-known developers (Bonava, YIT, Vastint) have already started to develop new rental buildings. Rental rates grew from the beginning of 2021 to pre-Covid levels, and have increased by additional 8-10% during 2022 due to high demand.

## **Student housing**

Student housing is a new sector in Riga and there are only three private professional student housing projects in Riga offering to market 535 rooms in total.

*By **Deniss Kairāns**, Partner, Managing Director at Colliers, Latvia*

# Overview of the Latvian Legal System

## General introduction to main laws that govern acquisition of assets in Latvia - real estate rights

### The main legislative acts governing real estate transactions in Latvia are:

- 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 real estate ownership;
- Law “On Recording of Real Estate in the Land Registers” — provisions of recording the ownership of real estate;
- Law “On Land Privatization in Rural Areas” — provisions of land privatization in rural areas; and
- Residential Tenancy Law — provisions of lease of residential property.

### General types of rights on real estate use are:

- Ownership (īpašumtiesības) - the right to enjoy and dispose of the property, fully and exclusively;
- Joint ownership (kopīpašuma tiesības) - ownership rights belonging to several persons in respect of one and the same undivided property as not as shares divided in reality but as undivided shares, so that only the substance of the rights is divided;
- Easement/servitude (servitūts) - the right to use property owned by a different owner for a specific aim, based on encumbrance burdening the third-party property; and
- Lease (nomnieka/īrnieka tiesības) – the right to use and enjoy a third party's property based on mutual agreement for specific aim(s) in exchange of payment. In Latvia, the legal framework differs depending on the main use of the real estate (residential or commercial use).

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

### Rural land ownership

Latvian and other European Union and European Economic Area member state citizens, as well as citizens of the Swiss Confederation and the registered legal entities therein, which have been registered as a taxable person in the Republic of Latvia may hold rights of real estate ownership at the territory of Latvia. Some ownership restrictions may apply depending on location of the real estate, such as:

- 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; and
- Land in the mineral deposits of national significance.

The same restrictions apply to third country citizens.

### Agricultural land ownership

One natural or legal person may acquire up to 2,000 hectares of agricultural land into ownership. If the acquirer of the land is a citizen of another member state of the European Union, a citizen of a country of the European Economic Area or the Swiss Confederation, the municipality commission must review whether the acquirer of the land has sufficient Latvian language proficiency (at least at the level of B2) for obtaining agricultural land in Latvia. In addition to the language requirement, the municipality commission may also reject the acquirer's application to obtain agricultural land on other grounds and

only if the provisions of the Law “On Land Privatization in Rural Areas” have been met, such as:

- The acquirer is registered as a performer of economic activity in Latvia;
- Land will continue to be used for agricultural activity within one or three years (depending on current use); and
- No tax debt exceeding EUR 150 (USD 149,908\*) has been registered either in Latvia or the acquirer’s domicile.

### **Municipalities’ right of first refusal**

Before the property rights are registered or changed in the Land Register through alienation of the real estate, the purchase contract or its copy should be submitted to the local municipality, its authorized institution or official, which after reviewing the purchase agreement or copy of it should issue a written statement. The statement should contain a 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 rights to build. However, there can be restrictions to the rights to build depending on where the owned land is located. For example, if the land is in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga, there may be certain construction limitations.

### **Real estate registry system**

In Latvia, there are two different property registers:

- Land Register (Zemesgrāmata); and
- Cadaster Register (Kadastrs).

Real estate ownership registry is called the Land Register (Zemesgrāmata). The Land Register has separate departments for each administrative territory of the territory of operation of the district (city) court (if the administrative territory includes the territorial division units of a municipality, the Land Registers are established for each territorial division unit).

The State Land Service of the Republic of Latvia is responsible for real estate address assignment and defining real estate Cadastral value.

Real estate is recorded in the Land Register based on the documentation verifying the legal acquisition of the real estate. Only a person registered in the Land Register is recognized as the owner of the real estate.

Until registration in the Land Register, acquirers of real estate do not hold any rights against third parties, they may not use any of the rights associated with ownership, and they must recognize acts pertaining to such real estate by the person who is indicated as the owner of such property pursuant to the Land

Register. However, such a buyer has the right to not only request compensation for all acts done in bad faith by the existing owner of the real estate, but also to request that the latter oversees all necessary steps to register the change of ownership rights within the Land Register.

After the transaction is made, the new owner can turn to the Land Register with a notarized corroboration request providing the legal basis of such change in ownership.

### **Notary role in the real estate transactions**

The corroboration request signature submitted to the Land Register needs to be notarized by a notary public. Both the representative(s) of a legal entity as well as a natural person need to submit documentation establishing legal basis when issuing a request for corroboration. Unlike the corroboration request, the purchase agreement of the real estate does not have to be authorized by a notary public.

### **Legal responsibility of the seller in real estate transactions – Contractual representations and warranties**

In real estate transactions, the seller can only be a registered owner or authorized representative of the registered owner of the real estate. Information on property, including not only rights of ownership but also property easements and encumbrances, is publicly available and potential buyers can verify who the registered owner is themselves via the Land Register website by requesting an extract for a small fee. Parties may agree on certain provisions of representations and warranties in the purchase agreement, such as:

- Payment of all utilities before the transaction date;
- Payment of all real estate tax duties before the transaction date;
- Responsibility of the seller to inform the buyer of any mortgages or encumbrances of the real estate (although such information is included in publicly available Land Register extracts).
- Obligation for a seller to obtain the necessary permits if the property is encumbered, such as imposed mortgage; a ban on expropriation is in force.

### **Mortgages and other usual guarantees adopted in financing assets**

#### **Common procedures for a mortgage constitution**

According to the Latvian Civil law, a mortgage gives a creditor property rights 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 should be registered in the Land Register. For the registration of the mortgage in the Land Register to be in effect, the following is required:

- It must be registered with the appropriate authority (the registration of a mortgage may only be made at the Land Register office in whose administrative area the real estate is located.);
- It must 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, signed by both parties — pledger and pledgee); and
- A mortgage can only be for a specific value and with respect to specific real estate, which is owned by a mortgagor.

The following documentation needs to be submitted to the Land Register:

- Request for corroboration;
- Loan (credit) agreement;
- Mortgage agreement;
- Consent of a pledger's spouse stating the property of a spouse is separate (in case of matrimonial property);
- Consent of a third party (if the prohibition in favor of a third party is registered in the Land Register);
- Receipt of payment of the stationery fee in amount of EUR 14.23 (USD 15.00\*);
- Receipt of payment of the state fee; and
- Power of Attorney (if the documents have been signed by the Power of Attorney).

### Creditor protection

According to the Latvian Civil Law, property alienation by a debtor of a 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 the expropriated real estate.

A pledge right (mortgage) remains in force until the creditor is completely satisfied.

## Lease of assets and lease of business

### Applicable laws

- Cabinet of Ministers Regulation No. 735 "Regulatory provisions on the lease of the property of public person";

- Residential Tenancy Law; and
- Law "On Residential properties".

### Types

There are no specific types of leases for business premises.

### Typical provisions

Latvian Civil law regulates the procedure for concluding lease agreements. The object of the lease agreement is a non-residential premise (office space, warehouse, etc.), although, in practice, apartments are leased as non-residential premises as well. However, when the premises are being leased for residential purposes, the specialized Residential Tenancy Law applies.

Lease agreements should be concluded in writing. Lease agreements must stipulate the 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 from agreeing on an advance lease payment and/or bail.

It is recommended to include provisions in the lease agreement stating the conditions under which rent is increased or reduced.

In accordance with the Residential Tenancy Law that came in force on 1 May 2021, residential rent agreements can only be concluded for a fixed period of time. If a lease agreement is concluded for premises conducting commercial activity, the lease agreement can also be concluded for an indefinite period.

### Lease of land

If the land under a property is owned by a different owner or is jointly owned with several owners (for example, land under an apartment building), then the owner(s) of the building must pay an annual fee of 4% of the Cadastral value of the land (likumiskā lietošanas maksa), if not agreed otherwise.

## Administrative permits applicable to construction or restructuring of assets

According to the Article 6 of the Latvian law "On Privatization of State and Local Government Residential Houses", the following persons have a right to privatize apartments, non-residential premises, artist 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%.

According to 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 in Latvia.

According to Article 78 of the Latvian law "On Local Governments", local governments have the right to first refusal, if real estate 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 property for the implementation of the local government functions.

## Environmental and energy – ESG rules and status of implementation

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 about 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, and 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 responsibilities of building owners for energy certification of buildings and the provisions of the minimum energy performance requirements in buildings.

### Emerging energy trends

Due to geopolitical tensions in the area and green incentives within the European Union, initiatives for renewable and clean energy development projects are highly regarded with the aim of promoting the development of renewable energy projects, stimulating energy efficiency, and a more active citizen involvement in energy production.

Recent legal framework amendment projects include the opportunity to develop wind power stations in rural areas by financially rewarding the municipalities in which the projects are being developed, as well as in forests, to increase renewable energy sources and reach energy independence.

Other initiatives include the introduction of energy communities (energokopienas) by which renewable electricity is shared within a community. For example, if a multi-apartment building has solar panels installed on the roof, it may be possible to share the electricity produced in this building without additional network costs and without applying the requirements for electricity trade (registration of economic activity, taxes, etc.).

## Direct taxes applicable to sales

### Real estate tax regime for non-residents

#### *Non-residents companies*

Using real estate located in Latvia for economic activities (such as rent or lease) will trigger permanent establishment registration requirements for the non-resident company. Thus, any profits generated from the real estate will be subject to Latvian 20% corporate income tax ('CIT', with 25% effective rate).

A non-resident company's income from the sale of the real estate located in Latvia will be subject to a 3% withholding tax ('WHT') on the transaction value. If the buyer of the real estate is a Latvian company, then the Latvian company withholds the 3% WTH from the sale value and pays it to the tax authorities (in the name of the non-resident).

Alternatively, the non-resident may choose to apply an alternative tax regime (instead of the 3% WHT) and apply 20% CIT on the capital gains from the sale of the real estate.

#### *Non-residents natural persons*

If the non-resident natural person intends to use the real estate located in Latvia for economic activities (such as rent or lease), the person may register with the tax authorities as a taxpayer - conducting commercial activities, and income from the real estate will be subject to progressive personal income tax ('PIT') rates:

- 20% tax rate for annual income up to EUR 20,004 (USD 19,991\*);
- 23% tax rate for annual income above EUR 20,004 (USD 19,991\*); and
- 31% tax rate for annual income above EUR 78,100 (USD 78,052\*).

If the natural person is registered as conducting commercial activities, the person is also liable to make social security contribution payments. If the monthly income does not exceed EUR 500 (USD 499,695\*), the person is liable to make a 10% social

security contribution payment. If the monthly income does exceed EUR 500 (USD 499,695\*), the person is liable to make full social contribution payments and additional contributions to a pension fund.

A non-resident natural person has a right not to register as the performer of commercial activities, by notifying the tax authority about the non-registered commercial activity, and income from the real estate will be subject to 10% PIT. However, under this regime, the person does not have a right to reduce the income by any expenses incurred. By applying this PIT regime, no social security contribution payments are due.

For non-resident natural persons, income from the sale of real estate will be subject to 20% capital gains tax (certain exemptions are available). If the person is registered as the performer of commercial activities, income from the sale of real estate will be subject to the progressive PIT rates stated above and social security contribution.

### Stamp duty

Real estate transactions are subject to stamp duty (on the value of the real estate) for registering the ownership rights with the State Land Registry (maximum is capped at EUR 50,000 (approximately USD 49,969\*));

- 2% upon the sale of real estate if sold to a legal person;
- 1.5% upon the sale of real estate if sold to a natural person;
- 3% upon gift transfer; and
- 1% upon capital contribution.

Real estate transactions are not subject to any other tax (for example transfer tax).

### Indirect tax (VAT) application

A registered taxpayer may be required to apply value added tax ("VAT") to the sale of real estate in certain cases. VAT must be applied to the sale of unused real estate and building land. Therefore, to determine whether a sale is subject to VAT, it is necessary to determine whether the real estate is to be regarded as unused or used real estate or whether the land has the status of building land.

#### Unused real estate is:

- A newly built building or structure (also stationary equipment installed therein), or a part thereof, if it is not used after being accepted for service, and a land parcel or a part of a land parcel related thereto;
- A newly built building or structure (also stationary equipment installed therein), or a part thereof, if such is used and sold for the first time within one year after being accepted for service, and a land parcel or a part of a land parcel related thereto;

- A building or structure, or a part thereof, if after renewal, rebuilding or restoration works have been completed it is not being used, and a land parcel or a part of a land parcel related thereto;
- A building or structure, or a part thereof, if after renewal, rebuilding or restoration works have been completed it is being used and sold for the first time within one year after being accepted for service, and a land parcel or a part of a land parcel related thereto;
- An object of uncompleted construction or a part thereof - a building or structure, or a part thereof, if such building or structure has not been accepted for service, and a land parcel or a part of a land parcel related thereto; and
- A building or structure, or a part thereof, if such building or structure is being renewed, rebuilt, or restored, but it has not been accepted for service yet, and a land parcel or a part of a land parcel related thereto.

Used real estate is one that does not fit any of the abovementioned criteria. For sales of used real estate, the VAT application can be chosen by the seller (i.e., they have the option to tax the real estate or not). Taxpayers who choose to apply VAT to sales of real estate generally do so to keep VAT deductions rights on their previously incurred expenses relating to the real estate.

Building land is a plot of land regarding which a construction permit for building thereon or for the construction of engineering communications therein, or for the construction of roads, streets or engineering communications input scheme intended for it has been issued after 31 December 2009. A plot of land is not deemed building land if the construction permit for construction works has been issued:

- Before or on 31 December 2009 and has been extended or re-registered after 31 December 2009; and
- After 31 December 2009, but the purpose for the use of the plot of land has been changed and does not provide for building thereon.

The application of VAT must also be noted for renting or leasing transaction.

VAT does not apply to the rent of residential real estate if property is rented to a natural person. This does not apply to short-term accommodation services such as hotels, motels, guest houses, lodgings, and other tourist accommodations

VAT is applicable to the leasing of real estate if it is leased to a legal entity or the property cannot be considered as residential (i.e., they are commercial spaces such as offices, warehouses, etc.). This applies to all types of leasing except the 4% Cadastral value fee ("likumiskā lietošanas maksa") which is considered as VAT exempt.

For VAT payers deducting VAT on purchases of real estate or incurring construction expenses for renewals, rebuilding, and restorations - there is a 10-year VAT adjustment period in which the VAT payer must disclose its activities with the real estate to the tax authorities and adjust their VAT deduction rights accordingly.

\*According to the 15 September 2022 exchange rate

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# Norway



# Real Estate Law in Norway

## **New asset classes and emerging opportunities in the Norwegian real estate market**

- The energy nation Norway has a solid economy and the highest GDP per capita in Europe. As of September 2022, the Norwegian Oil Fund is worth 1200 billion Euros, which corresponds to more than 3 times Norway's GDP
- Strong growth in logistics and industrial, linked to growth in e-commerce and offshore energy production
- We expect a strong professionalization of the Norwegian housing rental market. The sale of block of flats in the inner city and rental housing for students has increased sharply in the University cities
- Norwegians are back in the office. After the measures against the pandemic were called off, Norwegian employees quickly returned to the office. Offices will continue to be the largest part of the commercial real estate market
- The Oslo region is growing strongly and is now approaching 2.5 million inhabitants. The population is expected to increase by 15-20 per cent until 2030

## **Norway – a safe haven for CRE investors**

Due to the pandemic and a shifting geopolitical climate, the global commercial real estate (CRE) transaction market has changed rapidly during the last couple of years. To reduce risk, investors are about to change to a more selective approach to investment opportunities cross-border. However, Norway remains a safe haven with strong fundamentals. International investors are increasingly approaching the Norwegian market because of the political stability, our strong government finances, and a well-functioning transaction market. As the Norwegian transaction market has become significantly more liquid and professional over the last decade, we expect capital inflow from international investors to continue to increase going forward.

## **A shift from core to value-add**

As the economic environment continues to shift, we are likely to see other asset classes become more attractive to investors. In the Norwegian CRE market rising interest rates and borrowing costs makes investors moving towards value-add and opportunistic development investments to comply with return requirements. To gain return investors will have to increase cash flow or create value through renovation, redevelopment or extension of the property. Market knowledge and local advisors will be more crucial to get suitable financing and comply to laws and regulations.

### **Preparing for the EU taxonomy**

The EU taxonomy will have significant impact on whether a new construction project, rehabilitation or acquisition of property is to be classified as “green”. Our latest investor survey shows that 86 percent of investors in the Norwegian transaction market considers high sustainability classifications important for future proofing their portfolio’s value. The taxonomy is highly relevant for both new and existing CRE investors in the Norwegian market as there is an increasing focus on sustainability and social responsibility among investors, property owners, banks and tenants. Stricter requirements are likely to be implemented into Norwegian law in the short term to scale up sustainable investments.

### **Last-mile logistics rents will outpace other segments**

The logistics segment experienced a significant yield compression in Norway during the pandemic because of the strong growth in online shopping and low interest rates. E-commerce will continue to cause shrinking retail footprints while increasing demand for logistics. Despite rental growth easing in the logistics segment the rents of last-mile logistics in main clusters will continue to outpace other segments. There is limited available land zoned for industrial use due to protection of agriculture and forest areas. The low supply leads to increasing land values and increasing rent levels in the largest Norwegian cities, and especially in the Greater-Oslo region.

*By Anne Bruun-Olsen, Senior Partner of Cushman & Wakefield*

# Overview of the Norwegian Legal System

## General introduction to main laws that govern acquisition of assets in Norway - real estate rights

The purchase of real estate is regulated by the Norwegian Alienation Act, while the purchase of shares of a property single purpose vehicle (SPV) 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 customized standard agreement to cover both the aforementioned duality and the professional business aspects of the transaction. Almost all commercial real estate transactions in Norway are sold according to such a standard contract. Various standards are on the market, with the Norwegian Business Real Estate Brokers Association prevailing today, although it is considered somewhat lenient towards the interests of the seller.

All commercial and residential leases are regulated by the Tenancy act. The act applies to all agreements relating to the right to use a 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.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

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 such SPVs typically owned by a limited liability company in a holding structure. The main drivers for these structures are tax regulation and, to some extent, stamp duty.

Investments in the Norwegian real estate sector are therefore 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.

The real estate ownership normally 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.

All acquisitions of real estate ownership rights as well as the 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 European Union (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 100,000m<sup>2</sup>; or acquisitions of undeveloped land for the construction of a permanent residence or holiday home on plots of land no larger than 2,000 m<sup>2</sup>.

## Real estate registry system

Norwegian properties are registered in a land registry maintained and operated by the Norwegian Mapping Authority, which is the judicial authority for properties in Norway. The land registry is the official register of legal rights and obligations associated with fixed property and housing cooperatives. The land registry lists ownership in addition to rights and encumbrances such as mortgages, leasing rights and pre-emptive purchasing rights. Registration may still be conducted by original paper-based

documents sent by post; however, an increasing number of registrations are today done digitally. 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 registry 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% 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% 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. The 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.

## Notary role in the real estate transactions

There are no notaries public in Norway and no roles in transactions. See the above section on registration.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

The seller's contractual representations and warranties are normally limited to direct loss and with a basket amount regulation and maximum cap equivalent to 10 % of the purchase price. The standard warranties of the seller in the most commonly used standard form contracts regarding purchase of SPV companies are that:

- The company owns the property and holds title thereto;

- The company holds full and unrestricted title to all assets entered on the balance sheet;
- The company holds no other types of assets than those set out on the balance sheet;
- 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 buyer in connection with the conclusion of this contract, hereunder tax liabilities of any type;
- The financial statements of the company are correct and based on generally agreed accounting principles;
- The company is in possession of the documentation required under applicable Value Added Tax provisions for the acquisition/production and use of capital goods;
- The information in the adjustment specification (for VAT), is complete and correct;
- The company has not rendered any guarantee or furnished any security for the benefit of the liabilities of any third party;
- The company has no employees, and no pension obligations as against the seller or anyone else;
- The company is not party to any legal proceedings or other legal dispute;
- The seller holds, as per the transfer of ownership, full and unrestricted title to the shares;
- The share capital of the company is fully paid up;
- 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 preemptive rights;
- 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;
- No rights relating to the shares (hereunder dividend rights, pre-emptive rights, etc.) have been separated from the shares
- The activities of the company will, during the period from signing the 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;
- The encumbrance situation of the property will be as set out in an appendix;
- The property is leased as stated in an appendix;
- The seller is not aware of any claims or rights that limit the use or utilization 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; and

- 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.

## Mortgages and other usual guarantees adopted in financing assets

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 the 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 catch-all 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.

## Lease of assets and lease of business

Based on the prevailing Norwegian lease standards, the three most common contract types regarding leases of business premises are:

- **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
- **Bare house:** 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.

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. The 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 must 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 their rent obligations against claims they have against the lessor. If these claims are not honored by the lessor, the tenant must take out separate legal proceedings to have their 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.

## Administrative permits applicable to construction or restructuring of assets

The Norwegian Planning and Building Act contains detailed regulations related to planning on the national, regional, and local levels. Further requirements for dispensation and exemption applications and regulations related to responsibility, control, and supervision during the construction phase, as well as the main requirements during the completion and approval phase. In addition, the Act also regulates landowners' general rights to compensation due to the compulsory acquisition by the authorities for planning purposes or by direct claim of public ownership (expropriation).

Norway 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 to by any party directly affected by the plan, as well as being subject to overriding sector-specific public concerns. Thus, ratifying plans is considered a complex affair.

## Environmental and energy – ESG rules and status of implementation

Polluted environmental considerations have occupied a considerably large 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), for example, 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 must not only cover all reparative and preventive costs, but also the social costs that such pollution results in for society.

Legislation on ESG is expected to be implemented in 2023 for large, registered entities and the financial sector. As all financial assistance will be governed, it will also have major impact on the

real estate sector. The legislation is based on EU directives being adapted to Norwegian conditions. All entities included is obliged to make information on ESG public. Strict reporting obligations will be implemented to source finance towards environmentally friendly solutions.

## Direct taxes applicable to sales

Capital gains tax at 22% is due when real estate is sold as an asset, in addition to 2.5 % stamp duty to register the deeds. Commercial real estate is usually sold as shares in SPV which is tax exempt.

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 conduct business that falls outside the scope of the VAT acts (state governmental bodies, healthcare, 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 a taxable business for this period in order to avoid repayment of deducted VAT.

## Contact



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# Portugal



# Real Estate Law in Portugal

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## **New asset classes and emerging opportunities in Portugal**

- Offices in waterfront areas, both in Lisbon and Porto
- Large build-to-rent residential developments targeting the middle-class
- Hotels and resorts along Portugal's west coast

*By **Francisco Horta e Costa**, Managing Director, CBRE Portugal, a real estate services company working for investors, occupiers, and operators*

# Overview of the Portuguese Legal System

## General introduction to main laws that govern acquisition of assets in Portugal - real estate rights

The Portuguese constitution (Constituição da República Portuguesa) sets out the right to private ownership (direito à propriedade privada), which is also a fundamental right to property.

Full ownership means the exclusive right to own, to use and to transfer the property with no time limitation. Fiduciary ownership is only accepted in the Madeira Free Trade Zone.

The Portuguese Civil Code (Código Civil Português) also provides other property rights, the general principles, and rules applicable to contracts, horizontal property, and condominiums.

Other rights in rem are also governed by the Portuguese Civil Code, including building rights (direito de superfície), beneficial interest (usufruto), right of use (direito de uso e habitação) and lease (housing and non-housing) which is also governed by the “New Urban Lease Law” (Novo Regime do Arrendamento Urbano).

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

Real estate property may be acquired directly (asset deal), or indirectly through the purchase of equity interests of the entity owner of the property (share deal). In both cases due diligence should be conducted before the transaction in order to determine the legal and tax status of the target property or target company and potential risks.

There are no restrictions to the ownership right in Portugal regarding foreign or non-resident investors. Foreign investors need to obtain a Portuguese taxpayer number and, in case of foreign citizens with residence outside the European Union, it is mandatory to appoint a tax representative. Conversely, Portugal has adopted several measures to encourage and attract foreign investment, such as establishing a residency permit program (“Golden Visa”).

## Real Estate Registry system

The Land Registry Office is the entity responsible for keeping public records of each property's legal status, including ownership and encumbrances. The registration of facts establishing the constitution, recognition, acquisition, or changes of in rem rights over a property is legally mandated.

The registry at the Land Registry Office stipulates that the ownership right is enforceable against third parties. The land registry is based on the principle of registration priority, according to which the first recorded right prevails over following registration. The land registry office's certified information is accessible electronically. The seller must obtain an access code to provide the information to the buyer and then the document “Certidão Predial”, with all the information of the property, is available for a period of 6 months.

Real estate properties also have to be registered at the tax authority registry (Caderneta Predial) to keep an updated description of the property, its tax value (VPT – Valor Patrimonial Tributário) and the identification of the owner.

## Notary role in the real estate transactions

In asset deals the title of the property is transferred mainly with a public deed of sale and purchase entered by the parties before a notary. However, according to Portuguese law, lawyers may also perform tasks that had been exclusively performed by notaries

until recently. Therefore, the transfer of property may also be executed by signing a contract before a lawyer or a Land Registry competent office (Balcão Casa Pronta).

The main documents required for the completion of the sale are the property registry certificate (certidão predial), tax certificate (caderneta predial), use permit (licença de utilização) and energy certificate (certificado energético) and evidence that the entities entitled to preemption-right have not decided to exercise their right to acquire the property (if applicable).

Indirect transfers of real estate rights (share deals), through the acquisition of shares of a Portuguese company that owns a property, do not need to be executed before a notary and can also be executed by signing a contract between both parties.

### Legal responsibility of the seller in real estate transactions – Contractual Representations and warranties

Representations and warranties and specific indemnities are normally based on the outcome of the due diligence. Typical representations and warranties given by a seller include the capacity of the seller, ownership of the property, charges, and encumbrances, third party rights, planning and zoning, permits, litigation and liabilities, defects, and environment risk.

Conditions precedent to the transactions can also be agreed (e.g., obtaining a permit or insurance, a change in registry or a mortgage cancellation). Provisional registration at the Land Registry Office is also common in asset deals to ensure priority of the registration.

It is market practice for parties to execute a promissory sale and purchase agreement setting forth the agreed terms of the transaction, prior to the deed. It is common to establish:

- Price and payment conditions – usually a down payment is stipulated, which typically represents a percentage of the price, between 10% and 25%. In case of breach of the contract by the promissory buyer, the promissory seller can retain the amount already paid as down payment. In case of breach of contract by the promissory seller, the promissory buyer is entitled to receive twice the amount paid as down payment. As an alternative, the parties can claim the “Execução Específica” according to which the non-breaching party can obtain a court order which compels the other party to comply with the exact terms agreed between the parties in the contract;
- Deadline for completion – The parties establish a deadline for the final deed;
- Pre-emption rights – The law grants a right of first refusal to co-owners, tenants, owners of rural plots of land (for the sale of adjoining properties), and public entities (for the acquisition of some properties located in specific areas or

properties classified as assets of special historic or architectural value). Therefore, before the final deed of sale and purchase, it is mandatory to give notice to the entitled entities/persons of the terms and conditions of the transaction.

- Breach – The law grants compensation as consequence to breach of the promissory contract. However, the parties may establish different consequences for contract breach.

### Mortgages and other usual guarantees adopted in financing assets

Loan agreements are usually granted with a mortgage, using real estate property as collateral.

In order to finance the purchase of a property in Portugal, it is common for the financing entities to create mortgages on the property itself to protect their interests. There are also other guarantees as pledges over shares and pledges over receivables. In order to be enforceable and to have effect vis-à-vis third parties, mortgages and other charges must be registered at the Land Registry Office.

### Leases of premises

#### Applicable Laws

The lease agreement is governed by the Portuguese Civil Code and the New Urban Lease Law (Novo Regime do Arrendamento Urbano). According to the applicable law, lease agreements may be executed for a fixed or an indefinite term and may be for housing or non-housing purposes. Lease agreements must be executed in writing and, when entered into for a term longer than six years, must be registered in the Land Registry Office to have effect vis-à-vis third parties.

Additionally, any urban property 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 in the property (e.g., housing, or commercial).

#### Types of lease agreements

According to the Portuguese law, there are leases for housing purposes and for non-housing purposes. In this regard, all commercial leases are qualified as non-housing leases under the Portuguese law. While the housing leases must foresee specific provisions determined by law, the rules regarding duration, termination, and opposition to renewal of non-housing lease agreements (e.g., commercial leases) can be established freely by the parties, provided that some mandatory rules are observed, as detailed below.

The lease of retail spaces in shopping centers and retail parks is normally regulated by shopping center agreements. Considering

that there is no specific law for these agreements, they are usually very detailed and govern not only the use of the shop but also the services provided by the shopping center administration to the lessees.

### Typical provisions for lease agreements

#### Term

Lease agreements for housing purposes have an initial fixed term, which may not exceed 30 years. The minimum period for a lease for housing purposes is one year. On the other hand, the term for non-housing lease agreements can be freely agreed by the parties. In case the parties do not establish a term for the lease agreement, the agreement is considered to have a fixed term of five years;

#### Renewal

The parties normally establish a fixed term in the housing lease agreements, which is automatically renewed for successive periods (of equal or different duration). 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 lessees of this type of lease agreement may oppose its renewal and, in addition, may terminate the agreement at any time, after a third of the initial term of the agreement, or its renewal period, has passed.

On the first renewal, the lease agreement must be renewed for three years, if the initial duration is less than three years, unless the landlord needs the house for themselves or for their children.

In the non-housing lease agreements, the parties are free to provide the terms and conditions, but: (i) in the absence of a stipulation by the parties, the lease agreement is deemed to be concluded for a fixed term of five years and the lessee cannot terminate the agreement less than one year in advance; (ii) unless otherwise stipulated by the parties, the lease agreement with fixed term is automatically renewed at its expiry date for successive periods of the same duration or of five years if this is shorter and (iii) in the first five years after the start of the lease agreement, the landlord cannot oppose to its renewal;

#### Termination

Leases usually terminate at the end of the respective term. However, lease agreements may also be terminated for other reasons, either: (i) by mutual consent of the parties; (ii) in result of contractual breach by one of the parties; (iii) specific grounds, such as a) need for housing by the landlord or by their immediate descendants; or b) for the demolition or carrying out of deep remodeling or renovation works;

#### Maintenance works

The parties may agree on the rules applicable to any maintenance works on the leased property. The landlord is

usually responsible for structural and major repairs and taxes, while the lessee is responsible for any other wear and tear repairs;

#### Rent amount and updates

Parties may agree on phased or variable rents, as well as in 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, unless otherwise agreed by the parties;

#### Security

The lessee's security obligations are normally secured via a cash deposit or a bank guarantee in the amount corresponding to a certain number of rent periods;

#### Assignment and sublease

The assignment of the lessee's contractual position, as well as the sublease of the property, is not allowed without the prior consent of the lessor. However, the assignment may be allowed in the event of a transfer of the lessee's commercial activity, which will result in the automatic transfer of the lease agreement to the respective third party, provided that certain legal requirements are fulfilled;

#### Pre-emption rights

Lessees who have held leases for longer than two years have a pre-emption right in the event of the sale of the relevant property, as well as if the lessor wishes to enter into a new lease agreement with a third party; and

#### Taxes payable on rent

Lease agreements are subject to Stamp Duty Tax, which is currently payable by the lessor at a rate of 10% of the first rent. The rent is exempt from VAT, but the landlord may waive this exemption if 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.

## Administrative permits applicable to construction or restructuring of assets

### Main permits/licenses required for building works and/or the use of real estate

In Portugal, the building rules of each municipality is specified in planning instruments, which are the general plan (Plano Director Municipal), or more detailed plans that may be in force in a specific area, the master plans (Planos de Urbanização) and the detail plans (Planos de Pormenor). Before requesting licensing requests, it is possible to file a previous information request (Pedido de Informação Prévia or PIP) in order to obtain information regarding the project's feasibility.

The municipality with jurisdiction over the area where the real estate property is located is responsible for granting the relevant permits for construction works and the use of each property.

The applicable law provides two types of procedures for licensing urbanistic operations:

- License: The license is requested for any urban operation when the law does not establish specifically the exemption of license of subject to previous communication.
- Previous communication: In specific cases provided by law, the license procedure is replaced by a previous communication to the municipality.

The municipalities are also responsible for issuing use permits, which will be granted if the respective construction project of the real estate property has been executed in accordance with the approved plans and drawings submitted before the urban department of the competent municipality. The municipalities are also responsible for confirming if a building is suitable for the respective owner to perform certain activities.

### Special urban rehabilitation framework

In Portugal, the government provides special tax benefits for the rehabilitation of buildings for residential purposes, built for at least 30 years or located in urban rehabilitation areas determined by each municipality.

The tax benefits include: (i) an exemption from Municipal Real Estate Transfer Tax (Imposto Municipal sobre as Transmissões Onerosas - IMT) in the sale and purchase of properties for rehabilitation purposes; (ii) an exemption from Municipal Property Tax (Imposto Municipal sobre Imóveis - IMI) on buildings subject to urban rehabilitation, for a period of three years, with the possibility of renewal for five more years in certain cases; (iii) a reduced VAT rate of 6% on certain rehabilitation works; (iv) a reduced rate of 5% is 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 Portugal are taxed at 5%, provided that this income arose from leased real estate located within an urban estate with a special rent increase procedure, which is subject to rehabilitation works.

### Protection of historic areas

The municipalities and the national cultural heritage department (Direção Geral do Património Cultural) have a pre-emption right in the transfer of any classified real estate or buildings which are located with certain historical areas.

## Environmental & Energy

### Environment – Applicable law

The Portuguese Environmental Law establishes the legal regime of liability for environmental damages and transposes 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. 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.

Portuguese environmental law sets out three types of environmental liability: civil, administrative, and criminal liability. The civil and administrative liability may arise from damage caused to the environment by an economic activity. The Portuguese Criminal Code sets out, among others, the environmental crime of pollution offense. Furthermore, Portuguese law establishes a joint and several liability of legal persons and their directors and managers for any environmental damage.

### Energy 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 lessor must obtain and deliver with execution of the sale and purchase agreement, or the lease agreement, an Energy Performance Certificate (EPC) describing the building's energy efficiency and consumption expected for normal use. This EPC is issued by a certified technician and must be registered at the respective competent energy agency (ADENE). The EPC is issued for a 10-year period.

## Direct taxes applicable to sales

Taxes associated with the acquisition, sale, and ownership of real estate:

- Municipal Real Estate Transfer Tax (Imposto Municipal sobre as Transmissões Onerosas - IMT)
- Stamp Duty Tax (Imposto do Selo).
- Municipal Property Tax (Imposto Municipal sobre Imóveis - IMI) and
- Additional Municipal Property Tax (Adicional ao Imposto Municipal sobre Imóveis - AIMI).

There are two main taxes associated with property transactions in Portugal (i) Municipal Real Estate Transfer Tax (Imposto Municipal sobre as Transmissões Onerosas - IMT) and (iii) Stamp Duty Tax (Imposto do Selo). Additionally, the owner of a property located in Portugal will also be subject to Municipal Property Tax (Imposto Municipal sobre Imóveis - IMI) and in some cases

Additional Municipal Property Tax (Adicional ao Imposto Municipal sobre Imóveis – AIMI).

### IMT

Transfer of property rights is subject to IMT, payable by the buyer, prior to the transfer of the property. Tax is levied on the market price of the transaction or by the property's tax value, whichever is higher. Tax rates vary depending on the use that the property will be subject to, the value of the transaction and the qualifications of the buyer: (i) residential properties between 0% and 8%; (ii) other urban properties: 6.5%; (iii) rural properties: 5%; and (iv) properties acquired by an entity based in a country with a more preferable tax regime: 10%;

### Stamp Duty Tax

Stamp Duty Tax (along with IMT) is charged at the assignment of property rights, at 0.8% of the market price of the transaction or by the property's tax value, whichever is higher. Stamp Duty Tax is also charged on certain formal acts and documents that are exempt from Value Added Tax (VAT), such as contracts and credit concessions, executed either by Portuguese parties or within the Portuguese territory.

### IMI

IMI is a property tax charged annually, based on the tax value of the property. This tax is payable by the owner of the property, regardless of being a personal or legal entity. The IMI rate for urban properties range between 0.3% and 0.45%, depending on the location of the property, while a 0.8% rate is charged on rural properties. Also, property owned by residents in tax havens (except individuals) or by entities in a direct or indirect domain or control relation with entities domiciled in tax havens, is levied at 7.5%. The tax basis of urban property is calculated on several criteria such as average construction price, type of construction, quality standard, age, and location of the building, or other features of the property).

### AIMI

AIMI is a property tax charged annually, based on the tax value of the property, only applicable to real estate. Tax is calculated by aggregating the sum of the tax registration value of all the urban properties held by the same taxpayer. Taxpayers subject to this tax can be individuals or corporations, as well as structures or collective bodies without autonomous legal personality and undivided inheritances, that are owners, usufructuaries or have the surface right. The AIMI rate for urban properties range between 0.4% and 0.7%, depending on whether the tax subject is an individual/inheritance. Also, property owned by residents in tax havens are taxed at 7.5% –however, AIMI only applies to aggregate real estate property of at least EUR 600,000(USD 599.634,807\*) in the case of individuals or inheritances, or EUR 1,200,000 (USD 1,199.269,613\*) for taxpayers that are married or living in non-marital status and opt to submit a joint tax return.

### Personal income tax (“IRS”)

In the event of sale of a property, the holder of property will be subject to personal income tax, over capital gains made with the transaction.

In the event the seller of the property is a Portuguese tax resident, only 50% of the capital gains will be included in the tax basis, which will be levied at progressive tax rates from 14.5% to 48%, with the ability to have an extraordinary charge rate up to additional 5%, in case the tax basis is higher than EUR 250,000 (USD 249.847,836\*). If the seller of the property is a non-tax resident in Portugal, capital gains for property sale will be subject to a flat rate of 28% of the totality of the tax basis. However, due to recent judicial decisions, Portuguese courts have decided that non-tax residents may be eligible to choose to opt into the same regime as Portuguese tax residents. If the seller of the property is resident in a tax haven, capital gains will be subject to a 35% rate of the total amount of the tax basis.

Notwithstanding the above, there is the possibility of exempting the taxation of capital gains from property sale if the property is the taxpayer's primary residence and if the total amount obtained from the real estate deal is reinvested in the acquisition, construction, or improvement of another property for permanent residence purposes, located either in Portugal or in a European Union member state or in a European Economic Area member state, since such investment is performed between 24 months prior and 36 months after the relevant property sale.

When the sale of the property occurs, adjustments to the tax basis can be performed, such as the inclusion costs related with the maintenance of the property (for the last 12 years) and administrative and legal costs related to its sale. Property owners who wish to lease the property will also be subject to flat rates ranging from 28% to 10%, depending on the term of the lease. However, if the property owner is a tax resident in Portugal, they can opt to be subject to progressive tax rates from 14.5% to 48%.

### Tax benefits

There are benefits to the acquisition of real estate that is rehabilitated by its owners, if the property is at least 30 years old (from the date of its construction) or if the property is located in a rehabilitation area classified as such by the municipality and is subject to an evaluation.

If such procedure is concluded successfully, taxpayers may benefit from:

- Exemption from IMI for a period of three years from the year (inclusive) of the completion of renovation works, which may be renewed at the owner's request for a further five years in the case of properties leased for permanent housing or own and permanent residence;
- Exemption from IMT in the acquisition of real estate intended for renovation interventions, provided that the

acquirer starts the respective works within a maximum period of three years from the date of acquisition; and

- Exemption from IMT in the first transfer, after the rehabilitation intervention, if one of the following is met: i) the lease is transferred for permanent housing or ii) when located in an urban rehabilitation area, for permanent housing.

Additionally, if the person or entity responsible for the rehabilitation is a Portuguese tax resident, in the event of a sale after the rehabilitation works, the capital gains may be eligible for taxation at a flat rate of 5%. Similarly, if the property is leased, capital yields may be subject to a flat rate of 5%.

\*According to the 15 September 2022 exchange rate

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# Romania



# Real Estate Law in Romania

## Latest developments in Romania and areas to focus on in the future

- In recent years, the real estate investors, nationals, or foreigners, have been very active on the Romanian market. We have witnessed a change in the preference of investors, from office and retail to logistics and industrial projects. In what concerns the retail sector, the trend of investment has shifted from the development of complex shopping centers located in the main cities of Romania to projects located in medium to small towns across Romania.
- Concerning changes of the legal framework, the newly established 80% tax applicable to the sale of agricultural lands (either through asset or share deals) and the general lack of clarity surrounding its calculation and payment have generated concerns and legal, as well as fiscal complexities when structuring an agri-business acquisition. As such, the implementation norms that should bring light to the above matters are eagerly expected by investors.
- At the same time, the developers of new projects, particularly in the residential sector, are faced with the difficulties resulting from the continuous changes in the VAT threshold applicable to the acquisition of certain medium-sized residential units.
- In addition, real estate developments in Bucharest are undergoing a period of uncertainty due to the recent invalidation in court of the Bucharest General Urbanism Plan and the suspension/invalidation of the zoning urbanism plans of the sectors. Since the process for obtaining construction permits for new projects in Bucharest is currently frozen, the major real estate players are shifting their attention to nearby surrounding areas as well as to other important cities in Romania (such as Cluj, Timisoara, Iasi, and Constanta).

By **Irina-Andreea Dimitriu**, Partner, Deloitte Legal Romania

# Overview of the Romanian Legal System

## General introduction to main laws that govern acquisition of assets in Romania-real estate rights

The general legal framework regarding the acquisition of real estate assets in Romania is regulated by the Romanian Civil Code and by Law no. 7/1996 regarding cadaster and the land book system. These laws provide the mandatory conditions applicable to all real estate transactions (asset deals) (e.g., capacity, specific formality requirements for the transfer deed, price and main parties' obligations, seller's warranties, publicity conditions, etc.).

The notarized (i.e., authenticated) form is imposed under Romanian legislation as a validity condition for transfer of deeds concerning real estate rights, and the relevant legal provisions are included in Law no. 36/1995 regarding public notaries and notary activities.

In addition, specific provisions on real estate acquisitions are scattered throughout various pieces of legislation depending on the particular types of real estate assets, such as:

- Pre-emption rights and specific taxes applicable to the sale or purchase of arable lands located outside city limits, as regulated under Law 17/2014<sup>8</sup>;
- Pre-emption rights applicable to historic monuments, as regulated under Law no. 422/2001 regarding the protection of historic monuments;
- Restrictions and limitations resulting from the special laws governing the restitution of real estate assets taken over by the state during the communist period, such as Law no. 10/2001 on the legal regime of certain real estate assets abusively taken over during the period between 6 March 1945-22 December 1989.

Lastly, the development and construction legal framework contains legal provisions also relevant in the context of real estate acquisition:

- Law no. 350/2001 regarding the territorial development and urbanism;
- Law no. 50/1991 governing the authorization of construction works; and
- Law no. 10/1995 governing the quality of constructions.

## Acquisition structure usually applied in real estate transactions; restrictions—if any—applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

### Types of acquisition structures

Various legal structures, such as asset deals, share deals, forward purchase mechanisms, or transfers of on-going concerns (business transfer agreements), are used for the acquisition and/or development of real estate property in Romania.

Detailed legal, tax, technical, environmental, and commercial due diligence of the asset/company prior to the signing and closing of the transaction is recommended. Once the main commercial terms of a transaction are agreed, it becomes a market practice for a letter of intent, memorandum of understanding or term sheet to be executed. Except for provisions governing exclusivity, confidentiality and transaction timeline, the rest of the clauses in the abovementioned documents are generally non-binding.

In case of promissory sale-purchase agreements, if one of the parties refuses to conclude the final agreement, the other party is entitled to request the court of law to rule a decision replacing the sale purchase agreement. The relevant claim has to be filed

<sup>8</sup>Regarding certain measures for regulating the sale of arable land located outside city limits and for the amendment of Law 268/2001 for the privatization

of companies holding in administration land in the public or private ownership of the Romanian State

in court no later than six months after the date the final agreement should have been concluded.

The advance paid under a promissory sale/purchase agreement is secured by a legal mortgage over the target property. Unless the purchaser expressly waives the legal mortgage, the public notary is bound to register the legal mortgage with the relevant land book(s).

The timing for completing a real estate deal ranges from a couple of weeks to longer, depending on the contemplated structure. The main legal procedures that usually trigger delays in closing of a deal (and should be considered when setting the timeline) are:

- The registration of the purchaser with the land book; if the acquisition is financed by banks (or similar institutions), the facility may not be disbursed until the purchaser is registered as owner with the land book (and, in some cases, the bank's mortgage is also recorded therein);
- The Competition Council clearance, provided that certain legal thresholds are met;
- In some cases, the clearance of the Superior State Defense Council is required if the asset has a specific destination (among the ones specifically listed by the law) which is deemed strategic by the public authorities (such as: agri-business, energy, or transportation security, etc.);
- The foreign direct investment (FDI) screening for non-European Union (EU) investments;
- Pre-emption procedures for the acquisition of extra-muros arable lands; and
- Pre-emption procedures for the acquisition of historic monuments.

Share deals will require registration of the transfer with the Trade Register, while asset deals will require the notarization of the transfer deed by a public notary as a prerequisite for the valid land transfer, followed by registration of the purchaser as the new owner with the relevant land book(s).

### **Restrictions applicable to real estate acquisitions-foreigners**

The legal regime regarding the acquisition of real estate assets by foreign investors differs depending on (i) the type of real estate assets (land or buildings), and (ii) whether the foreigners are nationals of EU member states or non-EU member states.

While there are no restrictions for the acquisition of buildings by foreign entities and individuals, with respect to acquisition of land, the following applies:

### **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; and
- May acquire agricultural land and forestry land under the same conditions as 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 of the applicable international treaties, on the basis of reciprocity conditions; and
- Conditions for the acquisition of land may not be more favorable than for the nationals of EU member states.

### **Restrictions applicable to real estate acquisitions-agricultural lands located outside city limits**

The sale of agricultural land located outside city limits are valid only with the observance of the legal pre-emption rights established in favor of the co-owners, the family (spouses, relatives, and in-laws), the owners of agricultural improvements over the land subject to the sale, the land lessees, the owners or lessees of the neighboring plots of land, young farmers, neighboring state institutions in the field of agricultural research, people living in the respective territorial and administrative division (town) and in neighboring ones, and the state, through the State Property Agency (in this order, under equal price and conditions).

In addition, agricultural lands located outside city limits can be purchased by certain categories of individuals or companies (provided that the beneficiaries mentioned above have failed to exercise their pre-emption right), as follows: (i) individuals who have lived in Romania for the five years prior to the sale and have undergone agricultural activities and were registered with the Romanian fiscal authorities within the same period, or (ii) companies that have had their headquarters or secondary headquarters in Romania for the previous five years and a minimum of 75% of their income within the respective five years resulted from agricultural activities. An additional requirement for such companies is that the main shareholder should have been located in Romania for at least five years prior to the sale offer.

The sale of certain categories of agricultural lands located outside city limits also requires specific approvals issued by the Ministry of National Defense and the Ministry of Culture. In particular, if the land was subject to agricultural or forestry activities, as well as industrial, economic, or military activities that

may impact the quality of the soil, obtaining a soil quality certificate becomes a mandatory prerequisite to any sale.

The sanction for breach of the abovementioned procedures is the annulment of the sale agreement.

### **80% tax applicable to the sale of agricultural lands located outside city limits-asset deals**

An 80% tax is applicable on the sale of each agricultural land plot located outside the city limits (i.e., "asset deal" type of sale) before the expiry of eight years from the date of its acquisition. The tax base is calculated as the positive difference between (i) the value of the agricultural land on the date of sale and (ii) the value of the land on the date of its (previous) purchase. Such a value will be determined by reference to the indicative value established by the chamber of public notaries, or the minimum value established by the market study carried out by the chamber of public notaries, as the case may be, from the relevant date.

The tax is calculated and collected by the public notary before the authentication of the relevant notarial transfer deed. Thus, the seller must pay the 80% tax before signing the sale contract. For taxpayers who have the obligation to pay the profit tax, the 80% tax established by this law represents a non-deductible expense when determining the fiscal result.

The incomes obtained by non-residents from the sale of agricultural land located outside the city limits will not be subject to the double taxation avoidance agreements concluded by Romania with other states.

### **80% tax applicable to the sale of the control package of legal entities holding agricultural lands located outside city limits-share deals**

An 80% tax will be applied to the sale of the control package of legal entities owning one or more plot of agricultural land located outside the city limits and which represent more than 25% of their assets, to the extent that the transfer takes place before the expiry of eight years from the date of the purchase of any of such land. The obligation to pay the 80% tax pertains to the individual and/or legal person assigning the control package.

The tax base is calculated as the positive difference between (i) the value of the agricultural land on the date of transfer of the control package and (ii) the value of the land at the time of its acquisition. Such values will be determined by reference to the indicative value established by the chamber of public notaries or to the minimum value established by the market study carried out by the chamber of public notaries, as the case may be, from the relevant period.

If the legal entity owns several plots of agricultural land located outside the city limits, the 80% quota is applied to the total amount calculated by adding up the positive differences for the land acquired less than eight years prior to the transfer of the control package, without taking into account the negative

differences determined in accordance with the abovementioned calculation method.

If the agricultural land located outside the city limits was acquired as a result of an in-kind contribution to the share capital of the entity in which the control package is transferred, the term of eight years will also include the period of time when the shareholder held ownership of the land, subject to in-kind contribution.

### **Restrictions applicable to real estate acquisitions-historic monuments**

The ownership title to property listed as a historical monument may be transferred only with the observance of the Romanian State's pre-emption right upon acquisition. A sale agreement concluded in breach of the legal provisions will be null and void.

## **Real estate registry system**

Real estate properties and related rights are registered in the relevant land books held by the public authorities. Land books are opened for each real estate asset (land or, respectively, land and buildings) regardless of the identity of the owner.

Local offices for Cadaster and Land Registration are located in each county of Romania. All public registrations carried out within the abovementioned structures are further centralized under the supervision of the National Agency for Cadaster and Land Registration.

Currently, proof of ownership (or related real estate right) may be performed by way of notarized transfer deeds. However, the Civil Code provides that the proof of ownership right to real estate assets will be made by the excerpt from the land book as of the date the cadastral works for each local municipality are finalized. Hence, once the cadastral works are finalized, the registration with the land book will become a condition for the valid transfer of the title of real estate assets (save for certain limited exceptions provided by law).

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.

Further, land book registration offers special protection to the good-faith registered owners against third party claims against the title, after a certain period of time (five years when the acquirer may prove good faith).

## **Notary role in the real estate transactions**

Under Romanian law, the purchase of ownership rights over real estate property is performed through sale and purchase agreements (or other relevant transfer deeds) concluded in

notarized (i.e., authenticated) form. Therefore, for an acquisition through an asset deal (including sale and purchase, donation, share capital contribution, transfer of business, settlement agreements, etc.), to be valid, the authenticated, notarized form of the deed is required.

The signing of the sale and purchase agreement for real estate verifies the legal conditions for concluding the contract, including the verification of the representation powers of the signatories.

Subsequent to the authentication procedure, the public notary sends the documentation and the registration application to the Land Book Office for the transfer of the ownership right to be registered in the relevant land book. Once the updated land book excerpt is issued, the new owner of the real estate must register the ownership title with the local fiscal authorities.

The notary fee is calculated either by reference to a set of official evaluations (the public notary grid) that are updated from time to time. 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 RON15,000 (approximately US\$3,043 according to the exchange rate on 15 September 2022), the notary fee is 2.2% of the value of the transaction. The notary fee for a transaction of a higher value is calculated as a fixed fee for each threshold plus an additional percentage applied to the value of the transaction exceeding that threshold.

For example, a fixed fee of RON 5,080 (approximately USD 1,030\*) is applicable for a transaction value exceeding RON 600,001 (approximately USD 121,731\*) plus an additional 0.44% of the transaction value exceeding this threshold.

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.

### Legal responsibility of the seller in real estate transactions—contractual representations and warranties

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 hidden defects of the real estate. The seller's liability against eviction and flaws is regulated in detail by law and can be limited or extended (within the limits 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 on the following matters:

- Validity of title;
- Lack of litigation;
- Factual status 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; and
- Validity of its corporate approvals, sufficiency of funds, lack of any insolvency state (or alike).

### Limitation of seller's liability

The representations and guarantees granted by the seller may be subject to disclosure of information to the purchaser. The Civil Code allows the parties to negotiate and establish limitations on the seller's liability with respect to the eviction and/or the hidden defects that may affect the real estate asset subject to the transaction.

Nevertheless, according to Romanian law, there are certain limits within which the parties may regulate the liability of the seller. Namely, the liability of the seller may not be limited to matters which were known by the seller or which the seller should have known upon the performance of the sale of such asset but were not disclosed to the purchaser.

For material transactions where lawyers are involved, one or all of the following main limitations of the seller's liability are negotiated:

- Limitation depending on the disclosed information (namely the seller will not be held liable for matters arising from the information disclosed by the purchaser, with the exception of specific indemnities agreed for certain matters);
- Limitation of time;
- Limitation of amounts—the Civil Code sets a minimum threshold equal to the purchase price of the asset; however, for breach of non-fundamental warranties, the threshold can be set as a percentage of the purchase price; and
- Limitation to the payments made by the title insurance company.

### Mortgages and other usual guarantees adopted in financing assets

In case financing is obtained for the acquisition of real estate assets, the financing institutions will condition the granting of the

loan on the establishment of first rank mortgages over the acquired real estate.

To this end, the financing intuitions will typically perform additional due diligence verifications of the title and status of the acquired real estate asset. Normally, the financing process is performed simultaneously with the acquisition process, with the seller and/or purchaser providing the necessary documents and information enabling the creditor to determine if the real estate fulfills the necessary conditions for securing the loan.

Typically, the financing institutions require the real estate asset to be free of any encumbrances which may affect the priority of their mortgage. Thus, any prior mortgages or seizures registered with the relevant land books of the acquired real estate have to be de-registered in order to proceed with the acquisition financing.

The mortgages will be registered over the land and buildings, or over the land and the buildings intended to be developed thereon.

## Lease of assets and lease of business

The general framework applicable to lease agreements is regulated by the Civil Code; specific provisions govern residential leases and land leases. Residential leases are also governed by EGO no. 40/1999 on residential tenant protection. Specific provisions may apply if 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. If the latter, lease agreements must consider 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).

Although not expressly regulated by law, the market standard includes two main types of leases: (i) triple net leases (although, in Romania, capital repairs are born by the landlord) and (ii) non-triple net leases.

Typical provisions should refer to:

### Length of lease term

The terms of a lease may vary as follows:

- Three to five years (exceptionally seven to 10 years) in cases of regular tenants; and
- 10 to 20 years in case of anchor tenants of retail projects.

## Frequency of rent payments

Rent is typically paid in advance. Rent payments are made either monthly or quarterly (the last payment mechanism is applicable in case of anchor/large scale leases). Payment of a guarantee is made at the start of the lease

The tenant may provide the landlord with the following guarantees securing its obligations:

- A letter of bank guarantee (preferably irrevocable, unconditional and at first demand); or a
- Cash deposit.

The above should be accompanied (if necessary) by a parent company guarantee or a corporate guarantee.

## Indexation of rent

As a rule, the base rent is indexed annually based on either the Monetary Union Index of Consumer Prices (MUICP) or the Harmonized Index of Consumer Prices (HICP). In some cases, the parties may agree to fixed base rents applicable during certain periods of time. The turnover rent mechanism is also frequently encountered in retail projects. Thus, the tenant pays the higher amount of a certain base rent, or a 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) the tenant's fit-out works; (ii) the content, equipment, assets, furniture, and other personal items 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.

Generally, 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 insurance requested by the landlord (in any case, under the reserve of excluding excesses and limitations imposed by insurers).

The landlord concludes (i) property insurance for the building (including landlord's installations and equipment); and (ii) 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 a building permit, the 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; and
- Obstruct the windows, 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 monthly in advance for the services provided by the landlord, according to the lease agreement (such services may refer, but are 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) by default or (iii) in case of force majeure. Typical events of default triggering termination included in lease agreements are:

- 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; and
- Breach by the tenant of obligations regarding the permitted works/alterations within the premises.

If the lease is concluded for an unlimited duration, it can be unilaterally terminated by either party, subject to serving prior written notice at a reasonable time in advance.

## Administrative permits applicable to construction or restructuring of assets

### Construction development

Under Romanian law, the right to develop construction is granted only to owners and holders of real estate related rights (except for special licenses granted to oil and natural gas operators).

In Romania, the process for obtaining a construction permit entails:

- 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);
- 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.); and
- Issuance of the building permit.

Additionally, the building permit requires a rather complex technical project (that must be endorsed by specialized verifiers).

The owner of land located within the perimeter of archaeological sites, as defined by Government Ordinance No. 43/2000 must observe specific regulations concerning restriction for protecting and recovering of the archaeological patrimony. If archaeological works are required in a specific area, any other activities are suspended until completion of an archaeological investigation, as evidenced by a certificate for archaeological clearance.

### Planning and development of real estate

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); and
- The Administrative Code of Romania, approved through Emergency Government Ordinance No. 57/2019.

The Urbanism and Construction Code (replacing and amending the various pieces of legislation in the field) is being enacted in Romania.

The typical legislative and governmental controls for strategic planning and zoning are:

- For preparation and approval of the strategic planning documentation, there are plans prepared (at the level of public authorities) for the national territory, certain zones as well as for counties;
- For preparation and approval of the zoning documentation, the law defines (i) the general urbanism plan; (ii) the zoning urbanism plan; and (iii) the detailed urbanism plan;
- The implementation of and compliance with the strategic planning and zoning regulations are typically ensured by the Romanian State Inspectorate in Constructions and the Chief

Architect Institution (through their representatives at local level).

Furthermore, specific legislative and governmental controls are applicable to ensure 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.

### Construction permits

The first step in obtaining a construction permit is the issuance of the urbanism certificate, which presents the building parameters, restrictions, limitations, and/or specific requirements to be observed for development on a certain plot of land.

Of the restrictions or special requirements typically applicable to construction in Romania, the following are significant:

- Specific restrictions deriving from the zoning regulations—e.g., permitted and prohibited use of the plot of land and building parameters;
- 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, and 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 to or in the nearby vicinity of the neighboring ones for which protection intervention measures are necessary; and
- In the case of construction development with a destination different than the one of the neighboring buildings; for the change of destination of premises in the existing buildings.

Once the building permit is obtained, the investor is requested to send a written notice to the City Hall and the State Inspectorate in Constructions, certifying the date when the execution works effectively start. Commencement of works must occur within the deadline specified in the building permit, which may be a maximum of 24 months. Once commencement is officially announced, the execution works must be performed within a certain period of time expressly provided in the permit, which may be subsequently prolonged if certain conditions are met.

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 the State Inspectorate in Constructions.

## Environmental and energy–environmental, social, and corporate governance (ESG) rules and status of implementation

### Polluted land

Under Romanian legislation, the buyer of a real estate asset, even without having caused the pollution or contamination, would be compelled by the public authorities to perform the remedial/decontamination measures. As a preliminary step, in some cases, the seller would be required to perform a contamination investigation before the sale of the real estate assets and to provide the buyer with the details thereof and the related decision of the environmental authority. 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 notification procedure in front of the environmental protection authority and, subsequent to closing, indicate the way they agree to split the environmental obligations imposed by the environmental authority.

### Energy efficiency qualifications

With respect to buildings, the energy efficiency verification is performed by issuing an energy performance certificate. According to Romanian legislation, upon completion of a construction, it is mandatory for the owner/investor/manager to obtain an energy performance certificate issued by an independent auditor (i.e., natural person certified by the Ministry of Development, Public Works and Administration). For existing buildings, the certificate also includes recommended measures to reduce energy consumption and to increase the share of renewable energy used in total consumption.

Apart from the applicable fine for not obtaining and displaying such a certificate, any transfer of ownership over the building in the absence of the energy performance certificate is sanctioned with relative nullity, while the reception minutes are null and void in such an event.

### ESG rules

Although the real estate sector is not subject to compulsory ESG standards, the Romanian business environment (including in the real estate sector) has recently begun to consider ESG aspects, realizing that they can play a major role in the long-term success of the organization. Companies, including those in the real estate sector, are, in principle, subject to non-financial reporting (which also covers ESG aspects) if they exceed 500 employees.

## Direct taxes applicable to sales

Depending on the alternative chosen (asset deal vs. share deal), under the acquisition phase, several implications should be considered when determining the most efficient solution from a tax point of view, including, but not limited to the possibility of taking over the tax losses carried forward, depreciation costs, deductibility of borrowing costs with respect to financing the transaction, etc.

### Asset deals

For the seller, the tax treatment would differ depending on the tax regime of the company (i.e., corporate income tax or microenterprise tax). In practice, as real estate properties usually exceed the value of EUR 1 million (approximately USD 1,043,746 \*), the seller should be taxed at 16% on the overall gain that resulted from the sale of the property. Such gain is computed as the difference between the sale price and the fiscal value of the building/land (i.e., acquisition cost and historical construction cost). Previous valuations made for the property are not considered in the tax value.

From the buyer's perspective, following the acquisition of a real estate property, the acquisition cost becomes the new tax value of the asset, from which the related tax depreciation can be calculated. The buyer should split and book separately any real estate property, including buildings and land, considering that different depreciation regimes and property taxes apply.

### Share deals

Income from the sale of shares in a Romanian company is non-taxable if the shareholder held at least 10% of the shares in the Romanian company for more than one year at the time of the sale. Thus, if the seller transfers the shares in a Romanian company holding real estate property for which these ownership conditions are fulfilled, the income obtained from the sale of shares are not taxable in Romania. Compliance obligations should still be performed, and non-resident sellers should register in Romania within 30 days from the date of sale.

As regards share deals performed within the one-year period of ownership, the tax treatment would depend on the provisions of existing double tax treaties which could be applied.

The potential buyer should look carefully at the purchasing company's tax valuation of the property as well as the deferred tax calculation (i.e., unrealized exchange differences and the accumulated tax losses of the company), which will have an impact on possible future income reduction of the company.

Attention should also be given to the financing costs related to the acquisition and tax implications at the level of the holding company acquirer, considering the provisions of the Anti-Tax Avoidance Directive already implemented as well as the proposal for a directive laying down rules to prevent the misuse of shell

entities for tax purposes, which should enter into force starting 1 January 2024.

For both asset and share deals, if the transaction is performed between related parties, transfer pricing rules should also be observed.

## Contact



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\*According to the 15 September 2022 exchange rate

# Serbia



# Real Estate Law in Serbia

## Emerging Markets and new asset classes in Real Estate markets in Belgrade – Serbia

- After a slight decline in the number of transactions during the spring of 2020, the Belgrade residential market started to recover in the second half of the year, as well as in the first six months of 2021, when the number of sold apartments was over 10,000, which represents an increase of 47% compared to H1 2020, or 14% compared to H1 2019.
- Summarizing the whole of 2021, 20,360 apartments were sold in Belgrade alone, achieving an increase of 25% in comparison with 2020, which makes 2021 a record year in terms of demand for residential units. Generally, for the past couple of years, the asking prices of the projects depend on the location concept amenities, investor, and municipality within the city in question, whereas the high-quality projects command the market prices.
- Office market-limited changes in Belgrade office stock in Q4 2021, along with a record leasing activity, caused the further drop of the vacancy rate to 6.17% - the vacancy rate has been showing a constant decline. In 2021, the office leasing momentum has returned to pre-pandemic levels, considering that the overall demand in the first three quarters of 2021 amounts to 94,000 m<sup>2</sup>. The first six months of 2021 saw strong take-up activity of over 61,000 m<sup>2</sup>.

By **Stankovic Ana**, Business Development Manager for projects Wellport, Vozdove Kapije, and New port by Shikun & Binui

# Overview of the Serbian Legal System

## Real estate law—legal framework and overview of main regulations governing acquisition of assets in Serbia

This section contains a list of the most significant pieces of legislation, which, in our view, may be applicable to the acquisition and lease of real estate in Serbia. Please note that, depending on the complexity and structure of the transaction, other potential regulations may also be applicable. Thus, the list of regulations specified below is not exhaustive and should be perceived as a general guideline for the implementation of real estate transactions in Serbia.

### Ownership Act

The Ownership Act<sup>9</sup> governs the ownership right and possession over movables and immovables, third-party rights over immovables (i.e., servitudes, pledges, etc.), and the procedure for foreigners acquiring immovables in Serbia. This act is considered as the underlying act in the field of real estate.

### Public Notaries Act

The Public Notaries Act<sup>10</sup> empowers notaries to accept a declaration of will from the parties, to give these declarations the necessary written form, and to issue certificates that have the character of public documents. The act regulates the particulars of a notary's work. The provisions of the Public Notaries Act specify the form in which certain private documents (e.g., agreements) must be drafted and executed to produce legal effects.

### Property Transfer Act

The Property Transfer Act<sup>11</sup> governs the transfer of ownership

title to real estate via legal transactions, with or without consideration. The Property Transfer Act prescribes the form of a real estate transfer agreement and the jurisdiction of public notaries for certifying the transfer documents.

In addition, the Property Transfer Act bestows the pre-emptive purchase right upon:

- Co-owners of the property;
- Owners of the neighboring parcels, in case of agricultural land; and
- A third party, in case of contractual pre-emptive right and regulates the pre-emptive right procedures.

### Public Property Act

The Public Property Act is a framework regulating public property as well as other property rights of the state, autonomous province, and municipalities/cities. Natural resources (e.g., water, water streams, geothermal, and mineral resources etc.), goods of general importance (forestry, agricultural land, etc.), goods in general use (as stipulated in the law), property used by public bodies and organizations of the state, provinces, and municipalities/cities, agencies etc., fall under the public property regime.

The procedures for the sale of state-owned construction land by the Republic of Serbia as well as conditions, manner, and procedure for the swap of real estate owned by the Republic of Serbia are laid down in the decree on conditions, manner, and procedure in which the publicly owned land may be disposed of or leased for a price/rent lower than the market price, or without compensation, and in the Decree on Disposal of State-owned Construction Land.

<sup>9</sup> Act on Basics of Ownership and Proprietary Relations (In Serbian: Zakon o osnovama svojinskopravnih odnosa, "Official Gazette of SFRJ", nos. 6/80 and 36/90, "Official Gazette of SRJ", no. 29/96, and "Official Gazette of the Republic of Serbia", no. 115/2005).

<sup>10</sup> Public Notaries Act (In Serbian: Zakon o javnom beležništvu, "Official Gazette of the Republic of Serbia", nos. 31/2011, 85/2012, 19/2013, 55/2014, 93/2014, 121/2014, 6/2015, and 106/2015).

<sup>11</sup> Real Property Transfer Act (In Serbian: Zakon o prometu nepokretnosti, "Official Gazette of the Republic of Serbia", nos. 93/2014, 121/2014, and 6/2015).

## Cadaster Act and Law on the Registration Procedure with the Cadaster

The Cadaster Act<sup>12</sup> and Law on the Registration Procedure with the Cadaster<sup>13</sup> jointly regulate, inter alia, the procedure for state surveys and the registration of immovables, ownership rights, encumbrances, and third-party rights to immovable property. Stated laws also prescribe rules pursuant to which the owners of the property are registered, as well as procedures for the registration of remarks and prior remarks with respect to a specific property, which are important for the registration of ownership.

## Construction Act

The Construction Act governs the spatial development process, development, usage and transfer of state-owned construction land, and the designing and construction of buildings.

The Construction Act sets out the procedure for adopting planning documents. It also lays down the requirements for obtaining construction permits and use permits for buildings/structures (excluding mining buildings/structures which are regulated by a separate law). Further, it regulates the manner of disposal of publicly owned construction land and the possibility of its lease.

This law also contains provisions on the payment of a fee for the conversion of agricultural and forestry land into construction land, which are complementary to the provisions of forestry and agricultural land legislation.

## Act on Agricultural Land

The Act on Agricultural Land<sup>14</sup> governs the planning, protection, development, utilization, and transfer of agricultural land.

## Forests Act

The Forests Act<sup>15</sup> regulates the preservation, protection, planning, cultivation and use of forests, disposal of forests and forest land, supervision of the implementation of this law, as well as other issues important to forests and forest land, including change of the purpose in specific cases.

## Mortgage Act

The Mortgage Act<sup>16</sup> governs the rules and procedures for establishing mortgages as a security instrument over immovable property, as well as types of mortgages, registration of

mortgages, mortgage foreclosure, etc. This statute is particularly important in cases where the target real estate is mortgaged.

## Obligations Act

The Obligations Act<sup>17</sup> governs the obligation relations and sets forth default rules of various contracts, including the SPA, the lease contract, and the construction agreement.

Moreover, the Obligations Act encompasses provisions regulating tort claims and damages. These provisions are applied in situations where no specific rules are provided by a special regulation.

Finally, the Obligations Act contains a statutory seller's guarantee (which can be modified via SPA) that the sold property is free of any third-party claim.

## Act on Conversion of Right of Use to the Construction Land into Ownership Against the Fee

The Act on Conversion of Right of Use to the Construction Land into Ownership Against the Fee governs the procedure and conditions for changing the right of use of state-owned construction land into an ownership right for a fee. This law becomes important if a buyer intends to acquire a piece of land where the right of use (and not ownership) exists, and the land was at some point in the portfolio of companies that underwent privatization, bankruptcy, or enforcement. In such cases, the right of use has to be converted into ownership, against payment of a fee (which can be a considerable amount), as a prerequisite for obtaining a construction permit.

The rulebook on conditions, manner, and securing of payment of fees for the conversion of a right to use into ownership rights on state-owned construction land provides for procedures for conversion, specifically with respect to the payment of conversion fees.

## Legalization Act

The Legalization Act governs the conditions and procedure for the legalization of illegally constructed and/or modified buildings as well as consequences of legalization.

<sup>12</sup> Act on State Survey and Real Estate Cadastre (In Serbian: Zakon o državnom premeru i katastru, "Official Gazette of the Republic of Serbia", nos. 72/2009, 18/2010, 65/2013, 15/2015, 96/2015, 47/2017, 27/2018, 41/2018, and 9/2020).

<sup>13</sup> Law on the Registration Procedure with the Real Estate Cadastre and Utilities (In Serbian: Zakon o postupku upisa u katastar nepokretnosti i vodova "Official Gazette of the Republic of Serbia", nos. 41/2018, 95/2018, 31/2019, and 15/2020).

<sup>14</sup> Act on Agricultural Land (In Serbian: Zakon o poljoprivrednom zemljištu, "Official Gazette of the Republic of Serbia", nos. 62/2006, 65/2008, 41/2009, 112/2015, 80/2017, and 95/2018).

<sup>15</sup> Forests Act (In Serbian: Zakon o šumama, "Official Gazette of the Republic of Serbia", nos. 30/2010, 93/2012, and 89/2015).

<sup>16</sup> Mortgage Act (In Serbian: Zakon o hipoteci, "Official Gazette of the Republic of Serbia", nos. 115/2005, 60/2015, 63/2015, and 83/2015)

<sup>17</sup> Obligations Act (In Serbian: Zakon o obligacionim odnosima, "Official Gazette of SFRJ", nos. 29/78, 39/85, 45/89, and 57/89, "Official Gazette of SRJ", no. 31/93 and "Official Gazette of SCG", no. 1/2003 and "Official Gazette of the Republic of Serbia" no. 18/2020)

## Family Act

The Family Act<sup>18</sup> governs property relations in a family, including ownership relations between spouses and partners in domestic partnerships.

## Ownership rights in Serbia, ownership restrictions, and acquisition structure usually applied in real estate transactions

The Serbian legal system distinguishes the following forms of ownership based on the number of titleholders: i) individual ownership; ii) co-ownership; and iii) joint ownership.

### Ownership rights

Generally, any individual or a legal entity may obtain ownership rights on residential buildings, apartments, commercial buildings, business premises, agricultural land, and other real estate, except for natural resources that are owned by the state.

The ownership over real estate can be acquired pursuant to the:

- Statute;
- Legal transaction ("pravni posao");
- Inheritance; and
- Public body's decision.

The most common type of legal transaction is the sale and purchase agreement of real property (SPA). Each SPA should be signed by the parties and solemnized by a public notary.

According to the Public Notaries Act, an SPA must be entered into through a certified document (solemnized) before a public notary. The public notary verifies that the legal transaction is permitted by law. The public notary then inserts a confirmation (i.e., solemnization) clause, which is a precondition for the agreement's validity and confirmation that the parties to the agreement were informed of the content and the expected legal effects of the document.

Once the SPA has been entered into, a purchaser is entitled to register ownership over the property in the real estate cadaster, based on the owner's statement allowing registration of the purchaser's ownership right (so-called *clausula intabulandi*). Most commonly, the statement is inserted in the main SPA (i.e., transfer instrument). Alternatively, the statement may be given separately from the main SPA. This statement is a precondition for effecting registration of the ownership on the real estate property.

Below is a diagram of the simplified procedure for the purchase of a real estate.



Ownership right over an immovable property, on which another person has a valid title, may be acquired via a positive prescription ("održaj"), even if the owner of the land has not agreed to transfer it. In order to acquire ownership of such property via positive prescription, the person needs to fulfill the following criteria:

- To act in a good faith (i.e., a state of mind which implies believing that a person has a property right over the held property);
- To have a valid legal basis for acquiring the property (e.g., sale and purchase agreement); and
- To have possession of the property for at least 10 years; or
- To act in a good faith;
- Not to have a valid legal basis for acquiring the property; and
- To have possession of the property for at least 20 years.

Ownership is protected by law. An actual owner may seek to retrieve the possession via court from a non-owner.

### Acquisition of public property

Apart from the publicly owned land (construction, forestry, agricultural) to which special regimes apply (please see below), public property may be sold to a private entity exclusively pursuant to a decision of a competent authority. The competence for deciding on a disposal of property depends on the owner of the property. State-owned real estate may be sold exclusively following a decision from the Government of Serbia on disposal. The decision is prepared by the Republic Directorate. Conversely, the property owned by the municipality can be disposed of pursuant to a decision from the municipal assembly.

The general rule is that public property is sold in a public tender procedure at a market price. Exceptionally, public property could be sold via direct bargain and at a rate below the market. In these exceptional cases, the decision, including a proposal, must

<sup>18</sup> Family Act (Porodični zakon, "Official Gazette of the Republic of Serbia", no. 18/2005, 72/2011–another act and 6/2015)

contain a rationale for such a sale that proves the existence of special circumstances that justify the sale in such a manner. The market value of the real estate is determined by a competent tax authority.

The conditions and procedures for disposal of publicly owned construction land through direct bargains and public tenders are regulated in more details in i) the Decree on Disposal of State-owned Construction Land owned by the Republic of Serbia; and ii) applicable municipal regulations.

### **Co-ownership**

Co-ownership is when several persons/entities have ownership rights over the same real estate whereby the ownership share for each of them is determined in proportion to the whole (ideal share). If the co-ownership shares are not determined, it is assumed that they are equal. Co-ownership is usually acquired based on an agreement, by inheritance, division, or in another way prescribed by special laws.

The co-owner has the right to keep and use the real estate together with the other co-owners in proportion to their share, without violating the rights of other co-owners. The co-owner may dispose of their share without the consent of the other co-owners, provided that they honor their pre-emptive purchase rights.

Co-owned real estate is jointly managed by all co-owners. For regular management activities, the consent of co-owners whose shares together make up more than half the value of the property will be required, while to undertake activities that exceed the scope of regular management (alienation of the whole property, change of purpose, lease of the entire property, establishing a mortgage, constitution of servitude right, etc.), requires the consent of all co-owners. Management can be entrusted to one of the co-owners or a third party. If the co-owners cannot reach an agreement on management, this can be decided by the court.

The co-owner always has the right to demand the division of the co-owned real estate, and such right cannot be excluded.

### **Joint ownership**

Joint ownership is the ownership of several persons on real estate when their shares are determinable but are not defined. This will be the case with common premises of a residential building in the case of apartment purchase or joint ownership by the spouses.

According to the Family Act, any property acquired prior to marriage or the establishment of a domestic partnership, or from inheritance and gift agreement, is considered as a personal property and the person is entitled to freely dispose of such property.

Conversely, joint property is the property acquired through work during the marriage or a domestic partnership. According to the Family Act, joint property is managed jointly and with mutual consent. In conducting regular management activities in relation to the joint property, the consent of the other partner is assumed. However, disposal or encumbering of joint property is deemed to fall outside of regular management, and thus, the explicit consent of another spouse/partner is required for selling or mortgaging the property.

The law further provides that, even if only one spouse/partner is registered as the owner of the property it will be deemed that both are registered (owners), unless a consent of other spouse or prenuptial/property division agreement exists. Given the above, an issue may arise when the agreement is concluded with the registered owner, without the consent for disposal of the spouse/partner, in which event the agreement may subsequently be annulled.

In practice, this type of risk is mitigated by obtaining a written notarized statement from the spouse in which they consent to the sale of the relevant property. This consent could represent an integral part of the SPA or could be issued as a separate notarized document.

Moreover, the new Law on the Registration Procedure with the Cadaster, introduced in 2018, provides that joint ownership will be registered (*ex officio*) in each case when the buyer, who is married, acquires new property, unless there is a joint statement by the spouses that the property in question is actually the personal property of the buyer (one of the spouses). In this way, the lawmakers wish to align the cadaster register with the provisions of the Family Act.

### **Restrictions of real estate ownership**

#### ***Rights of foreigners***

Foreign physical and legal entities that perform business activities in Serbia may acquire ownership over real estate (other than agricultural land) if:

- Such property is required for their business; and
- Reciprocity exists between the two countries.

Foreign physical persons may also acquire ownership of an apartment or a house if the reciprocity exists.

Reciprocity between Serbia and the country of origin of a foreign entity/individual may be:

- Contractual reciprocity—existence of a bilateral agreement between Serbia and the country of origin of a foreigner which regulates the matter of acquiring real estate for foreigners; and
- De facto reciprocity (applicable in the absence of bilateral agreement)—meaning that the acquisition of certain rights by foreigners is not guaranteed by international agreements or

parallel laws, but is in fact provided in practice.

Acquisition of agricultural land is reserved exclusively for citizens of Serbia. The exception is the possibility for European Union (EU) citizens to acquire agricultural land under very restrictive conditions.

However, Serbian companies owned exclusively or partially by foreigners are not deemed as foreign entities for the purpose of acquisition of immovable property, so the restrictions do not apply to them, i.e., they may acquire the right of ownership over all types of real estates (including agricultural land).

### **Restrictions applicable to the acquisition of agricultural and forestry land**

The general principle embedded in both the Forests Act and the Act on Agricultural Land is that forests, forest land, and agricultural land, which are state-owned, cannot be transferred (sold) to private owners except in some limited cases. Specifically, pieces of forests/forestry land can be sold to the user in case of inability of rational management by the state. Also, publicly owned agricultural land can be sold to an individual–Serbian national, who has a registered agricultural holding and can acquire up to 20 hectares of agricultural land (assuming that other conditions are met), whereby the total surface of the land owned by such a buyer after the acquisition does not exceed 40 hectares.

Furthermore, the applicable regulations prescribe that only specific state land can be acquired which:

- Is located at least 10 kilometers or less from the state border, with the approval of the government;
- Is not planned for construction in the valid planning document;
- Is not subject to restitution;
- Does not belong to protected natural assets; and
- Does not belong to or does not border with the security zone/military base.

Moreover, the state cannot sell more than 20% of the total area of the state agricultural land which can be leased in a single municipality.

Finally, a pre-emptive purchase right of neighboring parcels would have to be respected.

Given the above, the only alternative to the purchase of respective land could be to have the necessary forest and agricultural land change their purpose into construction land by adopting a new, or changing the existing, planning document for which a government act is required.

### **Pre-emptive purchase right**

In cases where the buyer acquires land directly from the private owners, it should be considered that a potential pre-emptive right may exist. The Property Transfer Act bestows the pre-emptive purchase right upon:

- Co-owners of the property;
- Owners of the neighboring parcels, in case of agricultural land; and
- A third party, in case of contractual pre-emptive right.

Agricultural land and co-owners: Prior to selling the land to the buyer, the owner of the plot is obliged to offer their land on identical terms to the holders of pre-emptive rights co-owners (if any), and, if this is an agricultural land, to the owner of adjacent agricultural land.

The offer to the holders of pre-emptive purchase rights needs to be in writing and delivered via registered mail to all the holders of the pre-emptive purchase rights. The return receipt signed by the owner represents evidence of receipt of the offer, and this document can be used in court in case of a dispute.

The deadline for a holder of pre-emptive rights to exercise their pre-emptive rights is 15 days from the receipt of the offer. There is a statutory assumption that the holder of pre-emptive rights has rejected the offer if they do not reply within 15 days, in which case the owner may sell the land to a third party under the same or less favorable terms.

In the event the land is sold contrary to this statutory limitation and by disregarding the pre-emptive rights of third parties, holders of these rights may submit lawsuits seeking from the court to annul the sale and purchase agreement and to order the sale of the land to them on the same terms. The right to seek annulment of the agreement has to be exercised by the holders of the pre-emptive rights within 30 days from the date when such a person or a legal entity finds out about the sale, or in any case, within two years from the transfer of ownership.

However, the plaintiff would have to deposit the market value of the property with the court simultaneously with filing the suit, which makes such suits unattractive and represents a barrier to misusing pre-emptive rights.

Forest land: The state (or its company that manages the forests) has pre-emptive rights in case a private owner wishes to sell their forest, provided that the respective forest borders with the state-owned forest. The holder of the pre-emptive right in case of the forest is obliged to declare whether it accepts the offer within 30 days from the receipt of the offer sent by the owner of the forest.

Unlike the pre-emptive rights of co-owners or with respect to the agricultural land, if the forest land is sold in contravention of the pre-emptive right rules, the sale and purchase agreement would be null and void.

Water land: The Republic of Serbia has a pre-emptive purchase right on water land. Therefore, before selling the water land, the private owner has an obligation to offer this land to the Directorate for Water. The directorate is obliged to respond to the offer within three days from its receipt. Following a negative response or lack of timely response, the water land can be sold pursuant to the same or less favorable terms (from purchaser's perspective).

Contractual pre-emptive rights: The general rules and principles of statutory pre-emptive rights apply similarly to the pre-emptive rights established by an agreement; however, some specifics concerning deadlines are different. Specifically, the maximum duration of the pre-emptive right is five years, the deadline for responding to the offer from the pre-emptive purchase right holders is one month from notification. The deadline for submitting the lawsuit is six months from the date when the holder of pre-emptive right finds out about the agreement and, in any event, five years from the transfer of ownership to the third party.

#### **Corporate law restrictions**

In addition, for acquisition of property from private companies, and depending on the value of the property and the overall assets of the seller, there could be special internal corporate procedures within the seller company which must be complied with in order to complete the transaction (e.g., decision on disposal of the high-value property, etc.).

## Real estate registry system

The Serbian real estate cadaster ("katastar") is a complete register of all cadaster plots, buildings, and any (ownership) rights, encumbrances, and third-party rights attached to them (e.g., servitudes, long-term leases, mortgages, etc.). It is operated by the Serbian Geodetic Authority, which has its offices in each municipality.

The Cadaster, in its official capacity, also registers annotations and any data/property right change, i.e., registration, modification or cancellation of the requests submitted by the owner or third party who has adequate legal interest/right (e.g., mortgage creditors) and is open to the public.

The registration of ownership title transfer with the cadaster is mandatory and a precondition for acquiring ownership over real estate (narrow exceptions to this rule exist), as well as for the creation of rights in rem ("stvarnih prava").

The acquisition of property rights has two phases:

- Obtaining "iustus titulus" (contract or other legal act for the transfer of ownership); and
- "Modus acquirendi" (the manner of the transfer itself) which is registration before the competent cadaster.

The cadaster records any transfer of property rights and is updated regularly. Registration is based on the application submitted either by a notary public or courts (ex officio), or the person with adequate legal interest. Conditions for the registration of ownership include:

- The property has to be registered in the cadaster;
- A party to the SPA has to be registered as an owner of the property at the time of submission of the request for registration (with an exception explained below); and
- Valid basis for registration of ownership (e.g., SPA, court ruling or inheritance order, etc.), which has to contain the time, date and place of the solemnization, description of the property in line with the cadaster data, sale and purchase price (if applicable), personal data of the parties, statement of the owner (seller) permitting registration of the purchaser's ownership (i.e., *clausula intabulandi*), etc.).

Certain deviations exist in practice where ownership of the property is acknowledged without registration—so called unregistered ownership ("vanknjižna svojina"). Specifically, applicable regulations allow the registration of ownership against the registered owner who is not a party to the SPA or other transfer instrument if the request for registration is accompanied by the evidence of proper legal continuity between the registered owner and the party to the agreement with the buyer.

The real estate cadaster is a public register, meaning that the principle of reliance in public records ("načelo pouzdanja u javne knjige") applies. This principle states that the data registered in the cadaster are "true, reliable and that nobody can suffer any damage if they have relied on the data registered therein". In other words, any acquirer acting in good faith and with trust in the cadaster enjoys legal protection (assuming other legal preconditions are met). The purpose of this principle is to guarantee the safety of real estate transactions.

## Notary role in the real estate transactions

The notary public holds a key role in each real estate transaction by protecting the rights of their clients as well as increasing the efficiency and control of each transaction.

Agreements on the disposal of rights over immovable property, including mortgage agreements, need to be certified (solemnized) while unilateral pledge/mortgage statements have to be concluded in the form of a notarial deed. Non-compliance with the prescribed form will make the transaction null and void.

Only the public notary where the real estate is situated has jurisdiction for certifying the document. In case of several properties, located in different regions of the country, are being acquired by the same agreement, the public notary may notarize such an agreement based on the rules of attraction of jurisdiction.

The parties are free to determine the terms of the agreement; however, the content undergoes strict legal control by the notary public prior to the notarization. The public notary informs parties to the agreement of relevant circumstances surrounding the property that is being transferred (e.g., lack of use permit, ongoing legalization procedures, etc.) and their legal implications, and makes sure they understand the content and legal consequences of their contractual obligations, as well as to reflect the resolutions of the parties properly. Further, notaries public have access to the Legal Information System of the Republic of Serbia (PIS), which records all real estate transactions and contracts, making multiple sales of the same real estate almost impossible.

Finally, public notaries are obliged to inform a competent tax authority and cadaster about each real estate transaction, ensuring that each change in ownership of the property is reflected in the land registry in a timely manner.

Additionally, a document concluded in the form of a notarial deed represents an enforcement title allowing the creditor to initiate enforcement proceedings directly when other legal requirements are met.

### Legal responsibility of the seller in real estate transactions—contractual representations and warranties

The Obligation Act provides two general types of responsibility for the seller: responsibility for material (physical) defects and responsibility for legal defects (eviction/"evikcija").

The responsibility for material (physical) defects exists when real estate does not have all the agreed characteristics, or if there are certain material defects (flaws). After identifying the defect, the buyer has an eight-day deadline to inform the seller and request that they remove specific defects or to demand a decrease in the purchase price, or eventually terminate the sale and purchase agreement and demand compensation for damages. The seller will not be liable for the defect if such a defect has appeared six months after the handover of real estate unless a longer period is stipulated. Liability for material defects can be limited or excluded by the agreement.

The responsibility for legal deficiencies (eviction) arises when there is a third-party right on the real estate that excludes, diminishes, or restricts the buyer's right, whereby the buyer was unaware of it, or had not agreed to buy the real estate with such an encumbrance.

The buyer has one year from finding out about the third-party right to inform and demand from the seller to eliminate any third-party rights or claims on the purchased property. Should any claims of a third party arise following the sale, the seller is

obliged to provide all legal assistance necessary to refute the claimants' assertions with regard to the sold property. However, if the court accepts the third party's claim and the purchaser loses all or certain rights over the property, the purchaser is entitled to terminate the agreement or request a reduction in price, depending on the particulars of the case. This responsibility of the seller can be limited or completely excluded, except in cases where the seller was aware of the third-party right, in which case the liability release will have no effect on the buyer.

In addition, the contractor has to ensure the stability and security of the new building for 10 years, and provide a two-year warranty for the quality of performed works, from completion/handling over of the performed works/property.

### Mortgages and other usual guarantees adopted in financing assets

The mortgage ("hipoteka") is regulated by the Mortgage Act and is used for the security and collection of claims. A mortgage is a lien right on real property that entitles the creditor, in the event of debtor's failure to repay the due debt, to request the collection of a claim secured by the mortgage from the value of the real estate prior to ordinary creditors and junior mortgage creditors, and regardless of who the owner or possessor of the real estate is.

For a mortgage to be legal, it has to be registered in the real estate cadaster. A mortgage can be registered against land, buildings, special parts of the building (i.e., apartments, business premises, garages) as well as against buildings undergoing construction, provided that the investor has obtained a construction permit.

It can be registered on the entire real estate, its part or co-ownership share. If there are multiple registered mortgages on one property, they are ranked based on the time they were registered in the cadaster.

Mortgages registered on buildings under construction, or their separate parts/units, are registered on the underlying plot where the buildings are being developed, which is important for project financing and/or the acquisition of real estate prior to finalization. After the completion of construction works, obtaining a use permit by the investor and registration of the building in the cadaster, the mortgage is re-registered, changing from the plot to the newly registered building or its separate units.

There are four types of mortgages:

- Contractual mortgage, established by the mortgage agreement concluded between the real estate owner and the creditor, for securing the debt repayment;
- Unilateral mortgage, registered on the basis of a mortgage deed (pledge statement);

- Statutory mortgage, based on the provisions of special laws; and
- Judicial mortgage, registered on the basis of a court's decision.

The contractual mortgage rules apply *mutatis mutandis* to unilateral, statutory, and judicial mortgages.

A contractual mortgage (agreement) is concluded in the form of a certified (solemnized) document, while a unilateral mortgage (mortgage deed) needs to be signed in a form of public notary deed. In order to register a mortgage, a public notary is obliged to create a valid electronic document and to send it to the cadaster within 24 hours. For the registration of a mortgage, a public notary fee and administration fee for registration in the competent cadaster must be paid. Both fees depend on the secured amount.

A mortgage agreement or mortgage deed must contain specific legal provisions in order to be enforceable. If the debtor fails to repay their debt, the creditor can start an out-of-court enforcement procedure in which they can choose to sell the real estate by public auction or via direct bargaining procedure. If the creditor fails to sell the real estate in an out-of-court sale procedure within 18 months from the registration of the remark on the mortgage sale in the cadaster, they may start a new enforcement procedure through a competent court.

According to the Mortgage Act, a registered mortgage survives the sale of the property. Thus, the buyer should be aware of any encumbrances established over the property when purchasing, and, where possible, agree with the creditors, in whose favor the mortgages have been registered, on the terms of deletion. Mortgages need to be registered in the cadaster, and the buyer may check whether the relevant property is mortgaged by obtaining the relevant property sheet from the cadaster. This check could also be performed on the online cadaster, but this is not an official database and is often not up to date.

The risk is that the seller, who once paid for the property, may not use the funds to repay the debt, which would result in mortgage foreclosure and the sale of the property by public auction. The buyer could pay a debt to the bank on behalf of the debtor by agreement on such a payment, concluded between the buyer and the debtor (and/or the mortgage creditor), according to the Obligations Act.

## Lease of business premises

The Obligation Act regulates the general rights and obligations in relation to leases, without making any distinction between the leasing of movables and immovable assets. Also, there is still no separate legislation in Serbia governing the lease of business premises; therefore, these general rules apply to leases of all privately owned property.

Conversely, leases of publicly owned properties are regulated by the Public Property Act and are subject to specific rules.

The majority of the Obligation Act provisions are discretionary, meaning the parties are free to regulate them in any other permitted manner. As per the general rules, parties to lease agreements can be either natural or legal persons, either domestic or foreign. The subject of the lease can be the entire building, apartments, business premises, retail units, warehouses, garages, etc.

The lease agreement can be concluded for a definite or indefinite period. An agreement which is entered into for a fixed term will expire at the end of that period. However, if the lessee continues to use the leased property and the lessor does not object, it will be deemed that the new lease has been concluded for an indefinite period, and under the same terms and conditions, save for those relating to security instruments provided by third parties (e.g., pledges, guarantees etc.) that will cease to exist.

Conversely, if the lease is concluded for an indefinite period without defining a termination notice period, the statutory notice period of eight days will apply.

Lease agreements do not have to be in writing to be legally valid and binding. The exceptions are that the written form is required for long-term leases (i.e., lease for five plus years), and those signed with foreigners or foreign companies for the lease of touristic properties and amenities. However, in practice, the parties almost always choose the written form for reasons of legal security, especially with the lease of business premises where the subject of the lease is often property of great value. In addition, even if the parties opt for a written form, there is no obligation to notarize the lease agreement, except in cases when the parties wish to register a long-term lessee right to the cadaster, in which case the party's signatures on the agreement need to be certified by a public notary.

Unless the lessor and lessee have expressly agreed otherwise, the lessee may sub-lease the property to another person. The lessor may collect the receivables arising from the lease, request direct payment of the amount owed by the sub-lessee pursuant to the sublease agreement. Also, the lessor may terminate the lease agreement if the lessee is sub-letting the premises without permission (if such permission is required by law or under the agreement).

The lessor is free to dispose of the leased property, in which event the buyer (i.e., the new owner of the leased property) will assume the lessor's rights and obligations from the lease agreement. This means that the new owner cannot terminate the agreement and require the lessee to vacate the leased property before the expiration of the lease term defined therein. If the lease was agreed for an indefinite term, the new owner will have to send a termination notice and honor a statutory or agreed notice period. By contrast, if the premises are sold within an enforcement procedure, the lease agreement will be terminated

automatically if the lease agreement has not been registered in the cadaster prior to the first rank mortgage or the oldest foreclosure remark.

The Serbian Obligation Act sets the general rules for the lease of business premises. However, some of these are not appropriate or well-adjusted for commercial leases; therefore, the landlords/owners of retail and office space tend to regulate their obligations to the tenants with triple net lease agreements which are rather one-sided and in favor of the landlords. Given the recent expansion of the retail and office space market in Serbia, it is anticipated that a separate law governing the lease of business premises will be adopted, which is expected to provide a more suited legal framework for commercial leases and improve the lessee's position.

### Administrative permits applicable to construction or restructuring of assets

The construction process in the Republic of Serbia can be roughly divided into three administrative phases:

- Obtaining location conditions documents;
- Issuance of construction permit; and
- Issuance of use permit.

Location conditions are documents preceding the construction permit determining the rules of construction for a specific location. They are issued by a decision that contains all the data for the preparation of technical documentation, all in accordance with the valid planning document or urban plan. The request for obtaining location conditions is submitted electronically via the Central Information System (CIS).

With the amendments to the Planning and Construction Act of 2014 and introducing the so-called "one-stop-shop" system, the procedure for issuing construction permits has been accelerated considerably. The entire system and permitting procedure operate electronically; therefore, all documents must be submitted electronically and signed with a qualified electronic signature.

The procedure is initiated by applying through the CIS, along with adequate supporting documents (e.g., an extract from the construction permit design, proof of administrative tax payment, proof of ownership over the land, etc.). Competent authorities are required to obtain ex officio all necessary documents, which are issued by the competent public authorities. By law, the competent authority must issue a construction permit within five working days from the submission of the application. In effect, the entire process lasts approximately 100 days.

The construction permit is issued in the developer's name, but it may also be issued jointly in the developer's and the financier's name. This can significantly speed up the delivery of the project,

since it facilitates the takeover of the project in the event the developer is declared insolvent or bankrupt and paves the way for the financier to finish the construction of the building without interruption. This delivers substantial savings and mitigates the risks to some degree.

The use permit is the final administrative act which is issued based on a technical inspection of the facility. The use permit confirms that the facility is developed in line with the applicable (planning and zoning) regulations, and location conditions, that the installed equipment is tested and functional, the facility has all the necessary approvals from the competent authorities, and that the facility has passed all the necessary tests.

### Environmental/environmental, social, and corporate governance (ESG) regulations

#### Environmental Impact Assessment (EIA) procedure

Pursuant to the Law on Environmental Impact Assessment and relevant subordinate legislation, the EIA procedure is mandatory for certain projects that have/may have an impact on the environment. This procedure is also relevant for issuing construction permits and for the commencement of construction works.

When developing certain projects, the project holder (investor) is obliged to request from the Ministry of Environmental Protection a decision on whether an EIA procedure should be carried out. Such a request has to be filed on a prescribed template and must include, inter alia, data on the project parties and location, the description of project features, a description of the potentially materially adverse environmental impact, and the proposed measures to mitigate such an impact. Certain project documentation also has to be filed as an exhibit to this request.

Failure to file the above request is a potential misdemeanor liability and results in an inability to initiate construction of the objects. Specifically, conducting an adequate EIA procedure is a mandatory precondition for the issuance of construction permits, as well as for notifications on the commencement of works to be confirmed. In case neither (as applicable in each case) of the EIA study or a resolution that the EIA study is not required, the requisite permits would not be issued, and the construction could not take place. More specifically, requests for construction permits and/or confirmation of the notification of commencement of works would be dismissed, while new requests could only be filed once the necessary EIA-related documents are prepared, which could be a time-consuming exercise.

#### Energy certificates

In 2012, the Rulebook on Energy Efficiency of the Buildings and the Rulebook on Conditions, Content and Manner of Issuing Energy Certificates were adopted in the Republic of Serbia,

introducing significant novelties in the field of civil engineering and the ESG segment. Based on these regulations, all buildings that are being constructed, reconstructed, sold, or leased in Serbia must have an energy performance certificate (energy passport). An energy passport is a document containing basic data about a building, information about the materials used in its construction, an energy consumption calculation, the building's energy class, and recommendations for improving the building's energy efficiency. An energy passport is valid for 10 years and it is a precondition for securing building and use permits.

Apart from this novelty, the categorization of buildings by energy properties was also introduced, and eight energy classes were identified (from A+ as the most energy-efficient, to G class, as the least). New buildings have to meet the requirements necessary to be classified as class C as a minimum. Existing buildings have to improve their energy properties after adaptation by no less than one energy class.

There are few exceptions to the above obligations. Specifically, the energy passport is not required for: buildings that are being reconstructed with an area of less than 50 m<sup>2</sup> net, buildings with a use limited to two years or temporary buildings that are used during construction, manufacturing plants, buildings used for religious ceremonies or buildings under a special regime of (cultural) protection, and buildings whose temperature upon heating does not exceed 12 °C.

Energy passports are issued by authorized organizations which must have at least two employees holding licenses as chief energy efficiency engineers, who have completed building energy efficiency training.

The incorporation of these regulations into Serbian legislature is a step towards the harmonization of local regulations with the regulations of the EU (e.g., Directive 2002/91/EC), which obligates the member countries to implement the goals set by the Kyoto Protocol.

## Taxes

In Serbia, there are several types of taxes related to property. They are paid either for real estate transactions or for owning real estate.

### Property tax

Property tax is paid by a person who has the right of ownership on real estate located in the territory of the Republic of Serbia. That person may be a natural or legal person, either resident or non-resident. The tax rate is 0.4%. The tax base is determined by the body of the local self-government unit on whose territory the real estate is located, and the value of the real estate is determined by the usable area and the average price per m<sup>2</sup> of the corresponding real estate in the zone where the real estate is located. This tax is paid quarterly, within 45 days from the

beginning of the quarter. For the period before concluding the contract on the sale of real estate, the taxpayer is the seller. Therefore, prior to concluding the SPA, it is recommended to obtain a certificate on payment of property tax for the tax liability incurred up to the day of signing the SPA.

### Capital gains tax

When selling real estate, it can happen that the seller becomes a taxpayer of capital gains tax. This tax affects a natural person (including an entrepreneur) who sells their real estate. However, for this obligation to arise, it is necessary that a capital gain exists. This will happen if the property is sold for a price higher than the one at which the respective property was acquired. The tax is paid on the difference between the sale price and purchase price, i.e., that difference will constitute the tax base. The tax rate on capital gains is 15%. However, the rate applicable to capital gains incurred by non-residents is 20% unless envisaged otherwise by a relevant double taxation treaty.

There are a few exceptions to the payment of this tax. Specifically, if within 365 days from selling the property, a seller re-invests the funds received from the sale into buying another property and therefore resolves the housing issue for themselves or the members of their household, capital gains tax obligation will not apply (assuming that other conditions are met). If the new property is bought within the first 90 days, capital gains tax will not be payable. If the new property is bought, i.e., a housing issue is solved in the period from 90 to 365 days from selling the property, the seller will be obliged to pay capital gains tax, and the amount of paid tax will be returned subsequently based on a decision by the competent tax authority. Also, capital gains tax is not payable on a sold property that was in the seller's ownership for a period longer than 10 years, or if such a property was inherited within the first inheritance order.

### Property transfer tax (PTT)

PTT in Serbia is payable by individuals and legal persons that sell real estate, intellectual property, or second-hand motor vehicles, vessels, or aircrafts.

The PTT rate is 2.5%. The tax base for the transfer tax is the contractual price. However, the tax administration (TA) has the right to assess tax on the basis of the market value, if they determine that the contractual price is below the market price. According to the applicable regulation, the taxpayer is the seller, while the buyer is a guarantor for the payment of the tax liability. However, in practice, the parties usually stipulate that the payment of PTT will be the sole obligation of the buyer.

The taxpayer is obliged to submit a tax return to the TA within 10 days from the taxable event, i.e., the day when the agreement on the sale and purchase of real property was executed. However, based on the Notary Act, the parties may opt to submit the tax return to a public notary which will then be forwarded to the competent TA. Payment of the transfer tax is due within 15 days of the receipt of this decision from TA.

An individual who is a Serbian citizen and the buyer of their first apartment may ask for an exemption from payment from the PTT up to a certain amount.

### Value Added Tax (VAT)

Value added tax is applicable on the first transfer of ownership rights for newly built buildings constructed after 1 January 2005. The first transfer of real estate is subject to VAT at a rate of 20%, save for the first transfer of apartments that is subject to the VAT at a rate of 10%. An individual who is a Serbian citizen and the buyer of their first apartment, may ask for refund of VAT paid.

## Contacts



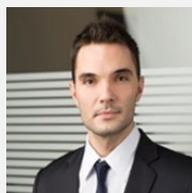
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His area of expertise includes advising in major real estate and M&A transactions, real estate development, energy, and mining projects

# Spain



# Real Estate Law in Spain

## Overview of the Spanish Legal System

### General introduction to main laws that govern acquisition of assets in Spain - real estate rights

The basic legislation regulating real estate law is contained in the Royal Decree of 24 July 1889, which approved the Spanish Civil Code. Mortgage legislation was established in the Decree of 8 February 1946, which approved the Spanish Mortgage Law, and the Decree of 14 February 1947, which approved the Mortgage Regulations.

The legislation governing urban leaseholds is the Spanish Urban Leasehold Law 29/1994, of 24 November. Real estate law covers the main laws governing real estate ownership and letting in Spain. However, other related regulations should be considered, such as local regulations applicable in some regions (e.g., in Catalonia, where there are specific laws regulating real estate rights).

For planning and zoning law, the Royal Legislative Decree 7/2015, of 30 October, which approved the consolidated text of Land and Urban Redevelopment Law, should be considered.

The environmental regulations regarding polluted land are mainly foreseen in the Law 7/2022, of 8 April, about waste and polluted land.

### Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

The right of ownership is the most 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 passed by Legislative Royal Decree 7/2015, of 30 October, by which the Consolidated Land and Urban Regeneration Law was 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 land. For these surface rights to be valid, 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 the administrative concession, which is a legal transaction whereby the public authorities grant one or several rights over, or obligations in relation to, public property.

The administrative concession concept may be analyzed from two different perspectives: (i) the concession of public domain regulated in the Law 33/2003, of 3 November, of Property of the Public Administration; and (ii) the administrative concession contracts, regulated in Law 9/2017, of 8 November, of Public Procurement.

Lastly, a right that does not appear frequently in real estate transactions is usufruct, whereby the owner of an asset grants the use and enjoyment of it to a third party. 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.

There are 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 which are 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 recognizes 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 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.

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 avigation 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.

## Real Estate 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.

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 Registry.
- **Priority:** This means that where applicants wish to register two incompatible rights, the rights of the holder who arrives at the Registry first is registered and if there are two rights registered in relation to the same property, the oldest right will have priority.
- **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 are presumed to exist for all legal purposes and belong to their holder in the manner determined by the respective entry.
- Unenforceability: Titles or other rights in rem over real estate which have not been duly registered or filed at the Property Registry do not adversely affect a third party.
- 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 retains such acquisition, once the 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 Property Registry and the Cadastral Registry so that it was, and still is, possible for the surface area of a property registered at the Property Registry to be different from that registered at the Cadastral Registry.

Spanish Law currently establishes a system of coordination between the Property Registry and the Cadastral Registry to ensure that the first includes a graphical georeferenced description of the registered properties.

## Notary role in the real estate 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-a-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.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

Before executing the sale and purchase of real estate, the following issues should be ascertained, among others:

- Ownership of and encumbrances on the property (request an extract from the Registry).
- Municipal building permits, if any have existed in relation to the property.
- Municipal opening or first occupancy permits.
- Surface area and boundaries of the property.
- Certificate attesting that the payment of taxes and levies 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 (and without prejudice to other provisions under local regulations), the seller is liable to the buyer for the legal and peaceful possession of the item 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 in buildings, reference should be made to Building Law 38/1999, of 5 November, 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, 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.

## Mortgages and other usual guarantees adopted in financing assets

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 in rem guarantees (such as 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, such as 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 the instalments, the mortgage creditor may realize the value of the real estate in order to receive the price.

## Lease of assets and Lease of business

In accordance with the Urban Leasehold Law, there are two types of property leases: (i) a residential housing lease and (ii) a lease for other uses. The latter 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. Leases for other uses are governed in general by free will.

In practice, leases entered into in real estate other than 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 usually 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, it is not considered an assignment. As a result, the lessor is entitled to raise the rent unless an express waiver is agreed upon.

- 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, there are some aspects that do not generally arise, but which are regulated in the Urban Leasehold Law, such as mortis causa transfer by subrogation to the heir or legatee who continues to carry on the activity or the lessee's right to indemnification for loss of customers.

## Administrative permits applicable to construction or restructuring of assets

Royal Legislative Decree 7/2015, of 30 October, establishes the basic regulations regarding urban planning to be developed by the Autonomous Communities and the municipalities on their own powers.

Law 38/1999, of 5 November, regarding 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, a series of authorizations and permits in Spain 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 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 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 may be also necessary to verify that the activity will be carried out in

suitable conditions of habitability and used for the particular activity in question.

## Environmental & Energy – ESG rules and status of implementation

There is a variety of legislation on pollution in Spain although, for the purposes of real estate transactions, of particular note is the following, notwithstanding applicable local laws:

- Royal Decree 9/2005, of 14 January, 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.
- Law 7/2022, of 8 April, about 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.

On the other hand, 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 European Directives.

## Direct taxes applicable to sales

The taxes which are generally the most significant in real estate transactions are:

- Value Added Tax/Transfer Tax: Depending on the characteristics of the transaction, the transfer of properties is subject to Value Added Tax ("VAT") or Transfer Tax ("TPO").
- Stamp duty: Where a transfer of property has been taxed for VAT purposes, the notarial document executing the transfer is also subject to stamp duty ("AJD").
- Property Tax: Lastly, although it is not an indirect tax, the Property Tax ("IBI") is a compulsory municipal tax, paid annually on the value of the real estate.

## Contact



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Agustín is a partner at Deloitte Legal, Spain, a professor of law at ESADE – Ramon Llull University, and a member of the Barcelona Bar Association. He is head of Real Estate Law in Deloitte Legal Spain. A former lawyer at other international law firms, he also served as secretary and vice-secretary of the board of directors in different companies. Agustín is yearly awarded Best Lawyer in Spain since 2018 and has been published as author/co-author in several legal publications.

# Sweden



# Real Estate Law in Sweden

## Emerging markets and new asset classes in Sweden

- We are currently experiencing a trend in the transaction side where modern logistic real properties with long lease contracts are increasingly requested. We have also noted that land for own development within the logistic segment is attractive.
- Community properties e.g., used for health care, school and different kinds of governmental properties are becoming more attractive as the government and municipalities are considered reliable tenants.
- The residential market is still attractive; both rental properties and development of condominium flats projects.

By **Anna Persson**, Head of Real Estate Tax in Deloitte Sweden

# Overview of the Swedish Legal System

## General introduction to main laws that govern property ownership and leases in Sweden - real estate rights

### The Swedish Land Code

The Swedish Land Code (1970:994) (Sw. Jordabalken) is the most comprehensive legal framework in the real estate area in Sweden, covering most aspects of real estate law. It regulates the definition of immovable property and its appurtenances and boundaries, as well as the purchase, exchange, lease/rent and gift of immovable property and the rules governing the granting of various forms of usufruct. It furthermore constitutes a framework on the relationship between neighbors and the rights and obligations they have towards each other, which can become relevant e.g., when roots of trees or other vegetation on one property encroach on the other. Rules on the title and mortgaging of a property (how this should be done, by whom and when) can also be found in the Swedish Land Code.

The provisions in the Swedish Land Code are often mandatory, meaning that the law governs certain relationships regardless of what the parties of contract may have agreed upon. This applies mainly to purchase contracts and the various rights of use. The rules on tenancy are furthermore a clear example of mandatory legislation, designated to protect the tenant or the usufructuary and, therefore, might have consequences for the landowner's ability to cultivate his own land.

### Other frameworks

Other important legal frameworks on the field, in selection, are the Swedish Planning and Building Act (2010:900) (Sw. Plan- och bygglag), which regulates the planning of land, water and construction, the Real Property Formation Act (1970:988) (Sw. Fastighetsbildningslag), containing provisions on, inter alia, the division of land into properties, as well as how the properties and land may be changed and under what circumstances, and the Swedish Environmental Code (1998:808) (Sw. Miljöbalken), promoting sustainable development and rules on good environment.

### The Sale of Goods Act and the Contracts Act

For indirect property purchases, i.e., purchases of shares in real estate companies, in commercial contexts, the Sale of Goods Act (1990:931) (Sw. Köplagen) and the Contracts Act (1915:218) (Sw. Avtalslagen) applies.

## Ownership rights: is there any kind of restriction for real estate ownership (foreigners, areas of country, others...) or restrictions to their use of land?

### Ownership restrictions

There are no specific restrictions related to the ownership of real property or condominium flats (Sw. bostadsrättslägenheter) in Sweden. On the contrary, regarding purchases of condominium flats, the Swedish Tenancy Act (1991:614) (Sw. Bostadsrättslag) prohibits the establishment of such requirements, which would stipulate e.g., a certain citizenship, income, or wealth in order to become a member of the condominium association. Membership can be denied only if there are reasons to believe that the applicant in question would not be able to fulfil their obligations towards the condominium association, for example not being able to pay the monthly fee.

Regarding purchase of real estate, the purchase type differs from purchases of moveable property in the sense that the law prescribes formal requirements which must be fulfilled for validity, but apart from the formal requirements there are no restrictions.

### Easements and usufructs

Real property can be afflicted with easements (Sw. servitut) or usufructs (Sw. nyttjanderätt), which affect the property owners' use of land. Easements can be contractual (i.e., easements agreed upon between the property owners) or official (i.e., an easement created via an authority decision). They usually remain until further notice, despite ownership changes since they are connected to the property rather than to the owner. Usufructs

on the other hand are binding for a maximum of 25 years if located on properties within zoning plan areas, alternatively 50 years if not located within zoning plan areas. They are created via an agreement with the property owner.

### **The right to public access**

One unique element of Swedish real estate law is the right of public access (Sw. *Allemansrätten*). In short, the right of public access is described in Chapter 2 § 15 in the Constitution of Sweden as the “public’s right to nature” and prescribes a right to travel and temporarily reside on private land without the property owner’s consent. The right furthermore implies that the public may, to a certain extent, use the private land for e.g., nature tourism and for picking berries and the property owner would not be entitled to compensation. Even if the right to public access versus the property owner’s proprietary rights is controversial, the public’s use of private land must not infringe the property owner’s financial interests. Neither must the public cause any inconvenience to the property owner or those who reside on the property while exercising their rights.

## **Real Estate Registry system**

### **Application for title with the Swedish Mapping, Cadastral and Land Registration Authority**

According to Swedish law, title to real property must be applied for within three months from the acquisition. The title is registered in the Property Register kept by the Swedish Mapping, Cadastral and Land Registration Authority (Sw. *Lantmäteriet*) to act as proof of ownership, after which it may constitute grounds for potential banking errands and similar. If the acquirer of the property fails to apply for title within the three-month period, the Swedish Mapping, Cadastral and Land Registration Authority may force the acquirer to apply for title with a recurrent fine. Should the property be acquired via purchase, the buyer must pay stamp duty of 1.5 % of the purchase price if the buyer is a physical person, alternatively 4.25 % of the purchase price if the buyer is a legal person. In addition to the stamp duty, all acquirers must pay a registration fee of approximately SEK 850 (USD 79,621\*). The application for title must be submitted with a copy of the document of purchase, which may be either the title deed (Sw. *köpebrev*) or purchasing contract (Sw. *köpekontrakt*).

### **If the applicant is a legal person**

If the buyer or seller of a real property is a limited liability company, the application for title must be submitted with a document of purchase and a certificate of registration/extract of registration to show the signatory rights of the company. Should the real property be acquired in connection with a merger, an additional certificate will be required from the Swedish Companies Registration Office (the SCRO), confirming that the merger is executed.

## **Notary role in the real estate transactions**

In Sweden, real estate transactions do not require attestation from notaries. For the formal requirements for the transaction to be valid, refer to section 2. In terms of attestation, the acquiree’s signature on the document of purchase must be attested by two persons in order for the application of title to be approved by the Swedish Mapping, Cadastral and Land Registration Authority. These two persons do not need to be notaries.

## **Legal responsibility of the buyer and seller in real estate transactions/Contractual representations and warranties**

### **Buyer’s duty to investigate**

According to Swedish real estate law, the buyer has an extensive duty to investigate the real estate prior to purchase. Any potential defects and damages that should have been noted during the investigation cannot be invoked by the buyer in retrospect. During the investigation, if the buyer notices a defect on the property or something that leads the buyer to believe that the property is not in the anticipated condition, the buyer’s duty to investigate the property is extended. Another factor that may call for an even more extensive investigation is e.g., if the seller informs the buyer of a suspected defect (however, the buyer is not obliged to investigate areas of the property when the seller has given guarantees about the area’s condition and the guarantees are not too general in nature). The scope and extent of the buyer’s investigation must be adjusted based on the property’s age, price, condition, and area of use.

### **Seller’s responsibilities**

The seller has no general liability to disclose information, which corresponds to the buyer’s duty to investigate. However, the seller may be liable to pay damages if they omit to inform the buyer of defects on the property if they were aware of the defects or should have been aware of them. Furthermore, the seller loses the right to invoke the buyer’s negligence in terms of the duty to investigate, should the seller omit to inform the buyer about a defect to such extent that the omission can be considered dishonest conduct. The seller can also become liable if they provide the buyer with inaccurate guarantees about the property’s condition. As mentioned above, general statements regarding the property cannot be considered guarantees. Finally, the seller is responsible for hidden defects during a period of ten years after the buyer’s purchase. The responsibility for hidden defects only includes defects which could not possibly have been discovered during the buyer’s investigation and applies regardless of whether or not the seller was aware of the defect in question.

## Contractual representations and warranties

In terms of contractual representations and warranties, freedom of contract applies to the parties' responsibilities for the property condition. Therefore, they are free to divide their responsibilities irrespective of what is stated by law. One example could be that the seller disavows their responsibility for the property condition, in general or with respect to a specific function.

Some common warranties of the seller in indirect real estate acquisitions include that the seller has registered title to the property, that all buildings and objects on the property constitute property and building appurtenances and fixtures in accordance with applicable law, and that mortgage certificates have/have not been taken out on the property.

## Mortgages and other usual guarantees adopted in financing assets

### Mortgage deeds

Sweden has a system of mortgage deeds (Sw. pantbrev), which are executed upon hypothecation of real estates. Mortgage deeds can only be issued for entire real estates and not a portion of it. Additionally, buildings on the real estate cannot be subject to mortgage.

The property owner wishing to mortgage the real estate applies for mortgage with the Swedish Mapping, Cadastral and Land Registration Authority and receives a mortgage deed in return. The mortgage deed is then handed over to the creditor. The mortgage deed that was issued first will have priority over the mortgage deed which was issued second, the second over the third and so on. In other words, it is the time of registration and not the amount on the mortgage deed which determines the precedence. As the mortgages are being paid, excess-security (Sw. överhyptek) arises.

### Second-hand mortgage

In case of excess-security in the already existing mortgage deeds on a property, one alternative is to apply a second-hand mortgage. A second-hand mortgage implies that security is taken in an already-existing mortgage deed rather than in a completely new mortgage deed in order to have better priority in case of e.g., the debtor's bankruptcy. It is also possible to combine a second-hand mortgage with a new mortgage deed as security for a loan.

When a real estate is subject to mortgage, stamp duty of 2% of the mortgage amount must be paid along with a registration fee to the Swedish Mapping, Cadastral and Land Registration Authority.

## Lease of business premises: applicable laws/types/typical provisions

### Types of tenancies

Sweden has different types of tenancies. The first concerns tenancy of buildings in whole or in part, being divided between i) tenancy of dwelling units (Sw. bostadshyra), and ii) tenancy of non-housing premises (Sw. lokalhyra). It is also possible to grant land for use in return for consideration in form of i) commercial ground leasehold (Sw. anläggningsarrende), ii) agricultural leases (Sw. jordbruksarrende), iii) residential ground leases (Sw. bostadsarrende) and iv) an apartment leasehold (Sw. lägenhetsarrende). The different types of tenancies are regulated in the Swedish Land Code, Chapter 8 – 12.

### Lease of non-housing premises

The relevant and most common alternative for companies wishing to lease premises for commercial purposes, depending on the nature of business, would be the lease of non-housing premises. Lease of non-housing premises is defined in Chapter 12 § 1 of the Swedish Land Code as the lease of "... a unit other than a dwelling unit", i.e., other than for housing accommodation. Indirect security of tenure applies to the lease of non-housing premises and arises after a period of nine months. In Sweden, the indirect security of tenure does not mean that the tenant has a right to renewal of the lease in the event of termination, but only a right to damages in the event of unjustified termination. The tenancy agreement must be drawn up in writing if the tenant or the landlord so requests.

### Commercial ground leasehold

When a landowner grants their land with buildings in writing to a tenant with the purpose to carry on some form of business activity, it is a commercial ground leasehold. Commercial ground leasehold is defined in Chapter 11 § 1 of the Swedish Land Code as "... land granted by leasehold for a purpose other than agriculture and the lessee is entitled, under the leasehold grant, to erect or retain, for commercial activity on the leasehold property, a building which is of more than minor importance for the conduct of activity." Common types of commercial leaseholds are land leased for gas stations, roadside restaurants, and wind turbines. Similar to leases of non-housing premises, indirect security of tenure applies to commercial ground leasehold.

### Miscellaneous

Provisions contradicting those in the Swedish Land Code regarding leases of dwelling units and non-housing premises are of no effect against the tenant or a party entitled to enter into the tenant's stead, unless otherwise prescribed by the relevant legal provisions.

## Legal permits applicable to construction or restructuring of assets

### Planning permission

In Sweden, planning permission (Sw. bygglov) is normally required for the erection of a new building or if adding on to an existing building by increasing the volume of the building in any direction (upwards, downwards, or sideways). Planning permissions is also required in the following situations:

- If the building is located within an area of a zoning plan, to change the appearance of the building by e.g., changing the color, cladding or roof material.
- When changing the building into an additional dwelling or premises for trade, craft, or industry, or to use the building for a substantially different purpose from which it has been previously used, e.g., by changing a dwelling into an office or a garage into a shop.
- When arranging, setting up, moving, or substantially altering certain facilities, e.g., walls and fences, storage, or material yards (such as permanent parking for cars, storage of boats or containers set up on site if not temporary), sports grounds, marinas, golf courses, radio and telecommunication masts and towers.
- If in areas with zoning plans, to put up or change signs and floodlights.

Once planning permission has been granted, building must commence within two years and must be finished within five years. Some building permits can furthermore be time-limited if only some of the criteria for building permits are met.

There are some exemptions to the requirement for planning permission that apply to one- or two-family houses. E.g., patios, canopies, outbuildings, walls, and planks can be built without planning permission and alterations to the façade can be made. Planning permission is also not required for sheds (Sw. Attefallshus) of 30 m<sup>2</sup> or less, for an extension of 15 m<sup>2</sup> or less, or an additional dwelling in single-family houses. However, the building committee of the municipality must be notified of the measure.

### Neighbors' consent & permission under the Environmental Code

In addition to planning permission and notification to the building committees, consent of the neighbors might be required if an extension of a building will result in the building being closer than 4.5 meters from the boundary. Permission may also be required under the Environmental Code within a shoreline protection area, i.e., normally 100 meters from the sea, lake, or watercourse.

## Environmental & Energy

### Environmental recommendations and guidelines

The Environmental Code (Sw. Miljöbalk (1998:808) sets out the general framework for environmental protection and has a very broad scope. More specific provisions are found in bylaws under the Environmental Code. Chapter 2 of the Environmental Code sets out the most important rules; the polluter pays principle, the precautionary principle, the product choice principle and the principles for recycling, management, and suitable activities. The rules apply for every operator of an environmentally hazardous activity from starting the activities and as long as the activities are ongoing. Besides material provisions, the Environmental Code also includes rules of supervision, sanctions, and provisions of different permits. Many activities may not be carried out until a permit has been granted.

In terms of environmental rules and codes, Fastighetsägarna, a trade association that works for a sustainable and functioning real estate market, issues several recommendations and guidelines on the area. They provide e.g., recommendations on how the property owners can structure their work on climate adaptation by identifying risks, critical properties, measures, and to follow up and develop an action plan. As part of Fastighetsägarna's effort to contribute to sustainability on the real estate market, they also provide, inter alia, tenancy agreement templates, which delegates ESG-related responsibilities between the tenant and the landlord. The template agreements can be bought for a fee of approximately SEK 80 – 100 (USD 7,493 - USD 9,367\*).

The property owner is responsible for ensuring that the property is maintained well and for implementing measures within the area of responsibility.

### Energy requirements

The National Board of Housing, Building and Planning (Sw. Boverket) provides rules on energy conservation and thermal insulation properties. The rules are divided into three requirements, which are for the building to have good energy management, limited electricity use, and sufficient thermal insulation. They apply when building a new house, as well as in case of renovating, converting, or adding on to an existing property.

Certain buildings are required to have an energy performance certificate. These buildings are i) buildings with a floor area of more than 250m<sup>2</sup> that are frequently visited by the public, ii) buildings occupied by tenants and iii) buildings that are newly constructed or to be sold. By establishing the energy declaration, the building owner gets a good overview of the building's energy status and indoor environment. It also shows whether it is possible to use less energy without reducing the quality of the indoor environment, which in turn would save the building owner money. Energy performance certificates are valid for 10 years.

## Direct taxes applicable

### Stamp duty

Stamp duty must be paid when buying a real property or leasehold, as well as when a mortgage is taken on the property. For the purchase of properties, the stamp duty is calculated on the higher of the purchase price and the assessed value from the previous year. Stamp duty is 1.5% for private individuals, housing accommodations and municipalities. Stamp duty is 4.25% for legal entities such as limited companies, partnerships and economic associations. Stamp duty is not payable in cases of inheritance of property or divorce.

\*According to the 15 September 2022 exchange rate

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# Switzerland



# Real Estate Law in Switzerland

## Emerging markets and new asset classes in Switzerland

- A major international organization is planning a complete renovation of its historic headquarters in Geneva. The project is expected to last two and a half years. The work includes renovating the facades, upgrading the security systems, completely redesigning the service areas and the 1,200 workstations, and modernizing the technical equipment and installations. The project aims to preserve the historical heritage while offering a high architectural quality. In addition, the renovated building will have to meet strict sustainability requirements.
- Two new four-story buildings for biopharmaceutical production and research, as well as for life sciences and other sectors, will be constructed in Lausanne. The new buildings will be built according to the Minergie standard, with the aim of obtaining certification for compliance with the British BREEAM standard. The construction work, which will start at the end of summer 2022, will take approximately two and a half years.
- To meet the population's demand and to preserve the canton's agricultural zone, 12,400 new units of accommodation of all types for people of all ages and social conditions, notably housing and residences for students and the elderly, will be built in the area of la Praille, les Acacias and les Vernets, in Geneva. In addition, nursery schools for children, restaurants, shops, cultural facilities, creative spaces, a large 8-hectare park and two rivers will be created and developed.
- By 2030, the university district in the city of Zurich is set to undergo major changes. The Swiss Federal Institute of Technology Zurich will renovate its canteen and its multi-purpose building under the Polyterrasse, as well as the main building and the forecourt. In addition, a new hospital will be built as well as a teaching and research center. Finally, the streets, bicycle paths and green spaces will be redeveloped.
- The "Zurich Neugasse Project" foresees that an addition to the city will be built on an area larger than four football pitches in the middle of Zurich. Different offers in terms of housing, workplaces and public spaces must be created. This will benefit not only the neighborhood, but also the entire city of Zurich.

- The "ZIMEYSAVER project" in Geneva concerns the industrial zones of Meyrin, Satigny, and Vernier, and has an estimated potential of 10,000 new jobs by 2030. This project covers more than 380 hectares and should enable the development of real business districts that are competitive for companies and pleasant to live in for employees, users, and local residents. It integrates the principles of industrial ecology that encourage companies and local communities to make better use of land and surfaces by optimizing infrastructure, equipment, and resources.
- The areas between Zurich's main railway station and Altstetten are among the last major development areas in the city of Zurich. With the upcoming transformation of the SBB workshops, the 42,000 m<sup>2</sup> site is to be transformed from an industrial facility into an attractive location for business and industrial innovation companies and start-ups, as well as a cultural venue. Under the name "Werkstadt Zürich", a lively area for work and leisure will be created over the next 20 years, which will grow together with the adjacent quarters to form a new urban space.

By **Paul de Blasi**, Partner, Deloitte Legal Leader Switzerland and Head of Deloitte Private, Romandie

# Overview of the Swiss Legal System

## General introduction to main laws that govern property ownership and leases in Sweden - real estate rights

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 Person Abroad ("Lex Koller", formerly "Lex Friedrich"), the Debt Enforcement and Bankruptcy Act ("DEBA"), the Ordinance on the Land Register ("OLR"), and as the Federal Act on Second homes ("Lex Weber").

Art. 641ss. of the CC sets forth the general provisions governing property ownership, 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. of the 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 contains provisions regarding the liquidation of real estate in debt enforcement procedures. The OLR regulates the organization and administration of the land registry.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

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; and
- Companies domiciled in Switzerland that are controlled by non-Swiss citizens.

Acquisition of real estate is still 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 (EU/EFTA permit B or permanent residency permit C);
- Other non-Swiss citizens who have the right of permanent residency (permit 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), including nationals of the United Kingdom under certain conditions;
- 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), years if not located within zoning plan areas. They are created via an agreement with the property owner.

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.

Recently, and in particular since 2007, The Lex Koller has been heavily debated recently, particularly since 2007, mainly around whether to repeal the Lex Koller or to amend it by making it stricter. It was widely recognized that the Lex Koller was the only effective measure to reduce the demand for Swiss residential properties. It was considered that an abrogation would have serious consequences for the economy, one of which would be increased pressure on property prices and rents and on the Swiss Franc. Therefore, the parliament decided in 2014 against repealing the Lex Koller.

The Lex Koller was subject to a proposed legislative amendment that would have made the acquisition of strategic infrastructure by persons abroad subject to authorization and thus extend the Lex Koller from real estate to include energy infrastructure. It was also subject to a proposed legislative amendment to place a condition on nationals of non-EU or EFTA member states to dispose of the real estate within two years of their departure

from Switzerland (as a condition for the acquisition of a main residence). However, the proposed amendments were rejected.

Nevertheless, 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 the following years.

## Real Estate Registry system

### Structure of the property registries in Switzerland

The land registry 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 agreements, 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”, e.g., 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 registry 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 registry plans (cadaster plans) based on official surveys;
- National geological data;
- Cadaster of ownership limitations and public law (OLPL-cadaster); and
- Cadaster of contaminated sites.

The land registry is under the supervision of the federal authorities. The cantons are responsible for the individual land registries, the definition of the districts, and administration. Therefore, there is no federal land registry. The land registry is managed by the individual land registries in the various cantons.

In certain cantons there is only one land registry, while others have several organized per political districts or even several per district.

### Compulsory registration

In principle, all privately owned land is registered in the land registry. As a rule, registration in the land registry is compulsory to effect 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 registry. In few cases, the registration is merely a declaration, 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 public use is recorded in the land registry only if rights in rem attaching to such property are to be registered or if cantonal law provides for its registration.

### Ownership rights

The land registry is assumed to be complete and correct and everyone may rely on it in good faith. Thus, the registration in the land registry 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.

Any person is entitled to obtain information from the land registry, such as the name and description of the immovable property, the name and identity of the owner, the form of ownership, and the date of acquisition. However, only a person showing a legitimate interest may consult the land registry or to be provided with an extract.

Furthermore, the registered owner according to the land registry is deemed to be the legal owner entitled to dispose of the real estate. 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 registry.

### Registration in a typical transaction

Registration is usually executed 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 is executed on the application day, i.e., the day on which the land registry receives the duly executed application. The internal review and control processes of the land registry start thereafter. The time from application to definite registration may vary depending on the canton, the time of year, and the workload of the registry. It may take between two weeks to several months. However, the effect in rem is independent from this duration, as it always refers to the entry date in the daily register (retroactive effect).

## Notary role in the real estate transactions

The notary public is in charge of drafting and notarizing the sale and purchase deed of the real estate. The notary is also obliged to make the parties aware of certain contractual arrangements, make sure they understand the content and consequences of such arrangements, and that they properly reflect the resolutions of the parties.

The notary also has to make sure that nothing can prevent the sale and that all conditions are correctly met. For instance, the notary must ensure that the property being sold belongs to the people who are presenting themselves as the sellers, and that the buyers have the right to buy the property in Switzerland (please refer to section 2 for the acquisition by person abroad).

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.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

### General legal responsibility of the seller in real estate transactions

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 responding to questions of the buyer relating to the transaction truly and accurately. If the seller does not disclose important information or gives false information, they may be liable for misrepresentation.

In addition, 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.

### Contractual representations and warranties

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 representations & warranties are often found, depending on the appropriate allocation of risk in the specific case:

- **Title and rights in rem:** The seller should warrant that they are the rightful owner and notably that there are no additional rights in rem other than those listed in the relevant extract from the land registry. Furthermore, liens of builder 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 thorough due diligence, the 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 they are 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 and pay for the repair works or have them done by liable third parties.
- **Lease agreements:** The rental income is often the most important factor for institutional investors. Warranties should be 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 creditworthiness of the tenants, their payment practices, the service charge statements, as

well as the rent guarantees will be included. Contractual representations and warranties

- 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. If the seller was involved in the construction, they 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: 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.

The CC contains a statute of limitation of the new owner in the land registry. It also 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.

## Mortgages and other usual guarantees adopted in financing assets:

### 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

registry. At the same time, there are no formalities in place for entering into a credit facility, subject to the self-regulatory standards for banks recognized as a minimum standard by the Swiss Financial Market Supervisory Authority ("FINMA").

These guidelines concern the examination, evaluation, and processing of loans secured by real estate pledges. In particular, there are minimum requirements for mortgage financing.

For the purchase of a residential property for own use, the person wishing to obtain credit from the bank must provide a minimum share of equity capital on the value of the collateral, not coming from the second pillar assets (advance payment and pledge). Moreover, this minimum share amounts to 10%.

With regard to repayment, the mortgage debt must be reduced to two-thirds of the pledge value of the property within a maximum of 15 years. This amortization must be linear and begin at the end of each quarter at the latest 12 months after the payment.

For mortgage financing of investment properties, the minimum equity share of the collateral value is 25%.

With regard to repayment, the mortgage debt must be reduced to two-thirds of the property's pledge value within a maximum of 10 years. This amortization must be linear and begin at the end of each quarter at the latest 12 months after the payment.

### Protection of a lender 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.

## Lease of assets and Lease of Business

### 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.

### 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.

### Typical Provisions

- Business leases typically last for five or 10 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; in a merger, a lease agreement is transferred to the new entity by means of universal succession; the acquiring legal entity must, 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; and
- Modifications of the premises are 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.

### Termination of lease agreement

As per art. 267 al. 1 CO, at the end of the lease, the tenant must return the business premises in a condition that accords with its contractually designated use. If on the date of termination, the tenant does not voluntarily vacate the property, the lessor's only defense is to apply to the competent court to obtain the release of the leased premises. This means that the lessor cannot take back the premises on their own.

### Assessment of proceedings

The lessor's action for eviction can be subject to the summary procedure ("Clear Cases"), without a prior attempt at conciliation, if the factual situation is not disputed or can be proven immediately and the legal situation is clear (art. 257 of the Swiss Civil Procedure Code). However, if the factual situation is disputed or cannot be proven immediately and the legal situation is not clear, either the ordinary procedure (art. 219ss of the Swiss Civil Procedure Code) or the simplified procedure (art. 243 of the Swiss Civil Procedure Code) may apply.

In Geneva, however, the court may, on humanitarian grounds, stay the execution of the eviction order to the extent necessary to allow the tenant to be rehoused, when it is called upon to rule on the execution of an eviction order. However, this particularity does not apply to business premises, and eviction must take place without delay.

### If the lessor suffers significant losses due to the inability to take back their premises after lease termination

If the tenant does not return the rented premises on time, they must pay the rent until it is returned. They are also liable for any damage caused to the lessor by the delay (art. 103 al. 1 CO).

### Administrative permits applicable to construction or restructuring of assets:

Swiss building laws and construction regulations, including zoning and planning, are adopted at all three levels of government (federal, cantonal, and local). Reliable information on the use and occupation of land and buildings and on environmental regulations can be obtained from the respective authorities. Increasingly, this information is also available online. In general, a permit is required to construct, modify, demolish, or change the use of a building.

All construction, alteration, or demolition work must be reported to the municipality, which will decide whether it is subject to authorization. Also, people who have an interest can oppose to a construction, alteration, or demolition work. The time and cost of obtaining these permits depends on the canton and municipality concerned as well as if an opposition is filed which can considerably extend the duration of the procedure. The costs can vary from a few hundred to several hundred thousand Swiss francs.

The procedure for granting a building permit ensures that a construction project complies with the municipal zoning plan as well as with legal and regulatory provisions (environmental protection, heritage conservation, safety and prevention, public health, etc.). It also makes it possible to preserve the public interest and the rights of third parties (neighbors) and to ensure that the applicant has the right to build.

Regarding second homes, the Lex Weber regulates the permissibility of building new homes together with changes to the structure and use of existing homes in communes with a proportion of second homes exceeding 20% (art. 1 Lex Weber). The Lex Weber also distinguishes between existing dwellings and new construction.

Existing dwellings are those that existed before 11 March 2012 or that had a building permit in force on that date. Such dwellings have a free use. They can be used as primary or secondary residences. The owner can therefore rent the property to someone who makes it their home without fear of losing its status as a secondary residence. Similarly, if the owner has occupied the property as a primary residence, they are not deprived of the possibility of selling it later as a secondary residence.

Such dwellings can be renovated, converted, and rebuilt without losing their status as existing dwellings. They may be enlarged by up to 30% of the main floor area, provided that this does not result in the creation of new second home units. If the extension exceeds 30%, the dwelling loses its status as an existing dwelling and a second home is no longer possible.

Regarding new construction, as per art. 6 al. 1 Lex Weber, in communes in which the proportion of second homes exceeds 20%, no building permits may be granted for new second homes. If the proportion is less than 20% and, if granting a building permit would result in the commune having a proportion of second homes in excess of 20%, a building permit may also not be granted.

However, in communes with a proportion of second homes in excess of 20%, building permits may only be granted for new homes if they are, in particular, used as a principal home or as a home deemed equivalent to a principal home in accordance or as a home intended as managed tourist accommodation.

## Environmental & energy – ESG rules and status of implementation

Before undertaking property transactions, a detailed determination is recommended regarding the state of a given property and possible liabilities by means of the:

- Land registry;
- Land registry plans;
- Cadaster of ownership limitations under public law. Such a cadaster may not exist or be incomplete. In such a case, it is recommended to resort to construction documents available from building permit authorities; or
- Cadaster of contaminated locations.

Each canton has a public register of contaminated real estate called “cadaster of contaminated locations” (“CCL”). These registers are increasingly 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; and
- Incident locations.

The publicly accessible CCL contains information on:

- Whether a site is contaminated (without damaging or potential environmental impact);
- Potential detrimental effects of a site that warrant examination;

- Potential detrimental effects of a site that warrant monitoring; and
- Suspect sites requiring rehabilitation that 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.

### Energy efficiency qualifications.

The assessment and management of the energy performance of buildings are regulated at cantonal level. It is generally not mandatory for owners to perform tests.

The Federal Council has put into place the “Energy Strategy 2050” which pursues the objectives set in the Energy Strategy 2007 by reinforcing them with new objectives. The measures take aim, in particular, at energy efficiency, renewable energies, phasing out nuclear power, and measures relating to electricity networks.

“Energy Strategy 2050” also 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 will be replaced by a steering charge.

Regarding buildings, “Energy Strategy 2050” aims to reduce the energy consumption of the Swiss buildings park to 55 TWh by 2050. In addition, the Swiss electorate accepted the revised Federal Energy Act on 21 May 2017. The aims of the revision are to reduce energy consumption, increase energy efficiency, and promote the use of renewable energy (as the “Energy Strategy 2050”). The revised version also prohibits the construction of new nuclear power plants.

To achieve the Paris climate agreement objectives, the Federal Council decided to reduce net CO<sub>2</sub> emissions to zero by 2050. Exploiting the still considerable savings potential in the buildings sector is of great economic interest. Buildings also account for substantial materials consumed, waste generated, and environmental harm caused to society.

The Environmental Protection Law also contains provisions regarding construction works and buildings. Lastly, the Environmental Compatibility Assessment law provides that any construction or building measure which materially influences the environment need to undergo an environmental compatibility assessment.

## Direct taxes applicable to sales

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 of up to 3.3%, depending on the canton of the real estate location (e.g., 3% in Geneva). Certain cantons (e.g., Zurich) do not have a real estate transfer tax. The tax is typically payable by the buyer. The buyer and the seller are often 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 12% and 21% 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 dual tax system (currently 17 cantons).
- In the cantons (currently 9) that apply the monistic tax system, a separate tax on real estate capital gains is imposed. The progressive tax rate depends on the period of the real estate ownership, gain realized, and the location of the real estate. For instance, the real estate capital gains tax rate in the canton of Zurich varies from 25% to 50%, and from 0% to 50% in the canton of Geneva.

For individuals owning the real estate as business assets, the same treatment as for legal entities typically applies. However, the progressive tax rates for individuals would be applied instead on the items that are subject to income taxes. Individuals who own the real estate as private assets can benefit from a tax-free capital gain on a federal level, provided the individual is not deemed a real estate dealer for tax purposes. On cantonal level, the real estate capital gains are in all cantons subject to a separate real estate gains tax (same treatment as for corporate entities with real estate in cantons that apply the monistic system).

In addition, for individuals owning the real estate as private assets, another tax is payable by the owner. This is the tax related to the rental value of the property (art. 21 al. 1 lit. b of the Federal Act on Direct Federal Taxation "LIFD"). It's a value that is supposed to be a notional rent. This rental value is anticipated if an individual who owns a property doesn't live in/use it (lives there/only visits it 2-3 times a month/second homes). It is considered an economic benefit that the landlord can benefit from because they do not have to pay rent. At the cantonal level, such tax rates cannot be below 60% of the local market rents.

In addition, although the owner supports a tax on the rental value of the property, the owner can deduct several charges from this tax, such as interest (mortgage interest/interest on construction credits), and maintenance costs of the property in

question. Transfers of real estate are, as a rule, excluded from VAT. However, there are two options:

- A waiver of exemption by an option to tax the purchase price of the building(s), 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 7.7%).
- A notification procedure (TOGC Transfer of Going Concern) if the building is not exclusively used for private residential purposes.

The seller and buyer always need 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 purchases 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, 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 exist 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%. In the canton of Geneva, the tax liability for cantonal taxes it amounts to 5% on the first CHF 500,000 (USD 522,013\*) and 3% above that up to CHF 4,000,000 (USD 4,176,104\*) and 2% above that, excluding tax.

\*According to the 15 September 2022 exchange rate

## Contact



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# Thailand



# Real Estate Law in Thailand

## Emerging markets and new asset classes in Thailand

Real estate market sentiment improved in Q1 2022 in line with eased business restrictions.

Despite the expectation of another difficult economic year in 2022, 2022 is expected to be better than 2020-2021.

### Condominium

Focus on new condominium projects in the midtown/suburban areas by most developers.

### Office

Bangkok office market becomes more competitive with a significant increase in new Grade A market office space while Grade B CBD and particularly Grade B Non-CBD submarkets saw continual net reductions in net take-up.

### Hotel

Thailand's tourism recovery remains highly dependent on the currently limited number of Chinese tourists.

### Housing

Housing market is active due to domestic end-user demand in the residential market while developers are trying to improve product development with new housing models coupled with government real estate stimulus measures.

Rising inflation might lead to the Bank of Thailand raising interest rates.

If the interest rate increase is less than 0.5%, the overall market index will expand to 3.4% from the previous forecast 9.1%, but if the interest rate is more than 0.5%, there may be no expansion or negative impact.

Purchasing power in the market is affected by household debt and higher inflation. Oil prices and building materials prices are much higher, leading to a 10% increase in house costs.

Sansiri, Thailand's leading property developer, adjusteds housing offers by house size, expensive material reduction, or housing model change to the price that customers can buy.

By **Nisakorn Songmanee**, Partner, Deloitte Touche Tohmatsu Jaiyos Audit Co., Ltd.

# Overview of the Thai Legal System

## General introduction to main laws that govern property ownership and leases in Thailand - real estate rights

In Thailand, the main legislation that provides legal basis for the legal rights relating to real estate is the Land Code Act B.E. 2497 (A.D. 1954) as amended and the Civil and Commercial Code (CCC). Rights over real estate can be acquired either by operation of law or by contract. Rights relating to immovable property or property rights over real estate are divided into five categories:

- **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; they have the right to follow and recover it from any person not entitled to detain it and have the right to prevent unlawful interference with it. This is an absolute right which is capable of being transferred by means 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:** A right attached to land/property for the benefit of another immovable property, known as "easement" in English Law. The owner of the servient land/property is bound for the benefit of the dominant property to suffer a certain act affecting the servient land/property, or to refrain from exercising rights derived from ownership of the servient land/property.

Apart from the aforementioned rights, a person has the right to possess real estate under the law by renting the property. This right is a personal right which cannot be enforced against a third party, except in cases 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 the consent of the lessor. Written evidence signed by the liable party is required to enforce the lease agreement. For leases with a term exceeding three years, written agreement and registration

of the title deed with the competent authority are required, otherwise it can only be enforced for three years.

## Acquisition structure usually applied in real estate transactions; restrictions – if any – applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

In general, foreigners, 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 land owned by Thai nationals.

Additionally, foreigners are permitted to own up to 49% of the aggregate unit space of a condominium under the Condominium Act B.E. 2522 (A.D.1979), as amended. Foreigners who are entitled to hold ownership in a 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 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 of more than 49% of the registered capital, companies as stipulated in Section 97 holding shares of more than 49% in other companies as stated in Section 97, and registered under Thai law;
- Corporates which are deemed as foreign under the Announcement of the National Executive Council No.281 dated 24 November 1972 and have been granted a promotion certificate under the Investment Promotion law; and
- Foreigners who have brought foreign currency into Thailand or can withdraw money from a Thai Baht account of a person with a residence outside Thailand or can withdraw money from a foreign currency account.

Foreigners who have brought in money for investment in Thailand are entitled to own land up to 1 Rai (1,600m<sup>2</sup>) for residential purposes if they comply with certain requirements as

stated in the relevant ministerial regulation and are granted permission by the Minister of Interior.

Pursuant to the Investment Promotion Act, B.E. 2520 (A.D.1977) as amended, a company with a majority foreign shareholders, which is granted investment promotion from the board of investment, is eligible to apply for 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 needs to be disposed of when the company no longer uses it for running its business.

According to the Industrial Estate Authority of Thailand Act, B.E.2522 (A.D.1979) as amended, companies with majority foreign shareholders may be permitted to own land located in an industrial estate for the operation of their business under certain factors set by the Governor of the Industrial Estate Authority of Thailand.

In addition, majority foreign owned companies that are granted concession by the Minister of Energy may acquire an ownership right over the land area on which the concession is granted.

## Real Estate Registry system

Under the CCC, the transfer of ownership in real estate executed through a commercial transaction requires registration with the relevant Land Office. Failing to register renders the transaction void. A transfer of 2% of the price of the land as appraised by the relevant Land Office needs to be paid upon the transfer of title.

A lease with a term of more than three years needs registration, otherwise it can be enforced for three years only, according to the CCC. In executing the registration of a lease, the parties to the lease are required to pay a fee of 1% of the total rental fee for the entire lease term.

Pursuant to the CCC, the registration of the mortgage is mandatory, otherwise the transaction will be void. To register the mortgage, the registration fee of 1% of the mortgage amount but not exceeding ฿200,000 (USD 5,607 at 1 July 2022 exchange rate), will be levied on the parties to the transaction.

Failure to register security interests or encumbrances 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.

## Notary role in the real estate transactions

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. If the power of attorney is held outside Thailand, notarization of the power of attorney is required.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

### General legal responsibility of the seller in real estate transactions

- 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 a reduction in value or if the fitness for its ordinary purpose or for purposes of the contract is impaired; and
- Unless it is stipulated in the sale contract, the seller is held liable if a disturbance is caused to the peaceful possession of the buyer as a result of a third party holding a right over the property sold at the time of the sale or due to the seller's fault.

### Contractual representations and warranties

- The seller is the 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 the third party. The law on hire of property states that in case when the ownership of the real estate is transferred, the transferee is bound by the lease contract entered into by the transferor and the lessee. There are covenants typically given by the seller when the property is subject to 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;
- A typical seller's covenants would include warranties for compliance with environmental laws and the absence of claims, and indemnities against breach thereof; and

- A 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 court action and making a claim for damages.

## Mortgages and other usual guarantees adopted in financing assets

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% of the amount of mortgage, but not exceeding THB 200,000 (USD 5,437\*) is payable. There is a stamp duty payable at the rate of one baht (USD 0,027\*) for every THB 2,000 (USD 54,373\*) with a maximum amount of THB 10,000 (USD 271,865\*). Mortgages can be transferred by means of registration with the Land Office, together with payment of a registration fee and stamp duty as stated before.

From 18 January 2022 to 31 December 2022, according to the Announcement of the Ministry of Interior, transfer of real estate which is a residential building, categorized as a single house, a semi-detached house, a townhouse, a commercial building, or land with such a building, with a purchase price and an appraised value of not more than THB 3 million (USD 81,559,78\*) will receive a reduction in transfer of ownership fee from 2% to 0.01%, and a reduction in mortgage registration fee from 2% to 0.01%. To qualify for the reduced rates, the sale and mortgage must be registered at the same time, and the buyer must be a natural person with Thai nationality.

Pursuant to the CCC, a mortgage over land does not extend to buildings erected upon such land by the debtor after the date of the mortgage unless it is stipulated to that effect in the contract. A mortgage over buildings erected or constructions made upon or under the land of another person does not extend to such land and vice versa.

With regards to the enforcement of the mortgage, prior to enforcing a mortgage, the lender must serve a written notice to the debtor requesting the debtor to perform their 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 lender may initiate a court proceeding requesting an injunction ordering the mortgaged property to be seized and sold via public auction.

Moreover, when the debtor has mortgaged a property to secure a performance of obligation by another person (third party), the lender is required to notify the debtor within 15 days from the date the notice is served to the third party. If the lender fails to comply with this requirement, the debtor cannot be held liable for the outstanding interest and compensation owed by the third party, as well as encumbrances that are accessories of the debt, all of which takes place after the end of the 15-day period.

Apart from enforcement of the mortgage through sale by public auction, the CCC provides ground for enforcing the mortgage via claim for 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 debtor has satisfied the court that the value of the property is less than the amount owed.

## Lease of assets and Lease of Business

Under the CCC, Thai nationals and foreigners have the right to lease the land on which the lessee has the right to occupy and use the leased property for a limited period of time - no more than 30 years. The lease can be renewed for a period of no more than 30 years. The lease is enforceable only if the lease is executed in writing and signed by the liable parties. However, if the parties contracted a lease term of more than three years, or for the life of either the lessor or lessee, a written agreement and registration with the competent authority are required, otherwise it can be enforceable for three years. As stated earlier, the leasehold is not discharged upon the transfer of the title of the land; the new owner of the land is bound to the original lease by the 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 no more than a 50-year term.

## Administrative permits applicable to construction or restructuring of assets

The main pieces of legislation that govern the construction or modification of buildings, and 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 land utilization in different zones can be found in ministerial regulations promulgated under the aforementioned Acts.

The Building Control Act establishes a minimum standard to be met in order that the authorization for construction, modification, or destruction of buildings or structures can be granted by the relevant governmental authority. The minimum standard, which encompasses the prescribed standard for designing the building, ensures that the buildings and man-made

disasters 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 depend on variable elements, such as geography, environmental, social, and economic conditions of each area.

## Environmental & energy – ESG rules and status of implementation

### Polluted land

Under the Enhancement and Conservation of the National Environmental Quality Act, B.E.2535, companies running designated businesses which have a high potential of causing environmental pollution, for example a hotel with a number of rooms exceeding 80; an office building with the internal area of more than 10,000m<sup>2</sup>; mining; petroleum plant; steel industry; the production of cement, will be required to prepare an Environmental Impact Assessment (EIA). In addition, businesses which are likely to have a serious effect on the quality of the environment, natural resources, as well as the health of communities, such as petrochemical industry; coal-fired power plants; metal melting, etc., will be required to prepare an Environment and Health Impact Assessment (EHIA).

### Energy efficiency qualifications

The building energy code, which comprises the Energy Conservation Promotion Act and the corresponding set of by-laws, sets the compulsory requirements and procedures for energy conservation in buildings with the purpose to promote efficiency of energy consumption in buildings. The building energy code stipulates mandatory requirements for the minimum performance of the building envelope system, lighting system, and air-conditioning system. The code completely applies to very large new commercial buildings only.

## Direct taxes applicable to sales

### Corporate income tax

The corporate income tax of 20% of net profits is payable for capital gains from the transfer of the property. Generally, corporate entities have to pay the corporate income tax (20% of net profits) calculated on capital gains from the sale of the property. However, small and medium-sized entities, i.e., companies with a maximum paid-up capital of THB 5 million

(USD 135.932,966\*) and total revenue from sales of goods and services no more than THB 30 million (USD 815.597,800\*) in a fiscal year, with net profits no more than THB 3 million (USD 81.559,78\*), are subject to a lower rate of 15%.

### Withholding tax

A corporate withholding income tax of 1% of the gross proceeds from the transfer is payable on the transfer of immovable 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% 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% withholding tax.

### Specific business tax (SBT)

The specific business tax is imposed on the transfer of immovable property at 3.3% of the selling price or the price as appraised by the Land Department, whichever is greater.

### Stamp duty

For a transfer of immovable property, a stamp duty of 0.5% of 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 0.1% is payable on the lease of immovable property.

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\*According to the 15 September 2022 exchange rate

# The Netherlands



# Real Estate Law in The Netherlands

## Emerging markets and new asset classes in The Netherlands

The current Dutch real estate market is very dynamic. The demand for and shortage in residential real estate are high, which equally applies to prime office locations and logistics.

Exploding construction costs has made the feasibility of new projects uncertain, while several regulatory and environmental restrictions impede the speed of project development and new construction. The upcoming regulation of the mid-market rent housing sector will also change the real estate playing field and the availability of energy (access to the electricity grid) will be a major factor in the development of new commercial real estate (including logistics and data centers). The retail market has picked up again after COVID-19, but the sector still has much more restructuring and redevelopment ahead. Many investors find their way to real estate investment opportunities, including many foreign investors.

The conurbation of Western Holland (Amsterdam, Utrecht, Rotterdam, The Hague, Eindhoven) is still the most sought-after region. Investors increasingly have their sights set on other urban areas too, such as Arnhem-Nijmegen, Twente, Groningen, and Zwolle. Knowledge of the local practices in these areas, local and national regulations, terms and conditions of the Dutch banks and other debt providers, and a network of real estate parties are essential for successfully doing business in the Dutch real estate market.

*By **Jurriën Veldhuizen**, Managing Partner of Deloitte Real Estate and Segment Leader Construction for Deloitte Netherlands*

# Overview of the Dutch Legal System

## General introduction to main laws that govern property ownership and leases in the Netherlands real estate rights

In the Netherlands, the main relevant legal code governing the purchase and sale of real estate is the Civil Code. The Civil Code comprises several books. Its most relevant books governing the purchase and sale of real estate are:

- Book 3: Real estate law in general
- Book 5: Rights in rem
- Book 6: General part of contract law
- Book 7: Specific contracts, such as purchase agreements, lease, and construction contracts.

The government regulates the use of real estate. Environmental rules are established at the national level under formal laws. Local governments decide on zoning and planning regulations as well as on the acquisition of permits.

Under the Money Laundering and Terrorist Financing (Prevention) Act (“Wet ter voorkoming van witwassen en financieren van terrorisme”, or WWFT), the Dutch law implementing the European Union (EU) directive 4AMLD, the civil-law notary is obliged to conduct a client screening and to investigate the origin of money. If a civil law notary suspects money laundering of criminally obtained money for the financing of terrorism, the civil law notary is obliged to report this to the competent authorities.

## Acquisition structure usually applied in real estate transactions; restrictions—if any—applicable to foreigners or to specific areas of the country or others, in real estate acquisitions

A real estate transaction results in the transfer of the right of ownership. Ownership is the most encompassing right. An owner may do almost anything with what they own. However, an owner must consider others, and the law includes provisions limiting their powers. It is possible to transfer parts of the ownership to another person or to give another person certain rights to what one owns. Such rights are referred to as limited rights, and they derive from a more comprehensive right. Restricted rights remain with the transfer of ownership of real estate. This also means that it may be the case that real estate is purchased encumbered with a limited right.

The following are limited rights:

### **Long leasehold (erfpacht)**

Long leasehold means that someone has the right to hold or use a piece of land owned by another person. The leaseholder pays an amount to the owner of the land, the so-called ground rent (erfpachtcanon). If a long leasehold is involved, a building may be owned by someone other than the owner of the land. It is the norm in Amsterdam that real estate stands on land issued on a long lease.

### **Right of superficies (recht van opstal)**

Right of superficies is the right to own or acquire works or plants in, on, or over another person's real estate.

## Easement (erfdienstbaarheid)

An easement is the right to use a piece of land (plot), even if you are not the owner yourself. It may also mean that the owner of a piece of land (plot) is not allowed to do something. So, the easement consists of tolerating something or not doing something. With an easement, it is never a duty to do something.

## Usufruct (vruchtgebruik)

Usufruct is a right to use another person's real estate and 'enjoy the fruits' of doing so. These fruits can be anything from actual fruits, such as apples from an apple tree, to someone living in the house of another.

## Mortgage (hypotheek)

The right of mortgage is a security right on a registered real estate which is linked to a loan, at least a maximum amount to be borrowed. The owner of the real estate may establish this mortgage right on the real estate for the benefit of a legal entity (such as a bank) that makes it a condition for granting the loan. If the borrower fails to meet their obligations, the mortgagee may forcibly sell the real estate. Once the real estate has been sold, the lender (such as a bank) may recover its claim against the proceeds of the real estate in priority to all other creditors.

Besides purchasing real estate (asset deal), it is possible to acquire real estate by purchasing shares of an entity that owns real estate (share deal). In a share deal, the purchaser acquires a separate legal entity, while under an asset deal, the assets and liabilities acquired can be transferred directly to the purchasing legal entity.

Most real estate transactions (either assets or shares) start with a letter of intent (LOI), usually granting parties a specific term of exclusivity, during which the buyer has the time to do their due diligence. The LOI ensures that parties do not accidentally enter into a binding contract. In the Netherlands, a binding contract is formed when parties agree upon the essentials of the transaction. For real estate, these essentials are, in general, the object and price of the transaction.

The terms of the deal will be recorded in a purchase agreement, including any conditions precedent (CPs), payment structure, transfer date, etc.

The last step in any transaction is the transfer of the ownership title by a civil law notary. The involvement of a civil law notary is a procedural requirement that needs to be fulfilled; without it the transaction is void.

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

## Real Estate Registry system

The Land Registry (het Kadaster) is the public register in which the rights on registered real estate (real estate, ships, aircraft, topography, and coordinate points) are recorded.

For each plot, the Land Registry records the deed of delivery and/or the right of superficies and/or the right of mortgage, including other limited rights (mentioned in the deeds of delivery).

The Land Registry also records whether the plot includes a monument and whether the plot is subject to any public law restrictions.

The Land Registry contains information dating back to 1832 and details of the current ownership and, if available, any previous transfers.

The ownership recorded in the Land Registry is held as the legally accurate representation of ownership. An acquiring party needs no further confirmation of ownership.

## Civil law notary's role in the real estate transactions

Without the involvement of the civil law notary (notary), no transfer of ownership of immovable real estate or the establishment of a limited right is possible.

The notary draws up the deed of delivery and the mortgage deed, if any, and has the parties involved sign them in their presence. Afterwards, the notary will register the aforementioned deeds in the public registers.

The notary is obliged to screen the parties involved in the transaction in accordance with anti money laundering laws.

## Legal responsibility of the seller in real estate transactions – Contractual representations and warranties

The seller of real estate must be the owner of the real estate and have power of disposal. For example, the real estate may not be subject to an attachment.

The seller has an obligation to provide information during a transaction. Under this obligation the seller is obliged to notify the buyer of any defects the real estate may have and the nature of these defects. If the defects are obvious and the buyer can see them, the seller need not mention them separately.

It is the obligation of the seller to provide a valid energy label for the real estate. An energy label indicates a building's energy

efficiency and which energy-saving measures could still be implemented. From 2023 onwards, every office in the Netherlands larger than 100m<sup>2</sup> will be required to have at least an energy label C. This legislation is still pending at the time of writing.

Furthermore, the sale and delivery of real estate requires a purchase agreement. The seller is obliged to fulfil the obligations imposed on them and the guarantees given by the seller in the sales contract.

## Mortgages and other usual guarantees adopted in financing assets

When purchasing immovable real estate, it is common to take out a loan from a bank or other lender. To secure repayment of the loan, a mortgage may be established on the immovable real estate. If the borrower does not repay the loan, the bank can sell the immovable real estate and recover the loan from the proceeds.

Even in the event of the borrower's bankruptcy, a mortgage right offers a high degree of security for recourse. "Ordinary" creditors are paid from the estate in proportion to their claims. But the lender of the mortgage is allowed to foreclose on the real estate outside of the bankruptcy.

A mortgage deed must be signed before a civil law notary. The notary must then ensure that the deed is registered in the land register.

When loans are acquired for the financing of projects, most arrangements require the pledging of all future cash flows derived from the project, ensuring the loans are redeemed before any other payments are made.

## Lease of assets and Lease of Business

In The Netherlands, real estate rental can be divided into three regimes: residential real estate, 290 business premises, and 230a business premises.

### Residential real estate

A tenant of a residential real estate has rent protection, unless one of the statutory grounds for termination applies. This means that the landlord cannot terminate the rental agreement of a residential real estate without reason. The landlord can only terminate the contract on the grounds specified by law.

If the lease of an independent accommodation (zelfstandige woonruimte) has been entered into for two years or less, or if the lease of a room (non-self-contained accommodation) has been entered into for five years or less, the lease will end upon expiry

of the term. In that case, the tenant is not entitled to rent protection.

### 290 business premises

A 290 business premises involves a building, or part thereof, that is rented out for the purpose of running a retail business, a restaurant or pub, a take-away or delivery service, or a craft business. The premises rented out must have a place accessible to the public for the direct supply of goods or services. Hence, business premises where customers can physically buy or order things fall under the 290 regime. Hotels and campsites also fall under this regime.

The tenant of a 290 business premises has relatively high tenant protection. This is reflected, among other things, in the term of the agreement. The first term is for five years, and without notice, it is automatically extended by another five years. In addition, the termination options of the lease are limited. Both landlord and tenant can only do so at the end of the agreed term. A notice period of at least one year applies. A contract of indefinite duration can be cancelled at any date. In all cases, termination by the landlord is only possible if they state the reason(s) for termination. This does not apply to the tenant.

### 230a business premises

If a leased real estate does not fall under the residential real estate or 290 business premises regime, the 230a regime applies. Examples of 230a business premises are office spaces, factories, storage spaces, and showrooms.

The tenant of a 230a business premises has considerably less legal protection than the tenant of a 290 business premises. The rental period, for example, is free of form and can therefore be entered into for a limited period. However, in the event of termination by the landlord, the tenant may extend their stay by invoking their eviction protection, for example, they need time to move to another business accommodation. This period is capped at three years after the date on which the notice of eviction has been issued.

It is important to know that in rental law, the sale of real estate does not affect the rental contract. When the real estate changes hands, the new owner becomes the landlord of the tenant.

## Administrative permits applicable to construction or restructuring of assets

It is not possible to realize every kind of real estate at every location. Each location has a zoning plan, showing the use allowed at that particular location. A zoning plan may also contain rules on building percentages, building heights, and other matters. If someone wants to transform or realize real estate for which the use differs from the zoning plan, an amendment to the zoning plan or an extensive environmental permit is required.

But, even if an intended construction project is in accordance with the zoning plan, a permit is almost always required. An ordinary environmental permit procedure must then be followed.

When applying for a permit, the municipality assesses the building or conversion on the basis of, among other things, the building code, the zoning plan, and the policy document for external appearance. These documents describe what is and is not allowed on the site and whether the appearance or architecture of the design fits within the framework set by the municipality.

Applications for an environmental permit involve costs and take a certain amount of time. An environmental permit that has been granted may be subject to objections by other parties. Depending on the kind of permit, any court proceedings consist of either one or two instances.

## Environmental & energy – ESG rules and status of implementation

A lot is happening in terms of ESG laws and regulations, especially at the EU level. This will primarily affect sizeable real estate organizations. On 7 March 2018, the European Commission (EC) released an action plan for financing sustainable growth. The action plan's main goals are to:

- Reorient capital flows towards sustainable investment to achieve sustainable and inclusive growth;
- Mainstreaming sustainability into risk management; and
- Foster transparency and long-termism in financial and economic activity.

### The action plan consists of three instruments:

#### *EU taxonomy*

The Taxonomy Regulation was published in the Official Journal of the European Union on 22 June 2020 and entered into force on 12 July 2020. It establishes the basis for the EU taxonomy by setting out four overarching conditions that economic activity must meet to qualify as environmentally sustainable.

#### **Corporate Sustainability Reporting Directive (CSRD)**

On 21 April 2021, the Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD), which would amend the existing reporting requirements of the Non-Financial Reporting Directive (NFRD). This regulation makes it mandatory for organizations to report on non-financial indicators (ESG topics).

CSRD reporting will become mandatory from 2023 for large companies that meet at least two of the following three requirements:

- > 250 employees;

- > 40 million in revenue; and
- > 20 million in balance assets.

#### **Sustainable Finance Disclosure Regulation (SFDR)**

Effective from 10 March 2021, the regulation on the provision of information on sustainability in the financial sector will apply. This regulation is better known as the Sustainable Finance Disclosure Regulation (SFDR). It enables the comparison of green investments and attracts financing for transition.

The regulation makes it an obligation for investment funds to report on their sustainability at both entity and product level. This allows an investor to compare different funds on their sustainability. It is important to note that if investment funds are not sustainable, they must report that they are not sustainable (Article 6). If they are sustainable, but their return/yield is still more important, they have to be reported as an Article 8 fund. When an investment fund puts sustainability first and returns second, it may be reported as a sustainable impact fund (Article 9).

The Netherlands is closely involved in developing legislation and therefore is likely to adopt the EC's appointed guidelines in full.

## Direct taxes applicable to sales

### **Indirect tax on Dutch real estate transactions:**

#### *Asset deal*

In principle, the supply of real estate in the Netherlands is value-added tax (VAT) exempt. If the real estate qualifies as 'building land' or the real estate has been taken into use for the first time at least two years ago, the supply of the real estate is VAT taxable.

If real estate is transferred together with the existing lease agreements and the lease agreements are continued by the buyer, the transfer may qualify as a Transfer of Going Concern ('TOGC'). As a result of the TOGC regime, a transfer is considered out of scope for Dutch VAT purposes and does not trigger Dutch VAT.

#### *Share deal*

If real estate is transferred through a share deal (i.e., the buyer acquires the shares in a real estate company), the supply of the shares is either not subject to Dutch VAT or VAT exempt.

### **Dutch Real Estate Transfer Tax (RETT) on real estate transactions**

#### *Asset deal*

In general, Dutch RETT is levied on the acquisition of the legal and/or beneficial ownership of real estate located in the Netherlands or certain rights in rem with respect to such real estate. For commercial real estate, Dutch RETT is levied at 8% on

the purchase price (or the fair market value of the real estate, if higher) and is payable by the purchaser.

### **Share deal**

RETT is also levied on the acquisition of shares or similar rights in real estate companies if, in general, the acquirer obtains at least one third of interest in a real estate company.

A company qualifies as a real estate company in case its assets consist of real estate assets for 50% or more and, at the same time, are located in the Netherlands for 30% or more ('assets test') and these assets as a whole are held mainly for the purpose of exploitation or trading of these assets ('purpose test').  
General

There are several exemptions for Dutch RETT. The main one deals with specific real estate transactions involving newly-built properties and building land.

## **Contact**



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Renée is a lawyer with 15 years of experience in real estate and urban planning. Renée advises Dutch and international real estate developers and investors on acquisition and disposition strategy, transactions, and real estate development. She is involved in commercial and residential real estate transactions, and land development for a wide array of purposes.

She has a special interest in public-private partnerships and is a specialist in the regulatory aspects of real estate development and transactions in the Netherlands.



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