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## Real Estate Law

# Guidelines for Investments in Commercial Real Estate





Real Estate Law  
Guidelines for Investments  
in Commercial Real Estate

Editor: LEGALINK  
Editorial: Jakoby Rechtsanwälte, Dr. Markus Jakoby, Berlin  
Design: Claudius Herwig, Berlin

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in Commercial Real Estate**

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# Introduction

After the subprime and the global financial crisis of the recent years with sharp decline of almost all markets including the commercial real estate market we see in 2010 the start of an recovery of the commercial real estate market in almost all business centers worldwide. The investors and all players in this field as well as and the financing banks look more precisely to potential risks of products in the markets and this is only fair when you look back. Most products in the current commercial real estate market therefore are more transparent and most market players are reluctant to invest in products that are not transparent and not easy to understand. It is good to see that the commercial real estate sector is developing very well these days and investors realise established truth that real estate has been on longterm basis a veritable investment over decades as long as the facts of the object in question are professionally reviewed and the investment professionally placed.

We are very happy to have in our developing worldwide Legalink network with more than 3000 lawyers of independant lawfirms located in most business centers of all five continents experts in this field that may help investors in all aspects of investments and transactions in commercial real estate and other real estate as well.

The experts of the Legalink-network know each other personally from at least two meetings a year with special interest groups of the network and from cross border projects on which the firms work together. In discussions with our clients we found out that many of them as well as further potential investors would like to get an introduction to the rules of investing in commercial real

estate and further aspects that have to be taken into account within the different areas of the world in this field. We are pleased to give potential investors with this book a first overview to what has to be taken into account when investing in commercial real estate in specific areas of the world that might be of interest for them. Of course every single placement has to be reviewed in detail by specialists.

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

If you need a cross border analysis of diverse law aspects or joint efforts in a cross border deal or if you have any questions how our network could advise to get best solutions for investments in commercial real estate, please do not hesitate to contact us. We will place you to the specialists of our network who can assist you best in your case.

Berlin, September 2010

Markus Jakoby

\*All answers in this booklet do not constitute legal advice as to the Legal Position of the countries represented by the Legalink members in this booklet and specific advice should be sought in relation to each particular set of facts and circumstances.

Legalink  
Rita Jardim  
Chief Administrative Officer

Tel: + 351 21 929 1772  
Mobile: + 351 91 234 97 55  
[ritajardim@legalink.ch](mailto:ritajardim@legalink.ch)

Jakoby Rechtsanwälte  
Schlüterstraße 37  
10629 Berlin  
Germany  
Tel.: +49 (0)30/88 03 20 0  
Fax.: +49 (0)30/88 03 20 10  
[jakoby@jakobyrechtsanwaelte.de](mailto:jakoby@jakobyrechtsanwaelte.de)

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# Questions

## I. Procedure of a real estate transaction

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

## II. Costs for transaction

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

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

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

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

### **IV. Foreign investors**

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

# **Australia**

## **Behan Legal**

Francis Ruggiero  
Level 1, 270 Bay Street  
PO Box 745  
Port Melbourne Victoria 3207  
Australia

Phone: 613 9646 0344  
Fax: 613 9646 3759  
ruggiero@behanlegal.com  
www.behanlegal.com

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

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

Australia is a Federation of six States and two Territories:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. Costs for transaction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**IV. Foreign Investors**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Behan Legal**

Francis Ruggiero  
Level 1, 270 Bay Street  
Port Melbourne Victoria 3207 Australia  
Phone +61 03 9646 0344  
Facsimile +61 03 9646 3759  
Postal Address:  
Behan Legal  
PO Box 745  
Port Melbourne, VIC 3207  
Australia  
ruggiero@behanlegal.com

## **Austria**

### **Fiebinger Polak Leon & Partner GmbH**

Am Getreidemarkt 1  
A-1060 Vienna  
Austria

Tel: +43 (1) 582 580  
Fax: +43 (1) 582 582  
fpfp@fpfp.at  
www.fpfp.at

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

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

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

#### **Land register**

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

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

For the transfer of the ownership of a property from the seller to the buyer the transfer has to be formally registered in the land register. This entry of transfer of title is a prerequisite for the transfer of title.

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

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

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

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

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

the purchase price from the escrow account to the seller's bank- account and to file an application with the land register for the registration of the buyer's ownership.

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

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

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

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

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

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

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

- Superstructures (Superädifikat)
- Building Rights (Baurecht)

Superstructures are constructions, which are erected with the intention not to leave them on a permanent basis. The type of construction and partially the intent of the parties is relevant for this legal structure. The erection of a superstructure need not be registered in the land register, but the subsequent transfer of the ownership of the superstructure to a third party. Superstructures can, therefore, not always be seen by consulting the land register.

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

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

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

## **II. Costs for transaction**

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

Real property transactions are subject to real estate transfer tax corresponding to 3.5 percent of the purchase price (in case of close blood relationship only 2 percent). When real property transfer tax is applicable, no additional VAT is payable. This rule does not apply when the parties choose to transfer the property with VAT (at a rate of 20%).

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

In Austria, one normally has to hold the property for 10 years calculated from the signing of the contract to avoid speculation tax that would be triggered if the resale price of the property exceeds the acquisition price (in certain cases

this time period is expended to fifteen years). For real estate property used as private residence by the owner, this time period is only two years. If the sold building was constructed by the owner himself, any profits in context to the building itself are tax free.

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

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

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

In Austria, we have the general rule that the buyer of a real property has the right to terminate the lease agreement by observing the statutory notice period (Section 1120 of the Austrian Civil Code). But normally the buyer accepts the duty to take over any existing lease agreements and, therefore, the buyer is not free to terminate the existing lease agreements. If the lease agreement is, however, registered in the land register or if the Austria Rental Act applies (in whole or in part) to the lease agreement, the buyer automatically steps into the landlord's position under the lease agreement by operation of law. Given that the Austrian Rental Act applies (at least partially) to at least 90 percent of the leased agreements in Austria, the general rule which allows the owner to terminate leases has no particular significance. If the buyer has the right to terminate the lease agreement, the lessee has the right to demand compensation from the seller of the real property.

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

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

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

- Notary's costs
  - Land register
  - Real property transfer tax
  - Advising lawyer (due diligence)
  - Estate agent
  - Others
- 
- Notarial costs: EUR 111,30 plus 20% VAT for the notarization of the first signature and EUR 55,65 plus 20% VAT for the notarization of all further signatures on the purchase agreement
  - Land register: EUR 50,000 (1% of the purchase price) for the registration of the ownership
  - Real estate transfer tax: EUR 175,000 (3.5% of the purchase price)
  - advising lawyer: depending on the agreement with the lawyers. Usually lawyers charge by the hour (EUR 250 to EUR 450 plus 20% VAT), so that fees are dependent on the complexity of the transaction. It is also common to charge a percentage (1% to 3% plus 20% VAT) of the purchase price as a lump-sum fee, depending on the complexity and the value of the transaction.
  - Real estate agent: up to 3% of the purchase price plus 20% VAT)
  - Others: about EUR 100 to 300 for the approval by the provincial authorities, if required under the Land Transfer Act of the respective Province; 0.8% or 1.5% of a loan as stamp duties (this may be avoided in some cases); 1.2% of the amount of a registered mortgage, as court fees for the registration in the land register;

**III. Costs for holding real estate**

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

In Austria owners are subject to a yearly land tax ("Grundsteuer"). The tax rates are different in each municipality and range from approximately 0.2% to 1% of the (historic) value of the property (Einheitswert). The value for tax purposes is not the real value of the property, but significantly less. Therefore

the actual tax rate is about 0.05% to 0.3% of the real value of the object per year as land tax.

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

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

**IV. Foreign investors**

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

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**

**At the moment not because of the impacts of the worldwide financial crisis**

We would definitely recommend invest in commercial and residential real estate in Austria, since the prices in Austria's cities are relatively low. Furthermore, the interest rates are very low at the moment.

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

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

in each of the nine Austrian provinces. The fulfilment of these requirements by the investor need to be checked in the course of a due diligence.

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

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

This depends on several criteria, including

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

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

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

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

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

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

We are capable of assisting clients in all aspects of real estate and construction projects. Please contact Manuela Maurer-Kollenz or Michael Kuen at:

Fiebinger Polak Leon & Partner GmbH  
Am Getreidemarkt 1  
A-1060 Vienna, Austria  
Tel: +43 (1) 582 580  
Fax: +43 (1) 582 582  
Email: [fppl@fppl.at](mailto:fppl@fppl.at)

# Belgium

**iustica.be**

**Advocaten-Avocats**

Avenue Louise - Louizalaan, 109  
1050 Brussels  
Belgium

Tel: +32 (0)2 548 29 72  
Fax: + 32 (0) 2 502 81 90  
[iustica@iustica.be](mailto:iustica@iustica.be)  
[www.iustica.be](http://www.iustica.be)

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

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

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

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

Although not necessary, it is preferable to execute the pre-contract with the help and in front of the notary or the legal counsel of each of the parties.

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

This pre-contract constitutes the title of the devolution of the ownership inter partes, so that legal advice beforehand is advisable.

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

After the signature of the purchase pre-contract, the parties shall enter into a notarial deed within 4 months, preferably in front of the notaries of the parties, although one notary is sufficient: the notarial deed remains in the archives of minutes of the notary of the buyer.

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

- the exact identity of the buyer and the seller;
- the legal capacity of the seller and the buyer;
- the matrimonial property scheme of the buyer and the seller;
- the 30 years history of the ownership (title, co-ownership, easements...);
- conformity between the information provided by the seller and the information coming from the land register;
- the mortgage situation;
- the existence of lease contracts;
- taxation situation of the seller (absence of the tax debts);
- conformity between the real estate and the urban legislation (ex: regularity of the building permit, the clean ground certificate, the energy certificate, expropriation...).

Once all the data are verified, the notary / notaries of the parties update the purchase pre-contract and on this basis draw up the notarial deed.

The notary / notaries convene then a meeting for the signature of the notarial deed. For the day of the signature, the buyer shall prepare the agreed sum for the payment of the price of the real estate, the registration fees (usually 12.5%), notarial fees and VAT as the case may be for new-building. The seller shall prepare the de facto transfer of the real estate to the buyer (ex: keys, closure of the water meter, transfer of an existing lease agreement and the rent guaranty), if it has not been done before.

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

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

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

As from the date of the registration in the land registry the transaction has effect vis – à – vis third parties.

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

Apart from the full ownership of real estate including land and constructions, the classic type of the distinct ownership between land and construction, the simple co-ownership (or joint ownership) of real estate and the co-ownership in the community parts in an apartment building should be called attention to.

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

Joint ownership or co-ownership of real estate by two or more owners (individuals or corporate bodies) on an undivided basis is possible. Each owner is vested with a portion of this real estate (ex:  $\frac{1}{4}$  for A and  $\frac{3}{4}$  for B). The joint ownership or co-ownership is maintained by the consensus of all co-owners; each co-owner has the right to claim the partition of the real estate. In this case the claimant has a choice to either sell his portion to other (s) co-owner(s) or

to force the sale of real estate in order to get the proportional portion from the sale price.

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

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

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

Attention could be called to the figure “le droit de superficie” which is a temporary (maximum for 5 years, renewable) contractual horizontal partition of real estate where the land is owned by one person and the building and / or planting by another. This figure is mainly used for quarrying or for forestry activity.

Another figure is the emphytéose - a long-term lease contract (minimum 27 years, maximum 99 years) during which the tenant is vested with prerogatives of the landlord who, at the end of the lease contract, is entitled to the constructions erected on the land.

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

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

The land register and the mortgage office are very reliable.

## **II. Costs for transaction**

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

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

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

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

Under certain circumstances, the percentage may be reduced to 6% (purchase with a social purpose) or 5% (modest residences and rural real estate).

For sales of newly built constructions, for buildings under the construction and for sales “on blue print” the registration tax is only due on the value of the land. The construction is submitted to the value-added tax (VAT), which is 21%.

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

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

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

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

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

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

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

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

The sale of leased real estate does not prejudice the lease contract. The sale of the real estate implies the assignment of the lease contract from the seller to the buyer, investing the buyer in the same rights and obligations of the seller in his quality of landlord.

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

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

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

In case of a commercial lease (retail, meaning premises linked to selling goods or services to the consumer), which by law grants a minimum 9 year title to the tenant, the landlord may terminate the lease contract by means of a one year prior notice which may only be served before the end of the first or of

the second triennium. The landlord has to justify that he wishes to establish his own business in the premises.

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

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

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

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

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

- Notary's costs
  - Land register
  - Real property transfer tax
  - Advising lawyer (due diligence)
  - Estate agent
  - Others
- 
- notarial costs = EUR 5'156.65
  - real property transfer tax = EUR 625'000 in Brussels and Walloon Regions
  - real property transfer tax = EUR 500'000 in Flemish Region
  - advising lawyer = around 10 hours (EUR 150 to EUR 300/ hour)
  - estate agent = a percentage of the price (around 10%)

**III. Costs for holding real estate**

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

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

The percentage of the land tax includes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A foreign investor may buy without major difficulties a plot of land in Belgium. However, in order to run a business, the foreign investor shall prior to

the purchase procedure enquire about the local urban planning which covers the plot of land he wishes to buy.

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

For all the other areas the procedure to get the approval to operate a business on the plot of land may be very time and costs spending.

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

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

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

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

IUSTICA.BE has a network of notaries and real estate experts.

IUSTICA.BE may also recommend real estate agents and / or caretakers.

Contact persons:

Johan LAMBERS

[jolambers@iustica.be](mailto:jolambers@iustica.be)

[www.iustica.be](http://www.iustica.be)

T. : +32 (0)2 548 29 72

F.: +32 (0)2 502 81 90

Anna SUSSAROVA

[asussarova@iustica.be](mailto:asussarova@iustica.be)

[www.iustica.be](http://www.iustica.be)

T. : +32 (0)2 548 29 77

F.: +32 (0)2 502 81 90

## **Brazil**

### **Moreira Lima Advogados**

Rua da Gloria, 344, cj. 702  
20241-180 - Rio de Janeiro - RJ  
Brazil

Tel: (55) 21 2221 1515  
Fax: (55) 21 2221 8340  
[eduardo@moreiralima.adv.br](mailto:eduardo@moreiralima.adv.br)  
[www.moreiralima.adv.br](http://www.moreiralima.adv.br)

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

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

Transactions that involve real estate in Brazil are governed by federal law, more specifically by the Brazilian Civil Code (Federal Law 10,406 of January 10th, 2002) and by Federal Law 6,015, of December 31st, 1973.

In general lines, a party may purchase real estate directly from the seller, or use a broker to intermediate the transaction. Whichever option the buyer chooses to proceed with, it is important to do some research before signing any agreement – especially to identify if the real estate is owned by the person intending to sell it, and to check if it is unencumbered. For such purposes, the purchaser should identify where the real estate is registered – every piece of land in Brazil must be registered with a Real Estate Public Registrar, based on its location.

The registration generates a certificate, which is the official and public document that describes (i) the size of the land, (ii) its adjoining boundaries; (iii) any construction or betterment in the land; (iv) all liens and/or encumbrances to the real estate; (v) current status and history of ownership; (vi) any and all information pertinent to the land and any building on it.

Having real estate deals registered confers authenticity, safety and validity to transactions. A purchase agreement signed by the parties – on itself - does not transfer title to the property, but simply generates the right to a credit; or, in other words, it generates, for the seller, the obligation to transfer the land. Its effects, however, are only produced between the parties to the agreement and cannot be opposed erga omnes. Title transfer only occurs when the sale is duly registered with the Real Estate Public Registrar. Once the purchase is registered, the sale is presumed legal – but may be reversed if the transaction contains any vice that may permit its annulment.

Our advice for any person or company intending to purchase land in Brazil is that the purchaser requests that the seller presents: (i) the Real Estate Certificate proving who has title to the property (ownership); (ii) a certificate that proves the real estate is not burdened by mortgages or any other liens; (iii) seller's good standing certificates to show the seller is free to sell the land and is not undergoing, for example, any bankruptcy procedure, or is not a defendant in suits that may compromise its right to sell the real estate without committing

fraud against its creditors; (iv) a certificate proving all taxes that fall on the property are paid up, as well as a general tax clearance certificate. In addition, it is advisable to check whether (i) the land is subject to expropriation or not; (ii) if there are City Hall projects that may involve the real estate; (iii) if there is someone living in the land that may claim to have lived there long enough to claim property (usucapião), etc. Once all such documents are analyzed and found to be in order, the prospective purchaser may proceed with reviewing the purchase and sale contract and negotiating its conditions. It is advisable to have an attorney overseeing the whole operation.

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

Brazilian law permits the construction of buildings in a single real property parcel with all the units or apartment owners having a right in common to use the common elements with separate ownership confined to the individual units or apartments.

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

Yes; property of the land may be shared by co-owners and that, in Brazil, is called condominium: when one real estate is owned by more than one person or company. Brazilian law provides for two types of condominium: (i) common or ordinary condominium; and (ii) special condominium. In the first case, each owner owns a share over the land, which is called an ideal fraction, because the person or company does not own a specific part, but a percentage of the total. In the latter, however, the real estate is actually divided and individuals and/or companies will be owners of a specific unit and perhaps share the common ownership of part of the land. It is the case of apartment buildings, where one owns the apartment and shares the benefits and responsibilities over the common land, like gardens and pools. Legal entities and individuals are allowed to purchase real estate in condominium.

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

Yes, in Brazil, as per article 1253 of the Brazilian Civil Code, any construction and plantation on one's land is presumed to belong to the owner of the land, unless proven otherwise. Exceptions may apply as it happens, for example, to mines, which are submitted to specific law and are considered a separate part of the land for exploitation purposes.

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

Yes. As already mentioned in question No. 1, all land and buildings constructed on them are to be registered with a Real Estate Public Registrar, based on its location. If land is sold and registered with the Public Registrar, title to such land is thus transferred to the purchaser and no other prospective buyer may allege that he or she did not know that the land had already been transferred, since all real estate registries are public. Registration of land, hence, protects good faith purchasers.

**II. Costs for transaction**

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

Transfer of property is taxable in Brazil. The type of tax that will apply depends on how the land is transferred to another party. If transfer is made by means of purchase, with payment for the land, then the buyer shall pay a Municipal tax called ITBI. The amount varies from City to City, but it is usually around two to three percent of the value of the real estate. If, however, transfer occurs through inheritance or through a donation, then the applicable tax is a State tax called ITCMD, which is usually around 4%, but also depends on each State.

In addition to transfer taxes, real estate is also taxed on its ownership. Owners of real estate must pay a yearly tax called IPTU, which is also Municipal, and is charged based on size and price of the land. It also varies depending on the City the real estate is located.

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

The above-mentioned taxes apply on every transfer of title to the property.

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

Yes. If the seller brought funds into the country to buy the property and registered it with the Brazilian Central Bank, then the seller may repatriate the funds upon sale of the property.

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

Purchasing real estate that is leased to third parties may be a tricky operation in Brazil. The law establishes that, if the real estate is sold while a rental agreement is in force, the purchaser may terminate the agreement so long as a 90 day prior notice is given to the tenant. Exception is taken, however, when (i) the agreement is entered for a specific term; and (ii) the agreement provides for the continuance of the lease in the event the real estate is sold – and (iii) the agreement is duly registered in the real estate registry. As a practical matter, though, if the tenant refuses to leave, the purchaser has to file a lawsuit to evict the tenant, and that may take years. Therefore, although the law provides some protection to the purchaser of the real estate in the event it has been leased, the truth is that an eviction suit may take years in Brazil. Aware of that, the purchaser may find cheaper to look for another real estate.

In addition, it should be noted that the tenant has a thirty-day right of first refusal to buy the property. The seller must, then, offer the land first to the tenant, and only when the tenant shows no interest in buying the real estate may the seller sell it to third parties.

Furthermore, special attention should be given if the real estate is being rented for commercial purposes, in which cases, after five years, the lessee has the right to have the agreement renewed for a period equal to the term of the last lease agreement entered into by the parties.

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

The destination of land in the country is delegated to each City Hall. Each City Hall designs a zoning plan, identifying which areas shall be dedicated to commerce, living, agriculture, touristic attractions. This pre definition may be changed, but each case must be analyzed individually, after a formal request is made to the City Hall

- 11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**
- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence)?
  - Estate agent?
  - Others?

Notarial costs and expenses charged vary from State to State, but in general the purchaser should be prepared (i) to pay around 2% of the amount of the real estate as ITBI tax; (ii) expenses with the execution of the deed of purchase and sale and registration thereof with the real estate register; (iii) attorneys' fees (which, of course, varies, but in general are charged by the hour); and (iv) around 6% as real estate broker's fees; (v) expenses to obtain good standing certificates if the seller does not pay for them (these last expenses are negligible).

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

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

Land owners must pay a City tax called IPTU, as described in item II, above. This is a yearly tax charged on the price of the real estate, and usually ranges from zero to four percent of the value of the land. In some cases, this tax may be waived if, for example, the building is declared as a historic landmark.

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

Real estate brokers usually charge 5% of the value of the real estate.

**IV. Foreign investors**

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

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

Although the price of real estate has risen at an unusual rate in the past five years, real estate is still a good and safe investment in the country – especially considering that Brazil was barely financially harmed by the crisis.

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

Yes, any individual person or legal entity is allowed to buy property in Brazil. However, some restrictions may apply. For example, land close to borders with other countries usually cannot be owned by foreigners. Another example is the percentage of rural land owned by foreigners, which is also limited by State. Until 1971 there was a statute in force, which imposed several restrictions on the ownership of rural land by foreigners, either individuals or companies. In 1994 the Federal Attorney Office issued an opinion in the sense that this statute was in contradiction with the 1988 Constitution and as such was deemed unconstitutional. Recently the same Federal Attorney Office changed its position and has submitted to the Executive Branch a new opinion revalidating the 1971 statute, which was sanctioned by the President just this August of 2010. Due to this new interpretation of the law, purchase of rural land by foreigners or companies owned by foreigners is limited in size. Furthermore, the total amount of land owned by foreigners and Brazilian companies owned by foreigners may not add

to more than 25 percent of the area of the City. Several entities are challenging this interpretation of the law, alleging the restrictions are not constitutional. The basis for the challenges is that Brazilian law does not make any distinction between a Brazilian company owned by Brazilians and one owned by foreigners. Therefore, there should be no distinction when it comes to companies purchasing land either, whether they are owned by Brazilians or foreigners. The results of these challenges are yet to be seen.

It should also be noted that all foreign persons and companies wishing to buy land in the country must have a registration with the Ministry of Finance, and a taxpayer number assigned to them.

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

All business companies, whether owned by Brazilian citizens or foreigners, must be registered in the respective State Commercial Registry. For such purpose, the company must fill a form with information on the company and its shareholders, attaching its bylaws and identification documents. The type of license the investor shall get will depend on the type of business being developed. A taxpayer number will also be mandatory, and that can be obtained through registration with the country's Ministry of Finance. All that can be filed/obtained within fifteen days if all documentation required is presented.

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

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

Yes, we are in a position to aid clients with all aspects involved with finding and purchasing real estate, and developing construction projects. However, due to the situation stressed in the foot note, it is advisable to await its outcome before buying rural land in Brazil.

## **Canada**

### **Miller, Canfield, Paddock & Stone**

144 Front Street West, Suite 400  
Toronto, Ontario M5J 2L7  
Canada

Tel: (416) 599-7700  
Fax: (416) 599-7800  
[www.millercanfield.com](http://www.millercanfield.com)  
[hand@millercanfield.com](mailto:hand@millercanfield.com)

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

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

In Canada, real estate transactions are governed by both provincial and municipal laws, which vary from province to province. In addition, common law comes into play in all of Canada's provinces and territories, except Quebec. Quebec is governed by its own Civil Code. The following is a general description of commercial real property transactions in the province of Ontario, Canada's largest province. This description is broadly applicable to the provincial jurisdictions, with some exceptions, particularly in Quebec.

The "closing" is the point at which ownership and usually possession of the property is formally transferred from the seller to the buyer. It takes place after the parties involved agree that all legal and financial obligations have been met. The following is a description of the typical process:

- Most properties are sold through real estate brokers and agents who market real property through organized real estate boards. The buying process begins with a purchaser selecting a suitable property, usually shown to the buyer by a real estate agent or broker, and making a written offer to purchase the property which is submitted to the seller. The written offer sets out the price the buyer is willing to pay, as well as any other terms of the transaction, such as financing terms, title and environmental conditions and warranties.
- The offer to purchase will be prepared by one of the agents or brokers or, depending on the complexity of the transaction, by the buyer's lawyer.
- After any conditions have been met, the buyer's lawyer will search title to the property. This is an exercise of going back through government records to ensure a clear title that is transferable. Electronic registration and title insurance have significantly changed the way titles on properties are transferred.
- In some complex and/or multi-property transactions, both parties and their lawyers will meet on the date of closing to complete and exchange documents, closing funds and keys, although the norm is now for the parties through their lawyers to exchange documents and closing funds on or before closing, to be held in escrow until the transfer/deed of land is released and registered in the appropriate property register. The buyer is entitled to possession of the property from the time the transfer/deed is registered. The state of the title to the

property at closing is “insured” either by the buyer obtaining, at its expense, title insurance issued by a title insurance company or a title opinion issued by the buyer’s lawyers.

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

Yes, the legal systems in Canada allow for the ownership of the whole of a parcel of land and ownership of only portions of the land, such as a unit in a condominium. Examples of types of ownership permitted are:

- freehold
- leasehold
- time share
- condominiums: freehold condominiums, common elements condominiums, vacant land condominiums, leasehold condominiums

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

Yes, title to real property in Ontario, and generally in Canada, can be held jointly. However, there are several ways of owning property. Ownership may be by one individual, multiple individuals, corporations, partnerships, or by trustees. The various methods of ownership can be distinguished as follows:

**Joint Tenants:** Title may be held by two or more individuals as joint tenants. Where there is a joint tenancy, upon the death of any one of the joint tenants, the deceased’s interest automatically passes to the surviving joint tenants in equal shares. Where title is held jointly, each joint tenant has an equal interest in the whole title.

**Tenants In Common:** Two or more individuals, corporations or partnerships may take title as tenants in common. Where title is held as tenants in common, upon the death of one party, the property becomes part of his or her estate and does not pass by survivorship to the other tenant(s) in common. Tenants in common may hold varying interests in the property.

A tenant in common is free to sell or transfer its interest in the property to a third party, subject to any prior agreement among the tenants in common.

**Partnership Property:** Two or more individuals, corporations or partnerships may hold title to real property as partnership property. The partnership arrangement is usually governed by a partnership agreement.

**Limited Partnerships:** A limited partnership consists of one or more general partners and one or more limited partners, and is not a legal entity separate from its partners. Its existence is owed entirely to statute. The limited partnership carries on business through its general partner. The relationship of the partners among themselves is usually governed by the terms of a limited partnership agreement entered into by all partners. The structure affords investors the protection of limited liability while permitting the net income or loss of the partnership to “flow through” directly to limited partners for tax purposes, making it an attractive vehicle through which to hold real estate assets.

**Bare Trustees:** Real property is sometimes held by a “bare trustee” or “nominee” (often used interchangeably), whose sole function is to hold legal title to the property for the beneficiary and to deal with the property only in accordance with directions received from the beneficial owner. For both tax and accounting purposes, the bare trust relationship is disregarded and the beneficial owner is treated as the absolute owner of the trust property. The property appears on the beneficial owner’s balance sheet and is not the property of the bare trustee.

While a limited partnership, or other ownership entity, will frequently use a bare trustee or nominee to hold registered title because it is not capable of holding title in its own name, nominee arrangements are also frequently used by beneficial owners of real property to keep the identities of beneficial owners confidential.

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

Unless otherwise specified, a conveyance of land includes all buildings, landscaping, watercourses, improvements and rights, including rents and profits, that benefit the land, but sometimes subject to exclusions for mineral and other rights.

However, there are other property rights that do not include ownership of the land, such as:

**Condominiums:** With a condominium property, a building typically is divided into units which are individually owned. The land upon which the building

is situated, and common areas that serve the individual units, are referred to as “common elements” and are owned by the unit owners as tenants in common.

**Ground Leases:** Land may be held under a ground lease in cases where an owner, often municipal or institutional, is unwilling to relinquish its ownership interest in a key parcel of real estate, but may be willing to lease it. Under a typical ground lease, the tenant is solely responsible for all capital and operating costs and has the right to construct buildings on the property, which remain the property of the tenant throughout the term, reverting to the landowner only upon expiration of the lease. The term of the lease may extend for a lengthy period of time, often as long as 99 years, but more often for less than 50 years.

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

In all jurisdictions in Canada, there are established property registers for the registration of transfers/deeds, mortgages and other real property instruments. Registration is deemed “actual notice” to any subsequent purchaser or encumbrancer who might otherwise claim to be a good faith purchaser without notice.

**II. Costs for transaction**

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

Land transfer taxes are payable by the buyer in most provinces of Canada (not in Alberta or rural Nova Scotia or Saskatchewan) upon the transfer of real property interests, whether registered or unregistered, and on the creation of long term leases, whether the buyer is a Canadian resident or not. The rates of tax vary from province to province, but they are generally 1% of the first \$200,000 of the value of the consideration for the transaction and 2% of the remainder. In addition, in most provinces a federal goods and services tax (“GST”) is payable on a “supply” of real property. A supply includes the sale of a real property (other than used residential), as well as a lease. However, if the purchasing entity is registered for the purposes of GST, the ultimate effect will be that the buyer does not pay GST. If personal property is included in the transaction, in certain provinces a retail sales tax (“PST”) (in some provinces PST has been

combined with GST and collected as a Harmonized Sales Tax) will be payable by the purchaser on the value of the personal property.

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

It is not a problem to buy and sell property on a short term basis. The tax treatment is the same regardless of the length of ownership.

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

Yes, subject to the withholding of a percentage of the sale proceeds if the seller is non-resident.

When a non-resident sells Canadian real estate, he/she is required to pay the appropriate amount of taxes on any capital gain. The normal Canadian tax rates will be applied to 50% of the gain. However, a non-resident is required to pay an estimate of the tax before the sale, an amount equal to 25% of the gain. This amount is to be retained by the buyer's or seller's lawyer until such time as a clearance certificate is received from the Canada Revenue Agency in connection with the sale of the property. If the certificate is not obtained, the purchaser is required to withhold from the sale proceeds, a percentage of the selling price (usually 25-50%).

The non-resident seller should file a Canadian income tax return for the year in which the sale occurs and should expect to receive a refund of a portion of the taxes paid. The taxation of Canadian real estate depends on whether the use of the property is for a principal residence, an active business or as a rental property.

Many countries, such as the U.S., have tax treaties with Canada that prevent a seller from being taxed in both Canada and the seller's home country.

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

A purchaser of leased real property steps into the shoes of the seller and becomes the landlord under the lease and is subject to all of the landlord's obligations under the lease.

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

In all built-up areas of Canada, the use of a property is dictated by the zoning by-laws of the municipality in which the property is located. If a property is zoned to permit multiple uses, in this case, both residential or office space, official approval from the municipality would not be required. If the property was zoned to permit only residential use, an application would have to be made to the municipality requesting a change in the use of the property.

Each municipality has its own building by-laws which specify structural requirements for different types of property. A change in use from residential to office space would also have to comply with the building by-law so far as the new use is concerned.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- Notarial costs are not a factor in Canadian real estate transactions, except in the province of Quebec where notaries are directly involved in the title search and registration processes. Quebec notaries typically charge by the hour, so the fees will be governed by the complexity of the title
  - The fee to register a deed/transfer or mortgage in the applicable property register varies from province to province. As of August, 2010, the fee to register a transfer/deed of land or mortgage in Ontario is \$70.00 Cdn.
  - For real property or land transfer tax costs, see section II 1 above.

- Buyer’s lawyer will normally charge by the hour, with the fees being governed by the complexity of the transaction. Fees ranging between \$15,000 and \$25,000 Cdn would be common in a transaction of this magnitude.
- Real estate agents’ fees will vary, but 5 percent of the purchase price would be the norm and, with some exceptions, are paid by the seller
- if title insurance is obtained, the premium is the buyer’s responsibility. Premiums vary, but are not substantial, being as low as 0.70% of the purchase price.

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

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

Property tax on real estate is virtually universal in Canada. It is usually levied and collected annually by the municipality in which the property is located. In most jurisdictions, property tax is determined by applying the value of the property as assessed by the provincial assessment authority to the current tax rates established by the local tax authority. Tax rates vary from municipality to municipality and also based on the classification of the property. For instance, the property tax rates for commercial and industrial properties will be higher than the rates for residential and farming properties.

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

Property management fees can vary significantly, from 3% to 5% of gross income derived from the property to 10% to 15% of the operating costs of the property.

### **IV. Foreign investors**

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

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**

**– At the moment not because of the impacts of the worldwide financial crisis**

The commercial real estate market in Canada is very strong (as of August, 2010). In the first six months of 2010, the value of commercial real estate transactions increased by 60 percent over the same period in 2009 and by more than 22 percent over the same period in 2005, a year more reflective of Canada's normal real estate activity. Canadian banks and other lending institutions remained stable throughout the financial crisis, with the result that lending activity did not dry up or entirely cease as in some other G7 countries. Accordingly, it appears to be a good time to invest in Canadian real estate, either directly or indirectly.

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

There are no restrictions in Ontario preventing any non-resident person or legal entity from buying property in Ontario. However, a foreign corporation is required to be extra-provincially registered in Ontario, and in most Canadian provinces, which is usually a straightforward and inexpensive process.

The Provinces of Quebec, Alberta, Manitoba and Saskatchewan have restrictions on foreign ownership or control of farm land. The Province of Prince Edward Island prohibits a non-resident (person or corporate entity) of Prince Edward Island from having an aggregate land holding in excess of 5 acres or having a shore frontage in excess of 165 feet unless permission is received from the provincial government

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

There are no official approvals required of a non-resident acquiring land in Canada (other than as referred to above – see section IV 2) that do not apply equally to a resident.

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

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

Yes, our firm is able to assist foreign investors acquiring, investing in and developing real estate in Canada. Please contact Peter Hand at Miller Canfield at:

144 Front Street West,  
Suite 400,  
Toronto, Ontario M5J 2L7  
Tel: 647-259-6296  
Email: [hand@millercanfield.com](mailto:hand@millercanfield.com)

## **Chile**

### **Urquidi y Asociados & Abogados**

Augusto Leguía 100 - Oficina 209  
Las Condes - Santiago  
Chile

Tel: + 56-2-233-3323

Fax: + 56-2-334-4230

[jcurquidi@urquidiabogados.cl](mailto:jcurquidi@urquidiabogados.cl)

[www.urquidiabogados.cl](http://www.urquidiabogados.cl)

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

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

The formal procedure in Chile for a real estate transaction is subject to the Civil Code provisions and whose legal fundamentals are construed upon Roman and French principles of law.

The transaction starts with a thorough and complete legal review of the titles of property including at least the last 10 years of ownership either by one single owner or by many different ones. Typically, for this transaction the purchaser must request original or authorized copies of the following documents:

1. Public deeds reflecting the transference of the real estate property from one owner to the following one for the term of 10 years computed backwards as of the date of the last registered public deed.
2. Authorized copies granted by the real estate registrar certifying the fact that the property is free of liens, encumbrances, mortgages and prohibitions that otherwise may affect the validity of the real estate transaction.
3. Certificates granted by the local Municipality and Ministry of Housing and Urbanism that the real estate property is not subject to expropriation plans.
4. Certificate granted by the National Treasury Agency stating that the real estate property is up to date with territorial taxes.
5. Other specific ad – hoc legal documentation shall be requested by the Purchaser to the Seller upon the fact on whether the real estate property is located within urban limits or on agricultural lands.

Each real estate transaction between a Selling Party and a Buying Party is backed up with the granting of a public deed in front of a Public Notary by the parties involved. Besides, an authorized copy of such public deed shall be recorded with the Real Estate Registrar being this legal act the ultimate valid requisite to consider that the ownership on a specific property has been legally accomplished and therefore the rights on the property vested on the purchaser.

Consideration must be given to the fact that there are certain elements of the essence of the legal transaction (“juridical act”) which must be always present in the respective purchase and sale contract granted by means of a public deed, namely, free consent or will by the parties to sell and buy, respectively; the

object matter of the transaction and the agreed price. Under the absence of one of these elements the real estate transaction shall be deemed as null and void for all legal purposes.

Taking into account the fact that sometimes due to the nature of the real estate property transaction an extra term would be required to materialize the closing in compliance with legal requirements, it is advisable for the parties involved to enter into a Promise to Purchase and Sell Contract, which shall be construed upon the legal formalities of being granted in writing, subjected to a condition or term and deemed legally in full compliance with all prescribed legal requisites.

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

Yes, our legal system does permit different sorts of ownership i.e. for instance ownership of the whole land and/or rights of property of specific units or lots. This is specifically abided by an ad – hoc regulation passed and approved by the investors (“project developers”) of the real estate project prior to the commencement of the selling procedures and accepted by the purchasers jointly at the time of executing the respective contract through a public deed in front of a Public Notary.

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

Yes, the legal system of the country does accept and permit joint ownership of real estate property by two or even more owners. Ownership may be exercised upon the real estate property as a whole or upon an ideal quota or percentage by one or more owners.

However, the law does not favour the maintenance of mere communities of heirs or of any different class or nature formed by the ministry of law or by a simple fact thus remaining as joint owners of a community holding title upon a real estate property for a long period of time. Therefore, any of the heirs or successors of a quota or percentage of rights of a real estate property owned in common as a community may request the liquidation of the community

anytime with a Civil Judge. The Judge will assign individual ownership on the common ownership of a real estate property.

Owners of a real estate property can be any person or entity. Natural persons must be in compliance with civil law demands in terms of age and legal standing. On its absence legal authorization to be granted by a Judge is mandatory as well as suffice economical capability is also a must.

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

In Chile, the owners of a real estate property held as “community”, like a building for instance, are in fact owners of a certain percentage of rights on the whole property i.e. on the land and building erected on it, equivalent to the area represented by its private ownership surface of ownership (square meters) in the building and calculated proportionally in the so called “common areas”. In other words, each single owner of a department in a building owns its department, parking lots and warehouse. The total sum of the respective square meters owned by one single owner considering the referred concepts must be proportionally calculated in respect of the total open and public spaces of the building called “common areas”. The final outcome in numbers gives the total amount or percentage of rights held individually by “one single owner”.

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

Yes, the real estate property integrated by the land and building erected on it as well as the single ownership expressed in a percentage of rights or even sometimes shares, as described above, must be recorded with the Real Estate Registry as this is the only legal requisite that once fulfilled trespasses title and risk to the purchaser from the seller.

A good faith purchaser is protected by law, but legal counsel advice is recommendable as article 1815 of the Chilean Code prescribes that the selling and purchasing of an alien real estate property is valid without prejudice of those rights belonging to the legitimate owner.

## **II. Costs for transaction**

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

There is no tax aspects involved in a real estate transaction, without prejudice of the Income Tax Law implications that any transaction may imply to either the seller or the purchaser at a personal level.

The only mandatory tax implications is to have tax payments on real estate ownership (“contribuciones”) duly paid and up to date with the National Treasury Department by the current owner or selling party as no Public Notary is legally entitled to approve and grant a real estate property transaction without this requisite being complied with.

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

From a taxation point of view, in Chile the general rule is that there is no problem to hold the property for a specific time span as real estate transactions are not subject or sole to tax payments. However, the local Income Tax Law provides that if more than one transaction on real estate property is executed by the same owner within the same calendar year (Fiscal Tax Year) then the price difference (higher value or price) including the respective price escalation of the price remainder shall be declared as a taxable income by the selling party.

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

Yes, monies arising from a real estate transaction may be repatriated anytime and without legal restraints as long as the legal formalities at the time of bringing the funds into the country have satisfactorily complied from a legal point of view. This is achieved by either entering into a Contract Law with the State of Chile (Decree Law 600 – Foreign Investment Statute) or by means of Chapter XIV of Chilean Central Bank Norms on International Exchange Currency Regulations.

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

If real estate property is purchased whilst a leasing agreement is in force, the leasing agreement shall be respected until the termination of the respective leasing agreement as per the agreed stipulations agreed by and between the original contracting parties. However the legal formality that must be present in the respective leasing agreement to respect the existence of the leasing agreement by the new owner (s) is that the agreement have been entered in writing and granted by means of a public deed granted with a Public Notary.

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

Yes, change in a building from residential use to office space is permitted, provided formal authorization is granted in writing by the Municipality and Housing and Urbanism Ministry officers.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence)?
  - estate agent?
  - others
- 
- notarial costs: Customary a 0,01% upon commercial value of real estate property is paid for this concept.
  - land register: Customary a 0,2% upon commercial value of real estate value is paid for this concept.
  - real property transfer tax: N/A

- advising lawyer (due diligence): Legal costs and fees should not exceed 1,5% of the total transaction value with a cap that is normally agreed on a case by case basis.
- estate agent: Customary a 2% commission fee on real estate property price is paid for this concept.
- others: N/A

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

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

As a matter of general rule, there is no tax obligations directly involved when holding a property. This with the sole exception of the tax on land ownership (“contribuciones”) which is paid each year on a quarterly basis and its rate is calculated upon the assessment value of the property (“fiscal value”) carried out by the National Treasury of the Republic.

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

This kind of costs will vary depending on the size and nature of the real estate property purchased by a foreign investor. It shall be agreed on a case by case basis but normally adjusted to competitive market conditions to be agreed thereupon.

In general charges due to this concept are around 5% - 7% of the leasing contractual arrangements.

### **IV. Foreign investors**

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

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

- directly in real estate: Yes.
- through real property funds, open or closed ones: No.
- through other clear and secure financial products: Yes.
- at the moment not because of the impacts of the world wide financial crisis: Not a problem as Chilean economy is very stable and reliable with a diversified commodities portfolio.

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

There are no restrictions in this regard provided powers of attorney are granted and a legally valid domicile is constituted within the Chilean territory. Adequate “legal engineering” on real estate transactions may be required for certain specific cases considering foreign interests in purchasing properties.

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

For green field projects and depending on the size of the business or investment planned by the foreign investor it may be required to prepare and file an environmental impact study or statement. Besides it will also be required to obtain all related sectoral permits which shall be granted by the respective governmental agency or service as it may be applicable.

Regularly a construction provisional permit shall be granted by the Direction of Municipal Works and with which the owner of the project is entitled to commence construction. Definitive construction permit shall be granted after having the municipality inspect and receive the final works on the real estate property.

For real estate property already constructed and fully operational there is no need to request new official approvals other than those obtained whilst being urbanized, constructed and sold to new buyers.

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

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

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

Chile

## **Colombia**

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

Carrera 9 No. 80-15, Oficina 602  
Bogotá, D.C.  
Colombia

Tel: +57-1-218-6366  
Fax: +57-1-610-9451  
[www.wiesnerasociados.com](http://www.wiesnerasociados.com)

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

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

In Colombia conveyance of ownership of real estate requires a public deed and registry. The public deed contains the detailed identification of the property and includes all of the terms of the agreement between the parties. In other words, the public deed is the real estate sale contract and it is issued by a Notary Public. Once the deed is signed by the parties, it has to be registered before the Registry Office to vest ownership in the purchaser.

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

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

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

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

At the same time the owner of the unit has an undivided ideal quota or share over the communal property (like the entrance lobby, the stairs or the roof) and every owner has a right of use over the communal property and a duty to cover the expenses. If the building which contains the units is destroyed, then all the

unit owners share the property over the land, with each owner retaining the same quota it had over the communal property over the vacant land.

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

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

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

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

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

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

The real estate Public Registry Office of the area where the property is located is the only office authorized to make changes into the property registry. Non registered transactions are not binding on third parties.

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

## **II. Costs for transaction**

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

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

of the transaction and, (iii) the so called charitable tax set at 1% of the value of the transaction.

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

Under Colombian tax law if the property is sold within two years of its acquisition the profits of the sale are subject to income tax. If the property is sold after two years of its acquisition then it is subject to occasional gains tax. Although both income tax and the occasional gain tax have the same rate (33% for corporations and 19% to 33% for individuals), the tax payer can claim some benefits under the income tax regime and reduce the payable amount, whereas the occasional gain tax does not allow any benefit claims. Hence, if the property is sold within two years of its acquisition it is possible to reduce the tax consequences.

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

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

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

Termination of the lease agreement is allowed but there are certain conditions that have to be met: (i) the lease contract can be terminated only at the end of the lease term or one of its extensions, (ii) notice of the intention of terminating the lease has to be sent three months in advance of the termination date, (iii)

the stated reason for termination has to be the performance of an obligation set forth by a purchase agreement and (iv) attached to the termination notice there should be a copy of a bond issued in favour of the leaseholder, valid for six months, with a value equal to six months of the lease, to ensure that the stated reason for termination is true.

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

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

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

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

Notarial costs change every year and are established by the National Superintendence of Notaries and Registry. For 2010 a transaction with a price set at EUR 5 million it would pay EUR 13,500 (2.7/1000 of the transaction value) as notarial costs. The registry of the deed would cost EUR 75,000 (EUR 25,000 for the registry tax and EUR 50,000 for the charitable tax). If the parties are required by law to pay the income withholding tax, then such tax would amount to EUR 50,000.

The real estate agent commission can be negotiated but it would be at least equal to 3% of the transaction value if the land is considered urban and 5% if the land is considered rural. Hence for the hypothetical transaction if the land is urban, the real estate agent would charge EUR 150,000 at least, and if the

property bought is considered rural at least EUR 250,000. Attorneys fees can be charged either at an hourly rate or as a flat fee encompassing all required work. For a transaction as the one proposed, the value of the fees would likely be of around US\$10,000.

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

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

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

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

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

Professional caretakers are commonly real estate agencies and charge for their services a monthly percentage over the lease they secure for the property. The real estate agencies offer different services ranging from showing the property to prospective clients, to administration packages. The usual monthly percentage is set at about 8% and may increase if the owner chooses to buy certain insurance coverage offered by the insurance companies through the real estate agencies.

#### IV. Foreign investors

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

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

Yes, both directly and through real property funds.

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

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

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

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

If the buyer plans to build in the plot of land it will need to secure a construction license by filing a request in a local government office (*curaduría urbana*) and paying a tax. Blueprints are also reviewed in the licensing procedure which may take up to three (3) months.

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

- Comply with zoning regulations, including noise level rules and hours of operation provisions.

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

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

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

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

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

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

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

## **Costa Rica**

### **LEX Counsel**

Edificio Terraforte, 4to piso,  
Centro Ejecutivo Multiplaza, P.O. Box 6997-1000  
San José  
Costa Rica

Tel: +506 2201-0300  
Fax: +506 2201-0412  
[www.lexcounsel.com](http://www.lexcounsel.com)

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

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

In Costa Rica, with qualified exceptions, property is owned and controlled by individuals (the land still owned by the government are National Parks or land only granted to poor people that do not own real estate). Real Estate agents or brokers are not required, but sometimes accustomed. However, our advise is to negotiate directly between seller and buyer. Before an option purchase agreement is signed, the attorney makes a due diligence on the property. We have a centralized public registry for Real Estate (the National property Registry) and also for maps of each property (nationwide), which are linked by cross reference numbers with each individual registered property. Then the attorney, acting as Notary Public prepares the purchase document, which is attested at the Notary Book of Records (“protocolo”), which is very formalistic. It is a formal book authorized by the Supreme Court of Justice’s Dirección de Notariado. Each page is of security paper, with lines numbered and each page (back and front) is also numbered. It has to be carried in strict timely order. Any correction has to be by explanatory note, affixed at the end of the particular transaction, referring to the particular text (line number, etc.) and signed by the parties. A certified copy of the transaction is then issued by the Notary Public and presented to the National Property Registry. The examiner of the Registry will make a detailed analysis, most of the times placing observations which need to be addressed by the Notary and sometimes by additions signed by the parties. Then it is recorded. The document is then returned, duly processed.

Contrary to other systems, escrow periods are not accustomed in normal circumstances. Sometimes, in extraordinary cases (when the property might be subjected to actions from other creditors, or when delicate ecological studies have to take place before the transaction takes place), the property is transferred into a Guaranty Trust and the title remains there until the closing takes place. In direct transactions, the time between signature of the contract and final recordation lasts about 3 weeks.

Normally, transfer of possession coincides with the closing. However, sometimes the parties agree to different alternatives (obtaining possession before or later), and “counter-guaranties” are rendered at the contract.

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

Yes. Single ownership, Co-ownership and Condominium ownership. There is also the possibility of splitting the ownership (“nuda propiedad”) from the enjoyment of such ownership (“usufructo”), whereby one person owns the property but grants the full enjoyment to a different party, under determined conditions.

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

Yes, by the alternative known as “Property in Rights” (Propiedad en Derechos”) declaring the property in a number of individual “rights” which are entitled to different parties. For instance, a father may declare the ownership in 5 rights and each son of the owner is given one of the rights. The individual right is not specifically determined, until a special procedure to locate each such right (divide the property physically) is done (“localización de derechos“). Also, multiple ownership can be achieved by means of having a legal entity (usually a company but sometimes cooperatives or associations) as legal owner of the property (and the shareholders, cooperative members or associates will then own it indirectly), or by placing the property into a trust.

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

Yes. Ownership of any construction over the land is presumed owned by the owner of the land. However, land can be rented for purposes of allowing a third party to build some construction over it. A detailed contract should be drafted, signed and recorded, to prevent that the owner of the land would be considered the owner of the building.

This is very seldom done, though.

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

Yes. As explained before we have a centralized National Property Registry where ownership, mortgages, liens, etc. are recorded (protecting therefore third parties). However, the due diligence is always required. For instance, a possible road, or high power transmission lines, or water pipeline, could be planned by the corresponding governmental agency (or mining rights granted to a third party, etc.). When a road or transmission land is planned, before the road or line is built the owner has the right to be compensated. But the amount of compensation has to be determined through expropriation proceedings before a Court, which might extend in time before resolved and become expensive.

**II. Costs for transaction**

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

Tax aspects directly involved in a purchase of real property are the transfer tax and the stamp duties that have to be paid in order to register the property in the name of the new owner, at the National Property Registry. These amounts are calculated on the basis of the highest value between the stated purchase price and the property value appearing at the National Property Registry. Transfer tax is a 1.5% of said amount, and shall be paid during the 3 months after the signature of the transfer deed. The stamps duties are: National Registry: 0.5%, Municipal Stamp: 0.2%, Fiscal Stamp: ¢625.00 –amount equivalent slightly over one US Dollar (US \$1), Agrarian Stamp: 0.1%, Costa Rican Bar Association: ¢10,000.00 (about US \$20) for deeds over ¢10,000,000.00., National Archive: ¢20.00 (about five US cents).

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

You are entitled to buy and sell even the same day. The same cost is –nonetheless- incurred. Sometimes, if the property is going to be owned by a short time, transaction costs are reduced by using a Trust Agreement. A different,

but related issue, is Capital Gains Tax. In Costa Rica, Capital Gains Tax is applicable only if the seller is dedicated to buy and sell properties (therefore not applicable to most of the transactions incurred by an owner that is not a professional developer, and its buyer. Capital Gains tax also applies to transactions incurred by non professional developers, but **only over the increase on the value of constructions affixed to the land** (as they might have been “depreciated” for Income Tax purposes).

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

Yes. There is no limitation on repatriation of funds.

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

Yes. However, a minimum of 3 years has to be respected by the new landlord (or more time if the Lease contract is recorded at the Public Registry by the time of the sale.

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

Yes, you are authorized if the zoning regulations applying to the area where it is located authorizes both uses. Zoning Regulations –approved by the corresponding county government (municipality)- are approved after public hearings, etc.

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

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

Notarial fees would be of 1% of the purchase price. Land registration and real property transfer tax and stamps, as stated above, are also set by percentage of the property purchase price (see table attached at an independent document –excel to facilitate using in with other real estate values). These costs are usually split between buyer and seller.

The fees of the advising lawyer are generally charged by the hour, and it may vary from one law firm to other. They can also be negotiated, considering the complexity of the transaction (whether the property has liens or encumbrances, or the other registrar's entries that need to be studied, etc.)

Fees charged by real estate agents are not established by law. However, the parties should be keen to negotiate in advance, as otherwise 5% of the transaction is the customary amount.

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

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

The Real Estate tax is charged by the County Government. The rate is 0.25% of the assessed value. The assessed value is determined either by following the sworn declaration of the owner (contestable by the Municipality), or by direct valuation rendered by the Municipality contestable by the owner. We always advise the later. Usually these valuations are lower than the value that the owner renders to its own property. No special assessments are customary, not even in reason of building a road nearby, etc.

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

It depends of the type of property. For a vacant lot the owner is required to have it clean and well fenced. These services are rendered, generally, by individuals (farmers, for instance). They charge about four dollars (US\$4) per square meter per year, which includes maintaining the fence (cost of fence wire and related expenses are paid separately), and clearing the grass twice a year. If the property is a building (and office complex for rentals, for instance), there

are specialized companies. The cost in these cases is about three dollars (US\$3) per square meter per month, which is recuperated from the tenant.

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

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

- **Directly in real estate**
  - **Through real property funds, open or closed ones**
  - **Through other clear and secure financial products**
  - **At the moment not because of the impacts of the worldwide financial crisis**
- 
- **directly in real estate or provide the company, its maintenance, etc:** Usually we advise to own property through a company. It will be more advantageous regarding taxes and inheritance transfers, etc.
  - **through real property funds, open or closed ones:** We have those funds. However, owning property in Costa Rica is simple and –moreover, I personally prefer to control by my own decisions regarding real estate that I may own. Therefore, I advise our clients accordingly.
  - **through other clear and secure financial products:** Besides open and close funds, we do not have other “financial” products to own real estate. Some developers (mainly in the tourism sector) sell “participations” in the project b selling preferred shares. However, attention should be given to the strict regulations for public offerings that we have and that generally exist at other countries where these projects might be marketed.
  - **at the moment not because of the impacts of the world wide financial crisis:** Contrary to the common belief, now it appears a good time to invest in these developments. Prices have plunged and most of the ongoing developments (at least those that we advise – I will send you separately some information on them) have used this “financial crisis” to slow the pace, improve the conditions of their own projects (re-designing, using alternative and “green” sources of energy and “green” methods of building, etc.). Remember the “old say”: “Buy land, God is not making anymore” (and specially, ocean front property in Costa Rica).

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways**

**to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Titled land may be owned without restrictions on nationality, etc. Taxes are the same for locals and foreigners. The only restriction for foreigners is regarding concession land (some land located within the first 200 meters from the ocean, at both coasts). In these cases, foreigners should have resided in Costa Rica for at least 5 years to be eligible for those concessions. In these restricted cases, some foreigners have selected to use a Trust Agreement (ownership of the concession is maintained in that trust and the foreigner is kept as beneficiary of the rights until local nationality or the 5 years residence is achieved). Also, there are some limitations at a strip close to our borders with neighboring countries.

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

It depends of the kind of property. The most difficult permit appears to be the license to sell liquor (required at a bar or a restaurant or a liquor store). A new bill is being sent to Congress to regulate better these licenses (“patente de licor”).

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

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**
  
- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers:** Yes, we do it all the time (and relinquish any real estate commission, usually offered by the brokers). And we also have advised our clients to sell the property if the need appears. We have achieved a good relationship and the respect of all the reputable real estate agents or brokers. This is required in Costa Rica because real estate agency is not well regulated in Costa Rica. They know that we might not be “easy” to their inter-

ests (defending our clients), but also know that we will do our best to achieve the best possible transaction for our client.

- **Developing construction projects:** Yes. We have been behind the most reputable developments of Costa Rica (the two Marriott projects, the Papagayo tourism Project, etc.), sometimes on the side of the developer, sometimes advising the bank or financial entity that financed the project. Also, our firm has handled ALL the projects that involve public works under private concession (highways, airports, sea ports).
- **All legal aspects involved in these contexts:** Yes. Public Works under Private Concession is a good example: This is a very specialized sector where you need to advise since the drafting of the cartel papers, the bidding process, the usual appeals, the negotiation with the Government for the contracts, and the execution phase.

For any additional information, please contact us at LEXCounsel, our firm: MRuiz@lexcounsel.com, or our telephone (506)22010300 or fax (506)22010412.



# Cyprus

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

2 Diagorou Street, ERA House, Floors 7-12,  
1097 Nicosia, Cyprus  
P.O. Box 20106, 1601 Nicosia  
Cyprus

Tel: +357 22022999  
Fax: +357 22022900  
info@idlaw.com.cy  
www.idlaw.com.cy

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

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

#### **Regulation**

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

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

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

Another feature of Cyprus real estate law is the recognition and enforcement of ‘specific performance’ orders as per The Sale of Land (Specific Performance) Law Cap.232. This law serves to hold both the Seller and the Buyer to their respective promises in connection with a transaction relating to land. In a broader context this feature provides a safeguard for the materialisation of investments in real estate.

#### **Procedure**

The procedure for purchasing immovable property commences with the signing of a purchase agreement commonly drafted by an advocate or by a real estate agent. Ordinarily at this stage the Buyer has to pay the Seller a ‘reservation fee’, which is later deducted from the total cost of the purchased plot or structure however, this arrangement is not “cast in stone” and can be varied subject to the respective wishes of the parties and their final agreement. The benefit of this practice is that it binds the Seller to the promise to sell to the Buyer who has in turn given due consideration. This promise is actionable and sounds in damages for breach of contract. It must however be noted that specific enforcement of the agreement to sell and transfer land in the name of the Purchaser can only be achieved under and subject to the provisions of the Sale of Land (Specific Performance) Law Cap. 232 (see above).

The value of land is found on the face of the title deed but is fixed at a particular date (1.1.1980) and is therefore certainly not representative of the market

value. To remedy this, the most commonly used practice is to employ the services of an independent chartered surveyor to conduct relevant evaluation and provide the parties with a report.

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

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

#### **Finance**

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

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

Cyprus land law recognises different kinds of title in land ownership. The Immovable Property Law (Cap.224) in conjunction with the Regulation of Roads and Buildings Law, comprise the legal framework for the division and ownership of land in units. Recent developments and population growth has seen this kind of ownership flourish over the past two decades. Commonly held buildings are a prime example of this, where title holders own individual units (flats or apartments) but also hold certain areas in common. Leasehold title is also valid and capable of registration in Cyprus.

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

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

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

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

With the exception of ownership of units, ownership of a building is implied in the ownership of the land. As mentioned above joint owners hold everything on the land, including buildings and fixtures. It should however be noted, that there is a legal obligation to register buildings and other structures attached to land for the purposes of Immovable Property tax. A District Lands office may refuse to transfer a plot of land containing an unregistered existing structure.

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

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

## **II. Costs for transaction**

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

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

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

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

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

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

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

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

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

Ordinarily no such approval may be required. However this varies according to the proposed usage of the building in question. Residential zones include

offices as well, although some restrictions as to usage may apply and approval from the city council may be required, particularly with regard to operating businesses and therefore Buyers should inquire of this.

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

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

For a purchase price of EUR 5 million

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

**III. Costs for holding real estate**

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

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

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

Normally caretakers or property management companies charge their work on a monthly basis. This amount may vary between €60 and €100 per month, depending of course on the size, value and facilities of the property.

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

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

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

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

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

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

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

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

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

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

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

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

## **Czech Republic**

### **Felix a spol. attorneys at law**

U Nikolajky 5  
150 00 Praha 5  
The Czech Republic

T +420 251 081 111  
F +420 251 081 122  
[www.akfelix.cz](http://www.akfelix.cz)  
[www.nomosli.eu](http://www.nomosli.eu)

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

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

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

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

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

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

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

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

The formal transfer procedure in respect of the real estate property in the Czech Republic is quite simple. The purchase agreement shall include formally perfect definition of the real estate property, expression of the will of the parties to transfer the property and the purchase price. The purchase agreement is usually drafted by a lawyer or a notary public however parties may also draft the purchase agreement by themselves. The signatures of the parties must be

officially certified which can be done by a notary, attorney, at municipal office, at post office or at any Real Estate Cadastre office.

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

**Before conclusion of the Purchase Agreement:**

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

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

If the purchase price is financed by a bank it usually requires a registration of its pledge over the subject of the purchase. The pledge agreement is typically signed by the vendor prior to signing of the purchase agreement and filed with the Real Estate Cadastre shortly before the purchase agreement. The loan facility is typi-

cally released by the bank after the priority notice in respect of the pledge and the priority notice in respect of the title transfer is marked in the Cadastre.

**Time period of transaction:**

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

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

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

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

There can be more owners of any property. A participation of each co-owner is registered in the Real Estate Cadastre and is freely transferable but subject

to pre-emption right of other co-owners. There is a special type of ownership of spouses and registered partners of the same sex.

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

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

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

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

Under the Czech legal system (Civil Code) a building is not part of the land which means that any building or plot can have different owners.

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

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

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

Despite the fact that anyone may in good faith rely on an entry made in the Real Estate Cadastre after January 1, 1993, unless proven otherwise, there is no 100% guarantee that the records in the Real Estate Cadastre are accurate or that the registered owner of a building or land actually has a title to it. All titles are, to some extent, subject to challenge. According to the Czech law there is not possible to acquire an ownership from a person who is not a real

owner though his ownership is duly registered in the Real Estate Cadastre. This happens namely in connection with the “restitution” of the ownership to original owners whose property was confiscated after the WWII (during the period 1948-1989). The problems often arise when the property was privatized in 90’ without regards to the possible rights of the original owners who were entitled to get the property back. The persons who obtained the property in privatization thus obtained the property from the non-owners and if original owners later filed their claims for restitution of the property, their ownership was duly registered.

The above risks can be excluded by executing a legal due diligence of the vendor’s title before the purchase.

## **II. Costs for transaction**

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

The real property transfer tax has to be paid on real property transactions. The percentage rate is 3 % and it shall be paid from the higher of (i) the agreed purchase price or (ii) expert valuation of the property. The tax is payable by the seller but the purchaser is a guarantor. The tax shall be paid within three months after the registration of a purchaser’s title in the Cadastre.

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

The sale of land is subject to VAT; however only if it is a construction site for which a building permit has been issued. Buildings are subject to VAT if sold less than 5 years after completion.

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

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

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

No problem in the Czech Republic.

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

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

Lease of flats has been highly protected in the Czech Republic however the relevant laws are being changed gradually. Still in case of so called regulated tenancy termination by a landlord is possible only in the event of breach by a tenant. Lease of flats under regulated tenancy can also be inherited which means it is very difficult for the landlord to terminate leases concluded for indefinite period of time. Regulated rents were extremely low; legislation has allowed landlords to increase the rent unilaterally since 2007 and has stipulated certain rules to achieve market rent by 2012.

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

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

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

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

- **estate agent?**
- **others**
  
- **Notarial costs:** notary assistance is not necessary; costs of notarial or attorney's escrow services vary between € 1,000 to 3,000 for a transaction (plus 20% VAT).
- **Land register:** EUR 20 plus another EUR 20 if the mortgage is also to be registered
- **Real estate transfer tax:** EUR 150 000
- **Advising lawyer (due diligence):** depending on the arrangement with the lawyers; normally they act with international clients on hourly rates, mostly specialized law firms have range of rates between EUR 120 – EUR 200; the time needed for the transaction depends on how the negotiation is complicated, but it should be somewhere in the region of 50 hours; plus 50-100 hours to carry out the due diligence (if requested).
- **estate agent:** between 2 to 4 % of the property price (plus 20% VAT)

### III. Costs for holding real estate

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

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

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

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

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

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

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

We would advise to invest in commercial properties in the Czech Republic. The prices are still down (yields of 9-10% compared to 6.5-7.5% in mid 2008) and the economy outlook is positive as the main export partner – Germany – is quickly recovering. The residential market is also recovering – it should be taken in consideration that there were not many residential projects completed in the last year, mortgage rates are back down under 5% p.a. and unemployment is stable at 9%.

Realistically, however, it will be maybe in 2011 or even in 2012 when the Czech Republic and middle Europe see significant increase in real estate value and a corresponding uptick in the industry as a whole. Due to the rapid price reduction in 2009 and partly in 2010 and reduction of the related construction works, investing into the real estate in the Czech Republic could be a great opportunity, mainly from the long term view.

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

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

The agricultural land and woodlands can be purchased only by Czech citizens, companies registered in the Czech Republic and EU citizens who are registered as farmers in the Czech Republic. It should be noted that any foreigner can register a company in the Czech Republic and use it for purchase of the agricultural land. There are no restrictions in respect of other properties.

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

The rules for use of land are the same for Czech residents and foreigners. No special permits are needed if an investor is a foreigner (save for the above restriction to buy agricultural land).

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

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

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

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

**Felix a spol. attorneys at law**

U Nikolajky 5, 150 00 Praha 5

The Czech Republic

T +420 251 081 111

F +420 251 081 122

[www.akfelix.cz](http://www.akfelix.cz)

[www.nomosli.eu](http://www.nomosli.eu)

## **England and Wales**

### **Mace & Jones**

Drury House  
19 Water Street  
Liverpool  
L2 0RP  
United Kingdom

Tel: (44 151) 236 8989  
Fax: (44 151) 227 5010  
[gary.jones@maceandjones.co.uk](mailto:gary.jones@maceandjones.co.uk)  
[www.maceandjones.co.uk](http://www.maceandjones.co.uk)

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

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

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

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

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

There are three basic stages to any property transaction:

1. Pre-contract
2. Exchange & pre-completion
3. Completion

#### **Pre-contract**

Under the pre-contract stage, the seller's solicitor or conveyancer drafts the contract for negotiation with the buyer's solicitor and engrosses the agreed form for signature. It is common for contracts for the sale of commercial property to incorporate a set of conditions known as the Standard Commercial

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

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

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

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

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

## **Exchange and pre-completion**

### **Exchange**

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

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

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

### **Pre-completion**

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

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

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

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

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

#### **Completion**

On completion, the buyer’s solicitor or conveyancer would need to arrange for completion monies to be transferred to the seller, to receive the executed transfer and all the necessary title documents, and to ensure that any charges affecting the property, which should have been discharged on completion, have indeed been discharged.

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

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

### **Post-completion tasks**

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

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

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

Commonhold combines freehold ownership of a single property within a larger development, with membership of a company limited by guarantee (commonhold association) that owns and manages the common parts of the development. The commonhold is managed in accordance with the commonhold community statement (CCS). Commonhold ensures that the owners of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **II. Costs for transaction**

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

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

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

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

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

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

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

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

There are no general restrictions on repatriation of funds.

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

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

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

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

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

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

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

### III. Costs for holding real estate

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

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

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

- offices, warehouses and other industrial buildings and shops – rental valuation method
- pubs and other licensed premises – fair maintainable trade, the annual level of trade they are expected to achieve.

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

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

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

**IV. Foreign investors**

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

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

This is a very good time to invest in real estate particularly where the investor is financially able to do so as property prices have fallen in England and Wales. There are also some excellent residential property portfolios that are available as well as some part built schemes. Bank sales are also worth considering in particular.

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

There are no general restrictions on foreign ownership of land. Property can be bought by private individuals or companies without necessarily needing British nationality or a registered office in England and Wales.

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

If anybody is buying property in the UK then they would need to comply with the same procedures as would apply to UK based investors. This may include

permissions in relation to planning and building consents and environmental consents as appropriate. There would not be any additional requirements placed on the investor because of its country of origin. The approvals and consents required would depend on the proposed use of the land but the requirements would be no different than to those applicable to UK based investors.

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

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

Yes. We are happy to assist foreign investors in all of the above aspects should they require our assistance.

## **Finland**

### **Hammarström Puhakka Partners, Attorneys, Ltd.**

Bulevardi 1 A, 00101  
Helsinki  
Finland

+358 9 474 21  
[www.hpplaw.fi](http://www.hpplaw.fi)  
[jari.tuomala@hpplaw.fi](mailto:jari.tuomala@hpplaw.fi)

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

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

Real estate transactions in Finland are governed by the Code of Real Estate (540/1995). Before a transaction is legally binding and can be registered, a sale purchase agreement signed by both parties needs to be attested by a notary.

A sale purchase agreement has to at least include information of the purpose of the transaction, identify the real estate and the parties and describe the purchase price or other form of consideration. In addition, a sale and purchase agreement usually includes terms for the transfer time of possession and ownership, a description of the condition of the land and the buildings, a list of information provided to the purchaser, payment terms, and details of possible encumbrances and mortgages.

The ownership of a real estate transfers from a seller to a buyer on the agreed date, which is often the date when the purchase price has been paid in full. It is also possible to agree different dates for the transfer of possession and ownership.

Registration is not a prerequisite for the transfer of ownership, however all changes in the ownership of a real estate have to be registered with the Land Register, held by the National Land Survey of Finland.

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

Finnish law does not allow direct ownership of own units or portions of improvements, nor constructions. A real estate, including the fixtures on it, is in its entirety owned by one or several natural or legal persons (discussed in detail below). Therefore, the division of the ownership of constructions into separately and individually owned units or portions is not possible.

A characteristic method of arranging ownership between several owners of land with buildings on it (e.g. large commercial buildings or apartment houses) is to do so indirectly by establishment of a real estate company (condominium). In such a case the real estate company owns the real estate and the sharehold-

ers are entitled to possess assigned flats or premises based on the shares they own.

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

Yes, joint ownership is possible. Both companies and private persons may jointly own a real estate, i.e. two or more subjects together.

There are no general limitations on private persons, companies and other commercial or juridical entities for owning real estate or shares in a real estate company,

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

Yes, in Finland a real estate is composed of an area of land and of all buildings and constructions that are located on the land. Therefore the ownership of a building is usually implied in the ownership of the particular piece of land where it is situated.

It is also possible, however, to own a building and to obtain a long-term lease (usually for 30 to 50 years) over the land from the owner, who usually is the municipality or the city. Therefore, in case of a land lease, the buildings and the land are owned by different owners. The land lease agreement must be registered in the Land Register. This registered land lease right together with ownership of the building by the lessee is close to the ownership of the real estate. The land lease right together with the building located on the leased land is usually transferable and can also be mortgaged.

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

After the purchase of a real estate the buyer has to register his title with the Land Register, which is held by the local office of National Land Survey of Finland, within six (6) months of the date of purchase. A land lease agreement has to also be registered with the same authority and within the same time

frame. The register includes information of the owner of the real estate or of the land lease right and the details of the land area. It does not, however, include information of possible buildings or other constructions located on a real estate. Therefore there is no official register of buildings in Finland.

A person acting in good faith can rely on register entries, even if the entries turn out to be erroneous or inaccurate. In such case, the State is liable for financial loss caused by the erroneous information.

## **II. Costs for transaction**

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

A buyer of a real estate has the duty to complete the registration of title within six months from the signing date of the sale purchase agreement as well as to pay transfer tax within the same time period. The transfer tax for a real estate is four (4) % of the purchase price.

If a real estate is owned indirectly through the shares of a real estate company, the buyer of the shares of a real estate company has the duty to pay within two (2) months from the date of transaction. The transfer tax for the shares of a real estate company is one point six (1.6) % of the debt free purchase price.

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

There are no limits in general on how long one has to have owned the property before selling it. The income tax for sales profit is 28 % (year 2010) regardless of the time of possession.

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

There are no restrictions on repatriation of funds from Finland to other countries.

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

The buyer of a real estate or of shares of a real estate company is not allowed to terminate any lease contracts merely due to change of ownership. The buyer (new owner) shall be bound by the lease contract in accordance with the lease contract terms, and thus the rights and obligations of the lease contract transfer to the buyer.

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

Changing the use of a building from residential use to office use means that the purpose of the space is actually changed. This means that an application for a building licence needs to be made to the local authorities (Rakennusvirasto) before the start of the construction. When there is a need for a major construction work, it might be necessary to apply for a deviation permit or even a new detail plan if the planned use contradicts significantly the existing land use (i.e. town plan), before commencement of the construction work.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence)?
  - estate agent?
  - others
- 
- **Notarial costs:** EUR 77,00
  - **Land register:** EUR 65,00
  - **Registration of title to a property:** EUR 65,00
  - **Real property transfer tax:** In case of a sale purchase of a real estate, the transfer tax is 4 % of the purchase price, i.e. EUR 200.000 in a EUR 5 million

transaction. In case of a sale purchase of shares of a real estate company shares, the transfer tax is 1,6 %, i.e. EUR 80.000 in a EUR 5 million transaction.

- **Advising lawyer:** As agreed, but normally the fee is based on hourly rates. Specialized law firms have rates around EUR 200 - 300 per hour. The final legal cost depends on the nature of the case and the complexity of the transaction, but typically it is in range of EUR 7.000 – 15.000 in a EUR 5 million transaction.
- **Estate Agent:** Normally their fee is based on provision, which we understand to be in the range of 1-3 % of the purchase price.

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

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

The annual real estate tax is charged from the owner and the tax per cent depends on the location of the real estate. Municipalities are allowed to choose their tax percentage with certain limits. The common tax percentage is usually between 0.65 to 1.35 % (2010). There are six different categories of real estate tax that is charged. The final tax amount greatly depends on what kind of building and especially for what purpose there are on the real estate.

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

The property maintenance management cost depends on the type of property. For an office or commercial property the maintenance management cost is usually in range of EUR 3,0 - 3,5 per square meter and for a warehouse property a usually lower. Parties usually agree the terms on case by case basis, but basically, the charge may be based on the actual accrued management costs or be fixed.

#### IV. Foreign investors

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

- **Directly in real estate**
  - **Through real property funds, open or closed ones**
  - **Through other clear and secure financial products**
  - **At the moment not because of the impacts of the worldwide financial crisis**
- 
- **Directly in real estate:** It is advisable to invest in real estate companies, where the allowed depreciations have already been made.
  - **Through real property funds:** Investment through real property funds plays only a minor part in Finnish markets, and all the existing ones are closed ones. The main reason for the lack of real property funds is that the expenses are quite high and there are many tax issues that apply to international investors. All together, the expenses are too high to achieve a proper profit margin.
  - **Through other clear and secure financial products:** This is a common investment form in the Finnish market. Mostly it is done through real estate companies.
  - Today, the Finnish market is showing new potential to new investments, and some international investors are showing their interest by returning.

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

Basically, there are no restrictions to foreign individuals or foreign entities to buy a property in Finland. The only exception is the Aland Island, where also Finnish people who are not residents of the Aland Island are subject to restrictions on buying property. This remains open only to residents.

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

When the purpose of buying a real estate or real estate company shares is to run a business, it is not subject to restrictions, except for some limitations in forest and agricultural transactions.

Under Finnish law, communes have a pre-emption right to buy the property within a three-month-period from the purchase. Areas with significance to commune development might fall under the pre-emption. Only land areas, which are larger than 5,000 square meters, (in metropolitan area this is 3,000 square meters), may fall within the pre-emption right. It is our experience that the communes use their right of pre-emption only very rarely.

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

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

Yes, our firm is capable in advising foreign clients in all real estate related assignments. Please contact Mr. Jari Tuomala (Partner, Real Estate) at:

Hammarström Puhakka Partners, Attorneys, Ltd.

Bulevardi 1 A, 00101 Helsinki

FINLAND

+358 9 474 21

jari.tuomala@hpplaw.fi

## **France**

### **Vovan & Associates**

7 rue de Madrid  
75008 Paris  
France

Tel: (33) (1) 44901710  
Fax: (33) (1) 44700164  
vovan@vovan-associes.com  
www.vovan-associes.com

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

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

The formal real estate transaction procedure requires the following documents:

- Purchase Offer (“Proposition d’achat”);
- Preliminary Contract (“Promesse de vente” or “Compromis de vente”);
- Sale and Purchase Agreement (“Acte de vente”).

Said procedure lasts between 45 days and 3 months depending on the period required for obtaining a financing and the collection of all necessary information to address the property issues.

#### **Purchase Offer (“Proposition d’achat”)**

The negotiation process is often initiated by the purchaser, who executes a written Purchase Offer entitled “Proposition d’achat”, whereby the purchaser offers to purchase the property at a given price.

Should the seller agree with the terms and conditions of said Purchase Offer, the purchaser will be legally bound to enter into a preliminary contract of sale within a given period of time.

Upon execution of said Purchase Offer, the purchaser is generally required to pay a deposit amounting to 5-10% of the proposed purchase price, which usually passes through the notary (“notaire”) to guarantee a bone fide payment receipt.

#### **Preliminary Contract (“Promesse de vente” or “Compromis de vente”)**

This document sets out the terms and conditions of the sale and is fully binding. It may consist in a “Promesse de vente” or in a “Compromis de vente”.

A Promesse de vente allows the purchaser to exercise an option to purchase the property within a specific time period. A deposit of 5-10% of the purchase price is usually made in consideration of this option. Said deposit is forfeited, should the purchaser fail to exercise the option for any reason other than the non-fulfilment of certain conditions precedent. Should the purchaser exercise the option, the 10% deposit will be considered as an advance payment of the purchase price.

A *Compromis de vente* irrevocably binds the seller and the purchaser and is subject only to fulfilment of the conditions precedent. Should any one of the conditions precedent not be fulfilled, both parties may release the contract. Nevertheless, unlike a *Promesse de vente*, once all the conditions precedent are met, the purchaser may not withdraw from the acquisition merely by forfeiting his deposit. The seller might enforce the sale by initiating legal proceedings.

Individuals purchasing property benefit from a seven-day withdrawal period for both forms of preliminary contract.

Should the contract be a private deed (“*acte sous seing privé*”), the purchaser shall receive formal notice thereof and may then withdraw from the deal and have the deposit refunded within a seven-day withdrawal period.

Should the contract be executed before and registered with a notaire (“*acte authentique*”), the latter will provide the purchaser with a draft agreement seven days beforehand, so the withdrawal period will have elapsed when the parties convene at the notaire’s office to sign the agreement.

When the seller and the purchaser each have their own notaire, the seller’s notaire is in charge of collecting and forwarding all relevant documents to the purchaser’s notaire. The notaire should then systematically address the property issues involved and eventually call a meeting to sign the final sales deed, when the purchaser is satisfied with the information provided to him.

Meanwhile, the purchaser liaises with his bank to raise any required financing. The Preliminary Contract usually states the terms of the loan application process and sets out a time period for the purchaser to evidence to the seller that he has applied for a loan (usually within 15 days from signing the Preliminary Contract) and subsequently, that the loan has been obtained (generally within a maximum period of 45 days).

### **Sale and Purchase Agreement (“*Acte de Vente*”)**

Once all the conditions precedent of the Preliminary Contract have been met, the sale is finalized by the parties entering into a Sale and Purchase Agreement, entitled *Acte de vente*. Said agreement reiterates the terms of the Preliminary Contract and incorporates the result of the searches (regarding title, etc.) required by the Preliminary Contract and any possible amendment thereto.

The purchase funds and other amounts exchanged at this point are as follows:

- the lender will transfer any funds directly to the notaire;
- the purchaser will pay the purchase price balance through the notaire to the seller.

At the closing, the purchaser gets the keys together with a certificate from the notaire, declaring that the former is the owner of the property.

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

Yes. The system of ownership devised for managing flats, offices and retail properties within one building is called „copropriété”. It is particularly relevant for apartments within a property and rare for individual houses.

The copropriété enables the purchaser of a property to acquire the full freehold ownership of certain parts, hence dividing occupation of the property.

Buildings are divided into private and common parts. The full freehold ownership of the private parts is passed to the respective owners whilst the common parts (e.g. entrance lobby, garden, roof) are collectively owned in copropriété in proportion of the size, situation and nature of private part held by each co-owner.

The definition and management of parts is set out in the rules of co-ownership (“règlement de copropriété”), which determines the proportionate shares of each co-owner in the control and service charges of the common parts.

A co-ownership property representative is appointed to take care of the day-to-day management of the property. Certain co-owners are appointed as members of the co-owners association by the annual co-owners meeting.

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

Yes. French property can be owned in various ways under French Law, which can be either a classic joint ownership, or a retroactive survivorship right („clause de tontine”) or through a French property holding company (“Société Civile Immobilière”).

Under a classic joint ownership, the purchase is assumed to be made equally and separately by the purchasers. For example, two owners will purchase 50% of the property divided between them and can be free to choose how to deal with the property in their respective wills.

A clause de tontine is an express clause, frequently used in the case of gifts by deed or will to persons as tenants in common, providing that, upon the death of one or more of the beneficiaries, his or their shares pass to the survivor(s).

A Société Civile Immobilière is a special form of French company that is set up for the ownership and management of property. This company has a legal personality distinct from that of its shareholders.

Many French and international buyers choose to buy a French property through a Société Civile Immobilière, because of the advantages it offers over the other forms of ownership, which are:

- to allow for the purchase of the property by various persons;
- to provide stability and continuity in the ownership and management of family property;
- to facilitate the transfer and ownership of property;
- to avoid the confines of French inheritance law;
- to obtain tax advantages;
- to protect the family home from business creditors.

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

Article 552 of French Civil Code states that, as a general rule, ownership of the ground involves ownership of what is above and below it.

According to Article 553 of French Civil Code, all constructions, plantings and works on or inside a piece of land are deemed to be made by the owner, at his expenses and belonging to him, unless the contrary is proved.

As a result, where plantings, constructions or works are made by a third party and with materials belonging to the latter, the owner of the tenement has the right either to keep the ownership thereof, or to compel the third party to remove them.

However, there are exceptions to this principle, which enable the lessee to have a property right (“droit réel”) on the leased real estate by the owner for a fixed period of time, such as:

- a long-term lease agreement (between 18 and 99 years) („bail emphythéotique“);
- a building lease agreement („bail à construction“).

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

The cadastral record and the title deed of a land are registered in an official land register called “registre des publications”, which is kept by the land registry office (“Bureau de la Conservation des Hypothèques”).

The legal effect of the publication of a valid title deed, which is almost the case especially after checkout of the notaire (the land registry office is not allowed to check the validity of the title deed he receives) in the official land register is the opposability of said title deed to third parties. Owners are somehow protected by the publication of their valid title deed.

However, should the validity of a title deed of a good faith purchaser registered in the official land register be argued by a person, said good faith purchaser may not use its publication as sufficient evidence of ownership.

Satisfactory evidences of ownership are:

- the adverse possession (“l’usucapion”),
- possession of the land,
- titles of transfer of ownership, and
- judicial presumptions.

Besides, the land registry office may be held liable for any damage caused by error in the official land register.

## **II. Costs for transaction**

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

The transfer of real estate in France is subject to taxation. With exception to property under 5 years old, the purchaser should allow 6.5% to 7.5% of the property purchase price as payment in taxes and costs.

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

Article 150 U, I of the French Tax Code states that, as a general rule, capital gains made by individuals of legal entities resulting from sale of property, built or not, are taxable.

However, said individuals and legal entities are exempted from paying taxes on the capital gain resulting from sale of property, where said capital gain results from:

- the sale of their main residence (Article 150 U, II, 1° of Tax Code);
- the sale of a property held for more than 15 years (Article 150 VC, I of Tax Code);
- the sale of a property of an amount less or equal to €15,000.00.

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

Yes, free movement of capital is the general rule. There are some exceptions to said rule both within the EU and with third countries, which are primarily related to taxation, prudential supervision, public policy considerations, money laundering, and financial sanctions agreed under the common foreign and security policy.

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

Restrictions have to be taken into account.

Article 10 of the Law of July 6th, 1989 on residential lease reads that, should the lessor fail to give notice of termination in compliance with the formal requirements and the advance notice stated in Article 15 of said Law, the lease agreement will be tacitly renewed for a three-year period.

Article 15 of said Law states that the lessor may give a registered notice of termination with acknowledgement of receipt within a 6-month period prior to the term of the lease agreement, provided that said termination is based on the decision to sell the leased property or on a sufficient ground.

Should the buyer acquire a real estate, that is leased to a person, he may only terminate the lease contract in compliance with the above mentioned requirements of Article 15 of said Law.

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

Yes, French case law allows the parties to change the purpose of the leased real estate from residential use to official space, provided that said change:

- results from a specific agreement between the parties or from a tacit consent of the lessor,
- does not infringe the declaration of co-ownership,
- does not relate to real estate built for residential purposes, which falls under the scope of Article L632-1 of the Construction and Dwelling Code and which requires a specific official approval for any change of purpose.

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

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

For a building in Paris under 5 years old,

- **notarial costs?** If the notaire is also negotiator, such costs should amount to €173,472.00 (excluding VAT). Otherwise, they should amount to €42,329.00 (excluding VAT).
- **land register?** €400.00
- **real property transfer tax?** €28,891.00
- **advising lawyer (due diligence )?** Lawyer fees are determined by the parties.
- **estate agent?** Estate agent fees are determined by the parties. In practice, they average out between 5% and 9% of the sale price. Therefore, in this particular case, they should range from €250,000.00 to €450,000.00.

### III. Costs for holding real estate

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

Holding a property gives rise to local taxes, in particular the property ownership tax („taxe foncière”) and the French residence tax (“taxe d’habitation”), and to the wealth tax.

Local authorities also charge rates on business premises, called the „contribution économique territoriale“.

##### – **the property ownership tax**

This tax is an annual property ownership tax applicable irrespective of whether the property is actually occupied or rented out.

The tax is levied on a collective basis by the local, departmental and regional councils and is used for funding local services.

Broadly speaking, the basis of the assessment is the notional rent that the property might be expected to achieve in the open market, having regard to the size, condition and location of the property.

The amount payable each year varies so much between local tax authorities that it would be meaningless to state an average.

##### – **the French residence tax**

The French residence tax is an annual residence tax imposed on the occupier of a property on January 1st of each year.

If the property is a second home, even though it is not physically occupied, the tax is still payable, provided that said property is capable of occupation. Indeed, the main criteria for this rule is the owner’s right of occupation of the property.

Similarly to the property ownership tax, the French residence tax is based on the notional rent that the property might be expected to achieve in the open market, having regard to the condition, size and location of the property.

##### – **the wealth tax**

The wealth tax is a specificity of the French tax system. It is a yearly tax applicable to individuals only, with personal assets reaching at least € 790,000. Pursuant to article 885 A 2 of the French Tax Code, foreigners are subject to a particular regime, since they are subject to the wealth tax for their sole assets located in France (except for their financial investments which are tax-free).

Wealth tax is yearly payable on the basis of a tax scale, that takes into account the disposable value of the taxable personal assets.

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

In practice, the professional caretaker's commission averages out between 2% and 5% (VAT excluded) of the rent.

**IV. Foreign investors**

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

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

Even though the 2009 worldwide financial crisis has affected the real estate market, French market turns out to be profitable for foreign investors. Indeed, France has benefited from not having an overpriced market and a system that is more cautious in terms of lending. These days, several measures have been taken to regain investors' confidence, such as the „loi Scellier”, which grants tax exemptions to investors in the new construction market. There are also more competitive mortgage products offered by French banks to attract foreign investors. Moreover, the attractiveness of the French market is enforced by the value of Euro falling down recently.

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

There are no restrictions on foreign ownership of land in France.

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

Foreign individuals are required to get a resident card to start a business in France.

As a general rule, foreign investments are not required under French law to obtain an official approval to run a business, except for restricted, sensitive and regulated business activities in connection with law and order, which require an authorization delivered by the Treasury Department.

Without prejudice to the exemptions listed under Article R152-5, Paragraph 2 of the French Monetary and Financial Code, starting business run by a foreign investor shall only be declared to the Treasury Department.

For statistic reasons, real estate purchased by foreign investors for a minimum value of €1,500,000 shall also be declared to the Public Treasury.

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

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

Yes, our firm includes lawyers with specialised experience in real estate and construction law, who may of course assist foreign investors in these matters.

The Rules of Professional Conduct of the Paris Bar, as recently amended, allow lawyers to act as real estate agents and foreign investors may call upon our services considering the following advantages:

- lawyers may be aware of sales which do not appear on the market, such as real estate related to inheritances, divorces, breach of joint tenancy;
- deposits in connection with real estate transactions are paid on lawyers' professional accounts (also known as "CARPA" account, i.e. the French funding body for monetary payments of lawyers) which guarantees the representation of the clients' funds with greater coverage than usually provided by real estate agents' insurance;
- not only our professional code of conduct – which provides for independence, loyalty, impartiality – but also our professional liability insurance apply to lawyers handling real estate transactions;

- lawyers are experts in negotiation and drafting of contracts, including real estate related transactions.

In conclusion, the professional ethics rules and expertise of French lawyers should lead foreign investors to seek their advice and assistance at each and all stages of their real estate transactions in France.

## Germany

### **Jakoby Rechtsanwälte**

Schlüterstraße 37  
10629 Berlin  
Germany

Tel.: 49 (0)30 / 880 32 00  
Fax.: 49 (0)30/ 880 32 010  
[jakoby@jakobyrechtsanwaelte.de](mailto:jakoby@jakobyrechtsanwaelte.de)  
[www.jakobyrechtsanwaelte.de](http://www.jakobyrechtsanwaelte.de)

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

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

In Germany, real estate transactions are governed by state law. In order to understand the German law in this field, it is important to see that all properties in Germany are formally registered in land registers:

#### **Land register**

Land registers are in most areas administrated by the local courts. The land register contains information regarding all private law aspects of the property, i.e.

- size of the property,
- if it is open area or landed property,
- where exactly it is located according to special field cards that authorities in Germany provide for,
- who the owner is and
- what encumbrances are on the property, e.g. rights of way, rights of pipes and very important land charges as securities for loans.

In order to transfer ownership of a property from the seller to the buyer the transfer has to be formally entranced into the land register. This entry of transfer of title is constitutive for getting the ownership. Communication with the land register is held by notaries who in Germany are specialized lawyers in this field of law. In some areas of Germany they act only as notary, in other areas like for example in Berlin some lawyers get the privilege to act as lawyer and as notary. The notaries draft the contracts for property transactions.

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

The parties of a property transaction may meet through internet or newspaper advertisements published by the owner himself or often through real estate agents. The parties usually first negotiate the main economical aspects like the price of the property or the warranties that shall be given by the seller to the buyer. The latter may vary highly depending e.g. on the age or stage of the property and its site.

### **Notarisation and transaction of the deal**

Then the parties give this information to a chosen notary. In most areas of Germany the buyer has the unwritten right to choose the notary, because in most areas of Germany it is legal custom that the buyer has to fully pay for the notary's work. The notary has to take care of the interests of both parties. He drafts a purchase contract and this contract rules everything with respect to the deal:

- The payment of the purchase price normally has to be arranged for, after
  - i) a so called priority notice (“Eigentumsvormerkung”) is entered in the land register which gives the buyer security that he will become the owner if he complies with the notarial contract, and
  - ii) all other formal aspects of the deal that have to be taken care of and checked by the notary are fulfilled.
- After payment of the full purchase price the buyer gets the possession of the property and all benefits and costs of it.
- After payment of the real property transfer tax, the notary organizes the formal transfer of title to the buyer.
- In many cases buyer needs to finance a big part of the purchase price and usually banks lend the money to these customers and in return ask for land charges to be placed on the property their clients intend to buy. Therefore the notaries include in the purchase contract corresponding clauses that allow the buyer to place one or more land charges for financing the purchase price on the related property. On the other side the notary has to provide security to the seller that the land charge is only valid against him after receiving the full purchase price according to the notarial purchase contract. In more complicated cases where the seller still has more than one loan (secured by land charges for the benefit of several banks) to amortize when signing the deal, the notaries often open trust accounts to which the buyer pays the money. The notary then checks with seller's banks how much has to be paid to them in order to get the land charges deleted. The notary then organizes the payments to the banks and the seller.

### **Time period for transaction**

The normal time period of a property deal from the notarial signing of the contract to the formal transfer of title usually takes about 5 months. About six weeks after the notarial signing the buyer in general has to provide for payment. The tax authorities need about 3 to 4 months to get the real property tax bill placed. After payment of the latter, the notary gets a formal information by

the tax authorities, the so called tax clearance certificate (“Unbedenklichkeitsbescheinigung”) that is necessary for applying for the formal transfer of title.

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

Yes, in Germany we know the “normal” property of land which includes usually by law the ownership of any buildings erected on the concerned land (see further two questions below). You can check in the land register, who the owner is and if there is a building on the property. Furthermore, the German law knows condominiums. Every single condominium gets a special deed in the land register and you can see on the name of the land register if the object is “only” a condominium or if the whole land is owned by a specific person.

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

Yes, the German system knows joint ownership. There can be couples or friends or almost all kinds of companies holding property alone or jointly by percentages they can freely choose.

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

In Germany usually the owner of the land owns all buildings erected on it. This may differ in cases where the land is for example divided into condominiums or if there is a so called hereditary building right (“Erbbaurecht”). This can be checked easily by having a look into the land register. The hereditary building right (“Erbbaurecht”) is the right to have a (whole) building in ownership on the land that is in ownership of another natural person or company. We see this hereditary building right in Germany often in areas where the big churches, i.e the Roman catholic and the evengelic church, own land. The churches often do not sell the land to people but give hereditary rights to have a building on the property for example for 50 or 100 or even more years. The hereditary building right is entranced formally in the land register and the land

register opens a further land register for the hereditary building right since this is handled like a property, which means that it can be used as security for land charges on this right and so on.

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

Yes, as mentioned above almost all (some property in ownership of the state has not to be registered) properties in Germany are registered in the land register and good faith into the correctness of the civil rights entanced in the land register (not to the size and use of the buildings erected on it) is protected. If the land register was false and a land charge was deleted by mistake and the buyer buys it on first sight “free” of charges, he is protected in his good faith (sec. 892 German Civil Code). The bank in the given example would have a claim against the Federal Land in Germany where the court of the land register is located for the damages suffered because of the false land register.

**II. Costs for transaction**

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

Real property transfer tax has to be paid on real property transactions and in most areas of Germany the percentage of this tax is 3.5 percent of the purchase price, in Berlin and some other areas it amounts to 4.5 percent. According to tax rules in general, when real property transfer tax is applicable no further turnover tax (19%) is due in parallel. This rule does not apply when both, seller and buyer, are companies or business persons and the seller waives the right of buying the property without turnover tax. This waiver can be good for the seller for example if he had paid pretax for erecting a building on this land in recent years. Then he can count up the part of the turnover tax against his pretax. The buyer can count up the turnover tax against his pretaxes as well so that he has often no negative result out of this tax aspect. Though this requests that the buyer has pretaxes in Germany which foreign investors usually only have if the building is or will be rented to entities or business persons who have to pay turnover tax on the rents. These tax aspects need to be checked before the purchase contract will be notarized.

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

In Germany, one normally has to hold the property for 10 years calculated from the notarial purchase contract to avoid speculation tax that can occur, if the selling price (incl. costs) of the property is higher than the purchase price has been. If speculation tax is applicable, the amount depends on the income tax rate of the seller of the property. Foreign investors should check possible further tax aspects of their home country in this respect.

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

In Germany no problem.

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

We have the rule that the purchase of a property does not break the lease contract (sec 566 German Civil Code), means the purchaser by law enters into the lease contract and normally the commercial lease contract cannot be terminated prior to the contractual term neither by the new owner nor by the lessee. For example, if the commercial lease has a term of ten years and the purchase takes place after one year the purchaser cannot terminate the lease for an earlier date than 10 years after start of the lease term. This is different when you acquire property in a sale by court order or from the insolvency administrator in insolvency cases. In these cases the purchaser has a special right to terminate the lease contract (“Sonderkündigungsrecht” sec. 57a Compulsory Auction of Immovable Property Act (“Zwangsvorsteigerungsgesetz”) and sec 111 Insolvency Act (“Insolvenzordnung”).

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

You have to check precisely for every purchase case separately. Two aspects have to be taken into account:

1. if the building permit allows the intended use of the purchaser and
2. if in the area in question the local authorities have set a development freeze (“Veränderungssperre”). Local authorities do this sometimes in areas with too little residential property.

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

- **notarial costs?**
  - **land register?**
  - **real property transfer tax?**
  - **advising lawyer (due diligence)?**
  - **estate agent?**
  - **others**
- 
- **Notarial costs:** About EUR 25,000 plus 19% turnover tax for German entities, normally no turnover tax for foreign entities; if financed for example with a land charge amounting to EUR 4 million further costs of about EUR 6,100 occur plus tax depending as outlined before
  - **Land register:** About EUR 12,500; if financed for example with a land charge amounting to EUR 4 million further costs of about EUR 6,100
  - **Real estate transfer tax:** EUR 175,000 (3.5 %) or in some areas EUR 225,000 (4.5%)
  - **advising lawyer (due diligence):** depending on the agreement with the lawyers; normally they act with international clients on hourly rates, mostly specialized law firms have ranges of rates between EUR 250 up to EUR 400; legal assistance from day one of the deal until transfer of title would take about 50 hours plus time of a due diligence, if a due diligence is requested by the client.
  - **estate agent:** between 4 and 6 % net of the purchase price depending on the market situation and the specific plot of land; VAT (19%) for German entities, normally no turnover tax for foreign entities

### III. Costs for holding real estate

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

In Germany you have to pay land tax (“Grundsteuer”) as owner of property, the rates are different depending from the area where the object is located. Three factors are relevant for the costs:

- i) First you have to check the rateable value of the object (“Einheitswert”),
- ii) then multiply this amount with the base value for tax purposes (“Steuermessbetrag”) and
- iii) multiply this amount with the multiplier ruled by the local authorities (“Hebesatz”).

For example in Berlin the base value for tax purposes is 0.0035 and the multiplier is 810%. The rateable value for tax purposes is not the real value, but much less, because it is a calculated value the object had in the year 1964 for objects in western parts of Germany and the year 1935 for objects in the former GDR. If the rateable value would be EUR 900,000 the outcome would be EUR 25,515 per year. You have to calculate depending on the kind of property and the area about 0.3 to 0.4% of the real value of the object per year.

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

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

### IV. Foreign investors

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

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

I would advice to invest in commercial (and non commercial) real estate in Germany, since the prices in Germany are relatively low, if you are not willing to invest in the best areas of Munich, Hamburg, Frankfurt or Düsseldorf. Furthermore the interest rates for financing are very low at the moment as well. But even if you would like to invest in these more expensive areas, compared to other countries like Italy, Netherlands, Belgium or Great Britain you will still have fair prices at the moment in Germany. Therefore it seems that two positive aspects come together. I would invest directly in real estate or in open or closed property funds, but funds only, if one knows the management and if they are very transparent with respect to the costs involved.

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

There are no restrictions in Germany. You can buy property as private or business person or as an entity with no seat or branch office in Germany.

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

It differs, depending if the investor is from

- i) a EU member state or
- ii) a country Germany has conventions in this respect with like US or Canada or
- iii) if the investor is from a country where no convention is applicable.

In cases (i) and (ii) the official approvals are practically no big deal, in case (iii) one has to check precisely what is needed.

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

## Germany

Yes, we would be pleased to assist foreign investors in all these aspects involved. The other German member firms of Legalink would be pleased to assist as well.

## **Hong Kong**

### **Charltons**

10th Floor, Hutchison House,  
10 Harcourt Road, Central,  
Hong Kong

Tel: (852) 2905-7888  
Fax: (852) 2854-9596  
[juliacharlton@charltonslaw.com](mailto:juliacharlton@charltonslaw.com)  
[www.charltonslaw.com](http://www.charltonslaw.com)

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

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

In Hong Kong, real estate transactions are governed by the Conveyancing and Property Ordinance (Cap. 219, referred to as “CPO”) supplemented by common law. Property transactions in Hong Kong may be divided and classified into three main stages, namely (A) the Provisional Agreement Stage, (B) the Formal Sale and Purchase Agreement Stage and (C) the Assignment and Completion Stage.

#### **(A) Provisional Agreement Stage**

The sale and purchase of properties in Hong Kong are generally commenced through meetings with and engagement of real estate agencies, who will conduct preliminary searches through the Land Registry for the property particulars and prepare a binding Provisional Agreement which contains simple and standard terms for the vendor and the purchaser to sign when they have agreed to the sale and purchase of a particular property.

In practice, it is common that (1) an initial deposit of about 5% of the purchase price is paid by the purchaser to the vendor on the signing of the Provisional Agreement and (2) liquidated damages in an amount equivalent to the initial deposit is payable by the party in default to the innocent party in the event of any breach or default of the Provisional Agreement or (3) in some cases, without such liquidated damages clause which allows the innocent party to compel the defaulting party to complete the sale in addition to any claim for damages.

A commission of 1% of the purchase price will normally be charged by the real estate agencies and paid by each party. The defaulting party will normally have to bear the costs of the estate agent’s commission on behalf of the innocent party.

#### **(B) Formal Sale and Purchase Agreement Stage**

Both the vendor and the purchaser will engage their respective lawyers to proceed with the property transaction after the signing of the Provisional Agreement. The vendor’s solicitors will prepare the Formal Sale and Purchase

Agreement with detailed terms and conditions reflecting the terms in the Provisional Agreement for the purchaser's solicitors' review and comments..

The vendor and the purchaser will usually but not necessarily enter into the Formal Sale and Purchase Agreement within 14 days after signing of the Provisional Agreement. A further deposit will be paid by the purchaser, making up a cumulative total of 10% of the purchase price (taking into account the initial deposit).. In some cases where the parties agree, the vendor's solicitor may act as stakeholder whereby he holds the 10% deposit for the vendor until the conditions of the stakeholdings are fulfilled, usually, upon proof that the balance of the purchase price is sufficient to discharge the mortgage (if any) and/or the purchaser is satisfied with the title of the property.

In relation to the purchase of a residential property, the purchaser's solicitors will arrange stamping of the Formal Sale and Purchase Agreement with the Stamping Office at the Inland Revenue Department and registration of the same with the Land Registry within 30 days after signing for the protection of the purchaser.

In relation to the purchase of a non-residential property, stamp duty is not payable on the Formal Sale and Purchase Agreement. However, the purchaser's solicitor will arrange registration of the Formal Sale and Purchase Agreement directly with the Land Registry within 30 days after signing for the protection of the purchaser.

### **(C) Assignment and Completion Stage**

After the Formal Sale and Purchase Agreement Stage, the vendor's solicitors will provide the title deeds and documents to the purchaser's solicitors, who will then carry out due diligence on the title. It is common practice in Hong Kong that any questions and requisitions concerning the vendor's title should be raised within 7 working days after date of receipt of the title deeds, save and except that requisitions going to the root of the title can be raised at any time before completion.

The vendor's solicitors must answer the title requisitions honestly and allow sufficient time for the purchaser to consider the answers. Once the purchaser's solicitors consider that the requisitions have been properly answered and the vendor is able to give good title to the subject property, they will prepare the Assignment and conduct pre-completion land searches to ascertain the status of the subject property.

On Completion, the purchaser will obtain vacant possession of the subject property (if the property is being sold with vacant possession) and the vendor

and the purchaser will sign and execute the Assignment to effect the transfer of title from the vendor to the purchaser.

Within 30 days after signing of the Assignment, the purchaser's solicitors will arrange stamping of the Assignment with the Stamping Office at the Inland Revenue Department and registration of the Assignment with the Land Registry for the protection of the purchaser.

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

After the return of the sovereignty on 1 July 1997, all land in Hong Kong is owned by the Hong Kong Government, which is part of the People's Republic of China. All land in Hong Kong is leasehold land other than the land on which an Anglican church, St. John's Cathedral is situated.

Land in Hong Kong is designated with lot numbers and the Hong Kong Government previously granted land for private leaseholding by way of a government lease. A government lease is a lease from the government that grants the leasehold land to the purchaser.

Since government leases are no longer issued, land is granted by way of Conditions of sale. A Condition of sale is a contract whereby once the conditions have been complied with, a government lease is deemed to be issued pursuant to section 14 of the CPO. ("Government Lease")

Subject to the terms of the Government Lease (issued by virtue of the operation of section 14 of the CPO), every leaseholder of land is at liberty to deal with his or her leasehold interest in the lot granted by the Government, including (1) the selling or disposal of his or her interest in the lot, (2) dividing and sectioning the lot into smaller segments and selling off parts of them or (3) sub-dividing the lot by constructing and building structures over the lot and assigning all or part of the sub-divided units or flats (in case of multi-storey building) to different purchasers. The owner has the exclusive right of occupation and possession of the erections or structures on the lot.

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

Yes, the legal system in Hong Kong allows co-ownership of real property in the form of (1) joint tenants or (2) tenants-in-common.

Pursuant to the CPO, where a tenancy in the same estate or interest in land vests in 2 or more persons under an instrument or a will, it shall be presumed that (unless the contrary intention is expressed in that instrument or will), the tenancy vests in those persons as tenants-in-common rather than as joint tenants.

### **Joint Tenants**

Real property may be held in the form of joint tenants whereby each joint tenant has an identical interest in terms of the extent, nature and duration with respect to the whole and every part of the real property. There is a right of survivorship in which the interest of the deceased joint tenant will automatically pass to and vest in the survivor(s).

### **Tenants-in-common**

Tenants-in-common jointly own the undivided shares of a property as a whole. However, each the tenants-in-common may own the property in a ratio determined by them i.e. either in equal shares or of different proportions.

Co-ownership by way of tenants-in-common differ materially from joint tenants because there is no automatic right of survivorship. However, a tenant-in-common's interest in the property will be part of his or her estate and can pass either under a will or upon his or her intestacy.

### **Owner of Real Property**

In Hong Kong, a company is capable of acquiring and holding real property in co-ownership in the same manner as if it were a natural person pursuant to the CPO.

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

Given the fact that virtually all land in Hong Kong is leasehold, land is not owned by the “owners” but leased to the owners only. The ownership of a building is not implied in the “ownership” of the land. However, the Deed of Mutual Covenant (a deed between the co-owners of the building governing the use of the building and land) usually provides that the owner of the undivided

share of the land will have the exclusive right to use and occupy the unit relating to that undivided share. Also, the ownership of a building will not necessarily imply the ownership of the land as it is possible to have different owners of the land and the building erected on it.

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

Hong Kong has a voluntary land registration system that is governed by the Land Registration Ordinance (Cap. 128, referred to as “LRO”). For the purposes of land registration, interests in land may be classified either as registrable (i.e. capable of being reduced into writing) or unregistrable (i.e. incapable of being reduced into writing).

Registrable interests such as deeds, conveyances, instruments in writing and judgments affecting real property in Hong Kong may be registered with the Land Registry and such registration (1) renders any registrable but unregistered interest unenforceable against any subsequent bona fide purchasers or mortgagees for valuable consideration and (2) precludes a registering party from being affected by any actual or constructive notice of a prior registrable but unregistered interest. The land registration system in Hong Kong therefore functions to (1) protect the priority of registrable and registered interest, (2) facilitate title tracing and checking and (3) giving notice of the registrable and registered interest to subsequent purchasers and mortgagees.

In relation to unregistrable interests in land, such as any unwritten equities creating interests in land arising out of constructive trust (e.g. interest of a wife in the real property arising out of promise or the husband and wife relationship) or resulting trust (e.g. interest of Party X in the real property arising out of contributions of purchase money or mortgage repayment by Party X in relation to the real property purchased by Party Y), both the CPO (in respect of the writing requirement) and the LRO (in respect of the registration requirement) have no application. The position regarding the priority of these unregistrable interest will revert back to the Common Law doctrine of notice in which case, priority may be given to those unwritten equity interests over a subsequent registered interest if the subsequent purchasers or mortgagees take notice of such equity interest when they acquire the interest in land.

Moreover, LRO expressly precludes the registration requirement for any short-term tenancy not exceeding 3 years and without any option to renew for another term.

In essence, the land registration system in Hong Kong offers protection and priority to a bona fide purchaser for valuable consideration against any registrable but unregistered interest in land, but he or she should always ascertain whether there is any unregistrable interest or short term tenancy affecting the property which may take priority over his or her interest in the property.

## II. Costs for transaction

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

Real property transactions in Hong Kong are subject to stamp duty pursuant to the Stamp Duty Ordinance (Cap. 117). Stamp duty will be imposed on both the agreement and assignment of real property (for non-residential properties, stamp duty is chargeable only on the assignment for the transfer).

For properties not exceeding HK\$2,000,000, the stamp duty payable is only HK\$100; for property consideration exceeding HK\$2,000,000, the stamp duty payable is on a sliding scale as follows:-

<b>Purchase Consideration of the Subject Property</b>	<b>Stamp Duty Payable</b>
(a) where the amount or value of the consideration does not exceed \$2,000,000	(a) \$100
(b) where the amount or value of the consideration exceeds \$2,000,000 but does not exceed \$2,351,760	(b) \$100 plus 10% of the amount by which the amount or value of the consideration exceeds \$2,000,000
(c) where the amount or value of the consideration exceeds \$2,351,760 but does not exceed \$3,000,000	(c) 1.5% of the amount or value of the consideration
(d) where the amount or value of the consideration exceeds \$3,000,000 but does not exceed \$3,290,320	(d) \$45,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$3,000,000

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- |   |   |
|---|---|
| (e) where the amount or value of the consideration exceeds \$3,290,320 but does not exceed \$4,000,000  | (e) 2.25% of the amount or value of the consideration   |
| (f) where the amount or value of the consideration exceeds \$4,000,000 but does not exceed \$4,428,570 and the instrument is certified in accordance with section 29 at \$4428570 | (f) \$90,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$4,000,000   |
| (g) where the amount or value of the consideration exceeds \$4,428,570 but does not exceed \$6,000,000  | (g) 3% of the amount or value of the consideration  |
| (h) where the amount or value of the consideration exceeds \$6,000,000 but does not exceed \$6,720,000  | (h) \$180,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$6,000,000  |
| (i) where the amount or value of the consideration exceeds \$6,720,000 but does not exceed \$20,000,000   | (i) 3.75% of the amount or value of the consideration   |
| (j) where the amount or value of the consideration exceeds \$20,000,000 but does not exceed \$21,739,120  | (j) \$750,000 plus 10% of the amount by which the amount or value of the consideration exceeds \$20,000,000 |
| (k) in any other case   | (k) 4.25% of the amount or value of the consideration   |

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

The Inland Revenue Department will charge profits tax on any persons, including corporations, partnerships and bodies of persons who derive profits through carrying trade, profession or business in Hong Kong. It is a question of fact as to whether a business is being carried on as a result of any sale and purchase of real property in Hong Kong, in which case some of the relevant factors that will be taken into account are as follows:

- (a) the time or length of ownership of the property;
- (b) the use of the property;
- (c) the financial situation of the purchaser when the property was purchased;

- (d) whether a mortgage was taken out;
- (e) whether the property was leased; and
- (f) all other circumstantial factors to ascertain whether the intention of the purchase of the property was for long-term investment or for business.

In the event that any sale and purchase of real property by any persons including corporations would be deemed or regarded by the Inland Revenue Department as carrying on a real estate business in Hong Kong, the profits tax rate presently applicable is 16.5% for corporations and 15% for unincorporated businesses including partnership and sole proprietors.

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

Subject to the anti-money laundering policies and regulations in Hong Kong, there are no restrictions on repatriation of funds from Hong Kong and a seller is free to remit monies from a property transaction in whole or in part overseas.

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

A lease creates an interest in land and in the event that there is an existing tenancy in respect of the real property, a purchaser will have to purchase the real property subject to the lease interest. It is advisable for a purchaser to ascertain if the vendor is able to deliver the subject property with vacant possession free from any lease and tenancy.

To terminate the existing tenancy, the purchaser will have to seek recourse to the termination provisions of the lease (such as early termination) and subject to the terms of the lease, the purchaser may be able to effect early termination of the tenancy.

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

In Hong Kong, the nature and use of a building is closely related to the type of land granted by the Government. The conditions of sale, grant or exchange in relation to a plot of land usually contains restrictive covenants governing

the usage of the land such as residential, commercial, industrial or hotel use. Variations or modifications of the Conditions of sale, grant or exchange will be subject to the approval of the Lands Department and payment of a substantial premium.

In relation to individual flats or units in a multi-storey building, such usage is governed by the “Deed of Mutual Covenant” and shall be the same as that stipulated in the Conditions of sale, grant or exchange. Any changes to the Deed of Mutual Covenant are subject to the approval of all the owners of a particular building.

Given the fact that any variations or modifications in the usage shall be (a) approved by the Lands Department, (b) subject to the payment of land premium and (c) approved by all owners of the building, a change of usage of a building in Hong Kong is really difficult if not impossible.

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

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

1. **Notarial Cost** – If the signing and execution of all agreements, Assignment and the relevant documents are in Hong Kong, no notarial cost is necessary
2. **Land Registration Cost** – Depending on the nature of the documents and the number of documents to be registered, the land registration fee per document for a normal sale and purchase can range from HK\$210.00 to HK\$2,000.00.
3. **Stamp Duty** – Approximately HK\$2,130,000 (Please refer to “II Costs for Transaction”)
4. **Legal Cost** – Approximately HK\$30,000 to HK\$70,000, but costs are quoted on a case-by-case basis.
5. **Estate Agent** – Approximately HK\$500,000, being 1% of the purchase price.
6. **Mortgage (if necessary)** – Approximately HK\$10,000 to HK\$30,000, but costs are quoted on a case-by-case basis
7. **Disbursements** – Approximately HK\$2,000 (such as photocopying charges)

### III. Costs for holding real estate

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

Government rent and rates are chargeable on real estate property at an amount of 3% and 5% respectively, based on the rateable value which is the estimated annual rental value of the subject property at a designated valuation reference date, assuming that the property was then vacant and for lease.

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

A foreign investor planning to engage a professional manager or agent to manage a purchased property will have to pay for the fees and expenses incurred by the manager or agent in relation to their services of (a) finding suitable tenant(s), (b) arranging the signing and entering into a formal tenancy agreement between the tenant(s) and the foreign investor and (c) collecting rentals from the tenant(s) for and on behalf of the foreign investor.

Such manager or agent may charge half or even a full month's rental as their service fees for finding suitable tenant(s) and arranging the tenancy agreement. The fees for rental collection may be charged by way of a percentage over the monthly rental value according to the following scale:

<b>Rental per month</b>	<b>Fees of the manager or agent (as a percentage of the rent per month)</b>
HK\$ 15,000	5.5% (with a minimum charge of HK\$500)
HK\$15,001 – HK\$25,000	5%
HK\$25,001 – HK\$30,000	4.5%
HK\$35,001 - HK\$45,000	4%
HK\$45,001 - HK\$55,000	3.5%
HK\$55,001 or above	3%

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

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

Hong Kong is one of the most expensive real estate markets by world standards, which can be a result of the scarcity of land, the housing shortage and having a population of 7 million.

However, it is useful to note that Hong Kong has been ranked as the world's freest economy for the 16th consecutive year according to the 2010 Index of Economic Freedom, jointly published by The Heritage Foundation and The Wall Street Journal. The Index covers over 180 countries across 10 specific freedoms including trade freedom, business freedom, investment freedom and property rights. Hong Kong scored a total of 89.7 out of a possible 100 points putting the city in first place.

Investing in real estate in Hong Kong is purely a commercial decision that requires taking into account a number of factors and considerations such as how familiar the foreign investor is to (a) the real estate market in Hong Kong and (b) the fluctuations and risks in interest rates and foreign exchange rates.

Interest rates are relatively low at the moment, which has attracted more buyers into the real estate market. In respect of foreign exchange rates, the Hong Kong dollar maintains a fixed exchange rate with the U.S. dollar in which interest rates and currency fluctuation follows the trend in the United States, creating a relatively stable currency platform.

It may be an opportune time for foreign investors to invest directly in real estate in Hong Kong due to the current low interest rates, which make it relatively affordable to finance a mortgage.

In addition, the Hong Kong Government currently operates a capital investment entry scheme whereby foreigners who make a capital investment of HK\$6.5 million may gain residency in Hong Kong. As there are numerous people in mainland China who would like to gain residency in Hong Kong, this scheme has led to many mainland Chinese investing in the Hong Kong property market and in effect, causing the price of property to rise.

Other clear and secure financial products include investing in stocks of various property developers. The stock prices of property developers depend largely on the price at which the land was auctioned, whether the land was successfully auctioned and whether purchasers are willing to buy the constructed

property (which in turn depends on interest rates and the economy in general). As mentioned above, the interest rate is low and property developers in general have been turning in good profits. Investing in stocks of listed property developers is another avenue of investing in the property market in Hong Kong.

In respect of real property funds, foreign investors may wish to explore the option of investing in real estate investment trusts (REITs), which are listed trusts.

Link REIT was the first REIT listed on the Hong Kong Stock Exchange with assets of around US \$3.3 billion. Link REIT includes 180 properties, consisting of mainly shopping malls and car park facilities.

REITs work by investing in income-producing real estate assets and using the income derived to provide a return to its unit holders. By purchasing a unit in a REIT, it allows investors to share in the risks as well as the benefits of owning the real estate assets held by the REIT.

Investing in REITs is relatively secure as they have a stable income and tend to give generous dividends, which makes them a very attractive investment alternative.

Although there was a global economic slowdown during 2008, Hong Kong has upheld its status as Asia's second largest destination for foreign direct investment after mainland China, attracting over US\$60 billion in 2008 according to the World Investment Report 2010. This in itself can provide foreign investors with the added confidence when investing in Hong Kong reflecting the fact that it is a popular hub for investment amongst foreign investors.

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

There are no such restrictions and any individual person, corporation or foreign entity that has a recognized legal status and capacity may purchase property in Hong Kong.

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

Government Leases usually contain restrictions as to the use that the land may be put. In the event that a leaseholder wishes to use the land for a specific purpose that does not comply with the lease conditions, an application for a lease modification should be made to the Lands Department in order to vary the conditions under the Government Lease. A lease modification is a variation of the conditions of the Government Lease in respect of the property, including the permitting of a change of use.

The Lands Department may also refer the application to other relevant departments for approval, including the Planning Department, Building Department and Fire Services Department. Each application will be considered on a case-by-case basis together with the relevant circumstances.

If the Lands Department approves of the application for the lease modification, then the modification will be reflected by way of a Deed of Variation or letter of modification.

In addition, the leaseholder will be required to pay a premium reflecting the enhanced value of the property. It may also be the case that additional conditions relating to the new use of the property are imposed.

The application for a lease modification normally takes at least 6 months to obtain approval.

In the event that the purchaser intends to build a building on the land, he will have to engage surveyors and architects to draw a building plan. That building plan must comply with the plot to volume ratio specified in the Government Lease. The plot to volume ratio specifies the floor area that can be built upon a specified piece of land. This ratio is a method used by the Hong Kong government to regulate the height of the buildings and the usable space of the buildings. As land becomes more scarce in Hong Kong, developers are more inclined to maximize the usable space by maximizing the use of the plot of land. Therefore, apart from complying with the plot to volume ratio of the land. The Planning Department must also approve the building plan. This is to ensure the building is suitable from a city planning perspective. The building plan must also be approved by the Lands Department, the Building Department and the Fire Services Department. The Fire Services Department will ensure that the fire escape paths in the building plan is useable, safe and effective.

Upon approval of the building plan, a certificate of approval will be issued.

If the building is for residential use, the whole building will be notionally divided into a number of undivided shares representing the units intending to be created from the block of flats. This is usually done by the purchaser's solicitors by creating a Deed of Mutual Covenant, which specifies the number of

shares allocated to various units or areas of the building. This Deed of Mutual Covenant must be submitted to the Lands Department and Planning Department for approval. After approval, an occupation permit will be issued.

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

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

Yes, we would be pleased to assist foreign investors in all these aspects. We may do so in conjunction with our associated firm “Boase, Cohen & Collins”.

Hong Kong

# Hungary

## **Szecskey Attorneys at Law**

H-1055 Budapest  
Kossuth tér 16-17  
Hungary

Tel: +36 (1) 472 3000  
Fax: +36 (1) 472 3001  
info@szecskey.com  
www.szecskey.com

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

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

After signing of the purchase agreement, the agreement is filed with the land registry immediately and it is also automatically forwarded to the tax authority. Filing with the land registry has the effect that any later requests for registration of rights or facts on the same property will be ranked behind the purchase agreement, thus the purchaser who filed first is protected. At the signing of the purchase agreement, up to the parties' decision, a collateral is usually also provided, most often a 10 - 15% earnest [foglaló] by the purchaser. If the purchaser breaches the agreement, it loses the earnest. If the breach is committed by the seller, it shall repay twice the sum of the earnest. After the signing, the parties have time to prepare the transfer of title, thus to vacate the property, free it from encumbrances (e.g. mortgage) and to collect the remaining installments of the purchase price. The transfer of the (last installment of the) purchase price, transfer of possession of the property and transfer of the seller's declaration of consent for the registration of the purchaser's ownership title takes place generally simultaneously. Finally, the purchaser files the seller's declaration of consent with the land registry, and once the land registry issues its registering decision, the purchaser will be registered as owner of the real property as of the date of filing the declaration of consent, along with the application form for the registration of the new owner's title.

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

The Hungarian legal system permits joint ownership of real estates, therefore multiple entities can be owners of the same real property to different proportions.

Besides this, it is possible that land and the building erected on that are owned by different owners. In that latter case, the building forms a separate real estate, the owner of the building may use the land to the extent necessary and has a pre-emption right over the land, while the owner of the land has a pre-emption

right over the building. These rights are attached to the ownership of the land / building, and not the person of the owner.

In Hungary, condominiums may also be founded in buildings where at least two, independent units for residential or non-residential purposes exist, or are technically eligible to be divided. In this case, technically separated parts pass into the private and separated ownership of the condominium owners, while land, structural parts and equipments of the building form joint property of the owners.

Although less popular, there also exist so-called “residential cooperative societies” [lakásszövetkezet], where the structural parts, equipments are not in joint ownership, but owned by the cooperative society (a legal person), in which all or some of the flat owners are members.

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

Two or more persons may be owners of the same real property by specific shares. Joint ownership of real property does not mean that the real property is either physically or legally divided, although, the joint owners may agree on the division of the use of the property. Each of the joint owners is entitled to use the property and to alienate or encumber its share, but the other owners have a pre-emption right (with identical terms) if one of them wishes to sell its share to a third party. If one of the joint owners deceases (dissolves), its share is inherited by its heirs (acquired by its successor) and the shares of the other joint owners remains unchanged.

Generally, all entities that are subjects of the law (natural persons, legal persons, and the two kinds of business associations without legal personality) can be owner of a real property.

Nevertheless, there are certain limitations on the acquisition of real property, in case the real property is qualified as agricultural land or if the purchaser is a foreign entity.

#### **Acquisition of agricultural land:**

- Domestic citizens may not acquire more than 3 sq kms of agricultural land.
- Domestic legal persons may not acquire any agricultural land in Hungary. The State and local governments are fully exempt from this limitation and churches and mortgage banks enjoy a specific partial exemption.

- Foreign citizens and foreign legal persons may not acquire any agricultural land in Hungary. Citizens of EU Member States, EEA Member States, and citizens of other states who enjoy the same rights as EU citizens as a result of an international treaty enjoy an exemption if they meet certain conditions. (Mainly that they have lived and pursued agricultural activity in Hungary for minimum three years before the acquisition.)

**Acquisition of non-agricultural real properties by foreign entities:**

- If the foreign entity is a citizen / legal person from a state that is not a Member of the EU, a Member of the EEA or a state whose citizens/entities receive the same treatment as EU citizens, the acquisition shall be authorized by the competent administrative office. The authority decides on the basis whether the acquisition would violate public interest or a local government's interest. This does not apply to foreign individual entrepreneurs, if the real property is necessary for their business activity.
- Citizens of EU Member States and legal persons registered in such states may acquire ownership of a non-agricultural real property under the same rules as domestic citizens, i.e. without any authorization.

The above limitations do not only apply to purchase, but to gift and swap transactions as well. Notwithstanding the above, it is not prohibited to own a real property, the ownership of which is against the above restrictions, in case the ownership title was lawfully acquired, prior to the effective date of the above prohibitions.

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

Pursuant to Section 97 of the Hungarian Civil Code, ownership of the building belongs to the owner of the land, based on the principle of *aedificium solo cedit*. Nevertheless, when a new building is built on a land, the constructing party and the owner of the land may agree that the constructing party will become the owner of the land. (Please see the response to the second question in Part I above.) Nevertheless, it is not possible to separate a building from a land when the building already exists.

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

In Hungary, a national land registry contains all real properties, including the condominium apartments and buildings detached from land. The land registry contains features of the real properties (e.g. location, topographical lot no., address, size, agricultural/zoning classification), and rights and facts established on the property (e.g. ownership, usufruct, mortgages, encumbrances, pipeline rights, pre-emption and option rights). Registration requests filed with the land registry office are also indicated, in the form of ‘marginal notes’. The land registry is authentic towards all acquirers in good-faith in respect of the rights and facts registered (but not the features of the property or the personal data of the persons registered). If someone has acquired a right on a real property in good faith based on the land registry, it is protected against claims based on the invalidity of the previous registry entry. Nevertheless, a lawsuit for the deletion of the newly acquired and registered right may be initiated if a previous registry entry was invalid. If the deletion claim is filed against the person who acquired the right directly by an invalid transaction, the deadline for filing the claim is the deadline for filing a claim for declaration of invalidity of the transaction. If the deletion claim is filed against someone who acquired in good faith based on the invalid registry entry, it shall be filed within three years from the invalid registration. Only those persons are entitled to file this claim whose registered right is violated by the contested registration entry (e.g. the previous owner).

## **II. Costs for transaction**

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

In case of a purchase of a real property in Hungary, the purchaser shall pay an acquisition duty. The duty is payable within 30 days from the notification of the tax authority, and its rate is:

- 4% after the part of the real property’s full value that does not exceed HUF 1,000 million (approx. EUR 3.6 million),
- 2% after the part of the value that exceeds HUF 1,000 million, but the total amount payable may not exceed HUF 200 million.

This duty also applies the purchaser does not directly purchase the real property, but a share in a company that directly or indirectly holds real property. Different rates apply to the acquisition of a housing property.

In case of residential properties (this might have a relevance, in case such property is bought for later commercial purposes), the duty rate is different:

- it is 2% after the part of the real property's full value that does not exceed HUF 4 million (approx. EUR 14,300),
- it is 4% after the part of the value that exceeds HUF 4 million.

If only partial ownership of the residential property is acquired, then the 2% rate limit shall be applied to such proportion of HUF 4 million as the partial ownership relates to the full.

The seller of a real property shall also pay tax after the transaction.

If the seller is a natural person, it shall pay personal income tax if there is an income for the real property. Income shall be calculated as follows: the value for which the property was acquired in the past, investments (e.g. renovation) and the duty paid in the past shall be deducted from the purchase price. The rate of the income tax is 25 % of the calculated income; nevertheless it decreases with time, as explained in the answer to the next question.

If the seller is a company subject to corporate income tax, the purchase price of the real property belongs to revenue of the company. The corporate income tax rate for is 19%, nevertheless a preferential 10% rate applies to the first HUF 50 million (approx. EUR 179,000) if the company meets some conditions.

If not the real property itself is sold, but a share in a company more than 75% of the assets of which are real properties located in Hungary, the person alienating the share shall also pay tax, if it is a tax subject of a foreign country with which Hungary has no conventions against double taxation. This rule was adopted to stop the practice that valuable real properties were sold through special purpose companies without paying tax. The rate of the tax is 19%, and it has to be paid by the person alienating the share, not the company. The tax base is the income received from the alienation, i.e. the difference between the price received and the costs incurred in acquiring and keeping the share. The rule does not apply to publicly listed companies, but it applies to income received through capital decrease in the company.

Between business parties, the purchase of a real property may also be subject to Value Added Tax (VAT). Whether VAT is payable, depends on many factors, including the type of the property and the legal status of the parties. In certain cases, the taxpayer may decide whether it wishes to pay (and deduct) VAT, or not. In certain cases, it is not the seller, but the purchaser who shall pay the VAT. The rate of VAT is 25% of the purchase price.

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

In case of natural person sellers paying personal income tax, tax is payable if there is a positive difference between the sale price of the real property and the cost of its acquisition (including investments). In both cases, the longer the period is between the purchase and the sale is, the smaller the tax rate is. The tax rate reaches 0% in the 15<sup>th</sup> year, but in case of housing properties, in the 5<sup>th</sup> year.

No such tax rules exist for companies.

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

In Hungary, there are currently no restrictions on moving foreign currency in and out of the country.

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

If the lease is for an undetermined period, the purchaser may terminate the lease, and also require the seller to terminate the lease contract and have the lessee move out. Based on the law, the deadline for leaving the property is 15 days, unless otherwise provided by the lease agreement. In case of flat rent, the deadline shall be the end of the month, but cannot be less than 15 days.

In case of a lease for a fixed period, the purchaser is not entitled to terminate the lease, unless the purchaser was misled by the lessee in respect of the existence or significant terms of the lease agreement.

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

Yes, it is possible to change the use of a building or a part of it. If the change of use does not affect the structure or the face of the building, no approval is necessary, the applicant shall only notify the construction division of the local

municipality. If the structure or the face is affected (thus the change also necessitates construction works) a request for construction permit shall be filed with the same authority.

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

- **notarial costs?**
  - **land register?**
  - **real property transfer tax?**
  - **advising lawyer (due diligence) ?**
  - **estate agent?**
  - **others**
- **notarial costs:** In Hungary, attorneys-at-law are entitled to draft and counter-sign real property sale and purchase agreements. Therefore, there is no need for a notary public. If the parties nevertheless stick to have the sale and purchase agreement in a notarial deed, the fee would be around HUF 560,000 (approx. EUR 2,000), unless the case is more complicated.
- **land register:** The land registry registration fee is HUF 6,600,- (approx. EUR 24,-) for each real property. Registration of a mortgage (if necessary) costs HUF 12,600,- (approx. EUR 45,-). If several rights are registered to the same real estate in the same proceeding, the fees are not accumulated, only the highest fee shall be paid. If there are different registration proceedings, the fees must be paid in each proceeding. The number of sellers or buyers does not affect the amount of the costs. In addition, if the parties are corporate entities, a signature specimen and a certified company registry extract is required for the procedure for each of them. These costs are: HUF 3,000,- (approx. EUR 11,-) for a company registry extract, and HUF 1,000,- (approx. EUR 4,-) for each notarial signature specimen of the corporate representatives.
- **real property transfer tax:** The duty payable by the purchaser is HUF 48 Million (approx. EUR 172,000) if no exemptions and allowances apply, and there is only one property. If there are more real properties, each with an individual price less than HUF 1,000 Million, the full amount of the duty is HUF 56 Million (approx. EUR 200,000).
- If VAT is payable after the transaction, its amount is EUR 1.25 million, calculated with the 25% rate.

- **advising lawyer (due diligence):** The legal fee of a simple real property transaction with a few parties and a few real properties (without due diligence and without additional and more complex legal consultancy) may vary in the range between 1-3% of the value of the transaction. If the transaction is more complicated (*e.g.* there are different encumbrances on the property, the sale is part of a more complex asset deal, corporate changes or public administrative procedures must be conducted, *etc.*) the costs may rise.
- **estate agent:** Estate agent costs are generally between 2-5% of the real property, plus 25% VAT.
- **others:** No other costs have to be incurred by the parties in a simple case.

### III. Costs for holding real estate

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

The person which is the owner of the real property as at 1<sup>st</sup> January of the year in question, shall pay a yearly building tax or a yearly land tax. The tax is payable to the local municipality and its rate is also determined by each local municipality on its own. The law only determines the highest rate of the tax, but the local municipalities are likely to apply the highest rate.

In case of buildings, the maximum rate of the building tax is HUF 900/sqm (approx. EUR 3.2/sqm) or 1.5% of the fair market value of the property. The local municipality is entitled to decide which calculation method shall be applicable.

In case of real properties within the city border of a local municipality (*i.e.* close to the inhabited area), land tax is payable if construction is possible on the property. Similarly to the building tax rate, two calculation methods exist: HUF 200/sqm (EUR 0.72/sqm) or 1.5% of the fair market value. Again, the local municipality is entitled to choose the method.

Local municipalities decide on the tax rate and the calculation methods in their local municipality decrees.

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

These costs largely depend on the type of the property (e.g. residential, office, industrial, etc.) and the services required. Professional caretakers offer a wide variety of services in Hungary.

According to the general practice of a significant market participant, costs of employing the personnel has to be paid, and besides this, they apply a so-called “open-book” invoicing structure, where the invoices received from the service providers (repairmen) are forwarded to the owner of the property with an additional 8-10% handling fee. Typically, property owners need for their office building 1-2 persons who check the maintenance status and tasks of the building 2 or 3 times a week.

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

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

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

In Hungary, the properties are still relatively cheap, compared to Austria, Germany, Italy, France or other western European countries. Considering other Central European countries, the prices are still on a fair level. Property prices have not or not significantly went down due to the effects of the financial crisis. In the last two years, many owners chose not to sell, but wait until they can achieve a better price, for the market seems rather to be stagnating. In spite of that, and because of the favourable price level we would definitely recommend investing in real estate, either directly or through real property funds.

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

Please see the answer to the third question of Section I above. Of course, where purchase by domestic legal persons is not restricted (non-agricultural property) it is possible to create a Hungarian company for the purchase of the real estate.

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

The kinds and time frames of official approvals vary greatly and depend on the intended business activity. It is also an important question whether the foreign investor is registered (and if necessary, licensed) in an EU Member State.

If the foreign investor is not registered in an EU Member State, it may pursue business activities in Hungary in the following forms:

- by way of a branch office or a representative office;
- by way of a Hungarian company of which it is an owner/shareholder;
- provision cross-border services, if permitted by a Hungarian law or an international treaty.

A representative office does not possess legal personality. Foundation of a branch office or of a company generally takes a month, but a simple limited liability company can be registered within 3-4 business days, if “default” clauses are acceptable for the investor.

Investors registered in EU Member States may provide cross-border services as prescribed by Directive 2006/123/EC on services on the internal market.

Otherwise, the investor needs to acquire the same permits as domestic entities have to.

The general deadline for the issuance of a building permit is 45 working days. Architectural and technical planning documentation must be attached, in accordance with the detailed statutory regulation. If an environmental permit is required, that shall also be attached.

If the investor wishes to pursue industrial activity on the plot, it shall be examined whether the activity requires a permit or a notification in respect of the plot. The relevant industrial activities (which may be harmful for health, cause fire danger, extreme noise or smoke, *etc.*) are listed in a Government Decree. Certain activities only have to be notified to the local municipality, others require a permit from the same. The permit is attached to the plot, not the owner. The deadline for the proceeding is at least 45 days, but it may be extended by 30 days.

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

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

Our law-firm has a wide and long-standing practice in advising foreign investors on matters related to commercial real estate. Our practice embraces sale and purchase of real estate, collateral agreements, zoning agreements with local municipalities, administrative procedures related to plot formation and zoning requirements, all kinds of construction permits, matters related to archaeological excavations on real properties, expropriation for investment purposes and obtaining all kinds of permits and approvals for construction, use, re-classification or the operation of a business in the energy sectors, project finances, M&A transactions and many other fields of business. For this reason, we would be pleased to assist foreign investors in all these aspects involved.

## **Indonesia**

### **Christian Teo & Associates**

The Jakarta Stock Exchange Building  
Tower II Floor 14 Suite 1405  
Sudirman Central Business District  
Jl. Jend. Sudirman Kav. 52-53  
Jakarta 12190  
Indonesia

[cteolaw@cteolaw.com](mailto:cteolaw@cteolaw.com)  
[www.cteolaw.com](http://www.cteolaw.com)

## I. Procedure of a real estate transaction

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

Under the Indonesian law, the State controls all lands. The management of land affairs, such as land tenures and titles, is administered by the State through the National Land Agency (*Badan Pertanahan Nasional* or “BPN”). Meanwhile, land/real property sale and purchase transactions can only be registered with BPN after it has been recorded in a deed drawn up by an authorized Land Conveyancing Officer (*Pejabat Pembuat Akta Tanah* or “PPAT”). Under the Indonesian law, PPAT is the only official authorised to prepare and draw the authentic deed for the land/property transaction. In most cases, only a notary public is eligible to become a PPAT but in some regions where there is no practicing notary available, a PPAT office could be held by the Head of Municipality (“Camat”) and/or a qualified retired (non-active) BPN official.

1. The procedure of real estate transaction in Indonesia is as follows:
2. The parties shall firstly deliver all of the documents required for the transaction (e.g., the original land certificate, the identity documents of the parties) to the PPAT.
3. The PPAT will then verify the status of land/property with BPN. Please note that PPAT shall bear the responsibility to examine the completeness of requirements for the validity of the sale and purchase transaction. Therefore, PPAT needs to ensure that no other party holds the title of the land/property other than the seller.
4. For a property that is still under development, the parties usually execute a Sale and Purchase Binding Agreement (*Perjanjian Pengikatan Jual Beli* or “PPJB”) to record the intention of the parties to sell and purchase the property (whether in the form of a private drawn deed or notarial deed) before entering into a PPAT’s Sale and Purchase of Land Deed (*Akta Jual Beli Tanah* or “AJB”).
5. Before the execution of AJB, the buyer must paid in full the land and buildings acquisition tax (*Bea Perolehan Hak atas Tanah dan Bangunan* or “BPHTB”) and the seller must paid in full the income tax gained from the sale proceeds.
6. The execution of AJB by the parties before the PPAT must be witnessed by at least 2 witnesses. By no later than 7 business days since the execution date,

PPAT is obliged to submit his/her deed to BPN for the registration purposes and notify in writing of the said submission to the parties.

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

Indonesian law recognizes the principle of horizontal separation of ownership, i.e. separate land ownership and building ownership, however there has not yet been any realization on the building ownership status (i.e., building ownership certificate).

In the case of condominium, a person who owns a condominium shall be granted with the Right to Own Strata Title Unit (*Hak Milik atas Satuan Rumah Susun* or “HMSRS”) for each unit. The HMSRS is attached to the ownership of the common land on which the condominium building constructed.

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

There is no restriction under the Indonesian law on joint ownership of the property, as long as each of the parties is eligible for that same kind of title of ownership.

Eligibility for property ownership depends on the title of the right of the land, being:

**1. Right of Ownership (“Hak Milik”)**

Hak Milik is the strongest title that may be held on land and it is perpetual and hereditary in nature. It can only be owned by Indonesian citizens (individuals) and certain legal entities determined by the Government (e.g., social and religious institutions). Other Indonesian legal entities and foreign citizens cannot own land under Hak Milik.

**2. Right to Build (*Hak Guna Bangunan* or “HGB”)**

HGB is granted basically to establish and construct (buildings) on land for a period of, theoretically, at the most 30 years, which may be extended for another 20 years and renewed for another 30 years. It may be granted to Indonesian citizens and Indonesian legal entities established under Indonesian law and domiciled in Indonesia, including foreign investment companies (“PMA Companies”).

3. Right to Cultivate (*Hak Guna Usaha* or “HGU”)

HGU is the right to cultivate land, which is normally granted to land for cultivation, plantation businesses. The period of HGU title is for 35 years and may be extended for another 25 years at the most and renewed for another 35 years. It may be granted to Indonesian citizens or Indonesian legal entities, which are domiciled in Indonesia, including PMA Companies.

4. Right to Use (*Hak Pakai* or “HP”)

HP title can be owned for a maximum period of 25 years and may be extended for another maximum period of 20 years.

HP may be owned by:

- a. Indonesian citizens;
- b. foreigners residing in Indonesia;
- c. legal entities established according to the Indonesian law and domiciled in Indonesia, including PMA Companies;
- d. foreign legal entities with a representative in Indonesia;
- e. departments, non-departmental government bodies and regional Government;
- f. representatives of foreign countries and representatives of international organizations; or
- g. religious and social institutions.

5. Right to Manage (*Hak Pengelolaan* or “HPL”)

HPL is a title granted over State land only to State-owned companies and governmental agencies normally for an unlimited term, to be managed by the holder of HPL with the authority to grant land title on top of the HPL land to third parties.

6. Right to Lease (“Hak Sewa”)

Hak Sewa is a land title that gives its holder a right to construct a building on top of other people’s land, upon payment of a rent.

Hak Sewa may be granted to: a. Indonesian citizen;

- b. foreign individual domiciled in Indonesia;
- c. Indonesian legal entity, including PMA Companies; and
- d. foreign entity having representatives in Indonesia

7. HMSRS

HMSRS may be granted to individuals or legal entities that fulfil the requirements as the holder of the title to the common land as mentioned in point 1 to 6 above.

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

As a recognition of horizontal separation of ownership, it is possible to have different owners for the building and the land where that building is constructed.

While the legal evidence for the land ownership is clear (i.e., land title certificate), the certification of building ownership status has not been implemented yet. In practice, the building ownership is usually identified by the Building Construction Permit (*Izin Mendirikan Bangunan* or “IMB”). The holder of IMB would be considered as the building owner.

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

Yes, the land registration by BPN is carried out in order to give a legal certainty of the land status (including ownership) and protection to the holder of the right of the land. In the case of building, as mentioned above there is no established building registration yet.

It has always been a recognized principle under Indonesian law that a party entering into a transaction with a good faith must be protected and it applies to a land transaction and registration as well.

Further, the law specifically provides a protection for a good faith purchaser who has legally acquired and occupied the property by setting a five years' statute of limitation (starting from the date of issuance of certificate of title) for a third party to file a claim over the property.

## **II. Costs for transaction**

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

1. Income Tax: The regulations have different treatment in respect of an individual and a company, as follows:

- a. if the seller is an individual, any gain resulting from the sale of real property is subject to 5% income tax, which calculation is based on the purchase price.
  - b. if the seller is a company, 5% income tax shall be applicable if the purchase price and the size of the building exceeds the limit determined by the Minister of Finance.
2. Real Property Registration Duty: The rate of real property registration duty is 5% of the purchase price. The buyer must settle the payment of registration duty at the same time of the signing of the sale and purchase agreement before the PPAT.
- In the event the purchase price as stated in the sale and purchase agreement is less than the purchase price of the property based on the latest tax valuation thereof (as indicated in the land and building invoice issued by the Land Office), the latter shall apply in calculating the applicable Income Tax and Real Property Transfer Tax.
3. Value Added Tax (“VAT”): In case the seller of a property is a taxable entrepreneur under the prevailing tax regulation and/or in real estate business, the VAT at the rate of 10% of the purchase price shall apply.
  4. VAT on Luxurious Goods: In case the seller of a property is a taxable entrepreneur under the prevailing tax regulation and the size of the property exceeds the limit determined by the Minister of Finance, the VAT on Luxurious Goods at the rate of 20% of the purchase price shall apply.
  5. Please note that this type of tax shall only applicable one time. Therefore, a buyer should carefully check the history of the relevant property to confirm whether the VAT on Luxurious Goods has been paid.

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

There is no legal requirement in Indonesia to hold the property for certain period. Therefore, one can buy and sell property on a short term basis or at any time. In general, any gains resulting from the sale of real property is subject to the income tax, regardless of the period of holding the property.

In common practice of a commercial building or apartment business, however, the developer usually imposes limitation as to the period and how many times the commercial building and/or apartment can be sold to other third party. This is usually employed by the developer to avoid any speculation.

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

In general, there is no restriction on this arrangement, but there would be some reporting obligations and/or declaration need to be made if the amount involves foreign exchange exceeding certain threshold..

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

The Indonesian Civil Code stipulates that the sale of the property does not terminate the lease.

This means, if the property owner (or the lessor) sells the rental property, the lease does not end or terminate, but rather, the buyer of the property becomes the new property owner or the new landlord. In this respect, the buyer should honor the existing lease agreement.

An exception, however, applies when the lessee and lessor has expressly agreed, in the initial lease agreement, that any sale or transfer of the property shall terminate the lease.

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

Every region in Indonesia has its own zoning area pursuant to the spatial layout applicable to that particular area. In general, the spatial layout divides the area into several zones designated for a specific purpose, e.g., residential purpose, tourism purpose, commercial purpose, combination of the foregoing, etc.

If a property owner intends to change the use of a residential building into an office space, the owner is required to amend the building permit, provided that the amendment is in line with the then-current zoning rules.

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

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

1. **Notarial Cost:** Subject to the location of the property, the Notary would normally charge 1% of the purchase price.
2. **Land Register:** The cost shall be calculated based on the following formula:  
 $(1\% \times \text{Value of Land}) + \text{IDR}50,000$   
The notarial cost above shall include the cost for registering the land with the Land Registry Office.
3. **Real Property Registration Duty:** The rate of real property registration duty is 5% of the result price of the purchase price minus reduction factors. These reduction factors vary depending on the region in Indonesia.  
The Notary will require the buyer to provide the evidence of payment of the real property transfer tax before the Notary proceeds with the registration of the land title/certificate.
4. **Advising Lawyer (Due Dilligence):** In general, a law firm specializes in commercial property will charge a legal fees of approximately US\$8,000 to US\$10,000 for this type of transaction, plus hours spent to conduct legal due dilligence (as requested). For a land due diligence, the legal fees vary from USD8,000 to USD15,000. Please note that the fees may change or vary according to the complexity of the transaction, the location of the property and the parties involved.
5. **Estate Agent:** Subject to the location of the property and the proposed purchase price of the property, the rate for an estate agent varies from 2% to 3% of the purchase price.

### III. Costs for holding real estate

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

In Indonesia, there are several tax charges for maintaining the ownership of the land/property:

1. Land and Building Tax (*Pajak Bumi dan Bangunan* or “PBB”):

PBB is paid annually and the rate is:

$0.5\% \times \text{NJKP Factor} \times (\text{NJOP} - \text{reduction factor})$

Whereby:

NJKP is Taxable Sale Value, and the NJKP Factor is 40% for NJOP above IDR1,000,000,000 (one billion Rupiah) and 20% for NJOP below that amount;

NJOP is Base Taxable Sale Value; and

The reduction factor may vary in every region in Indonesia.

2. Extension or Renewal of Land Title (in the form of HGB, HGU and HP):

In case the extension or renewal of land title is necessary during the ownership of the land, the owner must submit the extension or renewal application to the BPN and pay the renewal cost based on the following formula:

$(2\% \times \text{Value of Land}) + \text{IDR}100,000$

In addition to the above, in case the owner intends to rent the property to other third party, in return for a rental charges, the owner is also subject to the Income Tax with regard to the rental charges the owner receives (from the lessee).

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

In Indonesia, a professional caretaker usually cooperates with the property developer for the property management and maintenance services. The services charge for professional caretaker depends on the type of service and the service package and in the form of a fixed fee per month or year.

**IV. Foreign investors**

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

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

We would usually suggest for foreign investor who wishes to invest in property by way of a property management structure.

The above option is, by far, the most suitable investment option for foreign investor because, under the current regulations, a foreigner investor (whether individual or legal entity) is still prohibited to have a direct ownership over a land, while a foreign investment company (i.e., a company with foreign participation and established under the framework of Indonesian Investment Law) is also prohibited, from a conservative approach, to engage in lease/leasing/rental activities.

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

The restrictions to foreign investors in property sector (as we have briefly explained in Section 1 above) apply to all foreign investors, regardless of the nationality or registered office of the legal entities (except for HP title as mentioned above)

Foreign investor should not arrange for a local entity to hold ownership on its behalf, because Indonesia does not recognize the concept of beneficial ownership. Therefore, the one that will be acknowledged as the legal and registered owner of the land title is the local entity.

As also indicated in our advice above, one way to get around these restrictions is to arrange the business through a property management structure.

If this is the case, the foreign investor should establish the so-called PMA Company in Indonesia, which will allow such PMA Company to hold land title and/or own the property. However, it is important to note that a PMA Company cannot be established to only hold land title and property without having business activities. As a PMA Company, it must have its activities and is intended and expected to generate income from its business activities.

As mentioned above, based on the prevailing investment regulations, the most suitable business activities for the said PMA Company is to engage in “property management services” to manage either its own property or third party’s property by entering into a property management services agreement.

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

Please refer to Section 1 of this Questionnaire for further details regarding restriction to foreigner in holding several land titles.

Even if the foreigner intends to have a direct ownership over the land to run a business, the foreigner may only do so through a PMA Company.

For establishing a foreign investment company (PMA Company), a foreign investor must, first, apply for and obtain an investment approval or registration from the Investment Coordinating Board (Badan Koordinasi Penanaman Modal) by submitting the required application and the relevant supporting documents. Provided that the documents are complete and in good order, the approval may be available within 1 week. After an approval from BKPM, there are various corporate permits that required to be obtained by a company (e.g., approval from the Minister of Law and Human Rights, registration with the relevant Tax Office and Company Registrar Office, etc). The normal time estimation for setting up a PMA in Indonesia is 6 (six) to 8 (eight) weeks after the submission of the complete application to BKPM.

As for obtaining the relevant land title, in general, an application must be made to and must be registered with the BPN. There is no certainty as to when the BPN could issue a land title certificate but 2 (two) to 3 (three) months' period would be a realistic estimate.

There are other specific building permits that must also be obtained, e.g., IMB, building utilization permit, location permit etc. The timeline for obtaining the relevant building permit depends on various elements, amongst other things, building location, building purpose, and size of the building. For example, in Jakarta, IMB in respect of a non-residential building having more than 8 floors will be, theoretically, issued within 40 days as of the building retribution fee is paid by the applicant.

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

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

Yes, our Firm is in the position to assist foreign investors in every aspect as mentioned above.

Indonesia

## **Italy**

### **Bevilacqua Doria Lener & Partners**

Via Bertoloni 26/B  
00197 Rome  
Italy

Tel. + 39 06 807 20 34  
Fax +39 06 808 87 65  
[pierre.fortin@bdl-lex.com](mailto:pierre.fortin@bdl-lex.com)  
[giorgio.lener@bdl-lex.com](mailto:giorgio.lener@bdl-lex.com)  
[www.bdl-lex.com](http://www.bdl-lex.com)

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

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

Once a property for purchase has been identified, be it through a broker or a personal or professional contact, the parties usually enter into negotiations in respect of the terms of transaction. Negotiations can be carried out directly by the parties with or without professional assistance. It is not uncommon for the parties to be assisted by legal counsel in this phase.

However the negotiations are conducted, it is recommended that a notary be involved from the beginning to verify title and other formalities concerning the property. Under Italian law, the final Deed of Sale must take the form of a notarial deed and a notary cannot stipulate such a Deed of Sale unless the property is formally in order, including with the payment of taxes and amnesties for building-code violations. Unless otherwise agreed between the parties, the purchaser usually chooses and pays the notary.

The Preliminary Purchase and Sale Agreement (“PPSA”) may or may not provide for a period for the purchaser to carry out due diligence on the property (depending on whether such due diligence has been terminated beforehand) and the Agreement may make its implementation conditional upon the satisfactory results of the due diligence.

The PPSA can take the form of a Private Deed or of a Deed signed before a Notary, which is the rule in larger transactions. A notarized PPSA can either be registered in the Land Registry or not. A registered PPSA gives formal notice to third parties of the existence of a contract in respect of the property.

The PPSA will indicate, among other things, the sales price, the payment terms and the term for stipulating the notarial Deed of Sale. The signing of a PPSA almost invariably involves the payment of a down-payment, usually in the order of 20% of the sales price. The down-payment is non-refundable except as specifically provided in the PPSA (e.g., failure to meet conditions precedent). If the purchaser fails, without good reason, to execute the final Deed of Sale the down-payment is forfeited; if, on the other hand, the seller is in breach, a penalty equal to twice the amount of the down-payment is due.

The final Deed of Sale necessarily takes the form of a notarial deed. If the notary has not been involved at the negotiation stage, it is necessary that he

be brought in at latest later the signing of the PPSA as he is responsible for verifying title and the conformity of the property from a cadastral and building regulations point of view. The parties must be present personally or by proxy at the execution of the Deed of Sale. Any proxies or powers of attorney given in respect of this deed must also be notarized, and if coming from outside Italy, legalized by Apostille.

Once the Deed of Sale has been executed, it will be registered by the Notary both for tax and for Land Registry purposes, which normally takes a few days. Title passes upon signature of the Deed of Sale but will be opposable to third parties only upon registration at the Land Registry.

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

On condition that the object of the transaction can be clearly identified in the Land Registry, a purchase and sale of the property is possible. Depending on the regulations in force, it may be possible to divide a plot of land into various parcels or group together smaller parcels into a larger one. The same is applicable to residential units. These procedures, which should be carried-out preliminary to any formal undertaking of the parties (although their accomplishment may be a condition precedent contained in a PPSA) require formal permits from the local authorities which usually require time and expense.

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

Yes, property can be owned jointly by two or more parties. Any individual with legal capacity or entity with legal personality (e.g., corporations, certain associations, etc.) can be the title owner of real estate.

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

Unless otherwise specified in the Deed of Sale, the ownership of a building implies the ownership of the land on which it stands or of a larger plot if that

is the case. It is, however, fully possible for the ownership of the land and of the building to be split.

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

Yes to both questions.

## **II. Costs for transaction**

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

If the Seller is an individual, the sale of real property is subject to a registration tax of 7% and a hypo-cadastral tax of 3%, both calculated on the value of the transaction. If the Seller is a corporation, the sale is subject to VAT, currently 20% and hypo-cadastral taxes of 4%. Unless otherwise agreed, these taxes are for the account of the Purchaser.

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

Gains are taxed only in some cases, expressly settled by law. In particular, the gains realised on the sale of buildings or agricultural lands, are taxed only in exceptional cases; whereas the gains realised on the sale of building lands, are always taxed, without exceptions.

Usually, gains are taxed if the property has been purchased or has been built for less than five years, because the resale within short term is considered speculative. In this case, the gains must be inserted in the individual income tax return of the Seller, and it is taxed in virtue of the progressive rate applicable to his total income. In Italy, for an individual, the minimum rate is 23%, therefore it is always convenient to ask to the notary that stipulates the deed of sale, for the application of substitutive tax, which is 20%.

The same is applied to the sale of agricultural lands; whereas the sale of building lands, if realises gains, is always taxed.

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

Provided all taxes (which does not include income or capital gains taxes) and costs related to the transaction have been paid and provided the Seller is a bona fide foreign resident, the sales proceeds can be freely transferred out of Italy.

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

Purchase of leased property does not give the new owner the right to terminate the lease contracts in existence. The terms and costs of any such early termination must be negotiated separately between the parties to the transaction and the lessee.

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

Any modification in land or building use requires official approval which will in turn depend on the zoning regulations in force.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence)?
  - estate agent?
  - others
- 
- Notarial costs and fees including land register: € 21.000,00
  - Real property transfer taxes
    - a) if Seller is an individual € 500.000,00
    - b) if Seller is a corporation € 1.200.000,00
  - advising lawyer (due diligence) € 50.000,00

- d) estate agent € 150.000,00 (3%)

These costs may vary depending on the complexity of the matter, etc.

### III. Costs for holding real estate

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

All real property in Italy is considered to be income-producing, either real or virtual. The typical example of real income are rental payments. A property is considered to produce virtual income when it is not instrumental in producing real income. Such virtual or cadastral income is a factor of a statutory (or cadastral) value of the property which is updated every few years based on the real estate market. Both real and virtual income are taxed at normal I income tax rates for individuals or corporations.

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

It depends on the type of property and on the type of work that the professional caretaker has to do; for example, if the property is rented, the fee for the caretaker is usually calculated on 5% of every monthly rental.

### IV. Foreign investors

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

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

A foreign investor today can invest in Italian real estate through any vehicle which best meets the investor's financial or operational needs.

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

There are no particular restrictions on ownership of real estate in Italy.

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

If the land being purchased is already zoned for the type of business in which the investor intends to engage, no particular official approvals are required. If this is not the case, the investor will need to request a land-use change which, depending on the situation, can take from six to twelve months or even longer.

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

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

We can assist foreign investors in all of these aspects.

Italy

## **Korea**

### **Barun Law**

D&M Building  
1003 Daechi-dong, Gangnam-gu  
Seoul 135-851  
Korea

Tel: 82-2-3479-7517  
Fax: 82-2-3478-6222  
[www.barunlaw.com](http://www.barunlaw.com)

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

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

#### **1. Execution of Sale and Purchase Agreement**

In entering into a real estate transaction, real estate brokers are not required to be retained under Korean law. However, in Korea real estate brokers are involved in most real estate transactions in general, in which cases, and an insurance security is often purchased to cover defects that may arise with the property.

There is no specific provision regulating terms of real estate sale and transfer agreements under Korean law. However, a prior report or approval should be made with/from the government for real estate sale and purchase agreements for transactions that include land specifically designated for special uses such as development of restricted areas and/or agricultural use areas. In the event an agreement is entered into without having made such report or obtained such required approval, such agreement would be void.

A detailed description of the real estate being transferred can be confirmed by the real estate registry of the property, which is publicly accessible information. For a more accurate and complete information on the property, however, a visit to the actual site may be conducted.

#### **2. Payment of Purchase Price**

Parties to real estate sale and purchase agreements may agree on the payment methods for purchase price of real estate being transferred. In practice, such payment for the purchase price is customarily made in three installments, initial payment, interim payment and final payment. The amount of the purchase price is negotiated and agreed between the purchaser and the seller based on the market price and consultation with the real estate broker.

The purchaser's obligation to pay the purchase price and the seller's obligation to deliver the real estate and the title therefor are to be performed simultaneously. Accordingly, unless the parties otherwise agree, in the event a seller fails to perform his/her obligation to deliver the property and the title therefor, the delay in the purchaser's payment of the purchase price shall not result in default by the purchaser. In practice, parties generally agree to have the pur-

chaser make the full payment for the purchase price prior to the transfer of the property.

### 3. Transfer of Title

Together with the necessary documents to affect the transfer of title of the property, a seller is obligated to deliver and transfer the property as agreed under a real estate sale and purchase agreement. As mentioned above, such delivery obligation is to be performed simultaneously with the purchaser's obligation to make the full payment of the purchase price.

In order to transfer the title of real estate, a registration for the ownership transfer must be made. Unless such registration is made, the ownership transfer is not completed except for some cases provided under law. In registering the ownership transfer, in principle, a purchaser and a seller must apply for registration of such transfer at the registrar. However, in practice, a seller delivers the necessary documents for the registration of the ownership transfer to a purchaser with a power of attorney authorizing the purchaser to make the registration on the seller's behalf and the purchaser makes the application for the registration to the registrar. Once the application for the registration of ownership transfer is made, the transfer becomes effective on the date of the filing of the application. In the event the seller fails to perform its obligation to transfer the title (deliver the necessary documents to affect the transfer), a purchaser may bring a court action and the winning judgment therefrom may be used to show the seller's intention to apply for the registration of ownership transfer.

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

Yes. As further explained below, rights over land and building are separate from each other in principle. Accordingly, owners of land and buildings may be different parties except where there is strata ownership in one building pursuant to the Act on the Ownership and Management of Aggregate Buildings. For a land on which a building with strata ownership stands, use right over the proportional area of the land for a portion of the building owned under strata ownership is combined together with the respective portion of the building for conveyance.

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

Yes. Joint ownership is permitted in Korea. Joint ownership may be between or among person(s), associations, companies, and non-corporate associations.

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

There may be two different owners of the land and the building erected on it in Korea as ownership over the building and the land are separate. In case the land and the building erected on it have two different owners, surface right in-law, which is right granted to the building owners regardless of the intention of the land owner, over the land may be granted to the building owner, if certain conditions are satisfied. However, if such conditions are not satisfied and surface right in-law cannot be granted, the building owner must acquire the use right over the land from the land owner. If the building owner fails to acquire such use right, the land owner may claim for removal of the building against the building owner.

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

In order to acquire ownership over real estate, registration of the ownership is required, however, this does not protect a bonafide purchaser of the real estate who relied on the real estate registration. Even when an ownership is registered, in the event a defect on the registration of the ownership transfer exists (such as cancellation or termination of the real estate sale and purchase agreement), the registered owner would not be recognized as the owner of the property and any purchaser(s) of the property from the registered owner thereafter would also not have ownership over the property in such case. In this regard, although the ownership would not be recognized under law in such case, however, the bonafide purchaser may be protected under the Civil Code which prohibits bringing a claim against a bonafide third party on the basis of

cancellation and/or termination of an agreement, in which case the ownership of the bonafide purchaser would remain valid and effective.

## II. Costs for transaction

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

Taxes that are imposed in connection with a purchase of real property include registration tax, educational tax, acquisition tax and special tax for rural development. The registration tax and education tax are imposed in connection with registration of the transfer. Different rates are applied for residential and commercial buildings and land as follows, which may also differ depending on a case by case basis. In case a company acquires land for non-business use, for extravagant (vacation home and luxurious entertainment purposes) use and/or that is located within the Seoul Metropolitan areas, the registration tax and the acquisition tax may be increased up to three to five times the general rate.

#### 1. Residential Building

Registration tax	1% of purchase price
Educational tax	20% of the registration tax
Acquisition tax	1% of the purchase price

Tax in total: 2.2% of the purchase price (for an area exceeding 85 m<sup>2</sup>, additional 0.4% applies)

#### 2. Commercial Building

Registration tax	2% of purchase price
Educational tax	20% of the registration tax
Acquisition tax	1% of the purchase price
Special tax for rural development	10% of the acquisition tax

Tax in total: 4.6%

3. Land

Registration tax	2% of purchase price (in case of a purchase by a company incorporated within five years, three times this rate applies)
Educational tax	20% of the registration tax
Acquisition tax	1% of the purchase price
Special tax for rural development	10% of the acquisition tax

Tax in total: 4.6% (in case of a company, 8.3%)

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

Higher capital gains tax rate applies to sales of real estate with short holding periods. For a holding period not exceeding one year, 50% capital gains tax applies and 40% capital gains tax applies for a holding period exceeding one year and not exceeding two years to the difference in the purchase price and the sale price. In this regard, for ownership of one residence per family unit for three or more years (holding period of three or more years and residing period of two or more years for Seoul Metropolitan areas), there is no capital gains tax imposed.

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

Yes. When a foreigner remits funds into Korea, a report must be filed with a foreign exchanges bank. In case of repatriation of funds outside Korea, a report must also be made to the bank or the governmental authority and the evidentiary documents filed for the remittance of funds into Korea must be presented.

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

A new owner may claim evacuation from the real property to the lessee based on his ownership and the lessee may not object to such claim of the new owner

based on the existing lease agreement (however, since the existing lease agreement is between the lessee and the old owner, the new owner, who is not a party to the agreement, may not cause such lease agreement to be terminated), unless the lessee's right is a registered right. In the event that the lease is registered in the real estate registry, the lessee may enforce the lease against third parties other than the existing owner. There are exceptions to the new owner's right to claim for evacuation against small business owners and residents under the Commercial Building Lease Protection Act and the Housing Lease Protection Act, respectively. Based on the statutes, in the event the rent does not exceed certain amount, the lessees are protected from such right of the new owner. For leases that are governed by these statutes, in the event the lessor transfers the real estate to a third party, the purchaser is deemed to have succeeded the lease, does not have right to claim for evacuation and is unable to terminate the lease until its expiry. Whether a certain lease is subject to such statutes cannot be confirmed by the real estate registry and must be confirmed by the local government offices.

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

Governmental approval must be procured in order to change the use of real estate.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- **notarial costs:** Notarial fee costs 0.15% of the contract price, not to exceed KRW 3 million in total. As for a property costing EUR 5 million, the notarial fee would be approximately KRW 11,250,000 (KRW 7.5 billion\*0.15%). Since

the fee cannot exceed KRW 3 million, the notarial fee for this property would be KRW 3 million.

- **land register:** Land registration fee includes a certificate stamp fee of KRW 14,000 and a stamp duty of KRW 350,000. In addition, when purchasing real estate, a housing bond must be obtained. The cost of bond differs depending on the location and other details of the real estate, however, in general, it costs approximately 0.5% of the purchase price. Accordingly, in this case, it would be approximately KRW 37,500,000 (KRW 7.5 billion \*0.15%).
- **real property transfer tax:** For a purchase by an individual, as mentioned above, tax of 4.6% of the purchase price would apply (increased in case of a corporate party). In this case, the transfer tax would be KRW 345 million (KRW 7.5 billion\*4.6%).
- **advising lawyer (due diligence):** The attorney fees and due diligence period would vary depending on the complexity of the deal. In general, attorney fees range from KRW 200,000 to KRW 700,000 per hour of service by one attorney.
- **estate agent:** Real estate broker fees cannot exceed 0.9% of the purchase price (excluding VAT) in Korea. Although this amount does not include VAT, real estate brokers in general include VAT in its fee quotations. Up to the permitted amount, it is up to the parties to negotiate and agree. In this case, parties may agree on the broker fee not to exceed KRW 67,500,000.
- **others:** In practice, a paralegal may prepare the necessary Korean documents and applies for the registration of the transfer. The paralegal fee for the real estate registration is approximately KRW 3,400,000.

### III. Costs for holding real estate

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

Property tax for holding real estate is imposed on a yearly basis. Property tax is a regional government tax imposed by the offices of the city, gun/gu where the property is located. The standard rates and calculation methods for the property tax are explained in the following. Please note that the regional government may change the standard rates for the property taxes within a certain range.

##### 1. Standard of Assessment

In order to calculate property tax the standard of assessment must be first calculated as follows:

- (i) houses and land: 50% of the published price for houses and 60% of individually published price pursuant to the Public Notice of Values and Appraisal of Real Estate Act (annual increase by 5% for houses from 2008 and for land from 2006)
- (ii) buildings: 60% of the standard market price determined and published by the mayor/governor/chief of gu office (annual increase by 5% from 2006)

## 2. Calculation Method of Property Tax

### (i) Land

For purpose of calculating property tax on land, standard of assessments for land owned by the taxpayer in the relevant jurisdiction are combined except for certain properties subject to individual taxation. In addition, accessory land to buildings and land designated by the presidential decree are combined separately for property tax purpose.

General lands to be combined	KRW 50 million and below	KRW 100 million and below	Exceeding KRW 100 million
	K* 0.002	K*0.003 - KRW 50,000	K*0.005 - KRW 250,000
Other lands to be separately combined	KRW 200 million and below	KRW 1 billion and below	Exceeding KRW 1 billion
	K* 0.002	K*0.003 - KRW 200,000	K*0.004 - KRW 1,200,000
Lands subject to individual taxation	Field, paddy field, orchard, ranch, forest lands	Golf course and luxurious entertainment land	Other land
	K* 0.0007	K*0.04	K* 0.002

K: Sum of standard of assessment amounts

## (ii) Houses and Buildings

**Houses**

Vacation homes	K*0.04		
General Houses	KRW 40 million and below	KRW 100 million and below	Exceeding KRW 100 million
	K*0.0015	K*0.003 - KRW 60,000	K*0.005 - KRW 260,000

**Building**

Golf course, luxurious entertainment	K*0.04
Factory buildings	K*0.005
Others	K*0.0025

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

It is up to the professional caretaker and the foreign investor to agree on the terms of the agreement. We include the fee schedule charged by some of the major real estate trust companies for their service:

Type A service: management service (management of the tenants, building and ownership)

Type B Service: management of ownership in the building registry

<b>Value of the trusted company</b>	<b>Type A</b>	<b>Type B</b>
KRW 100 million and below	10/1000 per year	30/10,000 per year
KRW 500 million and below	8/1000 per year	15/10,000 per year
KRW 1 billion and below	7/1000 per year	13/10,000 per year
Exceeding 1 billion	6/1000 per year	10/10,000 per year
Minimum fee	KRW 300,000 per year	KRW 100,000 per year

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

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

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

Given the current unstable economic conditions in Korea, it is difficult to predict and advise on the issues raised.

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

In general any individual person and legal entity may purchase real property in Korea regardless of his/her/its nationality and/or existence of a Korea branch office.

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

A foreigner and a foreign company may purchase land in Korea, as long as a report is made with the government authority after the purchase. There is no requirement to obtain approval prior to the purchase. Accordingly, no additional effort or time would be required for a foreign purchaser of land, except that in case the foreigner or the foreign company does not have a registration number, such foreigner or the foreign company must obtain a number for real estate registration from the court. Exceptions to this are when the land being purchased is in the military defense area, cultural artifact protection area and other areas designated by statutes, in which case prior permit must be obtained from the government. Also, in case a foreign country prohibits Korean nationals from purchasing land in that country, persons with nationality of such foreign country may be prohibited from purchasing land in Korea based on reciprocity.

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

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

Yes, we frequently assist foreign investors in all these aspects of real estate transactions in Korea.

## **Malaysia**

### **Azman Davidson & Co**

Suite 13.03, 13<sup>th</sup> Floor  
Menara Tan & Tan  
207 Jalan Tun Razak  
50400 Kuala Lumpur  
Malaysia

Tel: (603) 216 40 200  
Fax: (603) 216 40 280  
[chong.hy@azmandavidson.com.my](mailto:chong.hy@azmandavidson.com.my)  
[www.azmandavidson.com.my](http://www.azmandavidson.com.my)

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

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

In Malaysia, land transactions are based on torrens system and are governed by the National Land Code, 1965 (“NLC”). However, if the separate title of the real property has not been issued, the transaction will be completed by way of an absolute assignment, where the beneficial ownership of the real property will be passed to the purchaser. Upon issuance of the separate title to the real property thereof, a Memorandum of Transfer (“MOT”) (a form prescribed under the NLC) will be submitted to the relevant land office/registry for registration, wherein the legal ownership of the real property is transferred to the purchaser.

In Malaysia, it is common for the vendor to appoint a real estate agent to negotiate initial salient terms (such as the purchase price, completion period) with potential purchasers. Once the parties reached an agreement on the salient terms, an offer to purchase will be prepared by the real estate agent to be signed by both parties. Thereafter, a lawyer will be appointed by the purchaser to draft and finalise a sale and purchase agreement within 14 days. It is up to the Vendor whether he/she elects to appoint his/her own lawyer to review the sale and purchase agreement. The parties will sign the sale and purchase agreement after they have mutually agreed on the terms and conditions contained therein the sale and purchase agreement. The purchaser is normally given 3 months with an extension of 1 month (subject to payment of interest) to complete the sale and purchase transaction. Upon payment of full purchase price, legal/beneficial ownership will be passed from vendor to purchaser once the MOT is registered in favour of the purchaser/ Deed of Assignment duly signed by both parties and stamped.

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

Yes. The Malaysian legal system permits:

1. ownership of the whole land, for example, purchase of a real property; and

2. ownership of one unit or lots of units, for example, purchase of a unit of condominium.

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

Yes. The Malaysian legal system permits joint ownership of real property by natural person other than minor who is of the age of 18 and below, corporations having power under their Constitution to hold real property, sovereigns, governments, organizations and other persons authorized to hold land under the provisions of the Diplomatic and Consular Privileges Ordinance 1957 and bodies expressly empowered to hold land under any other written law in Malaysia.

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

In Malaysia, the owner of land also own the building erected on the land. Any permanent fixtures or structures on the land shall form part of the land under the NLC.

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

Yes, only ownership of land is registered at the relevant land office/registry. Generally, the title or interest of any person or body for the time being registered as proprietor of any land is indefeasible unless such title or interest is obtained by way of fraud, forgery or misrepresentation. Where a person obtained title or interest by way of fraud, forgery or misrepresentation and subsequently transferred such title or interest to a good faith purchaser, namely X, X's title or interest is defeasible. However, where X transferred such title or interest to Y, Y's title or interest is indefeasible.

## II. Costs for transaction

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

Purchaser of a real property is required to pay ad valorem stamp duty on the MOT or deed of assignment, which is computed based on the consideration or the market value of the real property, whichever is higher. Currently, the calculation of ad valorem stamp duty is as follows:-

<b>Consideration/Market Value</b>	<b>Rate</b>
For the 1st RM100,000 or lower	1%
For the next RM400,000	2%
Thereafter	3%

The Purchaser is also required to pay real property gains tax in the event he/she disposes the real property within 5 years from the date of acquisition.

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

With the recent amendments to the Real Property Gains Tax Act 1976, disposal of a real property within 5 years from the date of acquisition of such real property is subject to 5% tax on the gain.

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

There are no general restrictions on repatriation of profits or proceeds from divestment of investments in Malaysia by a non-resident.

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

In Malaysia, a distinction is drawn between a tenancy and a lease. A tenancy is for a period not exceeding 3 years and is not required to be registered at the

relevant land office/registry. It is known as tenancy exempt from registration. Therefore, it is up to the purchaser whether to continue with the tenancy. However, if such tenancy exempt from registration is endorsed on the title of the real property, it is binding on subsequent purchasers. A lease is for period more than 3 years and once registered, it is binding on subsequent purchasers.

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

Yes, official approval needs to be obtained from the local authority to change the use from residential to office.

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

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

Exchange rate 1EUR = RM3.98, EUR5 million = RM19,900,000.00

- **Notarial costs** – It is generally included in the disbursement fees charged by the advising lawyer.
- **Land register** – Charges vary from state to state. Certain land office/registry charge based on a certain percentage calculated on the market value or consideration of the real property. For example, in Kuala Lumpur, it is currently fixed at RM100.00 and in Selangor, in the range of RM300.00 to RM1,000.00.
- **Real property transfer tax** – Purchaser is required to pay the ad valorem stamp duty on the transfer as mentioned earlier, totaling the sum of RM591,000.00 (EUR148,492.46).
- **Advising lawyer** – The scale fee as provided by the Solicitors Remuneration Order 2005 made pursuant to the Legal Profession Act 1976 shall apply. The estimated scale fee is RM51,850.00. The service tax is RM2,592.50 and the estimated disbursement to be in the range of RM1,500.00 to RM2,000.00.

- **Estate Agent** –It is paid by the person whom appointed the real estate agent. In Malaysia, it is normally appointed by the Vendor. The scale fee as provided under the Seventh Schedule (Rule 48) of the Valuers, Appraisers and Estate Agents Act 1981 is 2.75% on the first RM500,000.00 and 2% on the residue over RM500,000.00. However, the scale fee may be subject to a maximum discount of 30% but the minimum fee shall be RM1,000.00. As such, the scale fee (with a maximum discount of 30%) is RM281,225.00.

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

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

In Malaysia, land owners are required to pay an annual land tax known as quit rent and is calculated at the rate of 1 cent to 2 cents per square foot. The quit rent liability generally totals less than RM100.00 per year. Land owners are also required to pay assessment rates to the local authorities for provision of services. It varies from state to state. In most states, the assessment rates are calculated based on the annual rental of the real property in the open market on the assumption that the real property is rented out.

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

If you appoint a property management company, the annual fee chargeable under the Seventh Schedule (Rule 48) of the Valuers, Appraisers and Estate Agents Act 1981 is as follows:-

- 5.0% of the gross annual rent on the first RM30,000.00
- 3.0% of the gross annual rent on the residue up to RM100,000.00
- 2.0% of the gross annual rent on the residue over RM100,000.00

### **IV. Foreign investors**

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

- **Directly in real estate**
- **Through real property funds, open or closed ones**

- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

It is advisable to invest in both commercial and non-commercial real property in Malaysia for the following reasons:-

- a. real property prices in Malaysia are relatively low;
- b. economic and political condition are stable;
- c. relaxation on rules for foreign acquisition of real property; and
- d. attractive bank interest rates.

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

Any foreign individual person and legal entity are allowed to buy and own a real property in Malaysia subject to the following conditions:-

- a. the value of the real property must be RM500,000.00 and above;
- b. obtaining the consent from the state authority under Section 433B of the NLC. However such consent is not required in respect of real property which is subject to the category “industry“ or to any condition requiring its use for industrial purposes.

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

Official approval is only required if the land is not approved for commercial purpose. The requirements and amount of time necessary to obtain such approval vary from state to state, normally in the range of 3 to 9 months. Further, foreign investor is required to obtain the consent of the state authority under Section 433B of the NLC, as mentioned above. The amount of time necessary to obtain such consent is normally in the range of 3 to 9 months.

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

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

Yes, our firm would be pleased to assist foreign investors in all these aspects involved. Please contact Mr. H.Y.Chong at:

Azman Davidson & Co.  
Suite 13.03, 13<sup>th</sup> Floor  
Menara Tan & Tan  
207 Jalan Tun Razak  
50400 Kuala Lumpur  
Malaysia  
Tel: +603 2164 0200  
[chong.hy@azmandavidson.com.my](mailto:chong.hy@azmandavidson.com.my)

## **Mexico**

### **Capin, Calderon, Ramírez y Gutiérrez-Azpe, S.C.**

Galileo 55 1er. piso  
Col. Polanco  
Mexico City, D.F. Mexico C.P. 11560  
Mexico

Tel: + 52 55-52 80 91 93  
Fax: + 52 5-52 81 08 51  
[www.ccrga.com](http://www.ccrga.com)

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

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

In accordance with Mexican law, if a real estate purchase and sale agreement exceeds an amount of approximately USD \$1620.00 the agreement needs to be formalized before Mexican Public Notary. In such case, before the formalization is done, the Public Notary shall verify the following:

- (i) that the seller is the owner of the property;
- (ii) the absence of any liens on the property. If the property is mortgaged, the lien will follow the property, and therefore, the new owner may have the risk of forfeiting such property if the seller defaults on payment obligations;
- (iii) the existence of any easements on the property, either by law, or by agreement between seller and his neighbours;
- (iv) that the land involved is not considered “agrarian property” (*ejido*), If the land is classified as agrarian, it must be transformed into “private property;”
- (v) the status of administrative permits such as “water concessions,” or “Federal Maritime Zone Concessions;”
- (vi) the existence/non-existence of toxic traces in the soil;
- (vii) that the use regulations allow the use intended for the property; and also
- (viii) that the seller has paid the Real Estate Property Tax and water fees for the previous five years.

Once the transaction is formalized before the Public Notary, the transaction requires to be registered before the Public Registry of Real Estate Property of the state where the property is located.

Please note that since Mexico is a Federation, real estate property acquisitions are mainly governed by the State Civil Code and local regulations.

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

Yes, the Mexican legal system does also allow for full ownership, co-ownership and condominium regime system.

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

Yes, Mexican legal system does allow for joint ownership (co-propiedad). This is very common, for example, within the condominium regime where common areas are held jointly.

Different entities could be owner of real property such as: the state, private persons, corporations, limited liability companies, civil associations and trusts (fideicomisos).

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

Although the Mexican Legal system does not explicitly regulate the distinction between land and construction ownership, it allows in practice for the distinction of those two types of ownership. However, if the owner of the construction is unable to prove its property title, the construction would automatically be considered as an accessory to the land and therefore, would be deemed as attached to the land.

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

Yes, the real property has to be registered in the Public Registry of Real Estate Property. In terms of real estate property, the title owner has priority over the good faith possessor. Even if there is a presumption of good faith in favour of the possessor, he or she needs to prove “original possession”.

## **II. Costs for transaction**

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

Real Estate Acquisition Tax:  
Real Estate Acquisition Tax is a State tax which may vary from State to State,

calculated at a variable rate that goes from 1 to 3.7 of the value of the property, for example the rate of this tax in Mexico City is of 2%.

The tax must be paid whether the acquisition is carried out through, for example, a purchase and sale agreement, donation, trust, merger of companies, split-off, or payment in kind.

**Value-Added Tax:**

No VAT is triggered on the sale of land used for any purpose and on constructions used for residential purposes.

VAT shall be paid by the purchaser of structures or constructions used for commercial or industrial activities at the rate of 16 percent of the amount of the transaction. In case parts of the constructions are used for residential purposes, VAT will not be paid on such parts.

Mexican notaries issuing transfer documents will request a qualified appraisal for tax purposes. Usually, he will obtain certificates of no encumbrance from the Public Property Registry and certificates by tax authorities evidencing that real estate taxes are duly paid.

The final deed shall be registered before the Public Property Registry for the transfer to be valid against third parties.

The proceeds from the sale of real estate in Mexico are considered to be Mexican-source income. There are two methods to pay the tax on the transaction. The first is through a withholding by the purchaser of an amount equal to 25 percent of the amount obtained without deductions. In the second scenario, the non-resident seller must appoint a representative resident in Mexico, who shall notify the person authenticating the public instrument (notary, judge and broker) of any deductions to which the taxpayer is entitled. The person authenticating the public instrument will file the tax return within 15 days following the date of signature of the instrument, and in such case, a 30 percent tax rate for year 2010 will be applicable to the profit.

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

There is no restriction in buying and selling a real estate property within a short interval of time. However in order to be exempted from paying income tax derived from the sale of a residential unit, it is necessary to prove that the seller has been living in the property since the date of acquisition or at least in

the past 5 years prior to the sale and that the value of such property does not exceed 6,6 Million pesos (\$536,000.00 USD).

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

There is neither exchange control nor rules related to funds repatriation in Mexico, therefore no limitation regarding the repatriation of funds.

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

The minimum term for the lease of farming or residential real estate properties is at least of one year.

For industrial or commercial lease there is no limitation, therefore the term and termination conditions must be in accordance with what was agreed by the parties.

Please note that in case the owner decides selling the property, the lessee enjoys a pre-emptive right of 30 days to acquire the property under the same conditions of the sale to be carried out by the owner.

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

The person willing to change the use of a building is required to get a permit from the municipality. The municipality's urban development plan has to allow this type of change of use.

- 11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**
- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence) ?

- **estate agent?**
- **others**

The notarial fees vary from State to State and are calculated on the value of the property. In Mexico City, a transaction of EUR 5 Million would cost EUR 290,000 which stands for 5,8% of the transaction. This would include: public notary fees, registry cost, appraisal and acquisition tax.

The cost of an estate agent and of an advising lawyer is difficult to estimate, because of the wide range of expertise and reputations on the market.

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

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

Municipal law governs the yearly imposition of real estate property, which could vary between 1 and 1.5% of the value of the property. This value is determined by the value of the property when purchased, or reassessed by the municipality whenever it considers appropriate in accordance with factors such as inflation or urban improvements.

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

As an indication, the minimum wage in Mexico varies between 1630 and 1710 MXN a month, which is about 120-130 USD a month. A caretaker's wage could widely vary according to factors such as: market value of the zone, responsibilities of the caretaker, if the caretaker's housing is included in the contract, etc.

### **IV. Foreign investors**

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

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**

– **At the moment not because of the impacts of the worldwide financial crisis**

Yes, investing in Mexico could be a very profitable venture. If the residential sector recently went through a slight decrease, other types of investment such as touristic real estate and commercial and industrial leasing have been particularly profitable.

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

Foreigners may acquire real estate in Mexico, as long as they obtain a Permit issued by the Mexican Ministry of Foreign Affairs waiving the protection of his or her home government.

The Mexican Constitution establishes a “restricted zone” (100 kilometers wide from the borders and 50 kilometers wide from the coastal shores) in which direct foreign ownership is prohibited. However, Foreign Investment Law authorizes foreign participation in a Mexican company owning real estate within the restricted zone for non-residential purposes and requires only a notification to the Ministry of Foreign Affairs; if for residential purposes, title of the real estate must be held through a trust by a trustee, which must be a Mexican bank. Approval of the Ministry of Foreign Affairs is required. Long term leases of real estate are no longer prohibited.

Although foreigners may not acquire direct ownership in the prohibited zone they can acquire other rights over real estate in the following cases:

- a) A Mexican company with foreign investment up to 100 percent may directly acquire property within this zone to perform non-residential activities, i.e., industrial, commercial or tourism activities. The acquisition must be registered with the Ministry of Foreign Affairs.
- b) If the real estate is for residential purposes, foreign individuals or companies and Mexican companies with 100 percent foreign capital stock may acquire the rights of use and benefit from the real estate through a trust executed with a Mexican bank. The duration of the trust may be 50 years, and the term may be extended upon request of any person having an interest in the property.

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

Construction and development project are regulated by local authorities. It is therefore necessary to review the laws of each State, depending on where is located the said project to be developed.

A development may be planned either in an inner city or in a tourist resort in the seashore. The rules regarding foreign ownership are different in each particular case. Some of the regular authorizations required are as follows:

- a) Group Construction License.- in order to develop projects of construction, as well as developments including offices, stores, industries and services.
- b) License for the Use of Land.- Pursuant to the Municipal Urban Development Program, it is necessary to obtain a license for the use of land. Such document authorizes the use to be given to the property.
- c) Environmental Impact Authorization.- Pursuant to the Environmental Law, it is necessary to obtain an Environmental Impact Authorization. It is necessary to file an Environmental Impact Manifest which will serve as a basis to prepare the Environmental Impact Evaluation. The evaluation is the procedure through which the authorities evaluate the effects of the development project on the land and natural resources, in order to avoid damages to the environment.
- d) Use Limitations.- The deed of condominium must include the limitations to the use to be granted to each component of the project. Such limitations must be consistent with the corresponding Municipal Development Program.

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

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

Yes, our firm could definitely assist foreign investors in Mexico. We have several clients that are real estate developers and/or sellers of undeveloped land for the purpose of real estate development. There are several programs created by the Mexican government for medium or low income housing and therefore opportunities for rent or sale of this type of projects.

## **The Netherlands**

### **Jonker Abeln Advocaten**

De Lairessestraat 73  
1071 NV Amsterdam  
Netherlands

Tel: (31) 20 676 51 95  
Fax: (31) 20 676 98 86  
info@jonkerabeln.nl  
www.jonkerabeln.nl/

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

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

In The Netherlands, parties to a prospective sale of real estate will usually with the assistance of real estate agents or lawyers (in most instances *advocaten*) negotiate the terms of agreements of purchase and sale. In cases where parties are fully in agreement or close to it, they may turn to a civil law notary instead. A civil law notary is by training a lawyer, holding a public appointment. His duty is to render advice and draft contracts on basis of impartiality. Purchase and sale agreements will contain representations and warranties. For straightforward transactions standard forms for representations and warranties are in common use. Additionally, the relevant sections of the Netherlands Civil Code will be applicable. It is to be noted that in the case of a sale of commercial real estate, agreements will be binding even if only made verbally. Foreign investors may in the early stages of negotiations wish to stipulate that no agreement comes about unless and until made in writing in order to ensure that they have an opportunity to negotiate the representations and warranties they want to have.

Purchase and sale agreements will usually contain conditions precedent and a scheduled date for delivery. Title is transferred by the signing of an instrument of transfer (a deed of conveyance) and the entering of the same in the national land register (Kadaster). The instrument of delivery must be signed in the presence of a civil law notary, officiating in his capacity. It is almost invariably agreed that prior to the date scheduled for delivery, the purchase sum is paid into the client account of the civil law notary. Upon the signing of the instrument and checking whether the real estate is clear from liens and encumbrances, the civil law notary will deposit the instrument of delivery with the registrar of the land register and pay out the purchase sum to the seller. Usually, it is agreed that at delivery current rents (if applicable) and costs are settled on a pro rata basis relating to the proportion of relevant time periods lapsed. If there are no commercial reasons for agreeing a longer period (such as a condition precedent relating to obtaining the required finance) parties will agree periods varying from one month to three months between the agreement for purchase and sale and the instrument of delivery.

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

The normal position is that the ownership of land comprises the ownership of the surface, the buildings and the works forming a permanent part of the land. For the owners of land it is possible to create rights in rem on their land such as the right of leasehold (emphyteusis), the right of superficies and apartment rights and pass these on to third parties. Such rights give control to the surface, the land and the works to the extent provided in the deed pursuant to which such rights were created. Such rights can be transferred to third parties separate from the ownership of the land from which they are derived. Any remaining rights would remain with the registered owner. The creation and delivery of rights of leasehold, superficies and apartment rights must be registered in the national land register. Such registration is a constitutive element for the creation or delivery of such right in rem.

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

Yes, the legal system of The Netherlands permits joint ownership of real estate. Natural persons and legal persons can be owners of real estate. This would include foreign legal persons. Unlimited partnerships would not qualify as registered owners: one or more managing partners would be registered.

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

In The Netherlands, the ownership of a building is implied in the ownership of the land except where any of the rights in rem discussed above has or have been created. The existence of such rights would appear from the national land register.

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

In The Netherlands, all land is registered in the national land register (Kadaster) referred to above. As title to ownership and rights in rem may only be transferred by registering the same on the land register, the land register is very accurate. There is a very limited number of title defect, which would not appear from the registration. A good faith purchaser would not be protected with regard to such defects which, as implied, hardly ever occur. Title insurance is not available. A purchaser would rely on the normally rather thorough title search performed by the civil law notary. Defects, if any, would in due course loose effect through prescription.

## **II. Costs for transaction**

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

There is a national transfer tax amounting to 6% of the assessed value of the real estate concerned. There is a limited number of exemptions. Worth mentioning are the exemption in case of a subsequent transfer within six months from a transfer already taxed (except to the extent the purchase price of the second transaction is in excess of the purchase price of the first transaction) and, subject to stringent restrictions, the sale of plots on which construction is yet to take place. In the latter cases VAT at, currently, a rate of 19% would be payable. Such VAT may during the course of construction, be set off against the VAT payable on construction costs. The sale of the shares of companies which qualify as real estate companies is also subject to the 6% transfer tax.

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

It is generally not a problem to buy and sell property on a short term basis. Taxwise, a sale within the first ten years from delivery may be unattractive in the case of sale of plots used for construction if the aforementioned exemption from transfer tax was used.

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

In The Netherlands, there are no restrictions on transfer of capital to foreign countries.

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

Leases pursuant to a *tenancy agreement* (i.e. a contract, the most common type of lease) cannot be terminated with effect any earlier than the agreed term or any agreed option to extend. In the case of residential premises it is very difficult to terminate the lease upon termination of the agreed term. In the case of certain types of commercial real estate (primarily shops) the owner may only effectively terminate if and when its interests in terminating the lease override the interests of the tenant. In the cases of all other commercial real estate such as plants and offices, the tenant could upon the expiration of the agreed term at best rely on a grace period for eviction of three years at most, normally less. *Leasehold* rights are rights in rem and can therefore not be terminated unilaterally prior to the term stated in the instrument of creation of the same.

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

Whether the use of a building from residential use to office space is allowed depends on the municipal zoning restrictions applicable to the area in which the real estate is situated. Exemptions from the current zoning restrictions may usually be obtained if a change of use conforms to future public plans for the area. If and when the residential real estate is a leasehold right, the owner of the remaining interest in the land would have to agree to a change of use –and would usually make this agreement subject to an increase of the retribution payable for the leasehold.

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

- notarial costs?
- land register?
- real property transfer tax?

- **advising lawyer (due diligence )?**
  - **estate agent?**
  - **others**
- 
- Notarial fees are normally paid by the purchaser who will have the privilege to choose the notary to be employed. The fees will depend on the agreement made by the purchaser with the notary. The fees will in most instances amount to about 3/4% of the purchase price.
  - Costs of entry in the land register depend on the assessed value of the land. These costs are slightly in excess of nominal amounts.
  - Transfer tax normally amounts to 6% of the assessed value. See above.
  - The fees of advising lawyers are calculated on basis of agreement with their clients. Such fees would in most cases be based on time spent and the agreed rate. Due diligence would in most cases be included in the notarial services.
  - The fees of the real estate agent also depend on the agreement with the client. Often, a success fee is agreed, stating a percentage (ranging from 1% to 1,5%) of the purchase price.
  - VAT is charged on most fees and costs.

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

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

In The Netherlands, a real estate holding tax is charged by the municipality in which the real estate is located. The municipality will charge a percentage of the assessed value of the real estate. The percentage differs from municipality to municipality, 0,1% of the assessed value of the real estate being a typical percentage.

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

Professional caretakers will often charge on basis of the value of the property or on basis of rental income. Some will charge on basis of time spent. Charges may range from 4,5% (shops) to 6% (residential) of the rental income.

#### IV. Foreign investors

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

- **Directly in real estate**
  - **Through real property funds, open or closed ones**
  - **Through other clear and secure financial products**
  - **At the moment not because of the impacts of the worldwide financial crisis**
- Most foreign investors make the choice between investing directly or through companies depend on tax considerations. It will primarily depend on the country of origin of the investor whether a foreign or a Dutch vehicle is used.
- There is a number of real estate funds which invest in Dutch real estate. The choice depends on the foreign investor's strategy.

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

There are no restrictions with respect to nationality or registered office of foreign investors.

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

It depends on the type of business concerned whether local permits are required to run such business. In the case of EU nationals and nationals from treaty countries requirements may not discriminate and can in most instances easily be obtained. In the case of nationals from other countries it would depend on the type of business concerned.

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

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

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

- We can make introductions to real estate agents personally known to us. We can also make introductions to valuation experts who can double check any value assessed.
- We can assist with developing construction projects.
- We can assist with all legal aspects of planning and negotiating agreements. Due diligence as to title (other than introductory searches) and the responsibility for transfer of title are in The Netherlands in the hands of civil law notaries. We have good working relationships with many civil law notaries and tax planners in Amsterdam and around the country.

## **New Zealand**

### **Lowndes Associates, Auckland, New Zealand**

P O Box 7311  
Auckland 1141  
New Zealand

Tel +64 9 373 3331  
Fax +64 9 373 3423

[www.lowndeslaw.com](http://www.lowndeslaw.com)  
[lowndes@lowndeslaw.com](mailto:lowndes@lowndeslaw.com)

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

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

Any agreement to purchase real property in New Zealand must be in writing and can be made conditional on matters such as, but not limited to, mortgage finance, review of the registered title, valuations, review of title information held by the relevant local authority, building inspection, engineer's report and due diligence generally. An oral agreement to purchase real property in New Zealand is not considered to be legally binding.

When all the terms of the sale (including the purchase price, settlement and possession dates and any other conditions that may be required) have been agreed, a written agreement will be signed by buyer and seller.

Once an agreement is signed and dated, it is common (although not obligatory) for a deposit (often 10% of the agreed purchase price) to be paid by the buyer. The deposit is often paid to the real estate agent or to a solicitor. A deposit is normally held for and on behalf of the buyer and seller on the terms set out in the agreement. It is normal for the deposit to be paid to the seller once all conditions of the agreement are satisfied. The agreement will provide for what happens to the deposit if the conditions are not satisfied or if the agreement is otherwise cancelled.

Once all the conditions of the agreement have been satisfied, the agreement is unconditional. At this point, the deposit is released to the seller. Once the agreement is unconditional, it is unusual for the deposit to be refunded should the buyer fail to settle for any reason.

Settlement is the day that the buyer pays the balance of the purchase price and possession is given and taken. It is relatively common for a buyer to undertake a pre-settlement inspection before settlement funds are paid, to check that the property is still in the same condition as it was when first inspected.

A buyer will need to provide their solicitor or conveyancing professional with their cash contribution (if there is one).

Since February 2009, all transfers of real property in New Zealand (and other transactions, such as mortgaging land) are required to be transacted on-line. All transfers are transacted by internet in a special workspace called Landonline, created by Land Information New Zealand (LINZ), the government author-

ity with jurisdiction over the registered land title system. The workspace is accessed by registered conveyancing professionals acting for both buyer and seller. Briefly, a workspace (or e-deal) is set up for each transaction. Instead of signing paper transfers, each party to a transaction signs an Authority and Instruction Form (A&I) which authorises and directs its conveyancing professional to undertake the transaction on-line. The e-deal requires the various electronic documents to be pre-validated by the parties and by the Landonline system and for the documents to be electronically signed and certified by the conveyancing professionals. Once the transaction is properly arranged on Landonline, each conveyancing professional undertakes to the other that the electronic documents have been properly signed and will be released to the other at settlement.

On settlement day, the lawyer for the buyer will drawdown any mortgage advance from a lender and, provided the seller's lawyer is ready to settle, pay over the amount required to settle and finalise transfer of the title to the buyer. Title is transferred electronically on Landonline and the buyer's name is entered on the electronic land title register.

If the sale was initiated through a real estate agent, the keys will be made available from the real estate agent for the buyer to collect as soon as settlement is completed.

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

New Zealand law recognises two main estates in land, freehold and leasehold.

Freehold estates can be fee simple estates (ownership of the whole of the interest in the land), life estates (ownership for life) or stratum estates (ownership of separate stratum estates or units created within the greater estate).

In terms of the stratum estate, in New Zealand unit titles were created (under the Unit Titles Act 1972) to allow people to own an apartment in a building and to allow for multiple ownership of the common spaces and facilities, such as driveways and lifts.

A unit title can be bought and sold, or leased or mortgaged. It is made up of the following components:

- Ownership of the particular units (which can be the apartment and the car park).

- An undivided share in the ownership of the common property.
- An undivided share in the ownership of the units if the unit plan is cancelled.  
The unit owners own the common property as tenants in common so that when the unit owner dies, their share does not revert to the other owners but passes on to someone else, according to the terms of that person's will (or intestacy rules in the event there is no will). Each owner's share in the common property is proportional to their 'unit entitlement'.  
A body corporate arranges the upkeep and insurance for the building, paid for out of money levied on the owners.

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

There are a number of entities that can own property. This include limited liability companies, incorporated and unincorporated societies, trusts, joint ventures and partnerships (including limited partnerships).

There are two main ways in which real property can be jointly owned in New Zealand, as tenants in common or as joint tenants. These are detailed below:

**Tenants in Common**

Tenants in Common is for ownership by two or more people. There is no limit to the number of people that can hold title by Tenants in Common.

Property can be owned as Tenants in Common by people who are related and who are not related. Ownership by Tenants in Common can be held in equal or unequal shares. For example, John could hold 50% ownership, Mary 25% and Sarah 25%. All tenants have the right to possess the property. No tenant can exclude the other.

Upon death, the interest of the deceased co-tenant will pass to the co-tenant's heirs. If Sarah died, John would still hold 50%, Mary would own 25%, but Sarah's 25% would pass to whomever she designated in her will (or in accordance with the intestacy rules).

**Joint Tenants**

Each person owns an equal share and if one party dies, title transfers to the survivor, regardless of what a will may specify.

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

As a general rule, buildings are affixed to and form part of the land on which they are built.

It is more common in New Zealand for ownership of the land to be combined with ownership of the building erected on it. However, there are some instances of leasehold title where the land is owned by the freehold owner and the buildings are owned by the lessee, subject to the terms of the lease. The lessee pays rent to the owner of the land.

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

Land ownership in New Zealand is based on the Torrens System of land registration.

The Torrens system provides a public register recording all material facts relative to the title.

Once a registration is accepted the New Zealand Government guarantees what is called an ‘indefeasible’ title. The major advantage of the system is that anybody dealing with land in New Zealand is saved the effort of investigating back to the root of the title, and is able to rely on the details on the face of the register.

## **II. Costs for transaction**

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

This requires an assessment of the buyer and/or seller’s position from a tax perspective on a case by case basis which is beyond the scope of this note. A general overview follows.

New Zealand has abolished stamp duty (ad valorem transfer tax) on the transfer of real property. Selling real property may give rise to taxable income / capital gain for the seller, depending on the owner’s specific circumstances.

Buying and selling a family or private home usually has no tax consequence.

However some people buy family homes intending to resell them and some are doing this on a regular basis as a way of earning income.

If a person has a regular pattern of buying and selling family homes, this may also be considered property speculation or dealing for tax purposes. Tax will be paid on a capital gain, however long the property is held.

Generally, a person does not pay tax when selling an investment property except for any depreciation recovered. However, each time a property is sold it is important to consider if the seller is still a residential investor or has by course of dealings become a dealer.

If a person buys property with the intention of resale, any profits from the later sale are likely to be taxable.

It is important to seek specialist tax advice in relation to these issues.

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

Please see the answer to the previous question.

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

There are generally no restrictions on the repatriation of capital or earnings of a New Zealand business to overseas investors. This includes the remittance of dividends, profits, interest, royalties, management fees, etc. In many cases, however, non-resident withholding tax will be required to be deducted from the amount of those payments.

There is generally no restriction on the repatriation of capital or earnings arising from the sale of New Zealand real property by overseas investors.

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

If you buy the reversionary interest in relation to leasehold property then the general position is that, subject to the terms of the lease, you take the property subject to the lease. The buyer assumes the rights and obligations of the lessor.

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

Cities in New Zealand are broken down into local governments or authorities. Each local government has a District Plan which sets out the permitted and non-permitted uses of properties in specific zones. If you wish to change a property from residential to commercial use, then you would need to apply to the local government concerned. Non-complying uses as specified in the District Plan are not permitted.

The District Plan would need to be reviewed during your due diligence process to ensure whether or not the property in question is suitable for the particular intended purposes.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial Costs:** Transfer documents are not required to be notarised in New Zealand.
  - **Land Register:**
    - Transfer fee - \$51 (before 1/7/10); \$52.13 (after 1/10/10)
    - Title search fee - \$4 (before 1/7/10); \$4.09 (after 1/10/10)
  - **Real Property Transfer Tax:** Not applicable.
  - **Advising lawyer:** It varies, but could be anywhere from approximately \$800 (plus GST and disbursements) for a very simple transfer without due diligence and reporting. If the consent to the purchase of the Overseas Investment Office is required, factor in an additional costs of anywhere from \$1,000 (plus GST and disbursements).
  - **Estate Agent fees:** Real Estate agent fees vary but the following is indicative:
    - 4% on first \$250,000;
    - 1% on balance of purchase price

- Admin fees – usually around \$500
- Plus GST  
e.g. on an NZ\$8,506,295 purchase (EUR 5 million) the fees would be approximately:

4% on first \$250,000	10,000.00
1% on balance of 8,256,295	82,562.95
Total	\$92,562.95

Plus any admin/advertising fees.

However, a set commission may be able to be negotiated with the agent.

### III. Costs for holding real estate

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

There are no annual tax obligations or land taxes in New Zealand. Land owners are only required to pay annual rates levies which are set by the local government and/or regional council, depending on the location of the property. The levies are based on the current rating valuation which are re-valued, usually every 3 years. The percentage of the increase of levies varies between 3-5%, but this is only an estimate.

In certain circumstances, for example if you intend to trade the property, you may be required to pay income tax and/or Goods and Services tax (*GST*). *GST* is an ad valorem tax on the value of a supply of goods and services.

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

In New Zealand, there is no difference in the costs of engaging a *professional caretaker* (property manager), whether you are a foreign investor or New Zealander.

In relation to residential property, a land owner can expect to pay an ongoing management fee of anywhere between 7-10% of the weekly rent. If ongoing management services are not required, you can engage a property manager to do one-off lettings, inspections or vacancies, the costs of which can vary from \$250 to \$400 depending on the service(s) required.

The costs for managing commercial property in New Zealand are wholly dependent on the type of property being managed, the floor area of the property, location and number of tenants. Inquiries should be made at the time of completing a due diligence enquiry.

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

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

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

This is specialist investment advice which depends on an individual's particular circumstances. Specific, tailored advice should be sought.

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

In general, any individual person or entity is permitted to buy real property in New Zealand, and there are no restrictions as to nationality of shareholders, directors and officers or registered offices of legal entities.

There are however some restrictions that apply to foreign investors wishing to purchase land in New Zealand that is categorised as being *sensitive land* under the Overseas Investment Act 2005 (*Act*). Some examples of sensitive land include land that includes any foreshore or seabed and non-urban land that has an area of 5 hectares or more. An overseas person requires the consent of the Overseas Investment Office to purchase sensitive land in New Zealand. It is not possible to organise a domestic entity to avoid these restrictions. This is a complex area of New Zealand law and we highly recommend any foreign investor obtains specialist legal advice.

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

The District Plan will determine whether you may operate a business on any particular land. It is therefore important to check the zoning described in the District Plan before purchasing a property.

If the land is not zoned for the business use contemplated, you may be required to make an application to the relevant Council for a change to the land use for this property. This is a specialist area of work.

Generally speaking, a foreign company may do business either by incorporating a local subsidiary, purchasing an existing New Zealand company as a subsidiary or establishing a branch and registering it as an overseas company with the New Zealand Companies Office.

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

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

Lowndes Associates is able to assist any foreign investors in relation to all of the above matters. Please contact Mark Lowndes or Howard Thomas at:

Lowndes Associates  
P O Box 7311  
Auckland 1141  
New Zealand

Tel +64 9 373 3331  
Fax +64 9 373 3423

[www.lowndeslaw.com](http://www.lowndeslaw.com)

[lowndes@lowndeslaw.com](mailto:lowndes@lowndeslaw.com)  
[Thomas@lowndeslaw.com](mailto:Thomas@lowndeslaw.com)

## Norway

### **Brækhus Dege Advokatfirma ANS**

Kinoveien 14  
P.O.Box 216  
1301 Sandvika  
Norway

Tel: + 47 6780 9060  
Fax: + 47 6780 9061  
[www.bd.no](http://www.bd.no)

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

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

Real estates are sold either directly by the formal owner or indirectly as sale of the shares or parts in a single purpose company which again is the formal owner of the real estate.

All real estates in Norway are listed in a registry administered by the state. The purchaser must be formally registered in the registry to obtain protection against the seller's creditors, third parties acting in good faith etc. The key in a direct real estate transaction is therefore the formal registration of the transfer of ownership. There are some formalities necessary before the transfer will be registered. These formalities varies according to the type of real estate, the size of the property etc.

The parties can decide how they will handle the process. Normally the seller or the parties in common appoints a lawyer or a real estate broker to handle the formalities and to secure the financial interests of parties and the mortgagors.

If the sale is an indirect transaction the procedure will be more like the procedures for sale of businesses or companies.

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

Yes. The formal construction of owning a unit is common for apartments but also possible for commercial properties. The owner of such a unit will basically have the same rights for his unit as an owner of the real estate.

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

Joint ownership is permitted and there are no particular restrictions on this. The owner can be two or more persons together or companies etc.

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

The owner of the land is considered to be owner of the building as well. There are some modifications construed i.a. as leasing contracts.

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

Yes, all real estates are registered. A purchaser in good faith will in general be protected against encumbrances or liens not formally registered.

## **II. Costs for transaction**

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

The tax is 2.5% of the purchase price in a direct transaction. If the transaction is done as sale of shares or parts there will be no such tax.

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

The answer depends on the sort of real estate. For houses for personal use (homes and holiday homes) there are some requirements. For commercial properties there are no such requirements.

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

Normally this will be no problem.

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

The lease contracts can only be terminated if the contract opens for such termination.

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

You will need approval from various authorities.

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

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

The answer to this will depend upon the estate in question. The tax is 2.5 % (EUR 125.000). The estate agent, if any, is normally paid by seller. Legal costs for buyer will normally be in the range EUR 5.000 to EUR 20.000.

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

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

The land tax is not implemented fully in Norway. This have to be considered for each estate individually.

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

Normally a caretaker will charge a fee in the area 1-4 % of the rent.

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

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

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

In general investments in real estate have been successful if the investment is on a long term basis. The Norwegian economy is strong and we are not hit by the financial crisis.

We have no particular advice regarding how to invest. That depend on the client, the target and the seller..

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

There are some restrictions. Normally it is possible to find acceptable models for foreign owners unless the estate is a farm.

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

It differs depending on the sort of land, the sort of business and if the investor is from an EU country.

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

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

The answer is yes to all bullet points. We do a lot of such work.

Norway

## **Panama**

### **Rosas y Rosas**

Via Espana 122 - Oficina 1600  
Edificio Banco de Boston  
Apartado 8240  
Panama 7

Tel: (507) 264 9177  
Fax: (507) 264 0269  
jcroas@rosaslaw.com  
www.rosaslaw.com

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

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

In Panama, real estate transactions are governed by the Civil Code, Commercial Code and a group of regulations as special laws, executive decrees and resolutions regarding the subject matter. In our country, the signing of the purchase agreement has to be recorded in the Public Registry Office for the transaction to be effective. Payment is usually made when the recording takes place, via a payment letter from a bank, or the funds that a third party has held in escrow.

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

Yes. The Panamanian legal system permits different sorts of ownership.

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

Yes. Our legal system permits joint ownership of real property and it can be by two or more natural persons or a juridical person as a corporation, an LLC, A Private Interest Foundation or other type of entity recognized by the law.

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

In Panama this depends if it is a horizontal property or not. If it is horizontal property, the original title of the land where the construction is erected passes to all of the co-owners in the established percentage of participation in the Condominium Regulations. Said original title will retain ownership of the common areas in the building. The owners of the different units of the building

have property titles for each one of them and the ownership becomes effective since the moment of the recording of the title in the Public Registry.

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

Yes. As mentioned above, the ownership of a land has to be duly recorded in the Public Registry as a formality to achieve the effectiveness of it. Since the moment of the recording, the owner of the land is protected regarding his rights on the land. A good faith purchaser is also protected, but a due diligence must be done before purchasing a land, to verify that everything is in order and that the land, or other type of real property – is indeed free of encumbrances or any other kind of limitation.

## **II. Costs for transaction**

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

In Panama, real property transfer tax has to be paid and the percentage is 2% of the purchase price. Also a 3% of the purchase price has to be paid in concept of capital gains. Plus, the registry rights and the notarial rights have to be included in the expenses.

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

In Panama there is no limitation. You can buy a property and sell it after a short period of time without incurring in extra taxes.

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

Panama does not impose a limitation to the transfer of funds. If funds are transferred to a Head Office, other taxes could apply.

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

In Panama, the general rule is that the term of the lease contract has to be respected; in other words, the purchase of a property does not break the lease contract. In the case of commercial real estate, it might be probable that the lease contract is recorded in the Public Registry, so the terms of the contract will be enforceable to new owners and third parties and that's why it is so important to make the preliminary investigations before purchasing a real estate.

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

The first thing that has to be taken in account is the zoning. In Panama, there are areas where is not permitted to build or establish commercial activities because they are completely residential. Also, this could be subject of public hearings in order to evaluate the diverse opinions of people.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial costs:** these costs will vary depending on the length of the deed.
  - **Land registry:** About US\$16,500.00
  - **Real estate transfer tax:** if the purchase price is EUR 5 Million, the real estate transfer tax is US\$130,000.00.
  - **Advising lawyer (due diligence):** this will depend on the agreement but it could be between 1% and 2% of the purchase price.
  - **Real Estate agent:** 5% of the net purchase price.

### III. Costs for holding real estate

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

In Panama, you have to pay property tax on real estate and the amount will depend on the registered price of the property, which typically remains the same year after year except when there are government ordered appraisals which do not take place ordinarily. These percentages vary from 1.75% to 2.10%. As a manner of incentive to construction and purchase of real estate, there is an exemption in new horizontal properties, where the first 20 years are exempt of this tax. In the case of transfer of ownership, the percentage is 2% of the purchase price. Any sale within said 20 year period will cause property on the aggregate of the original amount.

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

A foreign investor might require an administrator, who would charge between 6% and 8% of the gross rental income, under regular conditions.

### IV. Foreign investors

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

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

We would advise to invest directly in real estate and through real property funds. Although it is no guarantee towards the future, in Panama the worldwide financial crisis has not impacted severely. Our banking system has remained strong and the real estate investments are still a good source of profit.

Panama has traditionally seen high quality construction in both commercial and residential development, and it continues nowadays with an important influx of foreign investment in the sector.

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

Individual persons and legal entities are allowed to buy property in Panama. The only restriction regarding the nationality is that foreigners cannot buy any land or property in less than 10 kilometres from the border with the other countries next to ours.

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

First, the ownership has to be recorded at the Public Registry in order to become effective. The official approvals will depend on what the business will be oriented to. Most of the approvals are managed by The Ministry of Commerce and Industries and the principal requirement that has to be completed is the issuance of a notice of operation.

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

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

Yes, our law firm, ROSAS Y ROSAS, can assist investors in all of the above mentioned aspects as in fact our real estate practice regularly involves similar issues. Contact persons for questions on commercial real property and other real estate issues:

ROSAS Y ROSAS  
Juan Carlos Rosas  
jcrossas@rosaslaw.com  
Rolando A. Guevara A.  
rguevara@rosaslaw.com

# Peru

## **Estudio Grau**

Av. Santa María 110 - 140  
(Miraflores, L 18)  
Lima  
Peru

Tel: (51-1) 422-0830  
Fax (51-1) 440-6158  
[www.estudiograu.com](http://www.estudiograu.com)

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

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

In Peru real estate transactions are governed by private law. The Peruvian Civil Code is the applicable law that governs the relationship between owner and seller. Private parties, both buyer and seller, negotiate commercial aspects of the transaction, such as price of the real estate or the warranties that shall be given by the seller to the buyer. Acceptance to a firm offer constitutes the agreement, which seals transfer of real estate to the buyer. For certainty and better right, Sales Agreements (the “Agreement”) is drafted in writing, notarized into public deed, and filed before the Local Real estate Property Register, where the property is located.

The Agreement contains every aspect of the prior negotiations that among others include the following: **(i)** sales price, **(ii)** financing terms, **(iii)** condition of the property, **(iv)** when the buyer gets the full possession of the property and all the benefits and costs of it.

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

Yes. The Peruvian legal system acknowledges different sort of ownerships. The “regular” property of land usually includes by law ownership of constructions built on the concerned land, as well as underground. The owner has the right to constitute single rights per units, or even rights of the underground, to the benefit of third parties.

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

Yes. The Peruvian legal system acknowledges joint ownership. More than one person (individuals or entities) can jointly own a property as co-owners. In case of joint ownership of real estate property, the Peruvian Civil Code estab-

lishes the presumption that all shares of the property are equal unless proven otherwise. Domiciled or non-domiciled entities can own real estate in Peru, provided property is not located within the 50 kilometres of country borders.

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

According to the Peruvian Law the ownership of the land includes the ownership of the constructions built upon it. However, the owner of the land may constitute different single rights over the building, to the benefit of different owners.

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

In Peru, registration of real estate property is not mandatory but highly recommended. However, every registered title before Local Real estate Property Register is considered public information and, hence, presumed to be known by all Peruvian citizens. Therefore, in order to protect the owner from third parties and good faith purchasers, it is highly recommended to register the property in the Local Real estate Property Register and every single right upon it. The exception is mortgages over property, for which property (and the mortgage title) has to be registered.

## **II. Costs for Transaction**

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

According to Peruvian Law real estate property transfers are subject to “Income Taxation“ and Alcabala. The rates of the first tax in question vary depending if the seller is a natural person or a corporation that domiciles in Peru, or a natural person or a corporation that domiciles out of the country.

If the seller is a natural person that domiciles in the country a 6.25% rate is applicable over 80% of the gross income obtained because of the property transfer. If the seller is a natural person or corporation that has its residence

out the country a 30% rate will be applicable over the gross income obtained because of the property transfer.

The acabala is calculated according to the following equation: transfer price minus S/. 36,000 multiplied by 3% of the transfer price.

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

The Peruvian tax law regarding this matter does not establish the specific obligation of holding the property for a certain term. Nevertheless, if a natural person domiciled in the country transfers more than two times a property in less than one year the income taxation rate would change from the 6.25% rate explained above to a 30% rate.

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

Yes. In Peru there is no restriction regarding this matter. Therefore the seller is able to transfer the money obtained due to the property transfer out of the country once the deal takes place.

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

The Peruvian Civil Code establishes that the buyer must respect the lease contract only if it is recorded in the Local Real estate Property Register. In this case, once the buyer becomes the new owner of the property it becomes the new landlord as well, assuming all the rights and obligations the previous owner of the property had due to the lease agreement.

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

This must be checked for every purchase case separately taking into account the following two aspects: **(1)** if the building permit allows the intended use of

the purchaser and **(2)** if local authorities have establish certain restrictions for example for commercial establishments in areas of residential property.

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial Costs.**- The costs vary depending of the Notary Public and the amount of the property transaction. In the city of Lima the notarial costs for the transfer of a property for an amount of 5 Million Euros would be approximately S/. 10,000.
  - **Land Register.**- S/. 3,600.
  - **Real estate Property Transfer Tax.**-
  - **Income Tax**
    - If the seller is a natural person that domiciles in the country S/. 897,500.00.
    - If the seller is a natural person or corporation that has its residence out the country an amount of S/. 5,385,000.00.
  - **Alcabala**
    - S/. 537,420.
  - **Advising Lawyer (due diligence).**- Depending on the terms convened with the lawyers.

**III. Costs for holding real estate**

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

Real estate owners are oblige to pay a Real estate Tax each year, as well a periodic payment for the services rendered by the municipality where their property is locate.

The real estate tax rate depends on the current value of the property. If the property value goes from S/. 0 to S/. 54,000 the rate is 0.2%; from S/. 54,001 to S/. 216,000, the rate is 0.6%; and from S/. 216,001 and beyond the rate is 1%. The real estate tax must be calculated in an accumulative way.

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

Peruvian law does not establish any special conditions for this service. In that case, the hiring of a caretaker of the property and their economic conditions must be regulated in a recruitment agreement.

**IV. Foreign investors**

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

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

We would advise foreign investors to invest in commercial as well as non commercial real estate property in Peru since currently the country experiments a huge financial growth and the prices on the real estate property market flow and can adapt to the investors demands. This means investors can find real estate prices that adapt to their interests depending on the area of the property and its location. Furthermore interest rates for financing are average at the moment. We would advise foreign investor to invest directly in real estate or in open or closed property funds only if they know the management and if they are very transparent with respect to the costs involved.

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

The Peruvian law establishes equal treatment for national and foreign investment. However, the Peruvian Constitution forbids foreign investors to purchase property within the 50 kilometers of the country border. Property in Peru can be owned by any individual or legal entity regardless it has no local branch office in the country.

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

The official approvals and local permits vary depending on the type of business the foreign investor would like to run in the country.

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

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

Yes, Estudio Grau would be pleased to assist foreign investors in all the aspects involving the analysis and evaluation of profitable investment products in real property, the developing of construction projects and all the legal aspects involved. Furthermore, Estudio Grau can advise buyers with the sale decision process by means of GIS Real Estate, a client-tailored product aimed at providing a fast and timely decision making in relation to legal, geographical, social, and environmental information regarding any of the property units located at the focused area.

Peru

## **Portugal**

### **Sérvulo & Associados**

Rua Garrett, n.º 64  
1200-204 Lisboa  
Portugal

Tel: (+351) 21 093 30 00  
Fax: (+351) 21 093 30 01  
[geral@servulo.com](mailto:geral@servulo.com)  
[www.servulo.com](http://www.servulo.com)

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

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

The transaction of a real estate in Portugal usually begins with the execution of a purchase and sale promissory agreement detailing the conditions of the sale, according to which the owner promise to sell the property, and the buyer promises to buy it, at an agreed price and within an agreed period. This agreement usually involves the payment of a deposit. As a rule, if the buyer fails to complete the agreement, he will lose the deposit; if the owner fails to complete the sale, he must repay twice the amount of the deposit.

Until recently the transfer of property had to be executed through a public deed and the property would transfer from seller to buyer with the execution of such buyer.

Since the 1st January 2009, with the real estate simplification and dematerialization of registration acts made through enactment of decree law no. 116/2008, the transfer of real state may be executed by private document, provided the signatures are certified by a lawyer, chamber of commerce and industry, public notary, registration services or para-legal.

However it is still frequent – not to say the rule – to use the previous mandatory procedure of transfer of property by means of a public deed at a notary.

On completion of the above notarial act the transfer of the property has to be registered before the land registry office. This registration is not legally mandatory but strongly advisable as the registration is the only act which confers an *erga omnes* (opposable to third parties) effect to the capacity as owner.

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

Yes. In Portugal it is possible to own the whole land or only a fraction of the land (plot) or building (autonomous unit), if the land / building is subject to an allotment permit / horizontal property regime.

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

Yes, joint ownership is accepted by Portuguese jurisdiction. Either single or legal persons, Portuguese or foreign may be owner of real property in Portugal.

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

Yes, in Portugal it is possible to have a different owner for the land and the building: the first is the *nu-proprietário* and the second the *superficiário*.

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

Land and buildings property are subject to public registration before the land registry office. A purchaser is protected if the acquisition is the first to be registered.

## **II. Costs for transaction**

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

All parties should be Portuguese taxpayers.

Purchaser will be subject to the following taxes:

**Municipal Property Transfer tax (IMT):**

Paid in the local tax office nearest to the property. The amount to be paid is related in terms of percentage by levels of the cost of the property being purchased. In limited cases the buyer will be exempt from paying this tax.

<b>Value of Property</b>	<b>Percentage Applied</b>	<b>Deducted Value</b>
Up to € 90.418	1%	€ 0,00
From € 90.418 to € 123.682	2%	€ 904,18

## Portugal

From € 123.682 to € 168.638	5%	€ 4.614,64
From € 168.638 to € 281.030	7%	€ 7.987,40
From € 281.030 to € 538.978	8%	€ 10.797,70
More than € 538.978	6%	€ 0,00

### **Stamp tax:**

A property purchase is subjected to a Stamp Duty of 0,8% of, as a rule, the declared value.

### **Municipal property tax (IMI)**

Every year the owner of any property is subject to pay an annual municipal property tax. This charge is due by the owner of the property at 31 December of each year. If the tax amount exceeds € 250,00 then it will be divided into two equal payments, the first for payment in April, and the second, for payment in September.

The IMI rates are variable from municipality to municipality and are revised each year.

### **Value added tax (IVA)**

Transfer of property does not attract VAT, although in certain cases the seller may waive the exemption if the buyer uses, in whole or in part, the building for taxed activities.

On the side of the Seller the sale can attract plus value in certain circumstances.

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

No. You can sell the property whenever you want.

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

Yes as a rule and at least from the perspective of sale of a real estate.

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

The transfer of a property does not entitle the new owner to terminate any lease contracts in force. The acquirer only succeeds in the previous owner rights and obligations. Also, the tenant has a pre-emption right in the transfer of property leased for more than 3 years.

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

Amendments to the use license are accepted, being however subject to city council authorisation. For buildings built before 13<sup>th</sup> August 1951 no license is needed on the perspective of the real estate (e.g., an industry might still need official approval).

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

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - others
- 
- **Notarial costs:** approximately € 2.000,00.
  - **Land Register:** approximately € 2.000,00
  - **Real estate transfer tax:** around 6% of the cost of the property, as referred in the table referred in II above.
  - **advising lawyer: (due diligence and contractual negotiation):** from € 150,0 to € 200,0 per hour of work
  - **estate agent:** between 2% and 5%

**III. Costs for holding real estate**

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

As referred, the only yearly land tax applicable after transfer of ownership is the Municipal property tax (IMI).

This charge is due by the owner of the property at 31 December of each year. If the amount exceeds €250,00 then it will be divided into two equal amounts, the first for payment in April, and the second, for payment in September. The IMI rates are variable from council to council and reviewed annually.

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

Caretakers are not that usual in Portugal. At least 1% of the value of the property is considered as annual remuneration plus an hourly fee if applicable.

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

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**
  
- **directly in real estate:** Yes
- **through real property funds, open or closed ones:** Yes although the usual tax advantages are now more limited
- **through other clear and secure financial products:** Leasing is an interesting option for companies
- **at the moment not because of the impacts of the world wide financial crisis:** As a result of the global crisis, real estate prices have dropped to very attractive prices in most of the country (although less in Lisbon), being therefore an opportunity for investors.

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

There are no such restrictions to buy property in Portugal, although investing through certain off-shores or equivalent may imply an accrual at the tax rates.

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

To run a business in Portugal it is as a rule advisable to incorporate a branch – when the foreign investor is a company – or a company – when the foreign investor is a company or an individual.

The official approvals required depend on the type of business, which may differ from very simple – commercial shop –, to complex – restaurant -, difficult – hotels and finally intricately – bank.

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

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

Yes, we would be pleased to assist foreign investors once the standard procedure of conflict check is satisfactorily concluded.

For any further information please contact Nuno Moura Roldão, partner of real estate department at:

Servulo & Associados  
Lisboa · Porto · Ponta Delgada  
Rua Garrett, 64  
1200-204 Lisboa  
Portugal

Tel: (+351) 21 093 30 00  
Fax: (+351) 21 093 30 01/02  
nmr@servulo.com  
www.servulo.com

Portugal

## **Russia**

### **Muranov, Chernyakov & Partners**

Bld. 6, 23 Denisovsky Lane  
Moscow  
Russian Federation, 105005

Tel: +7 495 783-7450;  
+7 495-795-3279  
Fax: +7 495 795-03-90  
office@rospravo.com  
www.rospravo.com/

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

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

The seller and the buyer enter into the real estate purchase agreement by drawing up a separate single document in written form. Written form of the real estate purchase agreement is an essential element for making a real estate transaction valid in Russia.

The parties to the agreement shall set forth precise details of the real estate, including information about the location of the real estate or stipulate whether it is a part of the real estate facility (the details shall correspond with official documents of state authorities responsible for record keeping and inventory). Should these details be absent in the agreement, it is believed that parties did not agree upon the property to be conveyed and, hence the purchase agreement will be invalid.

Real property is to be handed over under the transfer deed signed by the parties (transfer may be also effected after the transaction).

Once the purchase agreement is signed, the buyer files an application with a state registry of rights. An application shall be filed alongside with a number of documents, which sometime may be rather cumbersome and time-consuming to collect.

Transfer of ownership in the real property is to be registered within 30 days (general rule) from the date of application. Property in the real estate vests to the buyer from the moment of the state registration.

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

Russian legal system allows for both ownership of the whole land/construction and of one unit/units. However, the notion of condominium was removed from Russian legal system (with the adoption of Housing Code of the RF). Still there are some categories similar to condominium, but they are known only to housing area (for instance, “householder society”).

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

Russian legal system permits joint ownership, where two or more entities take ownership in the real property, thus the real property may not be parted without modification of its particular purpose. Joint ownership in the real property can be created by law and by the agreement of the parties.

There are two types of joint ownership in the real property:

1. Participatory share ownership (equity in the ownership can be determined) («*долевая собственность*»).
2. Joint ownership without determination of the equities («*совместная собственность*»).

It shall be noted that equity in the real estate property is not a separate physical object (room, premises or square meters), but a fractional number – part of the right to the real property.

Joint ownership without determination of the equities exceptionally created in case of: property of the spouses; farming enterprise; non-for-profit household.

Real estate can be owned by the Russian Federation, subjects of the Russian Federation and local authorities, individuals and legal entities.

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

In Russia when the buyer takes ownership in the building, simultaneously he/she becomes entitled to the land on which the building is erected and also to the plot that is necessary for utilization of the building. But the entitlement means that the buyer automatically receives easement to the land and not the ownership. In case the seller is a proprietor of the plot, ownership in the plot automatically transfers to the buyer upon purchase of the building.

It is possible to have different owners of the land and the building, provided that the owner of the plot has consented to the bargain. The consent is not essential if the conditions of plot utilization are not in conflict with law or contract provisions. When purchasing the building the buyer acquires the same right of enjoyment of the land as the seller had.

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

All real estate and transactions therewith are subject to state registration. The property right to the land and/or the building evolve only from the moment of its state registration. Any encumbrances and charges to the land shall be registered in the real estate registry as well. Hence any unauthorised entries into the registry are not permitted without prior consent of the land owner.

## **II. Costs for transaction**

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

In the course of a real estate purchase no taxes and charges are to be born by the Buyers, except for VAT (amount of which is usually included by the Seller in the total value of the real property). In the meantime, the Sellers are to cover:

1. VAT (legal entities and sole proprietor) – 18% of total value of the transaction (this is an indirect tax and paid by the Buyer but through the Seller);
2. Income tax (legal entities) – 20 % of the income for the corresponding fiscal period that amounts to 1 year;
3. Individual income tax (individuals) – 13 % (for tax residents) of the income for the corresponding fiscal period that amounts to 1 year (30 % - for tax non-residents).

Real property transfer tax is not known to the legal system of Russia, but it possibly has something to do with the state duty for registration of right transfer (that is 15 000 Rubles or approximately 350 EUR regardless of the value of the transaction).

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

Although it is not a problem to buy and sell property on a short term basis, the buyer will incur losses connected with charges for state registration (15 000 Rubles or approximately 350 EUR per each registration of right transfer). Fur-

thermore, individuals may receive income tax deductions when selling real estate which they owned for less than 3 years (up to 250 000 Rubles or approximately 6 250 EUR) or deduct the incurred expenses from their taxable income. When the real estate was in ownership for more than 3 years, individuals are entitled to refund of total value of the purchase agreement. Legal entities have a right to deduct the incurred expenses from their gains.

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

Yes, international investors enjoy the full range of guaranties, including the right to repatriate the funds.

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

Lease agreements are not repudiated or amended with the shift of the ownership in the real estate. A new buyer may terminate them only with the consent of the lessees.

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

It is permitted to change the use of a building from residential use to office spaces provided that official approval was given. If the seller has an ownership in the whole building, said approval can be rather smoothly obtained, but still the process is quite expensive and durable. If the seller owns one unit (premises) in the building, it will be much more complicated and subject to a number of conditions. For instance, one of the requirements to be met is the possibility to organise the separate entrance. And it is not worth saying that it is next to impossible to change the use of the premises if they are not on the first floor and no separate entrance is available.

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

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

In case of direct investments in the real estate (real estate purchase agreement):

- **notarial costs** – 0 EUR
- **land register** – approx. 350 EUR (15 000 Rubles)
- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – 0 EUR

In case of purchase of participatory interest in Limited Liability Company:

- **notarial costs** – approx. 250 EUR (10 000 Rubles), approx. 25 000 EUR (0,5 % of the total value of the contract)
- **land register** – 0 EUR
- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – 0 EUR

In case of acquisition of stock in joint-stock company, which keeps a registry of shareholders:

- **notarial costs** – 0 EUR
- **land register** – 0 EUR
- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – 0 EUR

Acquisition of shares in Joint-stock company, where a separate legal entity is responsible for keeping a registry of shareholders (“registrar”):

- **notarial costs** – 0 EUR
- **land register** – 0 EUR

- **real property transfer tax** – 0 EUR
- **advising lawyer (due diligence)** - unlimited
- **estate agent** - unlimited
- **Others** – costs connected with the services of registrar.

### III. Costs for holding real estate

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

Individuals and legal entities are levied with property tax and land tax. Land tax is determined by local authorities and shall not exceed 0,3 % of the cadastral value of an agricultural land and 1,5 % of the cadastral value of other lands. Company property tax is determined by constituents of the Russian Federation and shall not exceed 2,2% of the average annual value of the property.

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

We have to admit that the market of professional caretakers over the real property is not widely-spread in Russia and has not received yet the same recognition as it has in western countries. Analytics proclaim, that the reasons for such a creeping development of the institute of professional caretaker in Russia are as follows:

- Insufficient number of companies which offer such services;
- Low quality of the services of the professional caretakers;
- Owners of real property are reluctant to hand over their estate to the other company;
- Lack of information on the market.

Nevertheless, professional caretakers are present (“Property Management Company”, “Noble Gibbons”, “Hines”). The charges of the managing company amount to 5 % of the basic rental payments. It shall be noted that execution of some operations (for example, maintenance of fire safety) require license to be obtained by the professional caretaker.

The most common situation for Russia is an establishment by the foreign investor of the own managing company over the real property.

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

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

I would recommend investing in real property through purchasing of stock and participatory interests in joint-stock and limited liability companies, accordingly.

Generally this is a cost-cutting for the transaction: an avoidance of income tax and state duty for registration of right transfer.

The situation was changed one year ago for limited liability companies. There was an introduction into the Russian legislation according to which purchase of participatory interests is to be notarized (consequently, additional expenses are to be incurred). But still, except for the notarial costs, no further costs are involved.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Foreign individuals and legal entities are granted with *national regime*. There are no general restrictions for purchase of real property in Russia subject to several exceptions. For example, foreign entity may not take ownership of the agricultural lands and lands of the boarder territory.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Efforts of investor greatly depend on the form of business he/she would chose for establishment of economic presence in Russia (costs are above given). Official approvals for foreigners are the same as for Russian citizens and legal

entities. It may differ in case of foreign investments in companies which have the strategic meaning for defence of Russia. Generally, foreign investors are dowered with the same conditions for purchasing of plot of land.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

We will be pleased to assist and consult foreign investors on all legal aspects involved in these contexts.

Russia

## **Singapore**

### **CitiLegal LLC**

7 Temasek Boulevard,  
#21-02 Suntec Tower One,  
Singapore 038987.

Tel: (65) 6333 1611  
Fax: (65) 6338 6277  
annechoo@citi-legal.com  
www.citi-legal.com

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

All the answers in this questionnaire have been limited to commercial real property, and do not include residential real property.

In Singapore, for commercial property, the buyer and seller would usually negotiate the commercial terms of the sale and purchase through their real estate brokers or agents. The real estate agent usually provides a standard form of an Option to Purchase (“OTP”) to be entered into by the parties. The OTP is issued by the seller in exchange for an option fee of 1% of the purchase price (“the Option Money”) provided by the buyer.

The buyer is given a deadline (which is usually 2 weeks from the date of the OTP) within which he has to exercise the OTP, failing which the Option Money will be forfeited by the seller. The buyer exercises the OTP by signing “Acceptance Copy” in the OTP and delivering the same together with the deposit of 5% or 10% of the purchase price, less the Option Money (“Balance Deposit”) to the seller’s counsel who are authorised to hold the Balance Deposit as stakeholders pending completion (“Legal Completion”). See the example 1 below.

The OTP usually states the purchase price, deadline for exercise of the OTP, any conditions to exercise of the OTP, warranties on the property (if any), (the practice is for the buyer to inspect and buy the property on a “as is where is basis”), conditions under which the buyer can rescind the contract and the completion date. Further, the OTP will also state that it is subject to “THE SINGAPORE LAW SOCIETY’S CONDITIONS OF SALE 1999” so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the special conditions in the OTP. In the event of any inconsistency, the OTP terms shall prevail.

OTP must also be stamped within 14 days from the date of exercise of the OTP (for existing property) or date of the Sale & Purchase Agreement (for development cases).

See Part II below on Costs For Transaction for more details. Completion date is usually between 8-12 weeks from the date of exercise of the OTP. See example 1 below for a summary of the general steps and procedures.

### **Example 1**

- Price of property: S\$1,000,000
- Option money: S\$10,000 (being 1%) paid in exchange for OTP dated 1.1.2010
- Balance payable: S\$40,000 OR \$90,000 (being balance 4% OR 9%) paid when Option is exercised (no later than 14.1.2010)
- Stamp fees to be paid on the OTP (within 14 days from 14.1.2010 i.e. by 28.1.2010)
- Balance purchase price payable: \$950,000 OR S\$900,000 (being the balance 95% OR 90%) to be paid on Completion (being 8 – 12 weeks from 14.1.2010).

Except for large transactions, frequently, the parties engage counsel only after the buyer has obtained the signed OTP from the seller after his payment of the Option Money. However, it is advisable that the parties engage counsel to review and advise on the terms of the OTP before they exercise the OTP. This is because once the OTP is exercised, a binding contract is constituted (unless the OTP provides otherwise).

After the OTP has been exercised till legal completion, counsel for the buyer will carry out various checks on the property via “legal requisitions”. These are requests sent to various government bodies, being Rapid Transit Systems, Street Works, Water Reclamation Network Department (Sewerage), Building and Construction Authority, Environment Health Department, Inland Revenue Authority of Singapore (Property Tax), Urban Redevelopment Authority (Chief Planner), Central Building Planning Unit (Drainage). Counsel will also apply for a Road Line Plan to check if there are any lines of road/tunnel reserves on the property.

The buyer’s counsel will also carry out bankruptcy / winding-up searches on the seller and liaise with the seller’s counsel prior to completion to ensure that all discharge of mortgage documents have been executed by the bank, obtain evidence of payment of all outgoing liabilities (eg. property tax and maintenance contributions till completion date.)

Legal Completion is when the legal transfer of ownership/title passes to the buyer (and with it usually possession as well unless provided otherwise).

Counsel for the buyer will advise on and effect various formalities such as the execution by the buyer, stamping and filing of the instrument of transfer and mortgage (if any) with the Singapore Land Authority, various filings with the property tax department of the Inland Revenue Authority of Singapore informing the change of ownership.

### **Additional matters**

If the seller has a mortgage over the property, this has to be discharged on completion. If the buyer has taken financing to assist in the purchase of the property, there will be additional documents and requirements in relation to these aspects.

Furthermore, certain types of commercial property are ultimately owned by a government authority, the 3 main ones in Singapore being Jurong Town Corporation (JTC), Housing Development Board (HDB) and Urban Redevelopment Authority (URA). These authorities own the reversionary title on certain property but grants long term leases which are registrable interests in land (Eg. JTC has various plots of land zoned for different types of industrial uses and typically sells leases of 30 years with an option for a further 30 years). Sale of such commercial property is subject to the consent of the relevant authority and the seller and buyer have to comply with certain conditions such as environmental baseline studies and decontamination works for certain types of JTC properties.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

There are at 2 Systems of effecting transfer of an interest in land in Singapore – (A) Common Law System of Conveyancing; and (B) Transfer by registration under the Land Titles Act (LTA) and Land Titles (Strata) Act. Currently, most land in Singapore are registered under System B. The LTA was passed to provide a simplified system of registration of titles to land while the latter Act was passed to facilitate the subdivision of land into strata (eg. office units, flat units) to provide conclusive titles to various part of a building and to facilitate the disposition of titles relating to subdivided land.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Real property can be owned jointly as joint tenants or as tenants-in-common, the distinction being that the prior (joint tenants) creates a presumption that the rule of survivorship will apply unless otherwise rebutted.

Real property can be owned by corporations or individuals of legal age and capacity. However, note that there are restrictions on foreign ownership of certain types of residential properties, but this is not within the purview of this questionnaire.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Generally, the definition of land includes the buildings and fixtures on that land. However, this is subject to a very limited exception in relation to Malay stilt houses (which would not apply to commercial property) and the modification in recent times to allow for strata title. Such a clearly defined parcel of airspace (i.e. strata title) can also be separately owned and registered as land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Most land in Singapore these days are registered under the Land Titles Act (LTA) and Land Titles (Strata) Act. The Singapore Land Authority (SLA) maintains a Land Register in which instruments and dealings which affect LTA land must be registered. Any person who becomes a registered proprietor of registered land will hold that land free of encumbrances, liens etc except as is registered or notified in the Land Register, giving such owner indefeasible title to the property, save for certain exceptions.

A purchaser (in good faith and for valuable consideration) of property from a previously registered proprietor (whose indefeasible title may be challenged) may claim the benefit of indefeasibility.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Stamp duty is payable by the buyer or purchaser of real property. It is calculated in the following manner:

- On the first S\$180,000            1%

- On the next S\$180,000            2%
- On the remainder                    3%

Stamp Duty is payable within 14 days from the date of exercise of the OTP (for existing property) or date of the Sale & Purchase Agreement (for development cases).

If there are other instruments related to the property, such as a lease-back or if there is financing required and there is a mortgage, then such lease and mortgage are also subject to stamp duty at different rates.

Stamp duty is payable on the Mortgage and is calculated as follows:-

Every S\$1,000 of the loan or part thereof - S\$4 (Maximum duty payable is S\$500)

i.e. if the stamp duty computed is more than S\$500, the duty payable is still S\$500 because the duty on mortgage is capped at the maximum amount of S\$500.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no capital gains tax in Singapore. However, if a person is trading in property (ie does not hold the property for a sufficient period of time and/ or buys and sells property frequently ), whatever gains on the disposal of the property will be subject to tax. If the person is tax resident in Singapore, he will pay tax at the rate based on his taxable income and in the case of a company, the company's tax rate. A non -resident individual who is a property trader will also be subject to payment of a 20 % withholding tax and a non-resident company will be subject to payment of a withholding tax at the prevailing corporate tax rate which is currently 17% .

There is also a further stamp duty imposed on seller selling a residential property within 3 years from its purchase, but these relate to residential properties only.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Save for any applicable withholding tax (see above), there are no legal restrictions in Singapore on repatriation of funds out of Singapore.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In a sale/purchase of a property, the seller and buyer must agree on whether the sale is with vacant possession or not. If there is an existing lease and tenant and the property is sold with vacant possession, it is the seller's obligation to terminate the lease before completion of the sale. However, if the property is sold with tenancy, then the buyer buys the property subject to the tenancy. The buyer is then bound by the terms of the lease and any termination must be carried out in accordance with the lease terms. In Singapore, many leases are for a fixed term; therefore, in general, neither the landlord or tenant is able to terminate the lease.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use of a building depends on the permitted use as regulated by the Master Plan of the Urban Redevelopment Authority (URA). A change of use requires the URA's prior written consent and may be subject to conditions and fees. There are cases of change of office space to residential use, however, we are not aware of any change of use of a building from residential to office space. It seems unusual that URA would allow such change of use.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )?
- estate agent?
- others

Based on Purchase price of EUR 5 Million (*approx.* S\$10,000,000) of an existing commercial property and taking a bank loan to assist in the purchase:-

## Singapore

Legal fees in acting for (i) the buyer (as purchaser and borrower) ranges from \$10,000 onwards depending on (i) the complexity of the transaction and (ii) the type of the commercial property, eg.\* JTC properties would definitely bring about a higher fee

S\$10,000 onwards\*

Disbursements (eg. Title search, legal requisitions, litigation searches, photocopying charges & incidentals)

approx. S\$1,400 onwards\*

*(Amounts above are exclusive of 7% goods & service tax(GST) which is payable)*

\*\*Stamp fees on OTP (3% of the purchase price - \$5400)  
(to be paid within 14 days from date of exercise of OTP)

S\$294,600

\*\*Stamp fees on Transfer and Mortgage

S\$510

\*\*Registration fees on Caveats (Purchasers & Bank), Transfer & Mortgage

approx. S\$270

\*\**(All stamp and registration fees do not attract GST)*

1. Estate Agent's fees – usually paid by Vendor. Estate Agents usually charge 1% of the sale price (plus GST if agent is GST registered)
2. Others – If Purchaser is taking a loan, he is required to pay legal fees of the Bank's/Mortgagees' solicitors.

### III. Costs for holding real estate

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Commercial properties are subject to property tax. Property tax is assessed based on a percentage of the annual value of the property. Currently the tax rate is 10% of the annual value per year regardless of whether the property is let, vacant or for own use.

Owners of commercial property will also need to factor in costs of insuring the property.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Management agents charge different rates. Rates also depend on various factors such as the number of properties managed, how many of the properties are leased or are vacant, the state and condition of the properties and where applicable the building where the properties are comprised in. Agents charge monthly fee from S\$200 to S\$700 per property to S\$6,000 for a small building of 13 storeys (excluding the costs of onsite supervisor/technician and property manager).

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

In spite of the global financial crisis, the property market continues to be a vibrant one. The scarcity of land, growing population, increasing influx of foreigners and foreign companies, political stability and the opening of two integrated resorts/casinos have fuelled the demand for property, especially residential properties. Some people prefer to invest in real estate investment trusts as these are tradeable and therefore more liquid and enjoy certain tax benefits and usually a higher yield than yield from rental of real property.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways**

**to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions on foreign ownership (individual or foreign) in relation to commercial property. As mentioned previously, there are restrictions in relation to residential property. There are no restrictions on the organisation of a domestic entity, provided it takes the form of an entity that can hold property in its own name. So for example, societies and partnerships are recognised entities for carrying on business but are not separate legal entities, and the individual trustess or partners will have to hold the property in their names.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The purchase of the land is subject to the matters discussed above.

The carrying on of a business in Singapore is regulated separately. The foreign investor will have to set up a chosen business vehicle (eg company, partnership, branch, limited liability partnership) in order to carry on a business in Singapore. There may also be other regulatory approvals, licences or registrations required depending on the type of business be carried on.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

We will be able to assist in all legal aspects of an acquisition / sale of real estate or a construction project. Where necessary, we can refer the foreign investor to advisors or real estate agents who can assist.

## **Slovakia**

### **DEDAK & Partners**

Mlynske Nivy 45  
Apollo Business Center  
SK - 821 09 Bratislava  
T: +421 2 5828 2828  
F: +421 2 5828 2829

[office@dedak.com](mailto:office@dedak.com)  
[www.dedak.com](http://www.dedak.com)

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Real estate transaction starts with an offer to purchase or sell a real estate. The offer does not have any prescribed form, which means that it can be either oral or written. Once the offer is accepted or a counteroffer is presented and accepted, conditions of the contract are negotiated. The purchase contract has to have a written form and has to be signed by the seller before a notary, who verifies the identity of the seller. The new legislation created an option when the contract is done entirely by an attorney at law, who prepares the contract, verifies the identity of the parties and their representatives, assesses whether the contract is in accordance with law and within good manners. The attorney at law is also personally responsible for any damage that could occur from the authorization of the contract (for example the identity was not verified or the contract did not become valid) and prior to verifying the contract has to prove to the parties that he is insured for the damages. After the contract is validly signed, the first stage of the transfer is completed.

Cadastral registry was created in Slovakia to register ownership of real estate. The reason is to ensure that the status of the real estate in the registry is in accordance with the actual status. The second stage of the purchase of the real estate starts with filing the proposal to the Cadastral registry. The Cadastral registry considers the purchase contract and the proposal, and decides whether to allow or reject the contribution. When the Cadastral registry allows the contribution and marks it on the purchase contract, the formal ownership vests in the purchaser.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Our legal system permits ownership of a sole unit (condominium) and under this system creates joint ownership of common areas and built up areas in the apartment building.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Any legal person can become an owner of real estate (excluding specific types of property that can be only in ownership of the state) and our legal system permits joint ownership. Slovak legal system recognizes two types of joint ownership, co-ownership and joint ownership of spouses (only between husband and wife).

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Our legal system is not based on (contradicts) the principle “superficies solo cedit” since 1951, which means that our legal system considers buildings and the land as two separate subjects. It creates the possibility that the land will have different owner than the building built on the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

All real estate is registered in the Cadastral registry. The ownership of real estate is acquired by contribution to the Cadastral registry. Good faith purchaser is not protected on the basis of the contribution in Cadastral registry. Property can only be transferred by a legal owner.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Transfer of the real estate is not subject to any transfer tax. The purchase of real estate is subject to taxation (19 % VAT) only when it is purchased from the developer (first purchase of the given real estate).

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Profit from the purchase of a real estate is subject to taxation (19 % income tax) except when a legal person owns a real estate for at least 5 years or resides in the real estate (house or flat) for at least two years.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no restrictions in relation to the repatriation of funds.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

The change of ownership does not terminate the existing lease contract. The purchaser becomes a party of the lease contract *ex lege*. Lessee is allowed to terminate the lease contract consequently.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The change of use of a building is subject to authorization from a local authority.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?

- **notarial costs:** EUR 100
- **land register:** EUR 350
- **real property transfer tax:** does not apply
- **advising lawyer (due diligence):** depends on the size and difficulty of due diligence and legal advisory aprx. EUR 10,000
- **estate agent:** 2 % – EUR 100,000
- **others**

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

The owners of real estate are obliged to pay local real estate tax yearly. The rates reflect the location and the size of the real estate.

#### 13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?

The costs differ according to location of the property and the property itself, but for commercial property around Bratislava the property management rates are about 8 – 10 % of the monthly gross rent.

### IV. Foreign investors

#### 14. Would you advise foreign investors now to invest in your country?

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Due to the financial crisis the prices in real estate market have fallen. For this purpose it may be good time to invest in real estate.

#### 15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or

**registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions concerning the purchase of real estate. The only restrictions are for persons outside the European Union purchasing agricultural soil outside of the built up area of towns.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

The only restrictions for the purchase of land are for agricultural soil as mentioned above. Otherwise there are no further restrictions related to foreign investors starting a business. An establishment of a company may take anywhere from 15 days and longer depending on the subject of the business.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

We are permanently supporting foreign investors with all of the above mentioned. You can contact us at:

DEDAK & Partners  
Mlynske Nivy 45  
Apollo Business Center  
SK - 821 09 Bratislava  
T: +421 2 5828 2828  
F: +421 2 5828 2829  
office@dedak.com  
www.dedak.com

## **Thailand**

### **Vovan & Associates**

Silom Complex, 17th Floor  
191 Silom Road  
Bangrak, Bangkok 10500  
Thailand

Tel: +66(0)2 632 0180  
Fax: +66(0)2 632 0181  
[vovan@vovan-bangkok.com](mailto:vovan@vovan-bangkok.com)  
[www.vovan-associes.com](http://www.vovan-associes.com)

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In Thailand, the buyer and seller first negotiate and agree on the commercial terms of sale, either on their own or through the use of real estate agents or brokers acting as their representatives. A contract is usually drafted by the seller's lawyer. Before reviewing the legal terms, buyers conduct due diligence on the land to uncover any legal issues, most often with the assistance of local lawyers. If the due diligence results are satisfactory, the parties continue to negotiate the legal terms. The contract includes terms such as the sales price, the deposit amount, the condition of the property, any warranties, and the closing date. The buyer usually pays the deposit amount on the date that the contract is signed.

The parties usually effectuate the closing together at the local Land Department. At the Land Department, the seller signs the deed transfer to the buyer in front of a Land Department officer. The officer will help arrange for the transfer registration at the same time. Very often a buyer will pay the remaining balance to the seller with a cashier check. The use of an escrow agent is not customary unless the transaction amount is extremely high. Once the transfer has been registered on the same day, the buyer leaves the Land Department with the updated original title deed showing his name as the current owner.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. When the construction on the land has been registered as a condominium building, a separate title deed is issued for each condominium unit. These condominium units are separately and individually owned.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The legal system of Thailand allows joint ownership of real estate by two or more natural persons or juristic persons such as corporations.

All the co-owners own equal fractional interests in the real property asset.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Yes. The ownership of a building is implied in the ownership of the land. It is, however, possible to separate the ownership of the land from that of the building erected on it through specific registration scheme at the Land Department.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes. The land and the building (if the ownership of the building is separate from that of the land) are registered in a formal register. A good faith purchaser for value is protected under the law.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

There are transfer fee, specific business tax, and withholding income tax. Transfer fee corresponds to 2% of the official assessed value of the land. Seller's specific business tax equals to 3.3% of the declared purchase price of the land. Seller's withholding income tax is also collected at the Land Department and corresponds to 1% of either the official assessed value of the land or the declared purchase price of the land, whichever is higher. The official assessed value of the land is usually significantly lower than the actual declared purchase price – sometimes as much as four times lower.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no problem to buy and sell property on a short term basis. Many investors practice this short term sale to benefit from a short term profit. It is also

not uncommon for some investors, after having signed a land or condominium sale contract but before the closing date, to find a subsequent buyer and request the seller to transfer the land or condominium directly to the subsequent buyer. This quick sale helps avoid having to pay the taxes involved in the transfer twice.

There is also, however, a tax reason to hold the property for a longer period. The longer the holding period, the more the “Specific Business Tax” may be reduced through the expense deduction from the taxable base. For each year that the owner holds the property, the expense deduction percentage increases by a fixed number.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Whether the seller may transfer his money out of Thailand depends on where the money originates from. If the money originates locally through local investment, then the transfer will be restricted unless there is a legal reason supported by appropriate documentation. If the money originates overseas and was transferred into the country for investment purposes, the money may be transferred out of Thailand without so much difficulty after the investment stops. A foreign buyer usually declares the money being transferred into Thailand as capital investment or loan so that the money may be transferred out after the land is sold.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

When a landlord transfers its interest in leased property to a third party, the lease remains in force and effect, and the new landlord and the tenant generally have the same rights and obligations with respect to each other as did the prior landlord and tenant. The new landlord cannot terminate the lease while the lease is still in effect unless the lease contract allows such termination or the lease agreement with a lease period longer than 3 years has not been registered.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Yes. Change of the use of a building is allowed as long as the zoning at the time of change permits the new use. Official approval is required.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?**
  - **land register?**
  - **real property transfer tax?**
  - **advising lawyer (due diligence )?**
  - **estate agent?**
- 
- **notarial costs:** There are no notarial costs as the service of a notary public is not required in a land transaction.
  - **land register:** None.
  - **real property transfer tax:** The Specific Business Tax is 3.3% of the declared purchase price. If the declared purchase price is the actual purchase price of EUR 5 million, then the Specific Business Tax will be EUR 165,000.  
The transfer fee (2%) is calculated based on the official assessed value of the land, which is usually significantly lower than the purchase price.  
The withholding income tax (1%) is calculated based on either the official assessed value of the land or the declared purchase price, whichever is higher. Assuming the declared purchase price is higher, 1% withholding income tax corresponds to EUR 50,000. The official assessed values are kept at the local Land Department office.
  - **advising lawyer (due diligence ):** Real estate lawyers may charge approximately EUR 4,000 or higher, depending on the complexity of the transactions involved, to perform the due diligence, draft the land sale and purchase contract, and facilitate the transfer registration.
  - **estate agent:** If real estate agents are involved, seller’s agents charge approximately 3-5% of the sales price while buyer’s agents may charge EUR 20,000 – 50,000 of flat fee.

### III. Costs for holding real estate

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

There is a property tax on real estate in Thailand, which is usually levied by local municipals. The property tax is charged only if there is construction on the land. The property tax is 12.5% of the “annual fee,” which is calculated differently depending on whether the property is rented out. If the property is rented out, the “annual fee” is the annual rental. If the owner operates his own business without renting out the property, a government official will estimate the “annual fee” based on the size, location, type and purpose of the property.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The costs for a professional caretaker for a real property vary greatly depending on what services are needed. Assuming the professional caretaker’s duties include paying property tax and utility fees on the owner’s behalf, renting out the property, and maintaining the property, the annual service fee might be EUR 1,500 approximately.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Yes. Despite the world financial crisis and the political situation in Thailand, the property prices are not dropping. It is not common for property prices in Thailand to fluctuate widely. Instead, as the world economy slows down, the property prices in Thailand still increase but at a slower rate than they would under normal conditions. Compared to the uncertain property market in some other countries, real estate is an attractive investment in Thailand. In fact, most local investors almost always include some form of real estate in their portfolio, whether residential, commercial, or industrial. In addition, even if there is restriction against foreign ownership of land, open real property funds may be 100% foreign owned.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

In Thailand, foreign ownership of land is generally prohibited. Thus, non-Thai citizens may not legally be the registered owner of the land. However, they may lease a land in long term and own the construction built on the land. In addition, non-Thai citizens may buy and own condominium units as individuals.

If a foreign buyer already has a stake in an operating company in Thailand that is considered a Thai juristic entity under Thai law (at least 51% owned by Thai individual or company), the foreign buyer may have his company invest in a plot of land. Such a land transaction must be carefully structured in a legal way. As there are restrictions against using a Thai nominee to hold a land or equity in the land on behalf of a foreign investor, potential foreign buyers should consult an attorney on a case by case basis before investing in a land through this scheme to avoid violating Thai law.

Alternatively, some foreign buyers choose to lease a land in long term while opting to own any building on the land. There is no restriction against foreign ownership of the structure built on a land. The maximum legal lease term is, however, limited to 30 years for residential lease and 50 years for commercial lease. Many foreign buyers circumvent this limit by adding an option to renew the land lease multiple times in the sale contract. Nevertheless, there are nuances and details in the transaction that may affect the enforceability of such an option. Thus, potential foreign buyers should consult an attorney on a case by case basis before deciding whether an option like this is appropriate for a particular transaction.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Foreign investors may avoid the restriction regarding foreign ownership of land by applying for the Board of Investment privileges. There are over 150 categories of business operations that qualify for such privileges. One of the most important privileges is the privilege to have 100% foreign ownership of land on which the business will operate. The amount of time to get approved

and notified after submitting all the required documents is approximately 60 days. The process may take up to 110 days if the investment is larger than approximately EUR 2,000,000.

Not all businesses qualify for the Board of Investment privileges. Thus, to own a plot of land in order to run a business, a foreign investor needs Thai business partners to form a business entity that will be considered a Thai juristic person under Thai law. This usually means the foreign investor will have to become a minority shareholder in number of shares. The corporate structure, however, may be shaped so that the foreign investor has control of the company. It only takes 1 day to form a company after all the required documents have been submitted. The main time variable usually depends on how quickly the foreign and Thai investors can agree on the corporate terms and the required documents may be assembled.

#### **17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes. Our office can assist clients in finding interesting real estate. We can also assist clients with all aspects of real estate transactions and construction projects. Please contact us at:

Vovan & Associates  
Silom Complex, 17th Floor  
191 Silom Road  
Bangrak, Bangkok 10500  
Thailand

Tel: +66(0)2 632 0180

Fax: +66(0)2 632 0181

For French and English speakers, please contact Frederic Favre at:

[frederic.favre@vovan-bangkok.com](mailto:frederic.favre@vovan-bangkok.com)

For English and Thai speakers, please contact Laxami Warapasart or Siri

Lerdsirisopon at:

[laxami.warapasart@vovan-bangkok.com](mailto:laxami.warapasart@vovan-bangkok.com)

[siri.lerdsirisopon@vovan-bangkok.com](mailto:siri.lerdsirisopon@vovan-bangkok.com)

## **USA – California**

### **Lindborg & Drill, LLP**

550 N. Brand Blvd., Suite 1830  
Los Angeles  
CA 91203  
United States of America

Tel: (818) 637-8325  
Fax: (818) 637-8376  
idrill@ldllp.com  
plindborg@ldllp.com  
www.ldllp.com  
www.lindborgdrill.com

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws which vary from jurisdiction to jurisdiction. What follows is a general description of real property transactions in the United States based loosely upon the laws of California. While it accurately describes the parameters of a real estate transaction almost anywhere in the United States, local laws and practices will impact the specifics of any given transaction.

The buyer and seller, often through the use of real estate agents or brokers acting as their representatives, first negotiate and agree on the terms of the sale. A contract is drafted, often by one of the real estate agents, for the buyer and seller to sign. The contract includes terms such as the sales price, financing terms, the condition of the property, and any warranties. The contract often states a date for the “closing” to occur, which is the actual transfer of ownership. To effectuate the closing, the buyer and seller usually enter into a 3-way contract with an “escrow” company, which facilitates the exchange of money and the property deed (the official document that indicates ownership). At the closing, the seller signs the deed and has it notarized by a notary public, then transfers the deed to the buyer. The buyer must then record the deed by filing it with the local County Registrar-Recorder, or similar official depending upon the state in which the property is located. The date of the closing is normally also the date when possession of the property is transferred, although the contract can specify a different date when possession transfers. The transfer of possession of a house, condominium, or building is usually accomplished by handing over the keys. The contract can also specify which party pays for what closing costs. After the closing, the escrow period ends and the transfer of ownership completed. The state of the title to the property at closing is typically insured by “title insurance” issued by a company for which the escrow company acts as agent.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The legal system of the United States permits ownership of the whole land or ownership of only one or more portions of the land. A “condominium” is the primary form of ownership in which specified parts of a piece of real estate, often called “units,” are separately and individually owned.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The legal system of California permits joint ownership of real property by two or more persons, corporations, partnerships or trustees. There are various forms of joint ownership, some of which allow an owner’s interest to pass to his or her heirs upon death (“right of survivorship”). The main forms of co-ownership are: (1) Community or Marital Property (spouse’s co-ownership over marital property which typically passes to surviving spouse upon death); (2) Joint Tenancy (co-owners of equal interest in entire property with right of survivorship); or (3) Tenancy in Common (co-owners have right of survivorship and can own unequal fractional interests).

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Unless otherwise specified, ownership of the land includes ownership of the buildings and other improvements upon the land, as well as the mineral rights below the surface. It is possible, however, to separate ownership of the land from the improvements or minerals.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Property deeds, as well as mortgages and other documents effecting title to real estate, are typically recorded in the County Registrar Recorder’s office in order to protect the owner from losing title to a subsequent good faith purchaser (or, “bona fide purchaser”) who purchases the property without notice of the current owner’s title to it.

## **II. Costs for transaction**

### **6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Property taxes and transfer taxes vary greatly depending upon the locality. In California, property taxes are levied and paid annually according to the value of the property as of the date it was acquired or the date of completion of any new construction. Currently, the maximum annual tax on real property is limited to one percent of the market value (“base”) of the property at the time the property was sold, plus a maximum of two percent for annual inflation. When the property is sold, the tax can increase because it will then be based on the new market value. Also, upon sale of real property in California, local governments can impose a transfer tax at the rate of \$0.55 for each \$500.00 of the selling price.

### **7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

For domestic investors, gains realized on the sale of real property are taxed at a person’s ordinary income tax rate if the property is held for less than a year. If the property is held for more than a year, then gains are taxed at a preferential rate which is currently 15%. Foreign investors are generally not subject to the foregoing rules, but are instead taxed under the provisions of the Foreign Investment in Real Property Tax Act (FIRPTA), which usually requires a buyer to withhold 10% of the purchase price of real property owned by a foreign investor to cover that investor’s tax liability.

### **8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States.

### **9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

When a landlord transfers its interest in leased property to a third party, the lease remains in force and effect, and the new landlord and the tenant generally have the same rights and obligations with respect to each other as did the prior landlord and tenant. The new landlord cannot terminate the lease while the lease is still in effect unless the lease contract allows such termination.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities and counties divide their jurisdictions into land use districts, or “zones.” Within each zone a specific set of rules control the use of land. There are often zones for single-family residences, multi-family dwellings, commercial uses, industrial activities, open space or agriculture and, sometimes, mixed uses. If a property owner desires to use property in a manner not permitted under the applicable zoning rules, the owner may seek a variance or conditional use permit, or seek to amend the zoning rules.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )?
- estate agent?
- Others

Notary public charges in California are usually less than \$20.00 U.S. Dollars, or EUR 15,80. As of May 2010, the fee to record real property records can vary from county to county but is approximately \$20.00 U.S. Dollars, or EUR 15,80. In California, local governments can impose a transfer tax at the rate of \$0.55 for each \$500.00 of the selling price, which means the transfer tax for a purchase price of EUR 5 million can be up to approximately \$7,000.00 or EUR 5530. Real estate attorneys typically charge by the hour, so the fees are a function of the complexity of the transaction, but will typically average \$10,000 to \$15,000 in a transaction of this size, EUR 11.860, for a real estate transfer. Real estate agents charge approximately 5 percent of the sales price, which is ap-

proximately \$316,216.00 U.S. Dollars, or EUR 250.000, to be divided evenly between the buyer's agent and the seller's agent. Title insurance premiums are approximately 0.1% of the purchase price and escrow fees are approximately 0.075% of the purchase price.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

There is a property tax on real estate in the United States, which is usually levied by local governments at the county level. The forms and rates of the property taxes vary between jurisdictions. There is a property tax in California, which has to be paid yearly. Currently, the maximum annual tax on real property is limited to one percent of the market value ("base") of the property at the time the property was sold, plus a maximum of two percent for annual inflation. There may also be special assessment taxes, which are levied for the cost of specific local improvements such as streets, sewers, irrigation, and drainage. Special assessments may be due periodically to improvement districts or be levied only once by the city or county for a particular work or improvement.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

When you hire a property management company, the service can range from showing your property to an all-in-one package. An ongoing monthly fee charged to the owner to the property manager can vary from 3% to over 15%, usually 8% to 10%, of the monthly gross rent.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate**
- Through real property funds, open or closed ones**
- Through other clear and secure financial products**
- At the moment not because of the impacts of the worldwide financial crisis**

Due to the effects of the recent financial crisis, real estate prices have fallen in many parts of the United States, sometimes dramatically so. Recently, prices have stabilized and some early signs of a recovery can be seen. It is, therefore, probably a good time to buy real estate in the United States through any of the investment mechanisms described above.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-resident aliens is subject to certain special taxation rules. In general, however, it is not difficult for foreign investors to purchase property in the United States.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or conditional use permit, or seek to amend the zoning rules, to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought and other factors, but takes approximately six months. The investor will also need to register the business with the Secretary of State and obtain a seller's permit and business license from the city in which the business will operate, which can take anywhere from a few days to several months depending on the locality and other factors. Just as importantly, if a foreign investor is seeking citizenship in the United States, the EB-5 visa program offers a path to citizenship for non-citizens able to invest \$1,000,000 in a business in the United States.

- 17. Could your firm assist foreign investors in**
- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
  - Developing construction projects?**
  - All legal aspects involved in these contexts?**

Yes. Our office is capable of assisting clients in all aspects of real estate and construction projects. Please contact Peter Lindborg or Irina Drill at:

Lindborg & Drill LLP  
550 N. Brand Blvd., Ste. 1830  
Glendale, California 91203  
+1 818 637 8325  
plindborg@ldllp.com  
idrill@ldllp.com

## **USA – District of Columbia**

### **Patton Boggs LLP**

2550 M Street NW  
Washington DC 20037  
United States of America

Tel: (202) 457 6000  
Fax: (202) 457 6482  
jbrand@pattonboggs.com  
dmishkin@pattonboggs.com  
www.pattonboggs.com

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws which vary from jurisdiction to jurisdiction. Following is a general description of commercial real property transactions in the United States based loosely upon laws of the District of Columbia. While the following accurately describes the parameters of a real estate transaction in the United States, generally, local laws and practices will impact the specifics of any given transaction.

The buyer and seller, often through the use of real estate agents or brokers acting as their representatives, first negotiate and agree on the terms of the sale which is typically evidenced by a letter of intent. In the commercial context, a contract (known as the purchase and sale agreement) is drafted and negotiated by legal counsel to the parties for the parties to sign. The contract includes terms such as the sales price, financing terms, the condition of the property, conditions to closing, covenants, representations and warranties. The contract will also set forth the level of due diligence to be performed by the buyer.

After a purchase and sale agreement is executed, the next steps are determined by the terms of the purchase and sale agreement. The typical process is that the buyer will have a period of time during which the buyer can perform due diligence on the property. Due diligence typically consists of reviewing the title and survey for the property, reviewing environmental reports, determining the zoning status of the property, and reviewing existing leases and contracts affecting the property. Due diligence may include additional investigations and rarely is there a limitation on buyer's due diligence. The scope of the due diligence is negotiated in the purchase and sale agreement. The purchase and sale agreement will also specify a closing date as well as the location of the closing. Closing typically takes place at the title company's offices and the title company acts as escrow agent for all money and documents. The seller and buyer may show up in person to execute documents, but this is not typical. Money is wired directly to the title company and the documents are couriered to the title company. Once the title company confirms receipt of all of the documents and the money, as well as satisfaction of all of the closing conditions set forth in the

purchase and sale agreement and instruction letters from buyer's and seller's counsel, respectively, the real estate transaction closes and the deed is released from escrow for recordation. The deed is not recorded until after the real estate transaction closes.

After the closing, the escrow period ends and the transfer of ownership is complete. The state of the title to the property at closing is typically insured by title insurance, which is issued by a title insurance company. During the due diligence period, legal counsel to buyer will negotiate the form of title insurance policy to be issued at the closing to the buyer.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

The District of Columbia has two legal regimes in which the land is cooperatively owned and the units are individually owned. The first regime is a condominium. In a condominium regime, a portion of the property is designated as common elements (which are collectively owned by all of the condominium unit owners through a condominium association) and the remainder of the property is designated as condominium units (which are individually owned). The second regime is a cooperative. In a cooperative all of the property is owned by a corporation and the shareholders in the cooperation have the right to use a specific unit within the property.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

The District of Columbia allows the joint ownership of real property through the use of tenancies in common, joint tenancies and tenancies of the entirety. In addition to individuals, the following entities can also own real property in the District of Columbia: Limited Liability Companies, Limited Partnerships, General Partnerships, and Corporations.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In the District of Columbia it is possible for the ownership of the land to be separate from the ownership of the building(s) located on the land. One example of a structure where the ownership of the land and the building(s) located on the land are different is a condominium structure in which the land is designated as a common element and owned in by a condominium association, while any buildings on the land is a separate condominium unit that is individually owned. Another example of a structure where the ownership of the land and the building(s) located on the land are different is a property where the land is ground leased. When the land has been ground leased, during the term of the lease the building(s) on the land are owned by the tenant, while the land is owned by the ground lessor.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

The general rule in the District of Columbia is that “when 2 or more deeds of the same property are made to bona fide purchasers for value without notice, the deed or deeds which are first recorded according to law shall be preferred.” However, the question of whether or not the purchaser who records first is protected depends on the specific facts of the matter, specifically, whether the purchaser had notice of the other claim or deed even if such claim or deed is unrecorded.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Below are the typical taxes paid in connection with the purchase of commercial real estate in the District of Columbia:

- |                       |  |
|-----------------------|--|
| Deed Recordation Tax: | 1.45% of the greater of (i) the consideration, and (ii) fair market value of the property. |
| Deed Transfer Tax:    | 1.45% of the greater of (i) the consideration, and (ii) fair market value of the property. |

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no required hold period for real property in the District of Columbia. An owner can sell property at any time. In times when real estate values are rising, it is not uncommon for a purchaser to “flip” the property and resell the property the same day the purchaser acquires the property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States. There are U.S. tax implications for the foreign investor to consider including the Foreign Investment in Real Property Tax Act (commonly known as FIRPTA). FIRPTA is a United States tax provision that imposes income tax on foreign persons disposing of United States real property interests. Tax is imposed at regular tax rates for the type of taxpayer on the amount of gain considered recognized. Buyers of real property interests are required to withhold tax on payment for the property. Withholding may be reduced from the standard 10% to an amount that will cover the tax liability, upon application in advance of sale to the Internal Revenue Service. FIRPTA overrides most nonrecognition provisions as well as those remaining tax treaties that provide exemption from tax for such gains. A foreign investor should consult with a U.S. tax attorney specializing in investment in U.S. real property.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In DC, a buyer of real property does not have the right to terminate existing leases unless the transfer is through a foreclosure by a lender that has a priority position or where the lease has been subordinated. If the existing leases are commercial leases, then the owner of the property must wait for the existing lease to expire or the owner may terminate the lease after a tenant default. However, in the District of Columbia if the existing lease of the property is residential, then the owner must wait until the tenant moves out of the property. Residential leases in the District of Columbia are essentially life estates for the

life of the tenant and the tenant can only be removed through a judicial process for nonpayment of rent. Also, in District of Columbia if the existing leases are residential, the residential tenants have a right of first refusal to purchase the property by matching the purchase price of a third party purchase contract.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities and counties divide their jurisdictions into land use districts, or “zones.” Within each zone a specific set of rules control the use of land. There are often zones for single-family residences, multi-family dwellings, commercial uses, industrial activities, open space or agriculture and, sometimes, mixed uses. If a property owner desires to use property in a manner not permitted under the applicable zoning ordinances, the owner may seek a variance or conditional use permit, or seek to amend the zoning rules. Property in the District of Columbia is zoned for specific uses and the owner can not change a permitted use without governmental approval. Buyers must also be wary of covenants, conditions and restrictions (CC&R’s) which commonly restrict property. Such CC&R’s are private restrictions placed on the property which are enforced by private rights of action.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- Others

Recording Charges:	Estimated to be \$34 - A deed is typically three (3) pages and the recording charge is \$20 for the first page and \$7 for each additional page. If there is a deed of trust securing financing, then the recording charges for the deed of trust need to be paid as well.
Deed Recordation Tax:	\$72,500 – 1.45% of the greater of (i) the consideration, and (ii) fair market value of the property.
Deed Transfer Tax:	\$72,500 – 1.45% of the greater of (i) the consideration, and (ii) fair market value of the property.
Title Insurance:	Estimated to be \$23,750 – Title insurance rates are negotiated in the District of Columbia and vary from transaction to transaction based upon the relationship between the purchaser and the title company, as well as the coverage purchased.
Notarial Costs:	Estimated to be \$0 – Notaries are typically provided by the title company or attorneys involved in the transaction and the title company and attorneys do not charge for this service.
Attorneys' Fees:	Estimated to be \$20,000 – Attorneys' fees vary greatly from transaction to transaction depending on the complexity and amount of due diligence.
Real Estate Agent Fees:	Estimated to be \$300,000 – If there is only one (1) broker, then the fee is typically 4-5% of the purchase price. If there are two (2) brokers (i.e. the seller and purchaser have their own broker), then the seller's broker typically gets a fee of 3% of the purchase price and the purchaser's broker typically gets a fee of 3%.

### III. Costs for holding real estate

#### 12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?

There is a property tax on real estate in the United States, which is usually levied at the local level. Real property taxes are paid on an annual basis. The

real property tax is based on the assessed value of the property (as determined by the District of Columbia). The real property tax rate depends on the use of the property and generally varies on an annual basis. Examples of the 2010 real property tax rates are:

Vacant Commercial Property: \$10.00 per every \$100 of assessed value  
Apartment Buildings: \$0.85 per every \$100 of assessed value  
Commercial Property: \$1.65 per every \$100 of assessed value of the first \$3,000,000 of assessed value, and \$1.85 per every \$100 of assessed value thereafter

In addition to the real property tax, a property owner may have to pay additional annual fees, such as business improvement district fees or CC&R assessments. The existence of these fees depends on a property location and the requirement to pay the fees is usually recorded in the real estate records. Proper due diligence before purchasing any parcel of real property is necessary to determine the annual taxes and fees applicable to a specific parcel of real property.

There may also be special assessment taxes, which are levied for the cost of specific local improvements such as streets, sewers, irrigation, and drainage. Special assessments may be due periodically to improvement districts or be levied only once by the District of Columbia for a particular work or improvement.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Property management fees in the District of Columbia are negotiable but they are typically 4% of the income from the property plus the property manager's out-of-pocket expenses. If the property manager does work in addition to managing the property, such as overseeing and coordinating tenant construction work, there is usually a separate construction management fee of 3% for such activities.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**

- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

The District of Columbia is the Capital of the United States and the amount of real estate in the District of Columbia is limited thereby making the District of Columbia attractive to foreign investors. The decision to invest in property is best determined by the foreign investor with the advice of a reputable commercial real estate broker and real estate investment advisor.

Foreign investors are free to invest directly in real estate or indirectly through open real property funds, closed real property funds, and other clear and secure financial products. The most appropriate vehicle for investment varies from real estate project to project and a foreign investor should consult a local attorney, a U.S. tax attorney specializing in foreign investment in real estate and an accountant to determine the best investment structure for a given project.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-residential aliens is subject to certain special taxation rules. In general, however, it is not difficult for foreign investors to purchase property in the United States, although careful tax planning is critical.

Individuals, domestic entities, and foreign entities are all permitted to own real estate in the District of Columbia; however, foreign entities must qualify to do business in the District of Columbia before acquiring real property in the District of Columbia. Corporations, limited liability companies, limited partnerships and general partnerships are all appropriate entities for owning real estate in the District of Columbia.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or conditional use permit, or seek to amend the zoning rules, to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought and other factors, but takes approximately six months. The approvals and licenses needed to run a business vary depending on the type of business the investor intends to conduct in the District of Columbia. Generally, the investor will need to register the business and obtain the appropriate business licenses from the Department of Consumer and Regulatory Affairs (“DCRA”). The time frame for obtaining the necessary licenses varies depending on the nature of the business. It is common practice for investors in the District of Columbia to use a permit expeditor to speed the process of obtaining business licenses from the DCRA. Depending on the location and nature of the business, the investor may also need the approval of an Advisory Neighborhood Commission.

If a foreign investor is seeking citizenship in the United States, the EB-5 visa program offers a path to citizenship for non-citizens able to invest \$1,000,000 in a business in the United States.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Patton Boggs real estate group devises innovative and sophisticated approaches to achieve practical and cost-effective results for clients. We provide counsel on all aspects of real estate business, striving to always put our clients in the best position to conduct business and take advantage of new opportunities

Patton Boggs broad national real estate practice gives us valuable experience with virtually every kind of commercial real estate activity – whether on a local, regional or national basis – including all phases of commercial real estate development, project and infrastructure development, investment, finance, restructuring and workouts

Patton Boggs represents investors (foreign and domestic), banks and other institutional lenders, owners and developers in the complete range of real estate matters, including:

- Real property acquisition, disposition and operation;
- Development and construction; Mediation, arbitration and litigation;
- Zoning and land use planning;
- Financing;
- Restructuring, workouts, foreclosures, bankruptcy and creditors' rights
- Transactional tax planning
- Leasing

We understand the intense time pressures that are often involved in real estate transactions and that many deals will not close unless they are promptly negotiated and documented.

If we may be of assistance, we invite you to contact:

Deborah C. Ryan, Partner  
Co-Chair, Business Law Dept.  
Patton Boggs, LLP  
2000 McKinney Avenue, Suite 1700  
Dallas, TX 75201  
214.758.6628 Direct  
469.644.2585 Cell Phone  
or visit our website at [www.pattonboggs.com](http://www.pattonboggs.com).



## **USA – Florida**

### **Buchanan Ingersoll & Rooney PC**

301 Grant Street, 20th Floor  
One Oxford Centre  
Pittsburgh PA 15219-1410  
United States of America

Tel: (412) 562-8909  
Fax: (412) 562-1041  
[www.buchananingersoll.com](http://www.buchananingersoll.com)  
[gregory.pearson@bipc.com](mailto:gregory.pearson@bipc.com)

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Most real estate purchase agreements in Florida allow the purchaser to conduct due diligence with respect to the condition of the property and title issues for a period of thirty to forty-five days following the execution of the purchase agreement. During this period, a purchaser would typically complete reviews of (i) the structural integrity and mechanical systems of the improvements, (ii) the municipal land use records, including the existence of necessary occupancy and other permits, (iii) the environmental condition of the property, (iv) record title to the property, which is typically performed by a title insurance company or agency, and (v) a survey of the property. Following completion of the due diligence, assuming that the purchaser elects to proceed, closing will occur typically within thirty days, during which time conveyance documents are prepared and executed, any title issues are resolved and final settlement adjustments are calculated.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Our legal system does permit the separate ownership of portions of the improvements through a condominium organization and other similar arrangements. Occasionally separate ownership is effected through a cooperative arrangement in which shares of stock are issued and units are leased to the respective stockholders.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Our legal system permits joint ownership of real property. Joint ownership can be established through an entity or through direct ownership of portions of the fee interest. Direct ownership is typically accomplished through a ten-

ancy-in-common arrangement, in which each owner owns a direct percentage interest in the real property. Alternatively, ownership by individuals may take the form of a joint tenancy with the right-of-survivorship, in which case the surviving party will own the whole property upon the death of the other owner. Joint ownership can also be set up through various entities, including a general partnership, a limited partnership or a limited liability company.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

It is possible to have separate ownership for the land and the improvements. Separate ownership is often established pursuant to a ground lease, where the landowner leases the land to a ground lessee. The ground lessee would have the right to build improvements on the land and would have ownership of those improvements. The ground lessee would typically have the right to transfer its leasehold interest in the land as well as its ownership of the improvements.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

All deeds and other documents affecting title to real property must be recorded in the local land records office (which is the County Clerk of Court in Florida). Once recorded, a good faith purchaser is protected. If not so recorded, a document would have no effect on the rights of third parties, unless they had actual knowledge of the existence of the document.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Realty transfer taxes are applicable to transfers of real property. In Florida, the transfer tax in all counties except Miami-Dade County is \$7 per \$1,000 USD of consideration. In Miami-Dade County, the rate is \$6 per \$1,000 USD, except for commercial premises, in which case an additional \$4.50 per \$1,000 USD is

assessed. The seller typically is responsible for such transfer costs, but it is not unusual for this to be a negotiated business term in larger transactions.

There may be ways to avoid the effect of the realty transfer tax through the use of creative techniques, though some of these have been eliminated in recent years as states and municipalities seek additional sources of revenue.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

State and federal income taxes may apply to any gains resulting from sale of real property. To the extent that property is held less than one year, any gain would be taxed as ordinary income. If the property is held for more than one year, gains may be subject to treatment as capital gains, at a reduced rate, currently 15%. In Florida, there is no state income tax.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, although a portion of the funds may have to be retained to cover income tax which may be due from the seller.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

A purchaser is only allowed to terminate a lease when the lease specifically allows the landlord to terminate it upon sale. If the tenant's occupancy is on a month-to-month basis, the lease could be terminated at the end of the next monthly period by notice to the tenant. Most leases are for terms of years, and would not be terminable upon sale.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Whether or not the use of a building can be changed from residential use to office use depends upon the applicable land use ordinances, which are typically

called zoning ordinances. If the property is currently zoned for residential uses, a change in use would require a variance or an amendment to the applicable zoning ordinance. Variances are granted only in unusual circumstances, for example where the property has little or no value as currently zoned. An amendment to the applicable ordinance could be difficult to obtain where the surrounding neighborhood is zoned residential. In addition, even for commercial projects, depending on the size of the project and its location, it is not unusual to have neighborhood opposition to zoning or use changes, which can result in litigation. Also please note that recorded restrictive covenants may also limit the uses to which a property may be put without the consent of neighboring land owners.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- **notarial costs?**
  - **land register?**
  - **real property transfer tax?**
  - **advising lawyer (due diligence )?**
  - **estate agent?**
  - **Others**
- a. Notarial costs are nominal, less than \$100 USD.
  - b. Land register costs are nominal, perhaps \$100 USD to \$200 USD depending on the length of the documents.
  - c. In Florida, as discussed above, the transfer tax on a sale of a commercial property for USD \$6.35 million would be either \$44,450 USD or \$66,675 USD, depending on the location of the property.
  - d. A lawyer representing a purchaser and transaction of this size would typically charge between \$20,000 USD to \$30,000 USD. Fees could be higher, and will vary depending upon the complexity of the transaction, including but not limited to the mortgage, and the number of leases and other documents which may affect title to the property.
  - e. Real estate commissions are generally paid by the seller. We generally recommend that a purchaser be represented by its own broker, but the commissions would still in most cases be paid by the seller. Brokerage commissions are negotiable, and can range as high as 10% of the sales price. A typical commis-

sion would be 5% to 7%. The larger the project, the more likely it is that the commission can be reduced by negotiation.

- f. Other costs could include:
  - a. Environmental consultant
  - b. Inspecting engineer
  - c. Title Insurance (Generally a percentage of the purchase price, varying in accordance with the size of the transaction). In Florida, the rates are set by the State and non-negotiable. The title insurance premium for a USD \$6.35 million sale would be approximately USD \$18,000 (not including any lender required or other endorsements, which could increase the cost substantially).
  - d. Surveyor (\$2000 and up, depending on the complexity of the property).

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Annual real estate taxes vary from municipality to municipality. Taxes are assessed by the applicable county, municipal government and school district and may be adjusted yearly. They would typically range from 2% to 4% of value on an annual basis.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A professional property manager typically charges for its services based upon the rental income from the property. Typical charges for these services range from 2% to 4% of rental income. In addition, brokerage commissions would be payable to a real estate broker engaged with respect to the leasing of the property. These commissions would range from 5% to 6% of the rents payable over the life of the applicable lease. Both property management and brokerage fee arrangements can be negotiated.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate**
- Through real property funds, open or closed ones**
- Through other clear and secure financial products**
- At the moment not because of the impacts of the worldwide financial crisis**

The answer to this question depends on the particular circumstances and goals of the potential investor. There are many commercial properties in the United States which are available at prices substantially below where they were priced several years ago.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are generally very few restrictions on purchasers of real property in the United States. Persons and entities on the Specially Designated Nationals List published by the United States government are not permitted to purchase property in the United States.

Alien corporations (those owned by foreign persons or entities) are treated as foreign corporations (i.e. U.S. corporations incorporated in states other than Florida), and upon qualification, can buy and sell real property in Florida. Alien corporations which are engaging in activities which do not require qualification do not have to qualify to do business in Florida in order to own, acquire or hold real property.

Alien corporations which own real property or a mortgage on real property located in Florida must maintain a registered office and agent in Florida and file a notice with the state.

##### **16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Businesses must register with the State of Florida to do business in the state. They must also register with the state taxing authorities for payment of income and, if applicable corporate stock taxes, as well as workman's compensation insurance and unemployment compensation insurance. Local occupancy permits and business licenses are usually required as well.

Such registrations can generally be accomplished very quickly.

For particular types of businesses, for example the practice of law or medicine, or the sale of insurance or securities, state and/or federal licenses are also required.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes to all of the above.

Our firm is a full-service law firm that has extensive experience in all types of real estate transactions in Florida and throughout the United States. This experience includes the representation of investors, developers and lenders. We have relationships with numerous real estate brokerage firms and other advisors and can provide assistance with respect to investment products and direct investments in real estate, and with lenders which can provide financial assistance. We are title agents for several major title insurance companies and work closely with them in writing title insurance policies for both owners and lenders. Through our immigration practice, we can assist foreign investors in obtaining U.S. citizenship by investing in the United States in businesses which may own commercial real estate.

Please contact Greg Pearson or David Pearl at:  
Buchanan Ingersoll & Rooney PC  
One Oxford Center  
301 Grant Street, 20th Floor  
Pittsburgh, PA 15219-1410  
gregory.pearson@bipc.com  
(412) 562-8909  
david.pearl@bipc.com  
(305) 933-5625

## **USA – New York**

### **Carter Ledyard & Milburn**

2 Wall Street  
New York NY 10005  
United States of America

Tel: (212) 732 3200  
Fax: (212) 732 3232  
[www.clm.com](http://www.clm.com)

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, contracts for the transfer of real property are governed by the law of the state and the locality where the property is located. The following is a general description of real property transactions in the United States based loosely on practices in New York State. In New York, the purchaser and seller are generally free to structure the purchase agreement to meet their particular needs, with the basic terms of the agreement negotiated by the real estate brokers retained by the purchaser and seller. Lawyers representing the purchaser and seller complete the negotiations, and the seller's attorney usually drafts the purchase agreement. The agreement can be drafted using accepted legal forms, or a new agreement can be drafted to address special business terms. Purchase agreements can be lengthy and complex, particularly where the commercial property includes multiple existing tenants, where the property is believed to have environmental contamination, or where a change in the use of the property is contemplated. The agreement almost always requires the purchaser to pay money to an escrow agent. In New York, the escrow amount is typically 10% of the purchase price (or more for certain sponsor sales of condominium units), and the seller's attorney usually serves as the escrow agent. This money is usually credited to the purchaser on the closing date or forfeited to the seller if the transaction is not completed due to the purchaser's default.

Before the closing date, the attorney for the seller drafts a "deed", which is the legal instrument that transfers title to the property (assuming the transaction does not relate to a cooperative apartment). A bank loan that finances the purchase will be secured by the real property through a legal instrument known as a "mortgage". To protect its financial interest in the property, the bank typically requires the purchaser to obtain two separate insurance policies: one to insure against damage to the property and a second to ensure against any adverse claims to title. On the closing date, the deed is delivered to the purchaser, the purchase price (including any loan proceeds) is paid to the seller, and the deed and mortgage are delivered to the County Clerk (Office of the Register, in New York City). Along with attorneys for the purchaser and the seller, the bank is represented by its own attorney at the closing.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The United States, and New York in particular, are receptive to different sorts of ownership arrangements. Condominiums are common in residential buildings and also exist in commercial buildings. Another prevalent form of residential property ownership in New York is known as the cooperative (or “co-op”) in which all of the units in a property are owned by a cooperative corporation, with an occupant owning “shares” and a proprietary lease from the corporation which entitles the shareholder to use a particular unit in the building. Other forms of ownership that combine features of condominiums and cooperatives (the “cond-op”) have become increasingly popular in New York and other major metropolitan areas.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be an owner of real property in your country?**

Yes. New York State permits ownership of real property by one or more individuals, corporations, partnerships or trustees. There are various forms of joint ownership, some of which allow an owner’s interest to pass to his or her heirs upon death (“right of survivorship”). The main forms of co-ownership are: (1) Tenancy by Entirety (spouse’s co-ownership of real property which passes to surviving spouse upon death); (2) Joint Tenancy (co-owners of undivided interest in entire property with right of survivorship); or (3) Tenancy in Common (co-owners can own unequal fractional interests but have no right of survivorship).

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In the United States, land and buildings can be owned by different entities. In addition to other forms of ownership (condominiums, cooperatives, etc.), an owner may lease its land to a developer (a “ground lease”) to construct a building. Ownership of land can be divided into surface rights and subsurface (mineral) rights, and, in a number of local jurisdictions, including New York

City, transferable development rights (“air rights”) may be conveyed from one piece of land to another.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Yes. In New York State and most states in the United States, the deed, the mortgage and other legal instruments that affect the ownership of real estate are almost always “recorded” in the county office where the property is located to protect the ownership interest against a subsequent purchaser.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Taxes imposed on the transfer of real property are in addition to any income taxes that may also be payable. Transfer tax implications can differ dramatically depending on the jurisdiction where the property is located, but they typically do not vary based on the holding period. In New York City, a commercial mortgage of \$500,000 or more is subject to a mortgage recording tax of \$2.80 for each \$100 (or major fraction) of the loan principal. New York State and New York City also separately levy real property transfer taxes on non-exempt transactions. For commercial properties, the State rate is \$4 for every \$1,000 of the purchase price and the City rate is 2.625% of the purchase price.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

The time period a property is held may affect the tax rates that apply under both federal and state income tax laws. An individual investor who holds real property for less than a year is taxed at the federal and state tax rates for ordinary income. An individual investor who holds real property for more than a year is taxed at federal and state rates for long-term “capital gains”, which are normally lower than the rates for ordinary income. Corporations are taxed at separate rates which do not vary based on the time a property is held. Federal

tax laws permit certain like-kind exchanges that can mitigate the income tax consequences of the transfer of real property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Subject to certain exemptions, the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) requires a foreign corporation that distributes a U.S. real property interest to withhold a tax equal to a percentage of the gain it recognizes on the distribution to its shareholders.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In general, a purchaser is not allowed to terminate lease contracts. Unless the lease contract gives the seller the right to terminate the lease upon transfer, the purchaser assumes the rights and obligation of the seller under the lease.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use of land and buildings is governed primarily by local governments (cities, towns and villages). Most local governments, including the City of New York and most of its suburbs, have adopted land and building regulations known as “zoning” laws that specify what uses are permitted in the particular “zone” in which a building is located. If both residential and office uses are permitted in the “zone”, the change in use can normally be effectuated by a simple filing with the local buildings department. Where the proposed office use is not permitted, an owner is required to petition the local government to either seek a variance from the zoning ordinance or to amend the zoning ordinance. In limited situations, the validity of the zoning ordinance can, itself, be challenged. Even where a change of use is allowed, physical alterations to the building may be required to comply with local fire and other safety codes that may be applicable to the new use.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- Others

Assuming a €5 million (\$6.5 million) purchase of a commercial office building (and land) in New York City financed by a €2 million (\$2.6 million) loan with no exemptions, the mortgage recording tax would be \$56,000 (€43,077). The New York State transfer tax would be \$26,000 (€20,000) and the New York City transfer tax would be \$170,625 (€131,250). Legal fees vary greatly based on the complexity of the transaction, and whether the attorney is utilizing standard forms, or is drafting a new agreement for the specific needs of a client. Most attorneys bill at an hourly rate. In New York City, the seller of the property typically pays the real estate brokerage fees. Title insurance premiums would be approximately \$25,000 (€19,230) for the owner's policy and \$2,600 (€2000) for the lender's policy. Notarial and other costs are inconsequential compared to taxes and the overall value of the transaction.

### **III. Costs for holding real estate**

**12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In addition to income taxes, real property is subject to property tax in the United States. Real property taxes are levied by local governments based on a valuation of the property. Rates and valuation methods can vary greatly. Depending on the location of the property, the owner may be required to pay additional assessments for particular municipal services such as water supply, sewer service or fire protection. Property held by an individual investor (as opposed to a corporation) who subsequently dies may be subject to estate taxes. Some local governments, including New York City, require commercial property owners to report income derived from commercial property. Owners

of income-producing properties in New York City that have an actual assessed value of more than \$40,000 (approximately €31,000) are required to file an annual “Real Property Income and Expense” statement with the City of New York, unless the properties are specifically excluded from filing requirements.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

The costs of engaging a professional caretakers depends largely on the type of building, the range of services, the building’s tenants and its location. In the New York City metropolitan area, there are many companies that provide property management services, and there are several different ways in which the company may structure its management fees. For example, the fee may be based on a percentage of the rent received by the owner or it may be based on the building’s size. The property manager may also serve as the leasing agent to advertise and fill units in a building as leases expire and units become vacant.

**IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

The recent financial crisis has had a negative impact on real estate prices nationwide, with property values in some areas declining greatly and other areas experiencing very little decrease in value. Real estate values in the New York metropolitan area have generally experienced moderate declines in the past three years. However, New York remains a popular real estate market for international investors.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-resident aliens may be subject to certain special taxation and disclosure rules, such as those required under FIRPTA. In the aftermath of the September 11, 2001 terrorist attacks, certain specific entities are prohibited from transferring property in the U.S. However, in general, it is not difficult for foreign investment and purchase of real estate in the United States.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Assuming the business use is permitted by the local zoning law, where a proposed use is commercial or industrial, additional approvals may be needed from local, state and federal officials to address environmental, health and safety concerns. The time it takes to obtain these approvals varies. Simple approvals, such as building permits, can be obtained very quickly. Approvals to change the use of property or to permit an industrial facility to emit pollutants can take six months or longer and frequently require the assistance of attorneys.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Established in 1854, Carter Ledyard & Milburn LLP has been assisting international clients with all aspects of commercial and residential real estate transactions for generations. We assist clients in buying and selling properties throughout the United States, with a focus on office, retail and mixed-use buildings in Manhattan and elsewhere in the City of New York. Representative transactions include purchases and sales of actively-managed office buildings, net leased office buildings, joint venture transactions and air rights transfers. We represent both taxable and tax-exempt entities and advise both with respect to the tax treatment of sales, acquisitions and related financings. We have also represented tenants in negotiating with New York State, New York City and the State of New Jersey for tax abatements and other incentives in connection

with leasing transactions. We have strong contacts at realty brokerage houses in the New York metropolitan area. We have been involved in a wide range of real property development activity: assemblages, obtaining land use and other regulatory approvals, ground leases, creation of office and retail lease forms, construction financing as well as permanent and secondary financing, industrial development bond financing and condominium conversions. For more information, please contact H. Thomas Davis or Macculloch M. Irving at the address below, or visit our website at [www.clm.com](http://www.clm.com).

Carter Ledyard & Milburn LLP  
2 Wall Street  
New York, New York 10005  
+1 212 732 3200  
[davis@clm.com](mailto:davis@clm.com)  
[irving@clm.com](mailto:irving@clm.com)



## **USA – Ohio**

### **Bricker & Eckler LLP**

100 South Third Street  
Columbus  
Ohio 43215  
United States of America

Tel: (614) 227 2300  
Fax: (614) 227 2390  
[ematto@bricker.com](mailto:ematto@bricker.com)  
[jallen@bricker.com](mailto:jallen@bricker.com)  
[www.bricker.com](http://www.bricker.com)

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws that vary from jurisdiction to jurisdiction, with some federal laws also impacting certain elements of real estate transactions. What follows is a general description of real property transactions in the state of Ohio, but many of the same principles will apply to real estate transactions elsewhere in the United States.

The buyer and seller often connect through their real estate agents or brokers acting as their representatives, who typically assist the buyer and seller in negotiating the basic economic terms of the potential purchase and sale agreement. In commercial transactions, attorneys are frequently involved in assisting the buyer and seller with negotiating the specific terms of the contract that will serve to memorialize the agreement. Residential transactions frequently are completed without the involvement of attorneys, although a buyer's or seller's agent or broker may recommend an attorney under some circumstances. The purchase and sale contract that ultimately is signed by the buyer and seller includes a description of the property to be sold and essential terms of the deal, such as the purchase price, any conditions to the buyer's obligation to complete the purchase (such as inspections of the property, financing contingencies, and review and confirmation of marketable title to the property), any warranties to be given by the seller, among other potential terms and conditions.

The contract often states a date for the "closing" to occur, which is when the actual transfer of ownership occurs by a deed that may contain warranties of title or no warranties at all. To effectuate the closing, the buyer and seller usually work through a title agency, which facilitates the exchange of the buyer's purchase money and the seller's deed for the property. At the closing, the seller signs the deed and has it notarized by a notary public, then transfers the deed to the buyer. The title agency generally also assists the buyer with recording the deed in the public records of the county recorder's office. Title agencies offer policies of title insurance that the buyer (and the buyer's lender, if any) may obtain to protect against the risk of another party claiming to have an interest in the property that limits the buyer's ability to use the property or otherwise

results in damages to the buyer. The title agency requires a premium for the title insurance policy and imposes some fees for its services in connection with the closing. The premium for the title policy does not vary from agency to agency and is calculated relative to the purchase price if that is the amount of coverage the buyer desires to obtain. Frequently the buyer obtains possession of the property on the closing date, but that can be varied by the terms of the contract.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Yes. The legal system of the state of Ohio permits ownership of the whole land, along with the improvements on the land, but it is possible to separate (by contract or otherwise) ownership of the land from ownership of the improvements made to the land, and there can be separate ownership of specific units of a building constructed on the land, such as through ownership of distinct condominium units of a building.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Yes. The legal system of Ohio permits joint ownership of real property by two or more persons, trustees of a trust, corporations, partnerships, or other legal entities that may properly own an interest in real estate. There are various forms of joint ownership, some of which allow an owner's interest to pass to his or her heirs upon death. Common forms of co-ownership are: (a) a tenancy in common, whereby the co-owners have undivided percentage interests in the real estate (not in the sense of owning different "pieces" of the property but by owning various *percentage interests* in the entire, undivided property); and (b) a joint tenancy with right of survivorship, whereby, upon death of a co-owner, the surviving co-owner or co-owners inherit the interest of the deceased co-owner instead of the heirs of the deceased co-owner inheriting that interest.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

Unless otherwise specified by contract or by certain legal exceptions, ownership of the land includes ownership of the buildings and other improvements upon the land, as well as the mineral rights below the surface. It is possible, however, to separate ownership of the land from the improvements or minerals.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Property deeds, as well as mortgages and other documents creating liens on or otherwise affecting the state of title to real estate, are typically recorded in the recorder's office in the county in which the property is located in order to protect the owner of the property and the holder of any mortgage lien or other interest in the real estate from losing the ownership interest or other recorded interest in the property to a subsequent purchaser who acquires the property for value and without notice of the actual owner's or lien holder's or other party's interest in the property.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Property taxes and transfer taxes vary greatly in Ohio at the county or other local level. The owner of the property is responsible for paying real estate taxes levied and paid semi-annually according to the value of the property and the specific tax rates in the applicable jurisdiction. When real estate is sold in Ohio, a conveyance fee of \$1.00 per \$1,000 of the sale price is imposed, and the seller usually pays that fee unless the contract between the parties indicates otherwise, and the local county government is permitted to impose an additional conveyance fee amount up to a maximum of \$3.00 per \$1,000 of the sale price (for a maximum conveyance fee of \$4.00 per \$1,000 of the sale price).

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Presently, gains realized on the sale of real property generally are taxed at a person's ordinary income tax rate if the property is held for less than a year. If the property is held for more than a year, then gains are taxed at a preferential rate, which is currently 15% for US taxpayers. There are some options for deferring the taxes payable on gains realized from the sale of real property by, for example, re-investing those gains in new real estate acquisitions, but specific legal requirements, including time restrictions on the re-investment in new real estate, must be satisfied.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

When a property owner transfers its ownership interest in real estate that is leased to a third party, the lease generally remains in force and effect, and the new landlord/owner and the tenant generally have the same rights and obligations with respect to each other as did the prior landlord and tenant. However, under some circumstances where the new owner acquires ownership of the property without adequate recorded or constructive notice of the tenant's lease rights, the lease may not have to be recognized by the new owner.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities, villages, and counties in Ohio divide their jurisdictions into land use districts or „zones,“ such as areas zoned for certain commercial activities, areas zoned for residential use, and the like. Some jurisdictions in Ohio, however, have no zoning code. Where a zoning code exists, a specific set of rules controls the use of the land within each zone and may control specific aspects of construction on the land. If a property owner desires to use property in a

manner not permitted under the applicable zoning rules, the owner may seek a variance or conditional use permit or seek to amend the zoning rules.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence) ?
- estate agent?
- others

Notary public charges in Ohio are usually nominal, and documents notarized in a real estate transaction are often notarized free of charge. Fees for recording the deed and other transaction documents that must be recorded (such as a mortgage on the property) generally are \$28 for the first page and \$8 for each additional page. The conveyance fee will vary from county to county but can range from \$1.00 to \$4.00 per \$1,000 of the sale price. Real estate attorneys typically charge by the hour, so the fees are a function of the complexity of the transaction and the billing rate of the attorney and usually vary by region, but fees often do not exceed 1% of the sale price. Real estate brokers or agents commonly charge a commission of 6% of the sale price (which is generally paid by the seller), to be divided evenly between the buyer's agent and the seller's agent, but the commission amounts vary. Title insurance premiums are established by a schedule tied to the purchase price (or other requested coverage level), and for a transaction of \$5,000,000, the title insurance premium for an owner's policy would be just over \$14,500. Other costs may be imposed in connection with a real estate transaction, such as a recoupment charge for taxes that the buyer has to pay in the event that land taxed based on its agricultural value is acquired and its use modified to non-agricultural use (with the recoupment charge based on the amount of tax savings over the prior three years based on the land being taxed on an agricultural value).

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Real estate taxes charged to property owners vary greatly in Ohio at the county or other local level. The owner of the property is responsible for paying the real estate taxes levied and paid semi-annually according to the value of the property and the specific tax rates in the applicable jurisdiction. In Ohio, taxes for the first half of a given year generally are payable early in the following calendar year, and taxes for the second half of a given year generally are payable in the early part of the second half of the following calendar year. In real estate sale transactions, this often requires a seller of property to credit the buyer at closing for a significant amount of taxes to later come due and payable on the property, prorated through the date of closing. Properties also may be subject to special assessments, which are levied for the cost of specific local improvements such as streets, sewers, and drainage components.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A property management company's services may vary greatly depending on the specific type of property (retail shopping center, office property, industrial property, etc.) and the scope of services provided (e.g., maintenance, management of tenants, leasing of vacant space). A management fee of 3% to 8% of the annual gross rent generated by a property may not be unusual.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

Due to the effects of the recent financial crisis, real estate prices have fallen in many parts of the United States, including in Ohio, sometimes dramatically so, although Ohio's values had not spiked to the extent that occurred in some other states, so values haven't shown quite as sharp of a decline as in some other states over the past few years. Recently, prices have stabilized and some early signs of a recovery can be seen. It is, therefore, probably a good time to buy real estate in the United States, including in Ohio, through any of the investment mechanisms described above. Buyers with equity to put into transactions are finding attractive deals in Ohio and elsewhere, given the state of the market.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-resident aliens is subject to certain special taxation rules. In general, however, it is not difficult for foreign investors to purchase property in the United States.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or conditional use permit or seek to amend the zoning rules in order to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought, and other factors, but roughly could take approximately six months. The investor will also need to register the business with the Secretary of State and obtain a seller's permit and business license from the city in which the business will operate, which can take anywhere from a few days to several months depending on the locality and other factors. Other approvals and permits may be necessary, such as a permit allowing the sale of alcohol and permits for any construction. Just as importantly, if a foreign investor is

seeking citizenship in the United States, the EB-5 visa program offers a path to citizenship for non-citizens able to invest \$1,000,000 in a business in the United States.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Our office is capable of assisting clients in all aspects of real estate and construction projects. Please contact Jerry Allen at:

Bricker & Eckler LLP  
100 S. 3rd Street  
Columbus, Ohio 43215  
614-227- 2300



## **USA – Pennsylvania**

### **Buchanan Ingersoll & Rooney PC**

301 Grant Street, 20th Floor  
One Oxford Centre  
Pittsburgh PA 15219-1410  
Tel: (412) 562-8909  
Fax: (412) 562-1041

[www.buchananingersoll.com](http://www.buchananingersoll.com)  
[gregory.pearson@bipc.com](mailto:gregory.pearson@bipc.com)

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

Most real estate purchase agreements in Pennsylvania allow the purchaser to conduct due diligence with respect to the condition of the property and title issues for a period of thirty to forty-five days following the execution of the purchase agreement. During this period, a purchaser would typically complete reviews of (i) the structural integrity and mechanical systems of the improvements, (ii) the municipal land use records, including the existence of necessary occupancy and other permits, (iii) the environmental condition of the property, (iv) record title to the property, which is typically performed by a title insurance company or agency, and (v) a survey of the property. Following completion of the due diligence, assuming that the purchaser elects to proceed, closing will occur typically within thirty days, during which time conveyance documents are prepared and executed, any title issues are resolved and final settlement adjustments are calculated.

### **2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Our legal system does permit the separate ownership of portions of the improvements through a condominium organization and other similar arrangements. Occasionally separate ownership is effected through a cooperative arrangement in which shares of stock are issued and units are leased to the respective stockholders.

### **3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Our legal system permits joint ownership of real property. Joint ownership can be established through an entity or through direct ownership of portions of the fee interest. Direct ownership is typically accomplished through a ten-

ancy-in-common arrangement, in which each owner owns a direct percentage interest in the real property. Alternatively, ownership by individuals may take the form of a joint tenancy with the right-of-survivorship, in which case the surviving party will own the whole property upon the death of the other owner. Joint ownership can also be set up through various entities, including a general partnership, a limited partnership or a limited liability company.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

It is possible to have separate ownership for the land and the improvements. Separate ownership is often established pursuant to a ground lease, where the landowner leases the land to a ground lessee. The ground lessee would have the right to build improvements on the land and would have ownership of those improvements. The ground lessee would typically have the right to transfer its leasehold interest in the land as well as its ownership of the improvements.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

All deeds and other documents affecting title to real property must be recorded in the local land records office (the Recorder of Deeds in Pennsylvania). Once recorded, a good faith purchaser is protected. If not so recorded, a document would have no effect on the rights of third parties, unless they had actual knowledge of the existence of the document.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Realty transfer taxes are applicable to transfers of real property. Realty transfer taxes in Pennsylvania vary from municipality to municipality and range from 2% to 4% of the value of the property. They are generally shared equally by the seller and the buyer.

There may be ways to avoid the effect of the realty transfer tax through the use of creative techniques, though some of these have been eliminated in recent years as states and municipalities seek additional sources of revenue.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

State and federal income taxes may apply to any gains resulting from sale of real property. To the extent that property is held less than one year, any gain would be taxed as ordinary income. If the property is held for more than one year, gains may be subject to treatment as capital gains, at a reduced rate, currently 15%.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, although a portion of the funds may have to be retained to cover income tax which may be due from the seller.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

A purchaser is only allowed to terminate a lease when the lease specifically allows the landlord to terminate it upon sale. If the tenant's occupancy is on a month-to-month basis, the lease could be terminated at the end of the next monthly period by notice to the tenant. Most leases are for terms of years, and would not be terminable upon sale.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Whether or not the use of a building can be changed from residential use to office use depends upon the applicable land use ordinances, which are typically called zoning ordinances. If the property is currently zoned for residential uses, a change in use would require a variance or an amendment to the applicable

zoning ordinance. Variances are granted only in unusual circumstances, for example where the property has little or no value as currently zoned. An amendment to the applicable ordinance could be difficult to obtain where the surrounding neighborhood is zoned residential. In addition, even for commercial projects, depending on the size of the project and its location, it is not unusual to have neighborhood opposition to zoning or use changes, which can result in litigation. Also please note that recorded restrictive covenants may also limit the uses to which a property may be put without the consent of neighboring land owners.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
  - land register?
  - real property transfer tax?
  - advising lawyer (due diligence )?
  - estate agent?
  - Others
- a. Notarial costs are nominal, less than \$100 USD.
  - b. Land register costs are nominal, perhaps \$100 USD to \$200 USD depending on the length of the documents.
  - c. In Pennsylvania, the Commonwealth (the state) imposes a 1% transfer tax. Local real property transfer taxes are in addition to this, and vary from municipality to municipality, ranging from 1% to 3% of the consideration.
  - d. A lawyer representing a purchaser and transaction of this size would typically charge between \$20,000 USD to \$30,000 USD. Fees could be higher, and will vary depending upon the complexity of the transaction, including but not limited to the mortgage, and the number of leases and other documents which may affect title to the property.
  - e. Real estate commissions are generally paid by the seller. We generally recommend that a purchaser be represented by its own broker, but the commissions would still in most cases be paid by the seller. Brokerage commissions are negotiable, and can range as high as 10% of the sales price. A typical commission would be 5% to 7%. The larger the project, the more likely it is that the commission can be reduced by negotiation.
  - f. Other costs could include:

- a. Environmental consultant
- b. Inspecting engineer
- c. Title Insurance (A percentage of the purchase price, varying in accordance with the size of the transaction). The title insurance premium for a USD \$6.35 million sale would be approximately USD \$16,000 (not including any lender required or other endorsements, which could increase the cost substantially).
- d. Surveyor (\$2000 and up, depending on the complexity of the property)

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Annual real estate taxes vary from municipality to municipality. Taxes are assessed by the applicable county, municipal government and school district and may be adjusted yearly. They would typically range from 2% to 4% of value on an annual basis.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

A professional property manager typically charges for its services based upon the rental income from the property. Typical charges for these services range from 2% to 4% of rental income. In addition, brokerage commissions would be payable to a real estate broker engaged with respect to the leasing of the property. These commissions would range from 5% to 6% of the rents payable over the life of the applicable lease. Both property management and brokerage fee arrangements can be negotiated.

### **IV. Foreign investors**

#### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate
- Through real property funds, open or closed ones
- Through other clear and secure financial products

– **At the moment not because of the impacts of the worldwide financial crisis**

The answer to this question depends on the particular circumstances and goals of the potential investor. There are many commercial properties in the United States which are available at prices substantially below where they were priced several years ago.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are generally very few restrictions on purchasers of real property in the United States. Persons and entities on the Specially Designated Nationals List published by the United States government are not permitted to purchase property in the United States.

In Pennsylvania, alien corporations (those owned by foreign persons or entities) are treated as foreign corporations (i.e. U.S. corporations incorporated in states other than Pennsylvania), and upon qualification, can buy and sell real property in Pennsylvania. Alien corporations which are engaging in activities which do not require qualification do not have to qualify to do business in Pennsylvania in order to own, acquire or hold real property. Non-resident aliens and foreign governments can not acquire agricultural lands in excess of 100 acres, except for royalty, oil, gas or mineral interests or land acquired in enforcing a lien for collection of a debt. Resident aliens have to sell agricultural land within three years after they lose residency status in Pennsylvania.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

Businesses must register with the Commonwealth of Pennsylvania to do business in the state. They must also register with the state taxing authorities for payment of income and, if applicable corporate stock taxes, as well as workman's compensation insurance and unemployment compensation insurance. Occupancy permits may also be required.

Such registrations can generally be accomplished very quickly.

For particular types of businesses, for example the practice of law or medicine, or the sale of insurance or securities, state and/or federal licenses may be required.

**17. Could your firm assist foreign investors in**

- Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- Developing construction projects?**
- All legal aspects involved in these contexts?**

Yes to all of the above.

Our firm is a full-service law firm that has extensive experience in all types of real estate transactions in Pennsylvania and throughout the United States. This experience includes the representation of investors, developers and lenders. We have relationships with numerous real estate brokerage firms and other advisors and can provide assistance with respect to investment products and direct investments in real estate, and with lenders which can provide financial assistance. We are title agents for several major title insurance companies and work closely with them in writing title insurance policies for both owners and lenders. Through our immigration practice, we can assist foreign investors in obtaining U.S. citizenship by investing in the United States in businesses which may own commercial real estate.

Please contact Greg Pearson or Charles Knox at:  
Buchanan Ingersoll & Rooney PC  
One Oxford Center  
301 Grant Street, 20th Floor  
Pittsburgh, PA 15219-1410

gregory.pearson@bipc.com  
(412) 562-8909

charles.knox@bipc.com  
(619) 685-1902

## **USA – Texas**

### **Patton Boggs LLP**

2550 M Street NW  
Washington DC 20037  
United States of America

Tel: (202) 457 6000  
Fax: (202) 457 6482  
jbrand@pattonboggs.com  
dmishkin@pattonboggs.com  
www.pattonboggs.com

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

In the United States, real estate transactions are governed by both state and local laws which vary from jurisdiction to jurisdiction. Following is a general description of commercial real property transactions in the United States based upon laws of the state of Texas. While the following accurately describes the parameters of a real estate transaction in the United States, generally, local laws and practices will impact the specifics of any given transaction.

The buyer and seller, often through the use of real estate agents or brokers acting as their representatives, first negotiate and agree on the terms of the sale, which is typically evidenced by a letter of intent. In the commercial context, a contract (known as the purchase and sale agreement) is drafted and negotiated by legal counsel to the parties for the parties to sign. The contract includes terms such as the sales price, financing terms, the condition of the property, conditions to closing, covenants, representations and warranties. The contract will also set forth the level of due diligence to be performed by the buyer.

After a purchase and sale agreement is executed, the next steps are determined by the terms of the purchase and sale agreement. The typical process is that the buyer will have a period of time during which the buyer can perform due diligence on the property. Due diligence typically consists of reviewing the title and survey for the property, reviewing environmental reports, determining the zoning status of the property, and reviewing existing leases and contracts affecting the property. Due diligence may include additional investigations and rarely is there a limitation on buyer's due diligence. The scope of the due diligence is negotiated in the purchase and sale agreement. The purchase and sale agreement will also specify a closing date as well as the location of the closing. Closing typically takes place at the title company's offices and the title company acts as escrow agent for all money and documents. The seller and buyer may show up in person to execute documents, but this is not typical. Money is wired directly to the title company and the documents are couriered to the title company. Once the title company confirms receipt of all of the documents and the money, as well as satisfaction of all of the closing conditions set forth in the purchase and sale agreement and instruction letters from buyer's and seller's

counsel, respectively, the real estate transaction closes and the deed is released from escrow for recordation. The deed is not recorded until after the real estate transaction closes.

After the closing, the escrow period ends and the transfer of ownership is complete. The state of the title to the property at closing is typically insured by title insurance, which is issued by a title insurance company. During the due diligence period, legal counsel to buyer will negotiate the form of title insurance policy to be issued at the closing to the buyer.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

Texas permits ownership of portions of land. A condominium is the most common. In a condominium regime, a portion of the property is designated as common elements (which are collectively owned by all of the condominium unit owners through a condominium association) and the remainder of the property is designated as condominium units (which are individually owned).

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

Texas allows the joint ownership of real property through the use of tenancies in common, joint tenancies, and community property. In addition to individuals, the following entities can also own real property in Texas: Limited Liability Companies, Limited Partnerships, General Partnerships, and Corporations.

In Texas, co-ownership of real property through a tenancy in common does not create the right of survivorship in the co-owners unless a right of survivorship (commonly referred to as a tenancy in common with right of survivorship) is expressly granted. When one co-owner dies, the interest of the deceased co-owner goes directly to that person's heirs (either by will or intestate succession) and not to the other co-owner. Additionally, in Texas, a grant of ownership of real property to two or more persons is presumed to create a tenancy in common, unless otherwise expressly stated in the conveyance. Ownership of real property through a joint tenancy provides the co-owners with equal interests in the entire property, along with the right of survivorship. With respect to spouses in Texas, community property consists of the property, other

than separate property, acquired by either spouse during marriage. Each spouse owns an undivided one-half interest in all of the community property.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Texas, it is possible for the ownership of the land to be separate from the ownership of the building(s) located on the land. One example of a structure where the ownership of the land and the building(s) located on the land are different is a condominium structure in which the land is designated as a common element and owned in by a condominium association, while any buildings on the land is a separate condominium unit that is individually owned. Another example of a structure where the ownership of the land and the building(s) located on the land are different is a property where the land is ground leased. When the land has been ground leased, during the term of the lease the building(s) on the land are owned by the tenant, while the land is owned by the ground lessor.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

In Texas, property deeds, as well as mortgages and other documents effecting title to real estate, are typically recorded in the County Registrar Recorder's office in order to protect the owner from losing title to a subsequent good faith purchaser (or, "bona fide purchaser") who purchases the property without notice of the current owner's title to it. Usually, absent express language of subordination or language otherwise altering priority, the instrument recorded first has priority. However, the question of whether the purchaser who records first is protected depends on the specific facts of the matter, specifically, whether the purchaser had notice of the other claim or deed even if such claim or deed is unrecorded.

## **II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

In Texas, property taxes are imposed by local taxing authorities, including counties, cities, towns, special districts, and school districts. Each year, an appraisal district in each county sets the appraised value of the real property according to the market value of the real property. Depending on market conditions, the appraised value may increase or decrease from year to year. Property taxes are levied and paid annually according to the appraised value of the real property. However, unlike some states, upon the sale of real property in Texas, neither state nor local governments impose a transfer tax on the real property being conveyed.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

There is no required hold period for real property in Texas. An owner can sell property at any time. In times when real estate values are rising, it is not uncommon for a purchaser to “flip” the property and resell the property the same day the purchaser acquires the property.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

There are no general restrictions on repatriation of funds from the United States. There are U.S. tax implications for the foreign investor to consider including the Foreign Investment in Real Property Tax Act (commonly known as FIRPTA). FIRPTA is a United States tax provision that imposes income tax on foreign persons disposing of United States real property interests. Tax is imposed at regular tax rates for the type of taxpayer on the amount of gain considered recognized. Buyers of real property interests are required to withhold tax on payment for the property. Withholding may be reduced from the standard 10% to an amount that will cover the tax liability, upon application in advance of sale to the Internal Revenue Service. FIRPTA overrides most nonrecognition provisions as well as those remaining tax treaties that provide exemption from tax for such gains. A foreign investor should consult with a U.S. tax attorney specializing in investment in U.S. real property.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

In Texas, a buyer of real property does not have the right to terminate existing leases unless the transfer is through a foreclosure by a lender that has a priority position or where the lease has been subordinated. The owner of the property must wait for the existing lease to expire or the owner may terminate the lease after a tenant default.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Most cities and counties divide their jurisdictions into land use districts, or “zones.” Within each zone a specific set of rules control the use of land. There are often zones for single-family residences, multi-family dwellings, commercial uses, industrial activities, open space or agriculture and, sometimes, mixed uses. If a property owner desires to use property in a manner not permitted under the applicable zoning ordinances, the owner may seek a variance or conditional use permit, or seek to amend the zoning rules. Property in Texas is zoned for specific uses and the owner can not change a permitted use without governmental approval. Buyers must also be wary of covenants, conditions and restrictions (CC&R’s) which commonly restrict property. Such CC&R’s are private restrictions placed on the property which are enforced by private rights of action.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence )?
- estate agent?
- others

Notary Public charges in Texas are also typically less than \$20.00 U.S. Dollars and the fee to record real property documents in the real property records can vary substantially from county to county, but are generally nominal. Neither local nor state governments impose a transfer tax on real property being conveyed in Texas. Real estate agents in Texas typically charge a commission equal to 6% of the sales price of the real property, to be divided evenly between the buyer's agent and the seller's agent.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

In the U.S., property taxes are imposed by local taxing authorities, including counties, cities, towns, special districts, and school districts. In Texas, each year, an appraisal district in each county sets the appraised value of the real property according to the market value of the real property. Depending on market conditions, the appraised value may increase or decrease from year to year. Property taxes are levied and paid annually according to the appraised value of the real property. However, unlike some states, upon the sale of real property in Texas, neither state nor local governments impose a transfer tax on the real property being conveyed.

In addition to the real property tax, a property owner may have to pay additional annual fees, such as business improvement district fees or CC&R assessments. The existence of these fees depends on a property location and the requirement to pay the fees is usually recorded in the real estate records. Proper due diligence before purchasing any parcel of real property is necessary to determine the annual taxes and fees applicable to a specific parcel of real property.

There may also be special assessment taxes, which are levied for the cost of specific local improvements such as streets, sewers, irrigation, and drainage. Special assessments may be due periodically to improvement districts or be levied only once by the city or county for a particular work or improvement.

#### **13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Property management fees in Texas are negotiable but are typically 4% of the income from the property plus the property manager's out-of-pocket expenses. If the property manager does work in addition to managing the property, such as overseeing and coordinating tenant construction work, there is usually a separate construction management fee of up to 4% of the cost of such construction for such activities.

#### **IV. Foreign investors**

##### **14. Would you advise foreign investors now to invest in your country?**

- Directly in real estate**
- Through real property funds, open or closed ones**
- Through other clear and secure financial products**
- At the moment not because of the impacts of the worldwide financial crisis**

Texas has 4 of the 10 fastest growing cities in America (Dallas, Houston, Austin and San Antonio) which makes Texas an attractive option for foreign investment. The decision to invest in property is best determined by the foreign investor with the advice of a reputable commercial real estate broker and real estate investment advisor.

Foreign investors are free to invest directly in real estate or indirectly through open real property funds, closed real property funds, and other clear and secure financial products. The most appropriate vehicle for investment varies from real estate project to project and a foreign investor should consult a local attorney, a U.S. tax attorney specializing in foreign investment in real estate and an accountant to determine the best investment structure for a given project.

##### **15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Currently there are no restrictions on foreign ownership of land in the United States, although the sale of real estate by non-residential aliens is subject to certain special taxation rules. In general, however, it is not difficult for foreign investors to purchase property in the United States, although careful tax planning is critical.

Individuals, domestic entities, and foreign entities are all permitted to own real estate in Texas; however, foreign entities must qualify to do business in Texas before “doing business” in Texas. The mere ownership of land is generally not enough to trigger the “doing business” requirement in Texas but the facts of each business investment must be analyzed to make the determination. Corporations, limited liability companies, limited partnerships and general partnerships are all appropriate entities for owning real estate in Texas.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

If the property is not located in a commercial district appropriate for the type of business being operated, the foreign investor may need to seek a variance or conditional use permit, or seek to amend the zoning rules, to allow the business to operate in that district. The requirements and amount of time necessary to obtain a variance can vary depending on the locality, type of variance sought and other factors, but takes approximately six months. The investor will also need to obtain applicable permits and licenses. The approvals and licenses needed to run a business vary depending on the type of business the investor intends to conduct in various cities in Texas. The time frame for obtaining the necessary approvals also varies depending on the nature of business and the city.

If a foreign investor is seeking citizenship in the United States, the EB-5 visa program offers a path to citizenship for non-citizens able to invest \$1,000,000 in a business in the United States.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Patton Boggs’ real estate group devises innovative and sophisticated approaches to achieve practical and cost-effective results for clients. We provide counsel on all aspects of commercial real estate business, striving to always put our clients in the best position to conduct business and take advantage of new opportunities.

Patton Boggs' broad national real estate practice gives us valuable experience with virtually every kind of commercial real estate activity – whether on a local, regional or national basis – including all phases of commercial real estate development, project and infrastructure development, investment, finance, leasing, restructuring and workouts.

Patton Boggs represents investors (foreign and domestic), banks and other institutional lenders, owners and developers in the complete range of real estate matters, including:

- Real property acquisition, disposition and operation;
- Development and construction; Mediation, arbitration and litigation;
- Zoning and land use planning;
- Financing;
- Restructuring, workouts, foreclosures, bankruptcy and creditors' rights
- Transactional tax planning
- Leasing

If we may be of assistance, we invite you to contact:

Deborah C. Ryan, Partner  
Co-Chair, Business Law Dept.  
Patton Boggs, LLP  
2000 McKinney Avenue, Suite 1700  
Dallas, TX 75201  
214.758.6628 Direct  
469.644.2585 Cell Phone  
or visit our website at [www.pattonboggs.com](http://www.pattonboggs.com).  
[jallen@bricker.com](mailto:jallen@bricker.com)

## **Vietnam**

### **Indochina Legal Law Firm Limited**

Sun Wah Tower - Unit 705  
115 Nguyen Hue Boulevard  
District 1  
Ho Chi Minh City  
Vietnam

Tel : (84-8) 3821 95 25  
Fax : (84-8) 3821 95 20  
il.hcmc@indochinalegal.com  
www.indochinalegal.com

## **I. Procedure of a real estate transaction**

### **1. Could you give a short outline with regard to the formal procedure of a real estate transaction in your country starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser?**

As a general matter, individuals and organizations are free to directly enter into and participate in real estate transactions not contrary to law in Vietnam. These transactions commonly involve the sale, assignment, leasing out or granting of hire purchase of real estate. Nonetheless, where a real estate transaction is made with a real estate company (or real estate developer) or an individual licensed for real estate business activities, the Law on Real Estate Business of Vietnam requires that such transaction be conducted, for purposes of publicity and transparency, via a real estate trading floor. The real estate company or individual licensed for real estate business activities may either establish a real estate trading floor or hire the real estate trading floor of another organization or individual in order to service the former's real estate business activities.

A real estate trading floor is a legal entity licensed to provide real estate business services such as the conduct of real estate transactions, real estate brokerage, and one or more of the following services: real estate valuation, consultancy, advertising, auctioneering and management. There are currently over 370 real estate trading floors in Vietnam, each of which basically serves as an intermediary where interested parties can obtain real property information, negotiate, and conclude relevant agreement/s relating to real property.

Once the parties have executed an agreement relating to real property, Vietnamese laws require the performance of the following steps for the validity and completion of the real estate transaction:

1. Certification of the relevant agreement by a notary public, except for contracts relating to real property that are entered into with a real estate company;
2. Fulfilment of tax obligations comprising registration fees and capital gains tax, where applicable; and
3. Application with the local office of the Department of Natural Resources and Environment ("DONRE") where the real property is located for the issuance of the relevant certificate certifying ownership of any or all of the land use rights, residential housing and/or construction work/s on the land.

Prior to December 10, 2009, certificates were issued separately for ownership of the right to use the land (i.e., in lieu of private ownership of land;

“LUR”), residential housing, and constructions on the land. Decree 88/2009/ND-CP now provides for the issuance of a unified certificate of land use rights, residential house ownership and ownership of assets attached to the land (“Certificate”), which serves as the formal evidence of the ownership of any or all of the LUR to the land, residential housing (including an apartment unit in an apartment building and relevant section/s of community housing,) and/or construction work/s on the land.

**2. Does your legal system permit different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements?**

As there is no concept of private ownership of land in Vietnam, the State grants the right to use land to individuals or entities either by way of allocation or lease of LUR. Only Vietnamese individuals and entities may be allocated land by the State and depending on the intended use of the land, the allocated land can be either (i) on a stable long term basis (i.e., for an unlimited term) if the same is used for residential purpose; or (ii) for a fixed duration of up to 50-70 years if the use of the land is for other purposes.

As a general matter, the land user is also the owner of the construction on the land. Consequently, ownership or changes in the ownership of (i) both the LUR and the construction on the land; or (ii) solely on the construction on the land, are accordingly recorded in the Certificate.

For apartment buildings, a Certificate shall be issued for each of the apartment units in relation to the ownership of both the floor area (Net Sales Area) of the apartment unit and the common right to use the land where the apartment building is located.

**3. Does the legal system of your country permit joint ownership of real property? Which kind of entities can be owner of real property in your country?**

It is possible under Vietnamese laws for two or more individuals or entities to jointly own real property as for instance where there are multiple land users or multiple owners of the construction on the land, and each land user or construction owner, as the case may be, is issued with a separate Certificate, with the annotation therein that the LUR or the construction on the land are jointly held.

The following entities are allowed to own property in Vietnam:

1. Domestic organisations and individuals;
2. Vietnamese residing overseas, who, among others, return home to make a long-term investment, have made a significant contribution to Vietnam, or are permitted to live stably in Vietnam, but for residential purposes only;
3. Foreign individuals who, among others, have a direct investment in Vietnam, or hold managerial positions in enterprises currently operating in Vietnam, or are married to a Vietnamese citizen, but only for the purpose of owning one residential apartment unit for residential use; and
4. Foreign companies that (a) invest in the construction of houses and buildings for sale or lease, or upgrading land and investing in infrastructure works on the leased land in order to lease the land with completed infrastructure; (b) construct on a sub-leased land located in an industrial, export processing or hi tech zone; and (c) currently operate in Vietnam without having been authorized to conduct real property business but have a need for housing for the people working at the said enterprise.

**4. In some countries the ownership of a building is implied in the ownership of the land. Is it this way in your country as well and/or is it possible to have different owners of the land and the building erected on it?**

In Vietnam, ownership of the construction erected on the land generally presupposes and implies ownership of the land given that construction works on the land or investment in the construction works on the land can only be made by individuals or organizations granted the right to use the land, through allocation of land by the State; direct lease of land from the State; or capital contribution of LUR.

An exception to this principle is the recognition of ownership of the construction/s erected by sub-leasing investors (including foreign ones) on a sub-leased land located in an industrial, export processing or high tech zone. In this case, the investor does not lease the land directly from the State but sub-leases the same from the infrastructure construction company of the said zone, which has the Certificate for ownership of the LUR to the land. Although the investor is only a sub-lessee to the land, a Certificate will nonetheless be issued to the investor, certifying its ownership of the construction work/s on the land.

**5. Is the land and/or the building registered in a formal register and is a good faith purchaser protected with regard to the entries in this formal register?**

Vietnamese laws require that ownership of the LUR to the land, residential housing, and/or constructions on the land be registered and certified for the first time (to obtain the Certificate) and subsequently thereafter (for any changes thereon) with the Registrar of Issuance of Certificate under the provincial office of the DONRE where the real property is located. The transaction will only take effect as from the issuance of the Certificate or an amended Certificate, as the case may be, by the DONRE local office.

**II. Costs for transaction**

**6. What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

The tax obligations in respect of a purchase of real property are as follows:

1. Registration fee of 0.5% on the transfer price, normally borne by the purchaser;
2. In case of capital gain arising from the transaction, a capital gains tax at the rate of:
  - (a) 25%, or alternatively, 2% of the transfer price (if the purchase price and other deductible costs are undetermined), on the seller being an individual;
  - (b) 25% on the seller being a legal entity, in case of transfer of property including the transfer of the LUR and the transfer of the right to lease land; and
3. Value added tax of 10% of the value of the assigned construction on the land, normally borne by the purchaser.

**7. Do you have to hold the property for a specific time with respect to tax reasons or is it in this context no problem to buy and sell property on a short term basis, for example within a year?**

Under the laws of Vietnam, it is not mandatory for the owner of the property to hold the property for a certain period of time before being allowed to transfer such property to another.

**8. Can the seller get his money out of your country after the transaction (repatriation of funds)?**

Yes, foreign investors are free to remit their legitimate profits abroad, provided that they have fulfilled their tax obligations and the remittance is carried out in accordance with Vietnamese regulations on foreign exchange control.

**9. If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?**

Under the Civil Code, where the leased property is purchased, the lessee of the property shall be afforded the same rights and obligations as agreed in the lease contract for the remaining term of the contract. The new lessor of the property cannot terminate the lease unless agreed to by the lessee.

**10. Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

The use purpose of a construction project is initially approved by the competent authorities and any change of said approved use purpose must comply with the land use planning of the city/province where the project is carried out, and be approved in writing by the local People's Committee ("PC"), which supervises the use and management of land in its locality on behalf of the State. The use of residential housing for office use or business purpose has also been disallowed by the Ministry of Construction.

**11. To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 Million, particularly**

- notarial costs?
- land register?
- real property transfer tax?
- advising lawyer (due diligence)?
- estate agent?
- others?

Working on the assumption that the applicable exchange rate is EUR 1 = VND 25,000, the principal costs would involve the following:

1. Notarial costs: for any transaction over EUR 200, the costs will be EUR 80; but if the transaction value is less than EUR 200, the rate in the region of 0.05-0.1% will be applied;
2. Registration fees: 0.5% of the transaction value (EUR 25,000 for the transaction value of EUR 5 million);
3. Legal fees: generally chargeable on an hourly basis, and vary accordingly depending on the complexity of the transaction and the expertise of the advising lawyers; may be subject to a lump sum amount per transaction, depending on the law firm involved;
4. Estate agent fees: normally charged at the rate in the region of 0.05-0.1% of the transaction value; and
5. Other fees: may include bank charges in terms of escrow arrangements, or applicable bank interests, depending on the bank used for the transaction.

### **III. Costs for holding real estate**

#### **12. What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

Currently, individuals or organizations holding property are required to pay housing and land tax, as calculated on the basis of land area, quality of land and applicable tax rate. Tax rates are then identified according to three (3) levels of non-agricultural land tax, as follows:

1. towns, small cities and cities: 3-32 times higher than the agricultural land tax in the region;
2. mountainous areas: similar to agricultural land tax in the region; and
3. central highlands or low mountainous areas: 1.5-2.5 times higher than the agricultural land tax in the region.

Effective as from 1 January 2012, in accordance with the new Law on Non-agricultural Land Use Tax, organizations and individuals holding property shall be required to pay housing and land tax to be calculated as follows:

1. Residential land: tax calculation based on land area, land quota (as provided by the PC of the city/province as from 1 January 2012) and the following progressive rates:

<b>Tax Level</b>	<b>Taxable Land Area</b>	<b>Tax rate (%)</b>
1	Land area within the land quota	0.03
2	Land area not in excess of three times the quota	0.07
3	Land more than three times in excess of the quota	0.15

2. Residential land being an apartment building or an underground building: the tax rate of 0.03%; and
3. Non-agricultural production and business land: the tax rate of 0.03%.

**13. What are the costs you have to calculate as a foreign investor, if you engaged a professional caretaker for the purchased property? How does the caretaker normally charge for their work?**

Property management services can be provided by real estate trading floors licensed for this activity or by local and foreign property management companies (including Savills, CBRE, Colliers and recently, Knight Frank).

The current market information on property management fees estimates the same to be in the region of US\$0.5 to US\$0.8 per square meter of an apartment unit per month; and US\$0.8 to US\$1.0 per square meter per month for other properties such as villas and houses in a residential development complex. The property management charges normally cover management services such as common area utilities; repair and maintenance; housekeeping services and security services; and general administration. Management fees vary accordingly depending on, among others, valuation of the property and facilities available for common use.

#### **IV. Foreign investors**

**14. Would you advise foreign investors now to invest in your country?**

- **Directly in real estate**
- **Through real property funds, open or closed ones**
- **Through other clear and secure financial products**
- **At the moment not because of the impacts of the worldwide financial crisis**

A foreign developer can invest in real property either by direct investment or indirect investment in Vietnam, in accordance with the provisions of the Law on Investment and the Law on Real Estate Business.

1. Direct investment:

Foreign developers invest directly in real property in Vietnam commonly through (a) a joint venture with a Vietnamese partner who contributes the LUR of the land for the project; (b) direct lease of land from the State by the foreign developer; or in view of the long and complicated process of acquiring LUR as well as addressing issues on compensation and eviction of land occupiers, (c) taking over an existing project or acquiring interest in companies licensed to carry out real estate projects.

2. Indirect investment:

Foreign investors can invest in real estate in Vietnam by way of indirect investment, including: (a) purchasing of shares, bonds and other valuable papers; (b) investing through securities investment funds; and (c) investing through other intermediary financial institutions.

These forms of indirect investment are also recommended since the foreign investors do not need to set up any legal entity in Vietnam. In the case of purchasing shares in a local public company, the maximum foreign capital ratio of 49% under the Law on Securities have to be complied with by the foreign investor.

**15. Is any individual person and legal entity allowed to buy property in your country or are there restrictions with regard for example to nationality or registered office of legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

There are no restrictions on the acquisition of real property by Vietnamese citizens and domestic companies.

Vietnamese residing overseas who, among others, return home to make a long-term investment, have made a significant contribution to Vietnam, or are permitted to live stably in Vietnam can purchase real property but only for residential purposes.

Foreign individuals meanwhile who, among others, have a direct investment in Vietnam, or hold managerial positions in enterprises currently operating in Vietnam, or are married to a Vietnamese citizen, are permitted to buy only one residential apartment unit for residential use.

Finally, foreign property developers and foreign entities that have made constructions on a sub-leased land located in an industrial, economic or hi tech zone are allowed by law to own such constructions on the sub-leased land;

while foreign owned entities currently operating in Vietnam but not having been authorized to conduct real property business may own property for the residential use of the people working at the said enterprise.

**16. If a foreign investor buys a plot of land in your country to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

For a foreign investor to acquire land and conduct real estate business in Vietnam, the following approvals must be obtained:

1. With respect to the land: LUR to the land either through direct lease from the State, or through the capital contribution of the LUR by a Vietnamese partner; and
2. With respect to the project on the land: approval from the relevant authorities (inter alia, DONRE for the general plan on compensation and site clearance and the environmental assessment report; the Department of Construction for the master planning at 1/500 scale and construction permit; and the local PC for the compensation and site clearance and the issuance of an investment certificate).

The timing can take from several months to a year and even longer depending on the locality, the complexity and the schedule of implementation of the investment project.

**17. Could your firm assist foreign investors in**

- **Finding interesting real estate and related valid investment products in real property in your country where required through personally known estate agents and other advisers?**
- **Developing construction projects?**
- **All legal aspects involved in these contexts?**

Indochina Legal would certainly be delighted to assist foreign investors in all legal aspects of their real estate transactions in Vietnam, from the conduct of due diligence investigation, to the preparation of the relevant agreements for the licensing, implementation and completion of the transactions. Our firm has the significant experience and professional competence to assist the client on the proposed services as we have had the opportunity to handle the same type and nature of work in many real estate projects in Vietnam. We do not, however, provide property brokerage services but can recommend those who are able to do the same.



