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INTERNATIONAL LAWYERS NETWORK

BUYING AND SELLING REAL ESTATE: AN INTERNATIONAL GUIDE

ILN REAL ESTATE GROUP

This guide offers an overview of legal aspects of buying and selling real estate in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

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This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

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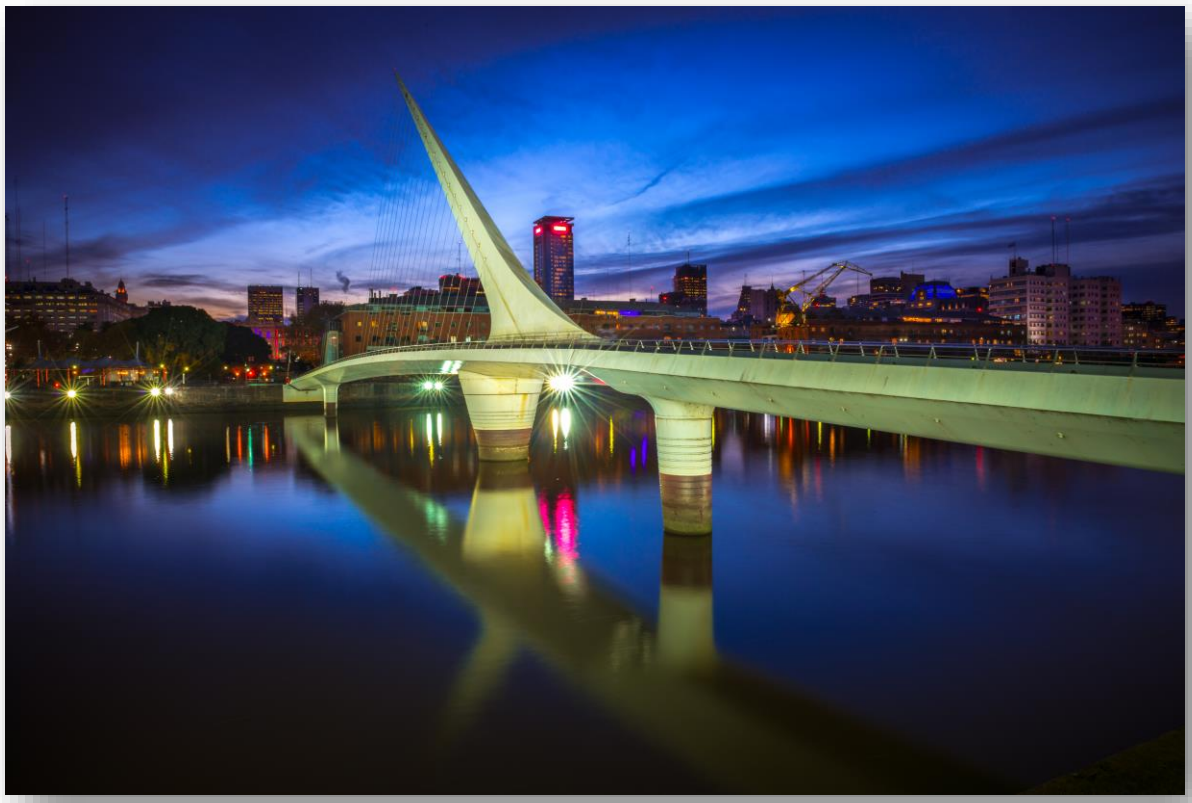

SALABERREN Y LÓPEZ SANSON ABOGADOS

Buying and Selling Real Estate in Argentina

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ARGENTINIAN LAW

I. INTRODUCTION.

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

II. FORMS OF REAL ESTATE OWNERSHIP.

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

a) Sole Ownership.

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

b) Joint Ownership.

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

Additionally, each co-owner can sell or encumber his or her undivided share without the assent of the other co-owners, while the sale of the whole property requires the consent of all the co-owners. Each co-owner is responsible for paying the expenses corresponding to his/her share, as well as of refunding other co-owners the expenses in which they may have exceedingly incurred in relation to their shares. Unless otherwise agreed, every co-owner may require the legal partition of the ownership and the division of the property.

c) Condominiums.

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

d) Residential Developments.

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

The main characteristics of this developments are: enclosure of the development, existence of common and

individual areas and the existence of an internal regulations. All of the common and exclusive parts and areas are interdependent, as well as the rights over them, conforming a non-divisible whole.

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

e) Surface rights.

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

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

The owner of the property keeps his right to sell and dispose of the property as long as it does not interfere with the existing surface right. During the agreed term, the surface right holder may transfer and encumber the constructions without the prior consent of the owner.

f) Usufruct.

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

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

III. LEGAL FORMALITIES IN RELATION TO REAL ESTATE OWNERSHIP ACQUISITION.

a) Preliminary Purchase Agreement.

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

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

In order to enter into the preliminary purchase agreement each of the parties must: (i) have general capacity in terms of the CCC as for the performance of legal acts; (ii) have an Argentine tax ID number; and (iii) in the case of individuals married under community property regimes, obtain their spouse's assent to the sale.

Preliminary purchase agreement usually include: (i) the identification of the parties; (ii) the price and payment terms; (iii) a detailed description of the property

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

b) Transfer Deed.

Once the due diligence of the title has been completed and the certificates have been obtained, which usually takes about 30 days, the parties shall grant the transfer deed which has substantially the same content as the preliminary purchase agreement.

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

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

c) Registration with the Real Estate Registry.

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

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

IV. TAXES.

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

a) Real Estate Transfer Tax.

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

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

According to the last tax reform, the transference of any rights over real estate property are also taxed at 15% tax rate (this includes the transfer of participations in real estate trusts).

b) Corporate Income Tax.

Companies selling real estate must pay corporate income tax over the sale of real estate property at 30% rate (in 2018 and 2019) and at 25% rate (from 2020 onwards), in both cases over net income. Also, corporations are taxed if they pay dividends at 7% rate (in 2018 and 2019) and at 13% rate (from 2020 onwards). The notary must make a withholding over the purchase price on account of this tax.

c) Stamp Tax.

This is a tax levied by each of the provinces in Argentina and the City of Buenos Aires which applies over the purchase price or the registered value of the property, whichever is higher. The tax

rate varies in each jurisdiction. Usually, this tax is borne in equal parts by the seller and the buyer.

V. AGENTS.

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

VI. SPECIAL CASES.

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

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

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

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

In order to obtain said approval, foreign companies must make a filing with the Internal Affairs Secretary, including certain forms provided by said governmental entity, certain corporate information (e.g. corporate bylaws, appointment of board members, latest financial statements, identification of shareholders), certificates of criminal record of the board members and an investment project to be conducted in the real estate property to be acquired. The filing should be made by the investor.

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

b) Protection of Rural Lands Ownership Act (Act 26,737) ("PRLO").

The PRLO limits the ownership or possession of rural land by foreign individuals or companies (which are referred to as Foreign Owners). Rural Land is defined as any real estate asset located outside the limits of cities. It provides that all Foreign Owners cannot

own or possess more than 15% of the total rural land of Argentina. Likewise, Foreign Owners cannot own or possess more than 15% of the total rural land in each Province or Administrative Department. Additionally, Foreign Owners of the same nationality cannot own or possess more than 30% of the rural land owned by Foreign Owners. Moreover, a single Foreign Owner cannot own more than 1,000 hectares in the core area or an equivalent surface in other locations to be determined by the governmental authority. Finally, Foreign Owners cannot hold an interest on rural land adjacent to bodies of water of certain importance. Moreover, any change in the composition of the corporate capital of local companies' owners of rural land should be informed to the authorities to verify compliance with the PRLO.

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

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

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

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

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

c) "UVA" mortgage loans.

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

These loans are expressed in Purchasing Value Units ("UVAs"), which reflect the average construction cost of one square meter and are updated based on the Consumer Price Index. This is an exception to the general prohibition of making adjustments based on inflation. They are expected to help individuals to acquire property, protecting them from currency swings.

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HALSBURY CHAMBERS

Buying and Selling Real Estate in the Bahamas

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PURCHASE OF BAHAMIAN REAL ESTATE BY NON- BAHAMIANS

Columbus came to The Bahamas when he first discovered the New World, landed on San Salvador in 1492. Over the centuries, the islands of The Bahamas became key waypoints for explorers and adventurers which connected the Old World with the New. In the late 17th century, the islands became the hotspots of pirates and privateers who marveled over landscape and mass of the Bahama Islands.

The 100,000- square-mile (258,998-square-kilometer) archipelago of The Bahamas begins just 50 miles (80km) off Florida's east coast at the Island of Bimini and stretches more that 500-miles (840km) southeast in a chain comprised of some 700 islands and cays in the Atlantic Ocean. Total land mass is estimated at 5,382 sq. mi (13, 939 sq. km). The capital, Nassau is on New Providence, while Freeport and Lucaya combined on Grand Bahama are regarded as the nation's second city.

The Bahamas has proven to be one of the top islands in the Caribbean hemisphere, when it comes to the purchase of real estate. To this end this article seeks to address two aspects of purchase of Bahamian real estate by non-Bahamians: -

(i) what is required under Bahamian law for non-Bahamians desirous of purchasing real estate in The Bahamas; and

(ii) to identify tax implications imposed on non-Bahamians with respect to their purchase and/or ownership of Bahamian real estate.

From the outset, real estate in The Bahamas presents a compelling buying opportunity for non-Bahamians potential investors from abroad. Purchasing real estate in The Bahamas can diversify an investor's investment portfolio and provides a bit of a shelter form economic siege, with a built-in benefit of permanent residency granted by The Bahamas Government.

It is customary that within a matter of weeks, foreign buyers could have residency status, provide that the purchase of the real estate is at least $1.5 million net or more.

1. Intent of Purchase

In any potential purchase of real estate in The Bahamas will require the drafting and preparation of Agreement of Sale. For the most part, a Realtor and/or Broker would facilitate in the location of the potential property and/or real estate, but once the real estate has been negotiated upon in terms of the purchase price and time limit for completion etc., it is mandatory under law that an Agreement of Sale be prepared setting out the agreed terms between the Seller and Buyer. In addition to the agreed terms which must be set out in the Agreement of Sale, there are additional requirements which must be adhered to by non-Bahamians whom seek to purchase property and/or real estate in The Bahamas.

Realtors/Brokers Commission Fees on Real Estate

i) Undeveloped property/real estate	10% of the agreed purchase price
ii)Developed property/real estate (whether residential or commercial)	6% of the agreed purchase price
iii) Family Island property/real estate	10% of the agreed purchase price (whether land, home or commercial)

If a non-Bahamian/foreigner does not own property in The Bahamas already, and wishes to purchase a piece of property and/or real estate in their own individual name, then an application must be obtained for Certificate of Registration or Permit from The Bahamas governmental agency. The application must be made to the Bahamas Investments Authority (IB) and is applied after the completion of the sale. The property and/or real estate being purchased must not be commercial property, must be less than five (5) acres and it cannot be titled in the name of two or more persons who are not related (i.e. the persons must be husband and wife or brother and sister/parent and child (with the same last name) or a company.

If the property and/or real estate is commercial property and is being purchased by a company or unrelated persons or consists of more than five (5) acres, then a Permit is necessary. The Permit also must be obtained from the IB before the purchased transaction is complete.

2. Requirements

The application for the Permit and the Certificate of Registration requires that the following be submitted to the IB in support of the same: -

- Copy of National Photo Identification (namely, Passport, Driver's Licence etc.);
- Police Record/Certificate from Country of residence;
- Character Reference;
- Copy of Site Plan of land being acquired/purchased - this will normally be attached to the Agreement for Sale or the title documents for the property;
- Bahamas Immigration Status (confirm if the non-Bahamian and/or foreigner has obtained permanent residency status or any other status in The Bahamas);
- Social Security Number/National Identification Number;
- Evidence of payment of real property taxes for the property being purchased- this is normally secured by the Attorney representing the Seller and provided to the Buyer's Attorney;
- A Certificate of Incorporation/Registration, if the applicant is a Bahamian Registered Company or a Foreign Company Registered under the Foreign Company provisions of the Companies Act of the Commonwealth of The Bahamas;
- **Financial Reference** – normally obtained from a bank/financial institution whom the Buyer has an account for at least three (3) to five (5) years;
- **Source of Wealth** – a letter obtained from the bank/financial institution holding the account in the name of the Buyer, which will be utilized as the source of funds for the purchase of the real estate.
- The Buyer will also be required to complete a ***KNOW YOUR CLIENT*** profile

Form for submission to his Bahamian Attorney.

Under the International Persons Landholding Act, 1993, amended in 2007, The International Person Landholding Act made it easier for non-Bahamians and companies under their control to own property.

- A non-Bahamian or permanent resident who purchases or acquires an interest in a condominium or property to be used by him/her as an owner-occupied property, or for construction of premises to be used as an owner-occupied property, must apply to the secretary to the Investment Board (IB) to register the purchase.
- Upon receipt of the above, the acquisition is registered, and a certificate of registration issued.
- A permit to acquire property is required if the property is undeveloped land and the purchaser would become the owner of two or more contiguous acres. A permit is also required if the non-Bahamian intends to acquire land or an interest therein by way of freehold or leasehold, when the acquisition is not in accordance with item 1.
- Non-Bahamians who own homes in The Bahamas may apply for an annual homeowner's residence card. This card entitles the owner, spouse and dependent child or children to enter and remain in The Bahamas for the duration of the validity of the card (one year). This facilities entry-it does not confer resident status in The Bahamas.

FEE SCHEDULE APPLIED:

(i) Application for Registration	**B$25.00**
(ii) Application for Permit	**B$25.00**
(iii) Certification of Registration	**B$250.00**
a. $50,000 under	**B$50.00**
b. $50,000.01 up to $101,000	**B$75.00**
c. $101,000 and over	**B$100.00**
(v) Annual homeowners'	
a. residence card	**B$500.00**

3. Joint Tenancy

As with any real estate whether purchased jointly or solely, there are legal implications which follows regarding the type of ownership the real estate falls under. It is said, *"A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner"*[1]. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. A joint tenancy is known by its four (4) principal features, in particular the right of survivorship and the *"four unities"*.

[1] Megarry & Wade- The Law of Real Property, Sixth edition, Sweet & Maxwell.

1. The right of survivorship: This is, above all others, the distinguishing feature of a joint tenancy. On the death of one joint tenant, his interest in the land/real estate passes to the other joint tenants by the right of survivorship. This process is said to continue until there is one survivor, who then holds the land/real estate as a sole owner. By law, joint tenancy cannot pass under a Will or intestacy of a joint tenant.
2. The four unities must exist, namely: -
    i) Unity of possession;
    ii) Unity of interest;
    iii) Unity of title; *and*
    iv) Unity of time

4. Tenants- in-Common

The other form of ownership is called and known as tenancy in common. It is said legally that tenancy in common differs significantly from joint tenancy.

Unlike joint tenants, tenants in common hold undivided shares in property and/or real estate. Each tenant in common has a distinct share in property and/or real estate which has not yet been divided amount co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them.

Similarly, there is no right of survivorship, accordingly, the size of each tenant's share is fixed finally and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is disposed of as he wishes. For instances, where a husband and wife are beneficial joint tenants and one of the spouses dies intestate, the survivor will acquire the property by right of survivorship and will in addition be entitled to a statutory legacy. On the other hand, if property and/or real estate is owned by the spouses by virtue of tenants in common, the survivor will receive only the statutory legacy, i.e. only the portion to which the spouse has contributed to the property and/or real estate.

In comparison to the principal requirements set out in determining whether joint tenancy exists, it appears that only the unity of possession is essential or may be present in a tenancy in common in establishing ownership.

5. Transfer of Title on Death

If property is purchased in the name of an individual, there are no transfer taxes on death in The Bahamas. On the death of the owner, the only thing that will have to be done is to probate the Estate. If the property is purchased by joint owners, then the surviving joint owner will automatically be the sole owner of the property. No probate of the deceased owner's estate is necessary. On the death of the last joint owner, however, his estate will have to be probated. If the property/real estate is purchased as tenants-in-common then on the death of one tenant, that person's share of the property will devolve upon the person entitled thereto under the last will and testament of the deceased tenant or according to the laws of intestacy, if he died intestate (without a Last Will and Testament).

6. Title held by a Company

If the property/real estate is purchased in the name of a Bahamian Company, then the following requirements should be met:

- The company must first be incorporated;
- The company must first be a Bahamian Company (domestic) with the majority of shares held by a Bahamian citizen. Alternatively, an application can be made to the Central Bank of The Bahamas with regards to a foreign person having

ownership of the real estate/property to be designated as a resident of The Bahamas.

- Shares of the incorporated Company will have to be issued – and these will devolve upon the person entitled thereto upon the death of the shareholder under the provisions of the Last Will and Testament of the deceased or the laws of intestacy (if the deceased died without a Last Will and Testament).
- If shares are transferred, taxes are payable on such transfer (see below).
- If the property is transferred to the owner of the company, taxes are also payable (see below).

A Bahamian company can be incorporated by a non-Bahamian as an International Business Company and it will be allowed to do business in The Bahamas. Central Bank Approval is required before shares in a company can be issued to a non-Bahamian. In this regard, the information required above for the Certificate of Registration is also required for submission to Central Bank.

Alternatively, some persons have opted to form a company in the Country where they live (i.e. United States) and have the company registered under the foreign company provisions of the Companies Act in The Bahamas. Once the company is registered then the company can proceed to operate in The Bahamas. The Central Bank of The Bahamas will require the same information stated above for the Shareholders of the company.

In any event, the Company whether it is a Bahamian Registered Company (i.e. IBC) or a Foreign Company registered under the Foreign Company provisions of the Companies Act, will have to be in existence before it can enter into an Agreement for Sale to purchase Bahamian property/real estate. Alternatively, if there is an urgent need to pay the deposit and to secure the purchase of the property/ real estate, the Agreement for Sale can be entered into by the potential Buyer with a provision in the said Agreement providing a right reserved therein to assign the sale of the property/real estate to the company once it has been established.

The only advantage to having a company is that there is limited liability protection (no one can go beyond the corporate veil of incorporation if they choose to sue the owner of the property, to attach the owner's personal assets. This is usually the case where the property is being used as commercial (i.e. rental) property and is constantly rented out for profit.

7. Legal Fees and Stamp Duty

Legal Fees associated in the purchase and sale of all real estate transaction in The Bahamas are normally 2.5% for each party- Seller and Buyer.

There are also charges imposed and implemented by The Government of The Bahamas in relation to Stamp Duty on all properties/real estate prepared by a deed of conveyance assignment or transfer of realty at two and a half per cent (2.5%) of the amount of value of the consideration. Provided that properties over fifty thousand dollars in value became liable to Value Added Tax (VAT) at 7.5%.

With regards to Leases on every property/real estate the stamp duty imposed is two and a half per cent (2.5%) of the annual rent reserved.

The normal procedure for a property transaction is that the Seller and Buyer each pay their own legal fees and one half of the stamp duty on the value and/or current market value of the sum that would be expected to be realized on the sale of any property/real estate

by the seller to the buyer. The commission of the Broker and/or Realtor is normally payable by the Seller. This, however, is all subject to agreement between the parties and can be drafted in the Agreement for Sales differently, if both Seller and Vendor so desire.

8. <u>Tax Implemented on Real Estates</u>

On or about March 2013, the Government of The Bahamas implemented new real property tax incentives, to provide tax relief to both Bahamians and non-Bahamians purchasing property/real estate in The Bahamas. The objective of the new tax incentives is to provide tax relief and to update the real property tax register. This new legislation and tax incentive came into effect on the 1st March 2013, which provides as follows: -

- All back taxes (if any) will be waived for owners of residential properties valued above the $250,000.00 exemption threshold and owners of commercial properties, who have never received a tax bill, if they register their properties with the Chief Valuation Office by the 30th June 2013; ***and***
- Owners of residential properties who remain current with their payments over the next three (3) years will receive a 5% rebate of their annual real property tax assessment.

It is certainly true that real estate purchase in The Bahamas is a purchase of paradise. Not only, by the unique geographical location of The Bahamas, just 50 miles off the coast of Florida, but The Bahamas is strategically positioned to the wider Americas. This is an undeniable advantage.

Its proximity to the US, Central and South America places The Bahamas in an enviable position to serve both its traditional and emerging markets and presents an opportunity to link commercial and financial interests of non-Bahamians desirous of purchasing real estate.

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Buying and Selling Real Estate in Brazil

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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER BRAZILIAN LAW

1. OVERVIEW OF BRAZILIAN HISTORY

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

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

Explorer Pedro Álvares Cabral claimed the area for the Portuguese Empire in 1500. Brazil remained a Portuguese colony until 1808, when the capital of the empire was transferred from Lisbon to Rio de Janeiro. In 1815, the colony was elevated to the status of kingdom upon the formation of the United Kingdom of Portugal, Brazil and the Algarves. Independence was conferred in 1822 with the creation of the Empire of Brazil, a unitary state governed by a constitutional monarchy and a parliamentary system. The ratification of the first constitution in 1824 led to the formation of a bicameral legislature, now called the National Congress and also marked the introduction of the real property registry system. The country became a presidential republic in 1889 following a military coup. A military junta came to power in 1964 and held power until 1985, after which civilian rule was reinstated. Brazil's current constitution, formulated in 1988, defines it as a democratic federal republic.

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

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

2. DIFFERENT TYPES OF REAL PROPERTY

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

a) Rural property.

b) Urban property.

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

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

3. TYPES OF REAL ESTATE DEVELOPMENTS

Brazil law basically recognizes the following types of land development:

a) Urban properties:

a.1) Allotment - the division of a plot of land into lots with the installation of the necessary infra-structure, i.e. serviced lots (e.g. streets, water, sewage, electricity for transfer to public agencies upon conclusion) prepared and ready for sale. There has been a notable impact on this type of development following the enactment of new Federal Law no. 13,465/17 that now permits a local municipality to control access to allotments, which has resulted in a fierce debate about the legality of access control to such allotments which, as a result, ended);

a.2) Land division - the division of a plot of land into lots without the installation of infrastructure (because the plot already has access to the necessary infrastructure);

a.3) Real Estate Development - real estate developments are regulated by Law 4,591/64, thus created by dividing a piece/portion of real estate into several individual/separate and private constructed units, whereby an undivided interest in the real estate is established/registered in each unit. For the development and sale of hotel units with the hotel and lease administrations included the Securities Commission's Normative Ruling nº 602/18 must be also observed;

a.4) Plots under the condominium regime - brand new type of real estate development also regulated by new Federal Law no 13,465/17, this type of condominium entails division of plots into lots, without improvements, created/developed as individual units with the remaining areas registered as communal property.

b) Rural properties:

b.1) Allotment - same concept as above;

b.2) Land division - same concept as above.

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

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

a) Land Analysis. Mainly involves the calculation of the:

a.1) Maximum amount of built area that could be constructed on the land, as prescribed by local zoning and use category legislation;

a.2) Unit sale price, which varies according to project and the property location, its distinctiveness, as well as the characteristics of the units on which the analysis is based;

a.3) The cost of the project, which primarily comprises construction costs, marketing costs, brokerage expenses and taxes; and

a.4) Environmental and zoning requirements pursuant to local regulations (Federal and State regulations might be also applicable).

b) Project approval. Any real estate project must be approved by the relevant Municipality prior to the commencement of the project.

c) Project development. A property developer is permitted to start selling the units of a real estate project only after obtaining regulatory approval and the relevant permits referred to above and after the project development has been registered with the relevant Real Estate Register Office.

d) Due-Diligence.

e) Project Launch. Essentially the start of the units' sale. The sale of units may only take place after a project has been approved and the development has been duly registered before the relevant Real Estate Registry Office.

f) Construction.

4. TYPES OF *IM REM* RIGHTS IN BRAZIL

a) ownership;

b) surface;

c) use;

d) right-of-way;

e) enjoyment;

f) habitation;

g) right to acquire;

h) pledge;

i) right of floor slab ("Direito de Laje", which roughly translates to the Right of the Floor Slab, allows to obtain a distinct title to construction on top of or under another building even though it sits on the same land) - regulated by the new Federal Law no 13,465/17;

j) right to guaranty:

j.1) mortgage;

j.2) fiduciary lien;

j.3) antichresis;

j.4) seizure.

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

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

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

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

- ✓ Technical (e.g. engineering, geological or archeological) and environmental due diligence would also be recommended, depending on the status of the property, its historical data or the prior (or future) use of the property.
- ✓ Execution of the purchase deed before a Notary Public. In Brazil, the acquisition of any real property occurs solely by virtue of a notarial deed (save for certain exemptions, as in the event of the permission obtained for the acquisition of a property for a price lower than the official minimum wage, or in case of participation of a financial institution by means of a private instrument). The Notary Public is usually chosen by the purchaser, who also pays the notary fees. Both the seller and the purchaser may either appear in person before the notary to execute the deed or appoint attorneys-in-fact to do so in their name and on their behalf by virtue of a notarized Power of Attorney. The deed must be drawn in the Portuguese language only. The Notary Public will read the deed aloud to the parties. Therefore, a non-Portuguese-speaking party (if attending the execution of the deed in person) will need to appoint and have a translator present.
- ✓ Payment of the property ownership transfer tax. In general, the property ownership transfer tax (a Municipal tax) must be paid upon the execution of the deed, but the rules on the payment of this tax and its rates vary in accordance with the applicable rules imposed by the municipal authority where the property is located.
- ✓ Registration of the deed of sale with the relevant Real Estate Registry Office (in contrast with the choice of Notary Officer, who may be chosen by one of the parties, the Real Estate Registry Office's jurisdiction is defined by State Law and, therefore, cannot be selected by either party). Under Brazilian law, a purchaser of real property only becomes the property's rightful owner after the notarial purchase deed is duly registered with the competent Real Estate Registry Office, as indicated in the real property ownership certificate.

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

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

Lawyer's fees can be negotiated and are established by the Brazilian Bar Association in its main fee guidelines. Under the law, a lawyer does not need to be present at the execution of the deed of sale; however, to ensure the

validity of negotiations and compliance with the relevant legal formalities, it is advisable to have a lawyer present. Furthermore, the presence of a lawyer also serves to ensure the accuracy of the deed's content in relation to the description of the property, the description of the succession of rights of the seller and his/her predecessors, in addition to other legal requirements.

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

7. FINANCING

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

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

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

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

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

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

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

9. RESTRICTIONS ON REAL PROPERTY ACQUISITION BY FOREIGNERS

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

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

It is worth noting that over the course of the last two decades fierce debate has been ongoing in on the issue of property ownership by foreign entities. Up until the end of 2016, in

São Paulo State the mere fact that an entity was duly registered with the São Paulo Board of Commerce, with no consideration given to the nationality of its shareholders, was sufficient for such an entity to be treated as a Brazilian entity, hence making it possible for the entity to own rural property in São Paulo State.

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

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

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

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

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

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

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

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

11. NOTES/OBSERVATIONS ON TAXATION

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

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

Rural Real Estate Property Tax ("ITR"). All rural real estate property in Brazil owned by individuals or legal entities as at January 1st of each year, is subject to Rural Real Estate Property Tax, payable to the Federal Government. Calculation of ITR is based on information provided by the property owner to the Federal Revenue (information includes the surface area, the purpose of its use, extent of

preserved native forest, agricultural production, among several other considerations).

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

12. NOTES ON THE REAL ESTATE REALTOR ACTIVITIES

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

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

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Buying and Selling Real Estate in Chile

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CHILEAN LAW

I. STANDARD FORMS OF AGREEMENTS

A. Offer to Purchase sets forth Buyer's offer of price, date for closing, contingencies for inspections, financing etc. and date for signing a formal purchase and sale agreement. Seller may accept or reject. If the seller rejects, rejection is considered a counteroffer if reasons for rejection are informed.

B. The most usual form of commitment to sell and purchase real estate, notwithstanding the property's purpose, features of the parties, or other conditions is through a Promise Agreement. The promise agreement must detail the terms and conditions of the purchase as thoroughly as possible, or it may be deemed invalid and unenforceable. This means the promise agreement must at least include:

1. A full description of the property, including address, boundaries, land tax identification number, and number of registrations in the competent Real Estate Registrar.

2. The agreed purchase price and its form of payment. If Buyer will pay part or all the purchase price with a loan from a bank or other financial institutions, Seller usually states that failure to obtain credit by the Buyer is considered a breach of the agreement and not a condition for declaring the agreement void. The parties also usually agree that the purchase price will be paid through bank documents that will be left in the custody of the notary public that authorizes the deed of sale, with instructions to deliver said documents once the property is registered to the name of the Buyer in the competent Real Estate Registrar, with no encumbrances except those that are unrelated to guarantees provided by the owner (i.e. Co-ownership Bylaws, easements) and those accepted by the Buyer in order to guarantee payment of credits for the purchase (i.e. mortgages, prohibitions to sell).

   If the parties agree that the purchase price will be paid in installments, the Seller does not waive its resolutory action and does not grant the Buyer settlement.

3. Form of sale and delivery: how the property will be sold: usually *ad corpus*, in its current state which the Buyer declares acknowledging, free of any encumbrances and in general any limitations to ownership. However, for large plots, especially rural real estate, the parties usually agree to review the property's exact surface through a topographical survey, setting a unitary price per square meter sold, which may produce an adjustment against or for each party regarding the price. For example, if the topographical survey reveals that the property's actual surface is less than 2% of the property's surface in its titles, that difference is accepted by the Buyer. If the difference is higher, the Buyer has the right to request a price

reduction. This also applies in case the property's actual surface is more than 2% of the property's surface in its titles: if the difference is higher, the seller has the right to collect an increased price that considers the actual surface of the property measured in the survey.

In case the property is part of a condominium, it is sold with the Co-ownership Bylaws that regulate how the condominium is managed. The property must be delivered empty, with no debts of any kind, i.e. land tax, utilities, common expenses, etc.

In the case of rural property, it must be delivered with no workers of any kind, the Seller guaranteeing that the labor contracts of any workers that worked in the property have been terminated.

4. Titles: the sale is usually subject to the condition of having the Buyer's attorneys review the legal titles of the property. If the titles do not conform to law, the condition fails, and the promise agreement becomes void with not liability to any party.

   Review of the property's legal titles seeks to verify that:

   1. The Seller, either directly or by adding the possession of the property by prior owners, has owned the property for at least 10 consecutive years, since this term is the statute of limitations for acquiring real estate through prescription.
   2. The Seller (and prior owners), especially in the case of corporations, were legally entitled to acquire, maintain, and sell the property (i.e., Stock corporations are mandated by Law to authorize, through an extraordinary shareholders meeting, the sale of real estate if it represents 50% or more of the company's assets).
   3. The property is not subject to encumbrances and limitations that may hinder its transfer or its full exploitation and use by the Buyer, due to, for example, leases, seizures, mortgages, prohibitions, mining permits, easements, expropriations, usufructs, environmental conservation rights, co-ownership regulation, etc.
   4. There are no technical conditions that may affect the transfer or full exploitation and use of the property by the Buyer, such as farming and forestry subsidies, debts owed to public institutions for land taxes, subsidies, declarations of public utility (which mean part, or all the property may be subject to future expropriation due to eminent domain), etc. In the case of urban real estate purchased for the construction of any sort of building, both the city and the district's land-use master plans must be reviewed to verify if construction in the property is authorized based on the use of the land included in the master plan.

5. Term and place of execution: the parties agree on a term to sign

the purchase agreement, usually based on the time necessary for the Buyer's counsel to review the property's legal titles and, when applicable, to obtain financing for the purchase. They also agree on the notary public's office where the deed will be signed. In case the property's price is paid partially or fully using a loan, the notary public who will authorize the deed is usually appointed by the financial institution that grants the loan.

6. Guarantees: in guarantee of complying with their obligations set forth in the promise agreement (for the Seller providing the legal titles of the property and signing the deed on the agreed date; for the Buyer signing the deed on the agreed date), the parties provide cross-guarantees in the form of banking documents with a sum usually equivalent to 10-20% of the sale price, which may only be collected if the counterparty breaches her contractual obligations.

7. Conflict resolution: any disagreements between the parties, including any disagreements regarding the legality or completeness of the property's titles, are usually resolved through arbitration, but there is no impediment in having the conflict resolved by the ordinary courts of justice.

C. Promise Agreements may be executed as private documents, or as public deeds. In the case of a public deed, if authorized by the Seller, the Buyer may register the Promise Agreement in the competent Real Estate Registrar, to notify third parties that the Seller has formally promised to sell the property. The Seller may also accept, at Buyer's request, to abstain from offering the property to third parties or encumbering it during the term of the promise agreement; and if authorized by the Seller, this prohibition may be registered in the competent Real Estate Registrar.

D. Purchase and Sale Agreement usually repeats the terms sets forth in the Promise Agreement. If there is no Promise Agreement, the complete terms of the purchase and sale, which are the same as those described herein, are included in the Purchase and Sale Agreement, except that in this case the Buyer may agree to accept the property's titles without actually reviewing them. In this case, the Seller inserts a clause having the Buyer acknowledge this situation and waiving its actions to sue the Seller for hidden flaws in the property ("*vicios redhibitorios*").

II. BROKERS

I. Real estate brokerage is an unregulated activity in Chile, no special qualifications or permits are required to operate as a broker.

II. Broker collects a commission of 1-2% of the sale price, from both the Seller and the Buyer, unless negotiated otherwise.

III. Brokerage is not mandatory. It is usually used in the sale of used real estate,

although seller can offer directly, and sellers of new residential/commercial/industrial/forestry/agro projects hire established brokerage firms to look for potential buyers, and to preparing bidding processes, usually for large properties with commercial/industrial/forestry/agro potential.

III. BUYER'S INSPECTIONS

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

B. When buying new property, the Buyer usually inspects the property with an architect to verify if there are any flaws or construction defects that must be repaired before receiving the property. Additionally, the sale of new property, especially for residential purposes, is subject to Chile's Consumer Protection Act in all aspects unrelated to construction quality. Therefore, inspection may reveal differences between the conditions offered by the Seller v. the actual conditions of the property, which may configure deceptive advertising and leave the Seller liable for infringing Chile's Consumer Protection Act.

IV. FORMS OF OWNERSHIP

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

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

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

V. FORMALITIES

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

B. If any of the parties needs to appear through a proxy, either because they are unable to be physically present on the day of execution, of because any of them is legally incapable (i.e. a minor, or a person that has lost the administration of its patrimony), a power of attorney must be granted by public deed, and said power of attorney must grant all the necessary authorities to the proxy, including agreeing the sale price and

form of payment, granting settlements and waiving resolutory actions.

VI. CLOSING COSTS/ADJUSTMENTS

A. The notary public's costs for authorizing the Sale and Purchase Agreement are usually borne 50% by each party, although the Seller may try to impose full payment of all costs by the Buyer. Costs of registering the Sale and Purchase Agreement before the competent Real Estate Registrar are borne by the Buyer. The fee paid to the Real Estate Registrar is of 0,002% of the sale price, considering a maximum price ceiling of CH$ 128.000.000 (USD 205,000 approx.).

B. Buyer and Seller adjust for land taxes, which must be paid on a quarterly basis. In addition to the foregoing, if the property is commercial property, adjustments are also made for rents, third party operating expenses and common area maintenance expenses.

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

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

VII. OTHER CLOSING DOCUMENTS

A. Condominiums: The Seller will provide the Buyer with a copy of the corresponding Co-ownership Bylaws, in the case of properties that form part of a condominium regulated by Law 19.537 of Real Estate Co-Ownership. The Buyer also usually requires the Seller to provide a certificate, issued by the condominium's administrator, stating that the Seller does not owe any common expenses for his unit.

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

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

VIII. RECORDING REAL ESTATE DOCUMENTS

A. Since real estate must be transferred by a public deed registered before the competent Real Estate Registrar, copies of the deed are always available firstly in the office of the notary public that legalizes the deed, and then in the competent Judicial Archive.

B. Regarding the actual registration, the sale deed is registered in the Property Registry of the competent Real Estate

Registrar, who may then issue copies of the property's registration to the Buyer's name, and a certificate that shows all the liens and encumbrances on the property, including prohibitions, seizures, litigation, easements, usufructs, Co-ownership Bylaws, etc.

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

IX. ANNUAL COSTS FOR PROPERTY OWNERSHIP

A. Property Insurance: it is not mandatory, but very common. For condominiums, insurance is contracted for the condominium's common property. When property is purchased through loans by banks or other financial institutions, the lender requires the Buyer to at least contract fire and earthquake insurance. Unemployment insurance for the Buyer who is a natural person is also usually demanded by financial institutions, which may be enforced contractually but is not legally mandatory.

B. Land tax: Real estate in Chile is subject to a land tax, paid quarterly to the Treasury, and whose value is determined by the fiscal value of the property, which usually is 1/3 of the property's commercial value. Some properties, due to their surface or use are exempt from the land tax. Some properties, due to their state, may be castigated with a higher land tax.

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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER COSTA RICAN LAW

General

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

Non-Resident Ownership

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

Land Use Planning

Local governments known as Municipalities, govern the use of land in the towns, cities and rural areas of their jurisdiction. These entities levy and collect real estate ownership taxes, and they pass bylaws and legislation to determine the use that will be allowed for private and public properties. As a consequence, local governments can regulate matters such as the type of construction that can be built, its height, density, and other building requirements. They also issue building and remodeling permits, requiring that interested parties wishing to carry out any type of construction comply with the established regulations, including zoning laws. Some Municipalities, due to lack of funding, have not been able to legislate on subjects such as land use planning and building requirements. In such cases, the Costa Rican Construction Code and the regulations issued by the National Institute of Housing and Urban Planning will govern construction. Most Municipalities that do have regulations on building and construction abide by the standards and regulations contained in the Costa Rican Construction Code, but specific laws, such as those passed by the Municipalities will prevail over general legislation such as the Construction Code.

Title Registration

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

Taxes on Real Property

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

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

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

The indicated taxes and fees represent 2.4% of the property fiscal value or purchase price (highest of) and they must be paid before the deed is submitted to the Property Registry. Since Public Notaries are private parties who are authorized to perform public functions, their fees are set by the Costa Rican Bar, in conjunction with the legislative power through a specific legislation, which is updated periodically. At this time, Notary fees for the drafting, issuing and submitting for registration a deed for the sale of a real estate property are set at 1.25% of the property value.

Capital gains in general are not currently taxed in Costa Rica, unless (a) the business activity that generates the income is habitual; or (b) the gain is generated as a result of the transfer of assets that are subject to depreciation/amortization for corporate income tax purposes. Legislation to expand the application of capital gain tax is currently being discussed in the Costa Rican Congress, but it is uncertain as to what its outcome will be.

Shoreline Concessions

In 1973, Costa Rica passed legislation that regulated the ownership, sale and purchase of properties located on the Shoreline. The Shoreline is a trip of land measuring of two hundred meters wide, starting from the line set by the lowest tide and moving inward two hundred meters. Of those two hundred meters, the first fifty have been declared to be of public domain and therefore cannot be owned by any physical or legal person. Access to that fifty-meter strip is free, since it is meant to be for public use. The administration of the remaining strip measuring one hundred and fifty meters wide, also known as the Restricted Area, has been awarded to the local Municipalities, who may grant concessions for its use. These regulations are governed by the Shoreline Zone Act ("Ley Zona Marítimo Terrestre"), which establishes several conditions and regulations instated for the use of concessions granted in the maritime-terrestrial zone. These conditions and regulations are described below.

❖ **Requesting a Concession**

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

❖ **Limitations to Possessing Concessions**

The Shoreline Zone Act establishes that the following persons and corporations cannot be granted concessions in the Shoreline Zone: i- foreigners who have not resided in the country for at least five years; ii- corporations with bearer shares; iii- corporations registered or established abroad; iv- corporations and entities constituted by foreigners; and, v- corporations in which more than fifty percent

of the capital stock is owned by foreigners. New legislation is currently being discussed in the Costa Rican Congress to eliminate the prohibitions restricting the concession of shoreline areas to foreigners.

❖ **Regulatory Plans**

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

❖ **Procedure to Register a Concession**

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

❖ **Term of the Concession**

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

❖ **Payment of Concession Rights**

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

Condominium Property

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

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

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

❖ **Areas Within the Condominium**

Two types of areas are established in a condominium property, and together they comprise the total land area of the Condominium: i-Common Areas, which normally are for general use of the condominium owners, but such use may be

restricted to only a portion of the owners, depending on numerous variations of the concept and, ii- Private Areas, which belong exclusively to each unit owner, who will have complete domain over the property.

❖ **Rights of the Condominium Owner**

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

❖ **Condominium Owners Assembly and Condominium Administration**

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

❖ **Condominiums in the Shoreline Zone**

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

The Gulf of Papagayo Tourist Development Project

❖ **General**

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

❖ **Master Plan**

The project has been developed in strict compliance with the regulations and restrictions contained in the Master Plan to develop the area. Any new projects or

development must comply with such regulations and restrictions. These vary in accordance with the location of the project and the tourist activity to be developed. Investors are advised to consult legal counsel before engaging in any activities in this special area.

❖ **Managing Council for the Project**

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

❖ **Term of the Concession**

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

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

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

Concessions that have already been granted to third party applicants may be validly purchased by new applicants and transferred, either totally or partially, by those legally empowered to do so. The transfer of the rights to a concession must be approved by the Board of Directors of the Costa Rican Tourism Institute and those interested in acquiring the rights to a concession must comply with the regulations stated for the original concession as well as comply with all the applicable requirements. The transfer of rights to a concession is made through a public deed in which the representative of the Tourism Board and the purchaser and seller are present to grant the transfer. This deed is ultimately registered in the Project's Concession Registry, which will be explained in full in the following section.

❖ **Registration of a Concession**

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

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

Through the creation of the Tourism Development Project, all the banks belonging to the Costa Rican banking system were authorized to grant loans to the owners of concession rights in the Project, accepting as collateral the conceded land itself and any improvements or constructions made upon it.

This is an incentive for Financial Institutions to provide loans to develop the project since they have the certainty of having sufficient and authorized collateral and they can also count on the legal rights granted to them by the registration of the lien in the Project's Concession Registry, which is a public record registry.

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INTERNATIONAL LAWYERS NETWORK

PETERKA & PARTNERS

Buying and Selling Real Estate in Czech Republic

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CZECH REPUBLIC LAW

I. Types of Real Property Transactions

a) Purchase of an undeveloped plot of land

b) Purchase of a developed plot of land

c) Purchase of a building (that is not part of plot of land)

d) Purchase of a flat

e) Purchase of a right to build

f) Through a share deal with a corporation that purchases and sells the real estate

Note: The right to build is *right in rem* related to a plot of land consisting in a right to have an overground or underground structure whether yet existing or future. It is considered according to Czech law as an immovable asset. There is a special regulation regarding this new institute which has been incorporated into the Czech law since 1 January 2014. A detailed description of this institute exceeds the scope of this article; however, it could be useful in some cases. We will gladly provide more detailed information upon request.

II. Major Content of the Purchase Agreement

- The contracting parties, as well as the price and the payment terms.
- An exact description of the real estate, i.e., the land, any fixtures and fittings of the building or flat and existing easements, pledges, etc. Czech law expressly regulates the description of the land and buildings used for the purpose of their registration in the land register. Therefore, the most important document containing the description of the land is the land register.

Note: The review of the land register is of major importance regarding the ownership status of the seller, existing mortgages and possible ongoing proceedings. Registered there are also records called "notices" concerning the important information regarding the registered real estate or its owners or the persons holding other rights to the real estate, for instance, information regarding dispossession, execution proceedings, prohibition of disposition, and prohibition of establishing a pledge.

- Description of needed repairs or other regulations the seller/buyer has to comply with.
- Date of handover to the buyer/date of transfer of ownership (N.B. the ownership is transferred on the day of registration in the land register retroactively on the day of filing the request.
- The conditions of the change of ownership.
- Real estate charges.
- Declaration regarding the required municipal decisions such as, for instance, the occupancy permit determining the purpose of the use of the real estate.
- Detailed representations and warranties regarding the current ownership and substantial characteristics of the real estate such as: access, connectivity to media supplies (gas, electricity etc.).
- Since 1 January 2016, the Energy Performance Certificate of the building shall be prepared by the purchaser, and it is recommended to include it in the purchase agreement as its annex.

Note: There are collateral provisions in the purchase agreement, which can be constituted as rights in rem and registered in the land register. These collateral provisions may

facilitate the negotiations of both contractual parties by ensuring their specific requirements through these rights in rem. The collateral provisions in the purchase agreement are namely: (i) reservation of the ownership right, (ii) reservation of the repurchase, (iii) reservation of the resale, (iv) pre-emption right, (v) purchase testing, (vi) reservation of a better buyer. A detailed description of these institutes exceeds the scope of this article however it could be useful in some cases. We will gladly provide more detailed information upon request.

III. Conclusion of the Purchase Agreement

- The purchase agreement has to be concluded in writing and the signatures of both parties must be on one document. For the purpose of the registration in the land register, it is required that the parties to the contract prove their identity by their officially certified signatures. The purchase agreement shall be thus concluded in writing with the officially certified signatures of both parties on one document.

IV. Transfer of Ownership

- The parties provide for who will apply for the registration in the land register in the purchase agreement. In most cases, it is stated that the seller is obliged to apply for the registration in the land register within a certain period of time from the conclusion of the purchase agreement.
- To ensure that the purchase price is transferred to the seller after the registration of the ownership in favour of the buyer, the parties mostly use a deposit of the purchase price at a notary, attorney-at-law or bank. The parties to the contract thus conclude, mostly with a purchase agreement, also an escrow agreement with the bank, notary or attorney-at-law. According to the escrow agreement the bank/notary/attorney-at-law is obliged to transfer the purchase price after the fulfilment of the conditions stated in the escrow agreement, which usually includes the registration of the buyer in the land register as the owner of the transferred real estate and payment of the tax on acquisition of real estate.

V. Agents

- The Buyer or Seller can both use a real estate agent. The contract with the agent can be concluded as an exclusive agreement.
- The Czech Chamber of Real Estate Agencies issued a book of recommended commissions for real estate agents, which is however not binding, and the real estate agent's commission is generally determined by the market situation. The commission ranges from 3% to 7% of the purchase price.

VI. Forms of Ownership

- In general, all individuals and legal entities can invest into and own real estate assets.
- It is irrelevant if the owners and purchasers are resident or non-resident or which country they come from. It is only crucial that the Czech land registry recognizes the legal personality of the foreign company or individual.

A. Acquisitions

- Real estate can be acquired by way of an asset or a share deal. The legal entities in the case of a share deal are mostly organized as limited liability companies or joint stock companies.

B. Residential Property

Most frequent forms of ownership of the residential property:

1. **Sole ownership:** The owner is the only person authorized to control and dispose of the land in question.
2. **Co-ownership:** More than one person owns an undivided share of land. Each co-owner is entitled to dispose of its share.
3. **Joint ownership of spouses:** Each of the spouses is entitled to a share of the joint property, but is not entitled to dispose of it independently, i.e. without the consent of the other joint owner (spouse).

Ownership by legal entities is however not excluded.

C. Commercial Property

Owners of commercial property are most frequently legal entities of either private or public law. The most commonly used entities under Czech private law are joint-stock companies (a.s.) and limited liability companies (s.r.o.). As regards the entities of public law, they are usually insurance companies, banks, funds or purely real estate companies.

1. Limited Liability Company – s.r.o.

- Most widely used legal form for corporations.
- Highly flexible, with relatively few obligations.

a) Legal Entity

- A legal entity acts autonomously, represented by executive director(s).
- Independently subject to taxation.
- The particular rights and obligations of an s.r.o. exist autonomously from those of the shareholders and the executive directors.

b) Formation

- The foundation act is a Memorandum of Association or Foundation Deed in the case of a sole shareholder. It has to be notarized.
- Setting up an s.r.o. is uncomplicated and can be accomplished easily. Registration is done either directly by the notaries or via Court.
- A supervisory board is not an obligatory company body.

c) Costs of Formation

The estimated total notarial costs for the formation of a standard s.r.o. are amounting approximately to CZK 6,800 CZK (€ 250) (In case of registered capital – CZK 200,000 (€ 7,300)) plus court costs, about approx. CZK 6,000 CZK (€ 220) and fees for a legal counsel for the drafting of the Foundation Deed or Memorandum of Association. The notarial costs are calculated according to the amount of the company's registered capital. It is also possible that the registration of the established company can be performed directly by a notary based on a certificated notarial deed. The total costs are in this case a little lower.

d) Minimum Registered Capital

- The minimum registered capital required for an s.r.o. is CZK 1 but it is recommended to set up a company with higher capital covering the initial company´s expenses in order to exclude situation of insolvency (at least CZK 100,000 (€ 3700).

- Nevertheless, at least 30% of each shareholder's monetary contribution must be paid-up in a special bank account before the company's registration in the Commercial Register. In case of sole shareholders, the registered capital has to be paid-up entirely.

e) Limited Liability

- The shareholders of the entity are not personally liable for the company's debts. The shareholders' liability is joint and several and is limited to the extent of their unpaid contribution in the registered capital according to the Commercial Register at the time they are invited by the creditor to meet performance.
- The limitation of liability arises once the s.r.o. has been registered in the Commercial Register.

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

- The company's statutory body is one or more executive directors. The executive directors act in all matters on behalf of the company in the way of acting that is registered in the Commercial Register. The Foundation Deed and the Memorandum of Association may state that the executive directors constitute a collective body. The internal restriction of the executive directors' powers is not effective against a third party.
- Under Czech law, a violation of these duties by an executive director will not affect the validity of a contract with a third party, but the s.r.o. may hold the executive director in question liable for damages.

2. Czech Joint-Stock Company – a.s.

- An a.s. (akciová společnost) is a legal entity in which the shareholders are not liable for the debts of the company during its existence.
- It is much more complicated to form and operate than an s.r.o.
- Hence, the rules of the a.s. are generally less flexible compared to the rules of forming a limited liability company.

a) Formation

- At least one founding shareholder is required, which can be an individual or a legal entity.
- The minimum share capital is CZK 2,000,000 (EUR 80,000).
- The Articles of Association must be notarized and contain certain mandatory information.
- Application for registration in the company's register takes place in the district where the company is located.

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

- Tax registration is at the local tax authority.

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

b) Structure – 2 options

- There are two options regarding the company's structure: (i) the monistic structure, (ii) the dualistic structure. Both options are not implemented in Czech law in their pure forms. The company may freely change its structure by changing its Articles of Association.
- The monistic structure is a new option which exists in the Czech Republic only since 1 January 2014. This structure is typical in European countries such as Italy, France and Switzerland, and this structure is also used for a European Company (Societas Europaea).
- A company with a monistic structure has a Management Board and a Statutory Director.
- The Management Board has the controlling powers towards the Statutory Director and determines also the fundamental orientation of business management. The Statutory Director is the company's statutory body with management powers (these powers are shared with the Management Board) and it is elected by the Management Board.
- The dualistic structure, which was originally the only structure used for a joint-stock company in the Czech Republic before 1 January 2014, and currently used also in Germany, is the more common structure of a joint-stock company in the Czech Republic.
- A company with a dualistic structure has a Board of Directors and a Supervisory Board. The Board of Directors is the company's statutory body which is in charge of the company's business management. Nobody is authorized to instruct the Board of Directors in business management matters. The Supervisory Board is a controlling corporate body supervising the performance of the Board of Directors and the acting of the company. Nobody is authorized to instruct the Supervisory Board in Board of Directors controlling matters.
- The General Meeting is the third body of the a.s. in both company structures. It consists of all company shareholders. Its most important rights consist of (i) electing new members to the Board of Directors in the dualistic structure if the Memorandum of Association does not delegate this right to the Supervisory Board; (ii) electing new members in the Supervisory Board in the dualistic structure or Management Board in the monistic structure except for members of the Supervisory Board who are not elected by the General Meeting; (iii) deciding on the distribution of profits and amending the Articles of Association.

c) Liability

- Only the company is liable towards the company's creditors and not the shareholders.

Note: Persons acting on its behalf are liable for the obligations which arise before the company's incorporation in the Commercial Register. If there are more persons acting together, they are liable for such acting jointly and severally. The company can acknowledge the effect of such acts within three months from its incorporation and then it is bound by such acts from when it began.

3. Other types of entities

There are two other types of companies Limited partnership company (k.s.) and Unlimited partnership company (v.o.s.), that are however not often used in real estate transactions.

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

VII. Financing

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

VIII. Payments and Costs

- The costs and taxes are normally borne by the buyer. However, usually the seller has to bear the costs of deleting old mortgages in the land title register.
- Usually, the purchase price is transferred to an escrow account maintained by the notary, bank, or attorney-at-law, whereby the money solely gets transferred to the seller when the registration in the land registry is complete.
- The tax on acquiring real estate is 4% of the purchase price to be paid by the seller, whereby the buyer is the guarantor (and the parties may agree in writing that the tax will be paid by the buyer) but as of 1 October 2016, this tax will be paid by the buyer only.
- Agent fees.

IX. Examinations before closing

- The buyer is advised to check the titles to the property for any potential or real deficiencies.
- Commercial buyers should additionally check if there are any planning restrictions: mostly, a construction or alteration as well as a change in use or the demolition of a building requires a building permit. The building project has to comply with the content of the local (or regional, as the case may be) development plans. Therefore, with regard to prospective plans of construction, the development and land use should be reviewed very carefully before the closing of the contract.
- In addition to this, environmental issues should be checked before closing too.

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

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INTERNATIONAL LAWYERS NETWORK

CONSORCIOLEGAL

Buying and Selling Real Estate in Ecuador

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ECUADOREAN LAW

I. STANDARD FORMS OF AGREEMENTS

A. Offer to Purchase sets forth Buyer's offer of price, date for closing, contingencies for inspections, financing etc. and date for signing a formal Promise of Purchase and Sale agreement, which for validity has to be a notary public deed.

B. Promise of Purchase and Sale Agreement sets forth the complete terms of the purchase and sale.

C. **Note**: In Ecuador a Promise of Purchase and Sale Agreement may be enforced as a binding contract; better if registered at the City Real Estate Registry.

D. The costs of Promise of Purchase and Sale Agreements are very low, since the notarial fees are in that case charged on the down payment or even considered as an undetermined sum deed, not on the Purchase price which will be stated afterwards in the final Purchase deed.

II. BROKERS

A. All Brokers in Ecuador whether they are working with the Buyer or the Seller represent the Seller unless the Buyer enters into a separate Buyer's Broker or Dual Agency Agreement. Brokers are officially registered, so they are good people. However, it´s always important to see if they are affiliated either to the Chambers of Commerce or the Brokers´ Local Associations.

B. Seller usually pays the brokers commission unless negotiated otherwise (not customary).

III. BUYER'S INSPECTIONS

A. Residential: Prior to Closing, the Buyer performs property inspections including inspection for structural issues, title, and if requested, a plot plan of the premises, especially when the building is relatively new, and plans are available.

B. Commercial: In addition to the inspections performed by residential buyers, commercial buyers also usually obtain a survey, an environmental review, and a use and zoning/permitting analysis which is issued by the corresponding municipality.

IV. FORMS OF OWNERSHIP

A. Residential Property is usually held in an individual's own name; some owners prefer the Stock Company kind of "shield". Joint owners may take title as:

1. Tenants in Common (each own 50%);
2. Tenants by the Entirety if the owners are a married couple (they each own the undivided whole of the property).
3. Individual or solo owner.
4. Horizontal Property where each owner owns an apartment or unit and the corresponding portion of the common areas as yards, halls, staircases, pools.

B. Commercial Property may be held as follows:

1. As the Owners pursuant to the forms set forth in A above.
2. Stock companies
3. Limited Partnership

4. Other types of businesses incorporations, as personal, limited copartner-ship (less frequent).

V. TAX REGULATIONS

A. The excise (Alcabala) tax is the highest in Real Estate Purchase-Sale Contracts (only in definitive or final ones; not in Promise of Sales agreements), 2% on the purchase price or on the Official Record of the Real Estate municipal appraisal, whichever is higher. Capital gain tax applies when there is a profit made in the sale, it is 10% of such profit but there are many deductions that have to be made including the real estate annual municipal taxes paid for the property while owned by seller, repairs, maintenance costs; and it is diminished by 5% of tax each year after the second one of having been acquired by seller, until at the 20th year when there will be no capital gain tax. Capital Gain is on the seller´s account unless otherwise agreed in the deed.

B. Regarding income tax, it all depends if the property is a productive estate, as for instance for renting, in which case, either in the form of a stock or other company or as individual property, the income tax level is between 22%-25% of net income. Corporations are subject to a "double tax," once on the corporate level, and again on dividends or distributions to shareholders, which affect directly the stockholders and not the company itself. Companies have more options to deduct general expenses from their income tax filings than individuals.

VI. DISTINGUISHING FEATURES

A. PROPERTIES HELD IN TRUSTS

1. Fiduciary relationship between "trustee" and beneficiaries listed on the corresponding trust contract.
2. Trustee has no power to deal with the trust property except as specifically directed by beneficiaries – legally an "agent"- for beneficiaries.
3. Third parties are entitled to rely on certificates signed by trustees of record.
4. Beneficiaries may terminate or amend trust at any time.
5. On termination, the trust property is conveyed to beneficiaries.
6. Advantages
    1. Beneficiaries are undisclosed (privacy).
    2. Trust property can be effectively conveyed by assignment of beneficial interests. Useful for intra-family gifts; albeit, there is income taxation on trust level in Ecuador.
7. Disadvantages
    1. No limited liability for beneficiaries.
    2. Deeds excise tax on transfer of beneficial interest.

B. JOINT PERSONAL TITLES: If title in the name of all the co-owners, all must sign the deed.

Attachments against co-owners individually can affect the title even if referring to an individual obligation or debt.

C. STOCK COMPANIES

Shareholders can be individuals or other companies.

1. Advantages
    1. Limited liability of shareholders by statute.
    2. Free transferability of stock.
    3. No deeds excise tax on sale of stock.
2. Disadvantages
    1. Double-taxation for corporation.
    2. Two-thirds or as statutory shareholder vote required to approve sale of all or substantially all assets.
    3. Dissolution by Superintendence of Companies– but reinstatement possible. Assets can be sold after dissolution during liquidation.

VII. CLOSING COSTS/ADJUSTMENTS

A. Buyer pays the transfer taxes due at the time of the definitive Purchase-Sale Contract. As stated before, Capital Gain is on seller´s account.

B. Adjustments are made for rents, buyer has the legal right to file court petition for termination of prior rent contracts.

VIII. OTHER CLOSING DOCUMENTS

Buyer has to obtain a municipal lien certificate from the Town/City where the premises are located stating the current status of real property, taxes payments and balances due. And, if Horizontal Property, a certificate of the Administration on payment of condominium aliquots. If Buyer or Seller are corporations it is necessary to also annex copy of the shareholders' minutes authorizing the sale if requested by statutes and copy of the document of proof of being the authorized company officer to sign on behalf of the company.

IX. RECORDING REAL ESTATE DOCUMENTS

A. Title Documents are recorded on a Canton (city) basis in Ecuador. Notary Publics can be from any city, not necessarily from the city where the estate is located.

Recording procedures are very well organized and fast in most cities.

X. ANNUAL COSTS FOR PROPERTY OWNERSHIP

A. Property Insurance

B. Real Estate Taxes

(BOTH ITEMS RATHER LOW).

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INTERNATIONAL LAWYERS NETWORK

A&K METAXOPOULOS AND PARTNERS

Buying and Selling Real Estate in Greece

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER GREEK LAW

1. PROCEDURE – MAIN STEPS OF REAL ESTATE ACQUISITION UNDER GREEK LAW.

Acquisition of real estate property in Greece includes mainly the following steps:

- Finding the property to be purchased, with the possible assistance of a real estate agent. Usually, the agent's fee amounts to 2% of the purchase price (plus VAT 24%) but can be negotiated between the parties.
- Obtain a Greek Tax Registration Number. This procedure is simple and does not require the presence of the foreigner in Greece, since it can be carried out by a third party, by virtue of Power of Attorney.
- Legal due diligence of the property. After having found the property and before proceeding to the execution of any deed or agreement, the purchaser should appoint a lawyer to perform a thorough legal due diligence of the property, which includes a detailed audit of the rights of the seller and his predecessors, as well as research on any possibly existing encumbrances (mortgages, claims, etc.). Legal due diligence is performed with the Land Registry or Cadastre of the region in which the property lies. It is noted that the responsibility for this very important step lies with the purchaser, given that Greek notaries are not obliged to (and will not) perform such due diligence.
- Technical due diligence. This is performed by a civil engineer and is needed in almost all cases of property transfer. Technical due diligence aims to ensure that the property meets all legal requirements for the construction of buildings to be allowed (in cases where the property is a non-constructed land) and, in cases where the property to be purchased is already built, to determine whether the already existing building(s) include any illegal constructions (namely constructions not covered by a Building Permit) which must be legalized according to the relevant laws. Even in cases where the property does not include any illegal constructions, the transfer may be performed only after a civil engineer certifies in writing that it does not include such constructions.
- Issuance of the required certificates and other documents. In order for a property purchase to take place, a number of certificates must be produced to the notary public, which however pertain to the seller.
- Execution of the notarial purchase deed. In Greece, purchase of any real estate property is performed solely by virtue of a notarial deed. Execution of such a deed takes place before a notary public. The notary public is usually chosen by the purchaser, who also pays the relevant notary fees. Both the seller and the purchaser may either appear in person before the notary in order to execute the deed, or they may appoint someone else to execute it in their name and on their behalf, by virtue of a notarized Power of Attorney.
- Registration of the notarial purchase deed with the Land Registry or Cadastre. In Greece, a purchaser of a property becomes the property's owner only after the notarial purchase deed is registered with the competent Land Registry or Cadastre. Such registration entails certain fees which are paid by the purchaser (and their amount is indicated herein below).

2. TIMELINE

The time required for the conclusion of a purchase of a real estate property depends on the complexity of each case. In regular cases, after the property has been found, purchase procedures are normally concluded within a period of 1,5 – 2,5 months.

3. MAIN CONTENT OF THE PURCHASE DEED

- The Contracting Parties
- Detailed description of the property
- Detailed description of the ownership rights of the seller and his predecessors
- The price
- The payment terms in detail
- Other clauses depending on each case.

The notary will read the deed aloud for both parties, but purchase deeds are only in Greek. Therefore, non-Greek-speaking purchasers (if personally attending the execution of the deed) will need to appoint a translator.

4. FEES AND EXPENSES CONNECTED WITH THE EXECUTION OF THE NOTARIAL PURCHASE DEED. TO BE PAID BY THE PURCHASER.

- Notarial Fees. These are calculated gradually, as a percentage upon the value of the purchase deed, ranging from 0,80% for the part of the value up to 120.000,00 € to 0,10% for any amount beyond 20.000.000,01 €. Notarial fees are subject to VAT 24%.
- Lawyer's Fees. The presence of a lawyer at the time of execution of the purchase deed is no longer required under law. It is, however, strongly recommended, in order to secure the accuracy of the deed's content in relation to the description of the property, the description of the sequence of rights of the seller and his predecessors, etc. Lawyer's fees for the performance of legal due diligence and the attendance of the execution of the purchase deed are agreed between the client and the lawyer and usually depend on the value of the transaction and the complexity of each case. Lawyer's fees are subject to VAT 24%.
- Registration Fees. The fees for the registration of the notarial purchase deed with the Land Registry or Cadastre amount approximately to 0,5% upon the value of the deed and are subject to VAT 24%.

5. FINANCING

The most common way of financing the purchase of a real estate property is through a bank loan. In order to grant a loan, Greek banks examine the financial situation of the purchaser. Greek banks have the current commercial value of the property estimated by a civil engineer of their own choice and grant loans for an amount not exceeding the 70 – 75% of such estimation. Before the loan is disbursed (directly to the seller) the bank shall register a mortgage upon the property for an amount of approx. 120% of the loan.

6. TAX TREATMENT

a. Taxes imposed at the time of purchase of the property. To be paid by the purchaser.

Transfer Tax

Before the execution of the notarial purchase deed, the purchaser is obliged to pay the corresponding transfer tax. Such tax amounts to 3% upon the value of the property.

It should be noted that Greek Law also provides for an exemption – under certain conditions – from the payment of the transfer tax. These exemptions apply only to

purchasers that already reside or intend to be established in Greece and fall into the following categories: (i) Greeks, (ii) repatriates from Albania, Turkey and countries of the former Soviet Union, (iii) EU citizens and citizens of the European Economic Area, (iv) acknowledged refugees, and (v) nationals of non-EU countries who enjoy the status of long-term residency in Greece.

Value Added Tax for new buildings

When it comes to new buildings, namely buildings the building permit of which has been issued or revised from 01.01.2006 onwards, a VAT of 24% upon the value of the property shall be imposed at the time of their first sale/transfer by a manufacturer, or by a person who deals professionally with the construction and sale of buildings. In cases where VAT is applicable, the purchaser is not required to pay any transfer tax.

Important Note: due to frequent legislative amendments in taxation of property, it is strongly recommended that all property related taxes are re-visited and re-calculated before any purchase.

b. Annual fiscal obligations of property owners.

Real Estate Property Tax (sic: "ENFIA")

Any real estate property located in Greece belonging to individuals or legal entities on the 1st of January of each year, is burdened with Real Estate Property Tax. This is the major annual tax imposed on real estate properties. Such tax is calculated on the basis of the surface of the real estate property, its location, etc. When it comes to buildings, it ranges from to 2,00 € per m2 to 13,00 € per m2, while when it comes to plots of land, it ranges from 0,0037 € per m2 to 11,25 € per m2.

Real Estate Duty (sic: "TAP")

This is a special duty imposed upon real estate properties, in favour of the Municipal Authorities. It is calculated by multiplying the value of the property by a rate ranging from 0,25 o/oo to 0,35 o/oo. This duty is collected through the Electricity Bills of the property.

Special Real Estate Property Tax

This is a special property tax imposed upon natural or legal entities residing or having their registered seat in countries with a privileged tax regime and possessing full or bare ownership or usufruct of properties located in Greece. Such tax amounts to 15% upon the value of the property. This tax has been imposed in order to deal with the phenomenon of tax evasion of offshore companies possessing real estate property in Greece. Law provides for a number of exemptions from the application of the above tax.

Tax on Income from Property Rents

Annual income from property rents is taxed by a rate of 15% on the amount of income up to 12.000 €, by a rate of 35% for the amount of income between 12.001 € and 35.000 €, and by a rate of 45% on any amount above 35.001 €.

Rents of properties leased for business or professional purposes is surcharged by a stamp duty of 3,6%, which however is usually paid by the lessee, subject to an agreement.

Important Note: due to frequent legislative amendments in taxation of property, it is strongly recommended that all property related taxes are re-visited and re-calculated as need may be.

7. RESTRICTIONS IN ACQUIRING REAL ESTATE PROPERTY IN GREECE

Cross-border Areas

Greek law provides restrictions for the acquisition of property rights in cross border areas of Greece, by individuals or legal entities that are not nationals of the European Union or the European Free Trade Association ("EFTA"). Furthermore, the transfer of shares or the change of partners /shareholders of companies not located in the EU or EFTA that own real estate property in cross-border areas of Greece, is also prohibited. Any such natural or legal persons (that are not nationals of the EU or EFTA) wishing to acquire real estate properties located in cross-border areas, must apply to a special Committee in order to obtain permission to acquire or rent the real estate property. Any transaction taking place in breach of the above provisions is null and void.

The following areas of Greece are considered as cross-border areas, in which the above restrictions apply: Dodekanisa, Evros, Thesprotia, Kastoria, Kilkis, Lesvos, Xanthi, Preveza, Rodopi, Samos, Florina, Chios, Thira (Santorini), Skiros, as well as certain regions of the areas of Drama, Ioannina, Pella and Serres.

Restrictions are lifted depending, in principle, on the legal form of the requested transaction, its monetary value, the exact location or value of the property, and unless national security reasons exist.

Purchase of Islands

Greek law also provides that in order for a natural or legal person to acquire ownership of or rent a privately-owned island or a property located in a privately-owned island, they have to apply for the issuance of a permit by the Minister of Defense.

When it comes to public islands, acquisition of ownership is not possible; such islands may only be leased under the same above conditions (prior issuance of a permit by the Minister of Defense).

8. IMMIGRATION RULES RELATED TO PROPERTY INVESTMENT

Greek law provides that a residence permit of 5 years shall be granted to citizens of non-EU countries who are the owners (either personally or through a legal entity the shares of which belong entirely to them) of real estate property in Greece, or who have concluded a timeshare agreement, or have leased hotel accommodations for at least 10 years. The minimum value of the real estate property and the contractual value of the hotel accommodations lease agreement has been set to the amount of 250.000 Euros. Such residence permits may be renewed for an equal period (5 years) for as long as the real estate property remains in the ownership of the non-EU citizen or the timeshare-lease agreements remain in force.

Said non-EU citizens may be accompanied by their family members (spouse, children under 21 years old, parents), to whom a separate residence permit may be also granted following their request. Their permit shall be terminated at the same time as the permit of the property owner.

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Buying and Selling Real Estate in Hong Kong

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER HONG KONG LAW

Introduction

According to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong"), all realties in Hong Kong are held under the People's Republic of China and are managed, used or developed by the Government of Hong Kong (the "Government"). There are constitutional provisions under the Basic Law (Articles 6 & 105) which specifically provide for protection of the right of private ownership, including the rights to acquire, use, dispose and inheritance of property and the right to compensation for lawful deprivation of property.

Almost all landed properties in Hong Kong are leasehold tenures. The Government may lease or grant to individuals or legal persons a piece of land for use or for development. It is also typical that such a lease or grant of land will be subject to certain onerous terms and covenants to be observed or performed by the lessee or grantee. Therefore, a sale and purchase of land in Hong Kong (whether in the first-hand property market or the second-hand property market) is in fact a transfer or assignment of a lease (with the term being the residue of the term under the lease granted by the Government). In general, interest in land comprises of the legal estate and the equitable interest. In a sale and purchase transaction, the vendor agrees to sell, and the buyer agrees to purchase both the legal estate and the equitable interest so that the purchaser will acquire a good title on completion of the purchase.

Registration of Deeds System

It should be noted that, unlike other common law jurisdictions, the Hong Kong registration system is not one of registration of title; the title to the land or real property cannot be guaranteed by registration. The Hong Kong registration system may be described as a system of registration of documents determining the priority of registered documents; the owner of a prior registered interest will have priority over a subsequent interest.

Under the current registration system, documents such as deeds, conveyances and other instruments in writing creating or dealing with an interest in land, or otherwise affecting land, are considered as registrable instruments and are required to be registered at the Government's Land Registry in order to have priority over any other subsequent registrable interests in land. While the general rule is that the priority of the registrable instruments shall be determined by the priority of their respective dates of registration, priority shall take effect by relation to the date of execution instead of the date of registration if such registrable instruments are registered within one month after the date of execution. Failure to register a registrable interest will render the same to be null and void against any subsequent registered bona fide purchaser or mortgagee for valuable consideration.

Sale and Purchase of Land

All dealings or disposals of land or real property in Hong Kong must be in writing. In view of that legal requirement and that a legal estate in land may only be created, extinguished or disposed of by deed, the vendor and the purchaser under a sale and purchase transaction relating to land will usually execute an agreement for sale and purchase and later a deed of assignment, to transfer the equitable interest and the legal estate in the land from the vendor to the purchaser. The vendor and the purchaser

may enter into a provisional but legally binding or non-binding agreement for sale and purchase in which (1) the vendor agrees to sell and the purchaser agrees to purchase the real property or land at an agreed consideration; (2) the parties agree to negotiate and enter into a formal agreement for sale and purchase after the signing of the provisional agreement; and (3) the sale and purchase transaction will be completed at a date several weeks or even months from the date of signing of the provisional or formal agreement.

Upon the signing of a legally binding provisional agreement for sale and purchase, the purchaser will pay to the vendor or to the vendor's solicitor as escrow agent a sum being the initial deposit. The purchaser will register the provisional agreement at the Land Registry. After signing the provisional agreement, the vendor and the purchaser will negotiate and agree on the terms and conditions of the formal agreement. The formal agreement, if signed, will also be registered at the Land Registry. The vendor will be under a duty to prove good title to the property by (1) delivering to the purchaser certified copies of all relevant title deeds and documents in respect of the property for proof of title; and (2) answering requisitions on title raised by the purchaser before completion. If the vendor agrees to sell the property to the purchaser free from any encumbrances (which is the normal practice), the vendor will have to remove all title encumbrances or to remedy all title defects so that the vendor will be able to assign the property to the purchaser free from encumbrances upon completion.

On the date of completion, subject to there being no prior registered interests shown on the 'on-the-day' land search obtainable from the Land Registry, the purchaser shall pay to the vendor the balance of the purchase price and the parties shall execute a deed of assignment in which the vendor shall assign all the estate, rights and interest the vendor has in the property (including the legal estate of the property) to the purchaser. The vendor shall also give title by delivering to the purchaser the original title deeds and documents on completion or within an agreed period after completion. The purchaser will then register the Assignment at the Land Registry.

Stamp Duty Implications

The following stamp duty implications will have to be carefully considered prior to entering into a sale and purchase transaction in relation to land: -

Ad valorem duty ("AVD")

Any instrument executed on or after 5 November 2016 for the sale and purchase or transfer of residential property, either by an individual or a company will be subject to AVD at the rate set out under "Part 1 of Scale 1" under Schedule 1 to the Stamp Duty Ordinance (Cap.117) ("SDO") (i.e. flat rate of 15% of the consideration or value of the residential property, whichever is the higher), unless specifically exempted or provided otherwise.

Part 1 of Scale 1 does not apply to an agreement /conveyance for a residential property where the purchaser/transferee is a Hong Kong permanent resident ("HKPR") (or he/she is a tenant or an authorized occupant of the Housing Authority who acquires the residential property under the Tenants Purchase Scheme) acting on his/her own behalf and he/she does not own any other residential property in Hong Kong at the time of acquisition of the subject property. In those circumstances, only the rate set out under "Scale 2" under Schedule 1 to SDO (i.e. rate ranging from $100 to 4.25% of the consideration or value of the residential

property, whichever is the higher) will apply to such agreement/conveyance.

However, unless specifically exempted, the sale and purchase or transfer of more than a single residential property under a single instrument executed on or after 12 April 2017 will be subject to AVD at a flat rate of 15% of the consideration or value of the residential property, whichever is the higher, irrespective of whether or not the purchaser/transferee is a HKPR who is acting on his/her own behalf and does not own any other residential property in Hong Kong at the time of acquisition of the subject properties.

Any agreement executed on or after 23 February 2013 for the sale and purchase or transfer of non-residential property, either by an individual or a company will be subject to AVD at the rate set out under "Part 2 of Scale 1" under Schedule 1 to SDO (i.e. rate ranging from 1.5% to 8.5% of the consideration or value of the residential property, whichever is the higher), unless specifically exempted or provided otherwise.

While it is typical for the purchaser to agree to bear the AVD, it is important to note that the purchaser, the vendor, and any person who uses the instrument, under the Hong Kong law, will be jointly and severally liable to pay AVD. In other words, the purchaser, the vendor and any person who uses the instrument will have the same extent of liability to pay for any AVD payable on the chargeable instruments, irrespective of any agreement to the contrary made between them.

Buyer's stamp duty ("BSD")

Unless specifically exempted or provided otherwise, BSD is chargeable on an agreement/conveyance for the sale and purchase or transfer of any residential property acquired on or after 27 October 2012, except where the purchaser or transferee is a HKPR acquiring the subject property on his/her own behalf. It is the purchaser (not the vendor) who is liable to pay BSD, the rate of which is 15% of the consideration or value of the residential property, whichever is the higher.

Special stamp duty ("SSD")

SSD is chargeable on a transaction involving the sale and purchase or transfer of a residential property if the subject property is acquired on or after 27 October 2012 and resold within 36 months after acquisition. The rate of the SSD payable varies from 10% to 20% of the consideration or value of the residential property, whichever is the higher, depending on when the subject property was resold within those 36 months. The purchaser and the vendor to the property transaction and any person who uses the instrument will be jointly and severally liable to pay SSD.

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INTERNATIONAL LAWYERS NETWORK

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Buying and Selling Real Estate in Latvia

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER LATVIAN LAW

1. ***Types of real estate***

1.1. Land estate

Consists of one or several land plots.

1.2. Land and building estate

Consists of one or several land plots and one or several buildings or structures located on the land plot (plots).

1.3. Building estate

Consists of one or several buildings or structures.

In case of a building estate, the land plot, on which the respective buildings or structures are located, is owned by another person, and does not belong to the owner of the building estate (*please see Section 3*).

1.4. Residential estate

Consists of:

- an individual property (apartment, non-residential premises, or artist's workshop in a residential house) in a residential building; and
- the relevant undivided share of the joint property (external enclosing structures, internal load bearing constructions and intermediate coverings of the residential house, premises for common use, engineering communication systems, devices servicing the residential building and other indivisible elements functionally associated with the exploitation of the residential building, as well as the auxiliary buildings and structures belonging to the residential building). The joint property also includes the land plot, on which the respective residential building is located, unless it is owned by another person (*please see Section 3*).

2. Undivided share of the real estate

It is possible to acquire not the entire real estate, but an undivided share of the real estate, i.e. to acquire the undivided share of the joint property (*Note: do not mix up with the joint property included in the composition of the residential estate).* The joint property is the undivided real estate owned by several persons – joint owners of undivided shares so that only the substance of the rights is divided.

A joint owner owns the undivided share of the joint property; therefore, the joint owner is entitled to deal with the undivided share, including alienating or pledging the respective undivided share.

However, to deal with the joint property itself, either in its entirety or with respect to a part of it, the consent of all the joint owners shall be obtained. The joint owners can agree on divided use of the joint property proportionally to the amount of the undivided shares by signing a respective agreement.

3. Divided estate

The general principle provided by Latvian law is that buildings and structures located on the land plot are part of the land plot and therefore owned by the land owner, and only in exceptional cases, buildings and structures as separate building property could be owned by another person, who is not the owner of the land plot – the so-called divided estate.

In case of the divided estate, namely, if the building (structure) is located on the land plot, which does not belong to the owner of the building (structure), but is owned by another person, the status of such building (structure) and therefore the legal consequences, which

depending on the status of the building (structure) may vary, should be evaluated.

There are two forms of divided estates, depending on the status of the building (structure) on the land plot:

First form. Compulsory divided estate

Generally, a building (structure) built during the Soviet time and until September 1, 1992, when the Civil Law of the Republic of Latvia entered into force.

The divided property was formed when the ownership rights of the land plot under the building (structure) were renewed to the previous owners or their heirs during the land reform, or the land belonging to the state or local government, or building (structure) was acquired by privatizing the state or municipal undertakings or separate real estate objects.

The owner of the building (structure) is entitled to use the part of the land plot functionally related to the building on the grounds of the so-called compulsory lease. In case of a compulsory lease, the parties should agree on the size of the leased area of the land and on the amount of lease payment, and, if the parties cannot agree on the mentioned, the dispute shall be resolved by the court. The usual practice is to establish a lease payment of approximately 6% of the cadastral value of the leased part of the land plot per year.

Second form. Voluntarily established divided estate.

Buildings built after September 1, 1992, when the Civil Law of the Republic of Latvia entered into force, based on a specific long term (at least 10 years) lease agreement providing the rights to the lessee to build buildings on the leased land plot as separate real estate objects.

The separate ownership of the building (structure) is established only during the validity of the lease agreement.

Amendments to the Civil Law entered into force on January 1, 2017, by introducing a new institute of build-up rights, which henceforward replaces the institute of specific long-term lease for the voluntary established divided estate.

The build-up rights are rights *in-rem,* established based on the agreement entitling, during the validity of such rights, to build and use non-residential buildings or engineering structures on the land plot owned by another person. The building (structure) built based on the build-up rights is an integral part of the build-up rights. It is not permitted to build residential buildings based on the build-up rights.

The validity of the build-up rights cannot be less than 10 years, and the build-up rights shall be registered with the Land Registry.

The build-up rights can be alienated and encumbered with rights in-rem, unless explicitly prohibited in the agreement on granting of the build-up rights.

After expiry of the build-up rights, the building (structure) built based on the build-up rights becomes an integral part of the land plot, i.e., becomes the property of the land plot owner. The owner of the land plot acquires the building (structure) without remuneration, unless such remuneration has been provided in the agreement on granting of the build-up rights. In the agreement on granting of the build-up rights the parties may provide that, prior to the expiry of the build-up rights, the holder

of the build-up rights shall vacate the land plot from the constructed buildings (structures).

4. Restrictions for acquisition of land in Latvia

There are certain provisions and legal restrictions for acquisition of real estate in Latvia; however, these restrictions are imposed only regarding ownership of the land, there are no restrictions regarding ownership of other types of real estate such as buildings, structures, apartments, business premises etc.

Restrictions for acquisition of land vary depending on whether the land is located in the city or in rural areas.

4.1. In cities land may be acquired by:

1) the citizens of Latvia and any European Union (EU) member state;

2) the State and local government, and state and municipal companies;

3) a capital company (a limited liability company or a joint stock company) registered in Latvia or any EU member state, if more than a half of the share capital of the company belongs to:

   a) the citizens of Latvia and EU member state; or

   b) the State and local government, and state and municipal companies; or

   c) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment and such agreement has been approved by the Parliament of Latvia prior to 31 December 1996 (*such counties are: the United States of America, Austria, Belgium, Luxemburg, Czech Republic, Denmark, France, Greece, Estonia, Israel, South Korea, United Kingdom, Lithuania, the Netherlands, Norway, Poland, Portugal, Finland, Spain, Switzerland, Uzbekistan, Germany, Vietnam, Sweden*); or

   d) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment after 31 December 1996, and the respective concluded agreement prescribes the rights of the private individuals and legal entities from Latvia to acquire land in the respective country (*countries, which have concluded agreements for the Encouragement and Reciprocal Protection of Investment after 31 December 1996 are - Armenia, Azerbaijan, Belarus, Bulgaria, Egypt, Georgia, Croatia, India, Iceland, Canada, Kazakhstan, China, Kirgizstan, Kuwait, Moldova, Rumania, Singapore, Slovakia, Turkey, Ukraine, Hungary, but regarding these countries the exact provisions of the agreements should be reviewed*);

4) a public joint stock company registered in Latvia or any EU member state, if its shares are quoted in stock exchange;

5) religious organizations, which were registered in Latvia before 21 July 1940;

6) the state or municipal institutions of higher education.

Other private individuals and companies that do not correspond to the aforementioned conditions may acquire the land in Latvia with the permission from the local government; however, it is also prohibited for such private individuals and companies to acquire the following types of land: land in the border zone;

- land in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga and land in the protection zones of public bodies of water and water courses, except if the build-up is allowed on the land in accordance with the spatial plan of the city;
- agricultural and forest land in accordance with the spatial plan of the city.

4.2. In rural areas land may be acquired by:

1) the citizens of Latvia, citizens of the EU member states or European Economic Area (EEA) states or Switzerland;

2) the Republic of Latvia or derived public persons (such as municipal or other public person established based on law);

3) a capital company (a limited liability company or a joint stock company) registered in Latvia, EU, EEA country or Switzerland, if the respective company has been registered in Latvia as a taxpayer and if all the shareholders of the company are:

a) citizens of Latvia, citizens of the EU member states or EEA country, or Switzerland; or

b) the Republic of Latvia or derived public persons; or

c) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment and such agreement has been approved by the Parliament of Latvia prior to 31 December 1996; or

d) private individuals or legal entities from the countries, which have concluded an agreement with the Republic of Latvia for the Encouragement and Reciprocal Protection of Investment after 31 December 1996, and the respective concluded agreement prescribes the rights of the private individuals and legal entities from Latvia to acquire land in the respective country;

4) legal subjects registered in Latvia, EU, EEA country or Switzerland, if the respective legal subject has been registered in Latvia as a tax payer or as a commercial activity performer and if the legal subject is:

a) an individual merchant owned by a citizen of Latvia, citizen of the EU member state or EEA country, or Switzerland;

b) an individual undertaking registered by a citizen of Latvia, citizen of the EU member state or EEA country, or Switzerland;

c) a co-operative society, if all the members of the society are legal subjects mentioned in clause 1), 2), 3) or sub-clause a), b), d) of clause 4);

d) other legal subject registered in the EU member state, EEA country or Switzerland, which can be compared to the above individual merchant, individual undertaking, or co-operative society;

5) religious organisations registered in Latvia, the activity whereof is at least 3 years;

6) associations and foundations registered in Latvia, the activity whereof is at least 3 years and the purpose of activity whereof is related to the environmental protection, production of agricultural cultivated plants or products, or hunting management or maintenance, if the land is acquired to ensure the mentioned purpose of activity.

Other private individuals and companies that do not correspond to the abovementioned conditions may acquire the land in Latvia with the permission from the local government; however, it is also prohibited for such private individuals and companies to acquire the following types of land:

- land in the border zone;
- land in nature reserves and other protected nature areas in zones of nature reserves;
- land in the protection zone of coastal dunes of the Baltic Sea and the Gulf of Riga;
- land in the protection zones of public bodies of water and water courses;
- agricultural and forest land;
- land in the mineral deposits of national significance.

If, due to the changes, the status of the legal subject does not correspond to the aforementioned conditions, in order to keep the land in the cities or rural areas, the permission from the local government should be received within a period of one month, and if the permission is not granted the land should be alienated within a period of two years.

If a private individual or a company, which has acquired land in the cities or rural areas with the permission of the local government, does not use the land for the prescribed purpose the land should also be alienated within a period of two years.

5. Agricultural land

The additional limitations are set on the acquisition of agricultural land in rural areas of Latvia. Legal entities are entitled to acquire 5 ha of agricultural land in aggregate without additional limitations, but private individuals are entitled to acquire 10 ha of agricultural land in aggregate without additional limitations.

In order to acquire more agricultural land, private individuals and legal entities should confirm that the acquired land will be used for agricultural activities, and the respective private individuals and legal entities shall comply with the specific criteria prescribed by law, including: clear information on the true beneficiaries and statement that the amount of the possible tax debt does not exceed EUR 150. In addition, the citizens of the European Union Member States, the Member States of the European Economic Area or the Swiss

Confederation, if they wish to acquire the agricultural land as private individuals, or if they are sole shareholders or shareholders jointly representing more than a half of the share capital of the company intending to acquire the agricultural land, or persons entitled to represent the respective company, shall receive a registration certificate of the Union citizen and the document certifying knowledge of the official language (Latvian) at least at B level grade 2 (*namely, the person is able to communicate on everyday subjects and professional issues, to clearly phrase and justify his or her opinion, reads and understands texts of different content, is able to write the documents necessary for work (for example, statements, summaries, minutes, reports, deeds), as well as expanded texts regarding everyday life and professional topics, comprehends, and understands naturally paced spoken texts on different topics*).

Upon the request of the local government, the person shall make a presentation in Latvian explaining the intended usage of the land in agricultural activity. If the agricultural land is to be acquired by a legal entity – the usage of the land in agricultural activity shall be presented by the individual – the sole shareholder or individual shareholder jointly representing more than one half of the share capital of the company (in case of beneficiaries – presentation shall be made by those beneficiaries).

For a person, who meets the criteria, to be able to acquire agricultural land, he or she shall first submit an application to the local government of the territory in which the relevant land is located, and after examination of the application and offering to exercise the rights of first refusal to the registered lessee, if any, of the agricultural land and to the Land Fund of Latvia, the commission of the local government shall decide on giving its consent or refusal to acquisition of the agricultural land.

In addition, one private individual or legal entity can acquire up to 2,000 ha of agricultural land. The local government has the right to determine the maximum area of agricultural land one private individual or legal entity can possess within their administrative area, but no more than 2,000 ha. Related parties can acquire up to 4,000 ha of agricultural land.

6. Rights of first refusal

The rights of first refusal are priority rights to purchase a real estate, if the owner sells the real estate.

6.1. Local government rights of first refusal

In case of alienation of the real estate, a local government shall have the rights of first refusal of the real estate, if the real estate is necessary for performance of local government functions.

The local government decision on exercising its rights of first refusal or on refusal to exercise its rights of first refusal is adopted within 20 (twenty) days after submission of the copy of the purchase agreement to the local government.

The local government rights of first refusal shall not apply to the following real estates:

- production objects with all their accessories;
- real estate, from which an undivided part has been alienated and which remains in the joint property of the seller and the purchaser;
- real estate that is being sold through voluntary or compulsory auction;
- real estate, to which third parties have the rights of first refusal or redemption

rights based on the law, agreement or will.

6.2. Joint owners' rights of first refusal

If any of the joint owners of the real estate alienates its undivided share (*please see Section 2*) to a person, who is not a joint owner, then the other joint owner(s) shall have the rights of first refusal. A joint owner is entitled to express the will to exercise its rights of first refusal within a 2 (two)-month period as from the receipt of the purchase agreement. But, if by the fault of the seller, the joint owner is not able to exercise the rights of first refusal, such joint owner will have the redemption rights, namely, within a period of 1 (one) year as from the registration of the acquirer's title to the real estate with the Land Registry, the joint owner will be entitled to claim for acquisition of the real estate, by taking precedence over the acquirer and by assumption of the rights of the acquirer.

6.3. Rights of first refusal in case of divided property

In case of divided property (*please see Section 3),* the owner of the land and the owner of building (structure) have mutual rights of first refusal and redemption rights, if the respective land or building estate is alienated. The rights of first refusal shall not apply, if the building (structure) is built based on the build-up rights.

6.4. Other rights of first refusal

Rights of first refusal can be established also by the agreement or will.

The law also provides for other specific cases when third parties have the rights of first refusal or redemption rights to real estate, for example, if the real estate is alienated in the territory of a civil aviation aerodrome of the state significance (also the territory necessary for further development thereof) and the civil aviation aerodrome is owned by a capital company where the state has a decisive influence – the state has the rights of first refusal, but if the civil aviation aerodrome is owned by a capital company, where the local government has a decisive influence – the respective local government has the rights of first refusal, or rights of first refusal to the real estate in the territory of the port may be exercised by the local government, represented by the port authority, but the rights of first refusal to the real estate in the territory of the port of Riga shall be exercised by the port authority of Riga as a derived public person.

7. Real estate registries

There are two registries related to real estate in Latvia: the Land Registry and the National Real Estate Cadastre Information System (Cadastral Registry).

The Land Registry is the main real estate registry and is kept by the respective Regional Court Land Registry Offices, each of them operating within a particular administrative territory. All rights (including ownership rights, all kinds of legal encumbrances, mortgages, restrictions, etc.) regarding real estate shall be registered with the Land Registry.

Ownership rights of real estate shall be registered with the Land Registry and only a person, whose ownership rights have been registered with the Land Registry, shall be considered the owner of real estate, except when the ownership rights of the real estate are established by the law.

Entries registered with the Land Registry have public credibility. Thus, not only the owner of the real estate is guaranteed credibility of its title registration, but also every third party is

provided with valid information on the current status of the real estate. However, this does not mean that transfer of title to real estate or the title itself cannot be challenged (for example, the seller has no rights to sell the respective real estate, or any third party's rights of first refusal have been violated and thus this person may possibly exercise his or her redemption rights).

The Cadastral Registry is kept by the State Land Service. The cadastral value (determined mainly for the real estate tax and Land Registry state duty purposes), detailed information on buildings and structures (area, number of premises, etc.) as well as detailed information on every real estate object, including graphical information and technical encumbrances, are held in this register.

However, not all encumbrances prescribed by law are actually registered in the registers, for example, protection zones and consequential restrictions and limitations are set by law, notwithstanding whether they are registered with the Land Registry and/or Cadastral Registry, therefore the actual situation on site shall be considered prior to the acquisition of the real estate.

In practice, frequently the information in the Cadastral Registry differs from the information in the Land Registry.

The law also specifies buildings and structures, which are not registered in the Land Registry as separate building property; for example, some transport structures, and such buildings and structures are registered in the Cadastral Registry.

Therefore, to obtain more detailed information on the real estate, the information in both registries – the Land Registry and the Cadastral Registry should be reviewed and considered prior to the acquisition of the real estate.

8. Permitted use of the real estate (zoning) and environmental protection regulations

Prior to the acquisition of real estate, the permitted use of the real estate (zoning) and possible restrictions for the usage, including construction, of the real property should be additionally reviewed in the local government spatial plan and Territory Usage and Build up Regulations.

Prior to the acquisition of real estate, it should also be reviewed whether the territory of the real estate is not registered with the Register of Polluted and Potentially Polluted Areas. However, it should be noted that, even if the territory of the real estate has not been registered as polluted or potentially polluted, depending on the historical usage of the respective real estate there is a risk that historical pollution may appear.

9. Agreement and re-registration of the title with the Land Registry

Any transfer of the title of the real estate should be registered with the Land Registry. Agreement on alienating the real estate should be prepared in writing and signed by both parties personally. It should be also noted that an oral agreement is binding to the parties, and each party is entitled to claim from the other party to express the oral agreement in a written form.

It is not required, but signatures of the contracting parties on the agreement could be certified by a notary public, as well as an agreement could be concluded in the form of notary deed.

Recently there have been discussions on establishment of a requirement that all real estate transactions should be concluded in the form of a notary deed.

Agreement on alienation of real estate is binding upon the parties from the moment of its conclusion, but for any third party, only a person, whose ownership rights have been registered with the Land Registry, shall be considered as the owner of real estate.

The title (ownership) is transferred to the buyer from the moment of re-registration of the title with the Land Registry (i.e. a Land Registry judge has adopted a decision on registration of the buyer's title). This rule would be always applicable in relation to reliance of third parties on the owner of real estate; however, the contracting parties may agree otherwise on the moment of transfer of title.

To re-register the title with the Land Registry, the registration request to the Land Registry on the transfer of the title should be personally signed before a notary public chosen by the contracting parties.

The notary verifies the identity of both parties, and in case of legal entity also the rights to represent the legal entity. The persons signing the registration request need to provide proof of the identity – passport or ID card for private individuals and also a representative of the legal entity. If the contractual party is a legal entity not registered in Latvia an excerpt from the company register certifying registration of the company and the representation rights of the representative should be provided. Depending on the registration country of the legal entity, the excerpt from the company register should be certified by a notary public or by an authority of the company register of the respective country (for the EU or the EEA countries, or Switzerland), or the excerpt should be legalized in accordance with the international regulatory enactments. The excerpt from the company register should also be translated in Latvian and translation should be certified by a notary public.

The notary fees are determined by secondary legislation, i.e. the Regulations of the Cabinet of Ministers.

For the re-registration of the title with the Land Registry, a state duty and a stamp duty should be paid prior to the submission of the registration request with the respective Land Registry Office.

The standard amount of the Land Registry state duty is 2% of the value of the real estate, i.e., of the cadastral value of the real estate or the transaction amount, whichever is higher; however, for some transactions the amount of the state duty may vary, for example, if a legal entity acquires a residential estate the state duty is 6% of the value of the real estate.

The ratio of 1.5 is applied to the state fee, if more than 6 months have passed as from the day of signing the respective agreement on alienation of the real estate.

Costs for the re-registration of the title with the Land Registry, including notary fees, are usually covered by the buyer, or equally divided between both the seller and the buyer; however, the seller usually bears the costs of deleting of the existing mortgage on the real estate, if any.

The seller should also pay the real estate tax for the entire year of the transaction, and no ownership will be transferred until the real estate tax is paid.

A registration request for the re-registration of the title with the Land Registry should be submitted with the respective Land Registry Office. The following documents should be enclosed with the registration request:

- an agreement on alienation of the real estate;
- a refusal to exercise the rights of first refusal (except the refusal of the joint

owner or owner of divided property) (*please see Section 6*);

- a consent from third parties, if such is required in the particular situation, for example, a consent from the bank in case of a mortgage, or a consent from the spouse of the seller, if the real estate is the co-property of spouses;
- permission from the local government to acquire the land in Latvia, if such is required by the law (*please see Section 4*);
- documents certifying representation rights of the parties;
- receipts for the payment of the state and stamp duties

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INTERNATIONAL LAWYERS NETWORK

PLASBOSSINADE ADVOCATEN NOTARISSEN

Buying and Selling Real Estate in the Netherlands

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER DUTCH LAW

Introduction

The purchase of an immovable property is a mutual agreement.

Neither the seller nor the buyer has the obligation to make use of the services of a real estate agent. In practice, one often sees that the seller instructs a real estate agent to act as an intermediary. A purchase agreement cannot be effected by the real estate agent himself: he is merely the intermediary. Should the seller engage a real estate agent, the seller must also pay the charges arising from the use of his services.

A real estate purchase agreement is often preceded by a pre-contractual stage. If the parties have agreed upon essential conditions, a purchase agreement has been achieved.

Generally, no formal requirements need to be observed, which means that a *written* purchase agreement is not necessary. This requirement only applies in the event of consumer sale i.e. that a residence is purchased by a natural person. In case of a consumer sale a so-called reflection period applies. Within three days after signing the purchase agreement, the consumer buyer has the right to dissolve the agreement without having to give reasons and without consequences.

Conformity – examination

The Dutch Civil Code (article 7:17) stipulates that a seller is obligated to supply the buyer with an immovable property that must be in conformity with the agreement. The immovable property is not in conformity with the agreement if it does not have the characteristics that the buyer, given its nature and the statements of the seller about it, could have expected on the basis of the agreement. The buyer may expect that the immovable property has the characteristics necessary for a normal use and on the presence of which he did not need to doubt, and also that it has the characteristics necessary for a particular use which was foreseen in the agreement.

The parties can derogate from this statutory main rule at the time of the purchase agreement. This is often done by giving substance to the duty of disclosure and examination and laying down the outcome in the agreement.

Elements purchase agreement

The following items require attention during the negotiations and in the purchase agreement:

- object description
- purchase price
- transfer of ownership by means of a notarial deed of delivery
- costs and taxes
- current agreements with regard to the immovable property
- transfer and transmission of claims
- guarantees seller
- oversize/undersize
- environmental regulations
- risk transfer of damage
- notice of default/omission/dissolution/penalty
- energy performance certificate
- registration in the public records
- Municipalities Preferential Rights Act
- suspensive or dissolving conditions

Various types of registered immovable property rights

The Dutch Civil Code distinguishes four main immovable property rights which confer full ownership or a limited right in rem to the purchaser. These rights are:

Property right

The property right (ownership right) is the most comprehensive immovable property right one may acquire, free and unencumbered with any limited right belonging to other (third) parties. The owner of the immovable property is in the position to sell and dispose of the immovable property, to encumber the immovable property with limited rights in rem such as leasehold or mortgage.

Leasehold

Leasehold ("erfpacht") is a limited immovable property right in rem and provides the leaseholder the right to hold and use the immovable property which is owned by another person or legal entity. The rights and obligations of the leaseholder are generally limited by law and can be specifically limited by the leasehold conditions which are concluded between the owner and the leaseholder.

The following items are usually determined by the leasehold conditions:

- duration of the lease (temporary, permanent or perpetual);
- ground rent ("erfpachtcanon");
- designated use;
- (conditional) right of transfer;
- (conditional) right of sub-leasehold.

The leaseholder is entitled to mortgage the leasehold without the consent of the owner. Therefore, in case the leaseholder requires the written consent of the owner under the leasehold conditions to transfer the leasehold, the mortgagee is not bound by this condition in a situation of a forced sale. However, after the execution sale the new leaseholder is again fully bound by the leasehold conditions.

Apartment right

The apartment right is a distinct share in an immovable property with its appurtenances, giving entitlement to the sole use of a certain part of the immovable property. The immovable property is divided into apartment rights by way of a notarial division deed, containing a division plan and rights and obligations of the owners of the apartment rights. The application of apartment rights is widely used as to legally structuring immovable property, whether residential or commercial or otherwise.

The notarial division deed contains, as required by law, the establishment of an owner association. All apartment right owners are members of this owner association by operation of law. The objects of the owner association are to manage the immovable property and the general interests of the joint owners directly relating to the immovable property.

An apartment right may be encumbered with limited rights in rem such as leasehold or mortgage.

Right of superficies

The right of superficies ("opstalrecht") is a limited right in rem and provides the holder the right to own or to acquire constructions and structures in, on or above immovable property which is owned by a third party. The right of superficies may generally be compared with leasehold, but a distinctive contrast is that the leaseholder may use and hold the immovable property itself while the holder of the right of superficies has the ownership and use of constructions and structures *in, on or above* a third party's immovable property.

A second difference between leasehold and the right of superficies is that leasehold is an independent right while the right of superficies may be an independent right or a right dependent on another agreement between the owner and the holder, such as a lease agreement. In such case, ending of the lease agreement would mean the end of the right of superficies.

The rights and obligations of the holder of the right of superficies are generally limited by law and can be specifically limited by the conditions which are concluded between the owner and the right's holder, equal to leasehold conditions.

An independent right of superficies can be transferred and encumbered by a limited right in rem such as mortgage. Since the dependent right of superficies depends on another agreement, such right cannot be transferred nor be encumbered with a limited right in rem.

The right of superficies is widely used for pipelines, cable networks and other valuable structures or equipment.

The property right, leasehold, apartment right and right of superficies can all be leased to a third party.

Non-registered immovable property rights (economic ownership)

Economic ownership can be defined as the separation of full ownership in legal ownership and economic ownership. It is based on obligations between involved parties by means of contracting. The economic owner is usually entitled to the value and profits of the real estate. The legal owner is registered at the Land Registry but does not necessarily hold any economic or financial interest of the real estate. For third parties only, the legal owner is known due to registration.

The role of Dutch civil-law notaries in immovable property transactions, payment procedure and the Public Registers

Under Dutch law, a notarial deed is compulsory in order to transfer title to immovable property or to establish limited rights in rem, such as a mortgage. Notarial deeds are conclusive proof of the transactions laid down therein.

Dutch civil-law notaries are impartial legal professionals appointed by the Government. In his capacity, the civil-law notary must take into account the interests of all parties involved in a transaction regardless who pays the notary's fee. Also, in general, the interests of third parties who are affected by a transaction must be taken into account. The civil-law notary advises the parties and oversees the transaction.

The notarial deed containing the transfer of ownership or the establishment of the limited right in rem are recorded by the notary with the designated Public Registers, kept by the Land Registry "Kadaster"), by way of filing a certified copy (or an excerpt) of the deed. These Public Registers are accessible to everyone. The civil-law notary is the custodian of the original deed and therefore, it remains with the notary. Parties entitled to it will receive a certified copy or, when required, an authenticated copy.

In an immovable property transaction, the purchase price (or secured loan amount) must be deposited with the (impartial) civil-law notary prior to the closing of the transaction. This has the meaning that at the time of the transfer of ownership of the transaction, the purchase price is in place, but out of the hands of the Buyer and Seller alike. After the transfer of ownership has been completed (by way of recording the deed of transfer in the designated public registers and checks of various other registers), the civil-law notary releases the funds to the Seller. Each civil-law notary is obliged to keep a special account in his name with a bank acknowledged by the

Dutch authorities, stating his capacity; this/these account(s) is/are exclusively intended for funds the civil-law notary retains in relation to his activities in that capacity.

The aforementioned statutory provision further implies that the funds in this special account, which is called a third-party account, do not belong to the civil-law notary, but to the parties entitled to them. This means that the balances in this account cannot be attached by the civil-law notary's creditors and that, should the civil-law notary get into financial difficulties or go into involuntary liquidation, the balances in the account cannot be involved in the financial difficulties or the liquidation.

The above has been included in the law to protect the interests of the civil-law notary's clients who need to be able to rely on the fact that the funds they have deposited with the civil-law notary will reach the parties they are intended for. The civil-law notary is the only party who can dispose of this account.

Tax issues

Value added tax (VAT)

In general, acquisition of real estate is not subject to VAT (21%), except for newbuilding and/or building sites. In case VAT is applicable, there is usually an exemption from Transfer tax. Newbuilding is considered newbuilding in the building phase, when it is completed and occupied, up until two years after occupation.

In the event newbuilding is purchased within two years after occupation and the seller is subject to VAT, VAT and Transfer tax are both applicable. Depending on the tax status from buyer for VAT purposes, VAT can be reclaimed in the VAT tax return. When a natural person – not subject to VAT - is selling newbuilding within two years of occupation only Transfer tax is applicable.

In case seller and buyer are both subject to VAT and buyer will use the real estate for 90% or more for VAT business activities, they can opt for a transfer of real estate with VAT. Transfer tax is also payable. VAT can be reclaimed by buyer in the VAT return. A revision period is applicable for 1/10 of the initially reclaimed VAT in the following nine years. When buyer in any year performs less than 90% business activities for VAT, the buyer has the obligation to partially pay back VAT.

Research on the tax history of real estate between a tax advisor and a civil-law notary is highly recommended especially with regard to commercial real estate.

Transfer tax

Transfer tax is imposed on the acquisition of existing, used immovable property and limited rights in rem thereto (not security rights such as mortgage). The tax rate is 2% for residential properties and 6% for commercial and all other properties. The taxable base is the purchase price or the fair market value of the real estate when this value exceeds the purchase price.

Subject to Transfer tax is the transfer of:

I. Real estate including rights derived from real estate such as leasehold, right of superficies and apartment right.

II. An economic ownership in real estate. The economic ownership includes the risks of change of value of the real estate. Participation rights in real estate investment funds are exempt when acquiring interests below one/third in the fund, interests above one/third are subject to transfer tax (including interests already held).

III. So-called fictitious real estate, to be distinguished as follows:

a. Shares in a (separate) real estate entity, which possessions mainly consist from real estate (acquisition of one/third or more of shares, including interests already held).

b. Rights on memberships of association or cooperation in case the rights include the (exclusive) right to use of a building or a part from that building that is meant to be used separately.

Several acquisitions of real estate are under conditions tax exempt for Transfer tax among which:

- the acquisition of newbuilding and/or building sites in the phase before occupation (subject to VAT 21%);
- acquisitions under the scope of business/family succession;
- acquisitions in the event of mergers, restructuring and division of corporate entities.

Corporate income tax

A Dutch corporate entity investing in leased real estate is subject to Corporate income tax. Real estate held by foreign corporate entities is considered as a permanent establishment for Corporate income tax purposes.

Taxable income is profit (rental income, realized capital gains) minus costs and depreciation. Depreciation is limited to 100% of the determined value of the leased real estate of for the purposes of the Valuation of Immovable Property Act. Depreciation of real estate that is used by the corporate entity itself, is limited to 50% of the determined value of for the purposes of the Valuation of Immovable Property Act. Transfer tax is not deductible as costs from taxable profit and is part of the cost price of the real estate on the balance sheet. Interest on loans is in general deductible from profit.

The Corporate income tax rates for 2018:

20% for taxable income between € 0 - € 200.000;

25% for taxable income exceeding € 200.000.

According to the plans of the government (September 2018), Corporate income tax will be reduced to 19% as from 2019 (taxable income between € 0 - € 200.000) and 25% (taxable income exceeding € 200.000). As from 2020, further reductions of corporate income tax will enter into effect (2020/2021 16,5%/15% (taxable income between € 0 - € 200.000) and 22,55%/20,50% (taxable income exceeding €200.000)).

Income tax

Real estate (not the residence/permanent home in the Netherlands) can be taxed with (personal) Income tax within three categories (Box 1, 2 and 3).

Real estate which is part of a personal business (including partnerships that qualify as business) is subject to Box 1 progressive income tax rates with a maximum rate of 52%. Box 1 can be applicable for personally held real estate leased to certain affiliated companies. Net income from real estate may also fall under the scope of Box 1 in case the owner performs active real estate management in order to make more return on investment compared to passive real estate management.

Box 2 is a flat rate of 25% for owners of more than 5% of the shares in a corporate entity (a substantial interest). Income from real estate from the corporate entity is not directly taxed by the shareholder, but with the entity itself with Corporate income tax. Valuation of the real estate held by the entity is directly related to the value of the shares held by the shareholder. In case the shareholder sells shares in the real estate entity, a rate of 25% is applicable in case capital gain on the value of the shares is realized.

According to the plans of the government (September 2018), the Box 2 flat rate of 25% will apply in 2019. The flat rate will be increased to 26,25% as from 2020 (and 26,90% as from 2021).

Individually held real estate with passive asset management, including investment in real estate funds and partnerships is taxed under the regime of Box 3, wealth tax. Per 1 January of each year, the market value of real estate minus debts related thereto is subject to a notional annual income of 0,36%-5,38% (2018, as from 2019: 0,13% - 5,60%). The notional annual income calculated is taxed with 30%.

The abovementioned Boxes are also applicable for non-resident investors subject to Dutch income tax. They are considered as non-resident taxpayers for Dutch Income tax purposes. The Netherlands have an extensive network of tax treaties with other countries in which the effects of double taxation are mutually arranged, with regard to Box 1, 2 and 3. The right to levy Dutch income tax on income, gains and assets of non-residents may be therefore limited.

Capital gains on real estate or shares in a Dutch corporate entity holding real estate

Capital gains made by a Dutch corporate entity and a foreign corporate entity (also by means of a partnership) are subject to Dutch Corporate income tax. Capital gains made by individuals under the regime of Box 1 of Income tax are progressively taxed.

In case there is an intention to reinvest a capital gain, profit from selling real estate can be reserved in a fiscal reserve up until three years after selling. Within these three years reinvestment has to take place. If not, the capital gain is taxed in the third year after selling, at the latest.

Capital gains on the sale of shares in a corporate entity by a Dutch corporate entity is in general exempt from Corporate income tax. The Corporate income tax act provides for a participation exemption on dividends and capital gains for Dutch and foreign held shares by Dutch corporate entities under the following conditions:

- at least 5% of the shares is held by the Dutch corporate entity;
- the shares are not held as an investment;
- the participation is subject to a corporate tax with a realistic tax rate compared to Dutch tax rates; or
- less than 50% of the assets of the participation consists from low tax rated investments (surplus liquidities, assets related to passive financing of group companies, or assets that are placed at the disposal of group companies).

Dividend withholding tax

The Dutch government has withdrawn the plan to abolish the Dividend withholding tax. Below the current Dividend withholding tax rules for the following categories:

- dividends paid to shareholders (natural persons) with a substantial interest;
- dividends paid to shareholders (natural persons) without substantial interest;
- dividends paid to a resident corporate entity;
- dividends paid to a non-resident corporate entity.

Dividends paid to shareholders (natural persons) with a substantial interest (5% or more of the shares) are subject to 15% Dividend withholding tax. Dividend withholding tax is an advance levy before Box 2 flat rate of 25% in Income tax. In case the shareholder with a substantial interest is a non-resident, the same rules in principle apply. The non-residential shareholder is considered as

a non-resident taxpayer for Dutch income tax purposes. Dutch tax regulations and tax rates may be overruled and/or adjusted in case a tax treaty is applicable with the country of residence of the non-resident shareholder.

Dividends paid to resident shareholders without substantial interest are subject to 15% Dividend tax. Dividend withheld tax is refundable and/or can be settled with due Income tax. Non-resident shareholders without substantial interest are also subject to 15% Dutch withholding Dividend tax. Dutch tax rates may be overruled and/or adjusted in case a tax treaty is applicable with the country of residence of the non-resident shareholder. On request, the Dutch tax authorities will refund Dividend tax entirely or partly, depending on the applicable treaty.

Dividends paid by a Dutch corporate entity to another Dutch resident corporate entity are exempt from withholding Dividend tax in case the participation exemption of the Corporate income tax applies. The participation exemption applies in case a corporate entity holds 5% or more of the shares in another corporate entity. Dividend tax withheld in other situations will be refunded and/or settled with Dutch Corporate income tax.

Dividends paid by a Dutch corporate entity to a non-resident corporate entity are subject to 15% Dividend withholding tax unless the non-resident corporate entity holds more than 5% of the shares and the EU Parent Subsidiary is applicable. In other cases, the 15% Dividend tax rate may be adjusted due to the applicable tax treaty with the country of residence of the non-resident corporate entity, depending on conditions.

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INTERNATIONAL LAWYERS NETWORK

MGRA & ASSOCIADOS LAW FIRM

Buying and Selling Real Estate in Portugal

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER PORTUGUESE LAW

I. INTRODUCTION

Portugal is an Iberian Peninsula country, bordered by the Atlantic to the west and south and Spain to the north and east; in addition to its continental landmass, it also comprises the archipelagos of the Azores and Madeira. Portugal has around 10.3 million inhabitants.

Portuguese territory is split up into three administrative divisions: the first division includes 18 administrative country districts, while the others include the autonomous regions of the Azores and Madeira. All country districts are sub-divided into 308 municipal districts and approximately 3,100 parishes.

Lisbon is the capital of Portugal and its largest city with around 510,000 inhabitants. Portugal's second largest city is Porto, in the north, with around 240,000 inhabitants.

Portugal is a democracy. Its sovereign bodies are the President of the Republic, Assembly of the Republic, Government and the Courts. The current President of the Republic, elected in 2016 for a five-year term, is Marcelo Rebelo de Sousa. Elections for the 230 deputies of the Assembly of the Republic are held every four years and are followed by the appointment of the Prime Minister (currently António Costa), who then forms the government (currently a PS government supported by a four-party left wing alliance).

Portugal has been a member of the European Union since 1986 and a founding member of NATO in 1949. It has been a member of the United Nations since 1955.

II. REASONS TO INVEST IN PORTUGAL

Portugal has a pleasant weather, an extensive Atlantic coast, a wide system of motorways, excellent infrastructure for living and for leisure time, competitive operating costs, proactive pensions, an advantageous tax system for investors and flexibility in human resource management systems. These singularities have made Portugal a privileged place to invest, to do business and to live.

III. OVERVIEW OF THE NATIONAL REAL ESTATE MARKET

The real estate market in Portugal is highly developed. It has a high relative quality of supply in all sectors, on par with the larger core European markets, dynamic demand and a considerable presence of foreign occupiers. The market is highly transparent, with various international consultants regulated by the most demanding professional organizations of the commercial real estate sector. There is also a strong international contingent of developers and investors looking for new opportunities in the Portuguese market.

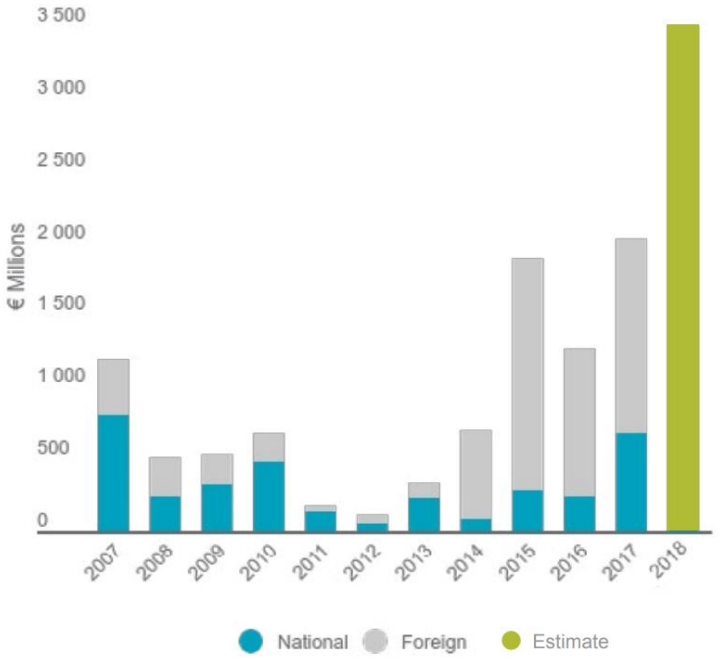
1. REAL ESTATE INVESTMENT MARKET

In 1985, the road for real estate investment funds in Portugal was opened. Since their launch and up until the 1990s, these funds had typically been used as SPVs rather than as an actively managed, pooled, closed-end-fund. The market in Portugal, up to 1998, was relatively small and not particularly professional, with foreign investments being few and far between.

The elimination of foreign exchange risk with most other European markets, when Portugal joined the Euro in 1999, placed the country more notably on the radar of international

investors. Investment, in 1998, ahead of the Euro's launch, increased from around €180 million to more than €400 million, around 90% of which was foreign. Almost all asset transactions were in the office or shopping center sectors; with retail property accounting for more than 60% of the capital involved. As can be noticed in the picture to the right:

- In 2007, the volume of transactions broke through the €1 billion barrier and achieved a new investment volume record.
- 2008 registered a 60% fall in activity compared to the preceding year, mostly due to restrictions and scarcity of bank funding for the real estate sector.
- In 2009, the market followed the previous year numbers, before showing a slight recovery in 2010 with a total investment volume of €690 million.
- The two following years continued to reflect the sector investment tendencies. 2012 reached a low point for the last 12 years, recording only a total investment of €108 million (a 36% drop over 2011).
- In 2013, the rise in the market activity began, and a total of €322 million in commercial real estate assets were closed, tripling the volume of 2012 and double the 2011 figure of €167 million.
- 2014 continued the evolution of the Portuguese real estate market. There was a significant evolution in all sectors.
- 2015 registered €1.9 billion of transactions in commercial real estate assets, doubling the volume of the previous year. 90% of the invested capital came from outside the country. The values surpassed the historical high of 2007.
- During the year of 2016, the value of real estate transactions was lower (around € 1.3 billion), but in 2017 Portugal reached a new historical high, with € 2 billion invested in real estate.
- It is widely expected that in 2018 may surpass 2017 and even reach the investment threshold of € 3 billion.



Real Estate Investment in Portugal during the past decade.

2. FOREIGN INVESTMENT IN REAL ESTATE

The real estate investment market in Portugal came to notice by the foreign investors since the country joined the Euro in 1999.

More than €4.2 billion of foreign capital have been invested mostly by Germans, British, Dutch and Americans on the acquisition of several real properties since then. Recently, investors from China, Russia, Brazil and France have also made an impact in

Portuguese market. This value could have been higher as the Portuguese market was, on occasion, simply not large enough to supply sufficient products in terms of number, quality and/or scale, to fully meet the demand recorded at the time.

Portugal remained present in the investment intentions of several of the most important European investment houses over the past 15 years, with buyers interested in effectively diversifying risk and achieving slightly higher income returns than those available from other markets, in a country offering security, transparency and less competition.

Dramatic changes impacting the European economic situation and in particular Portugal had driven away the attention of foreign institutional investors until 2013. However, the second half of 2015 brought back international investment in to Portugal and, more particularly, the last quarter of the year, showed signs of what may be considered an upturn of real estate investment activity. The successful outcome of the political crisis, continued improvement of economic indicators, greater public debt market stability and Portugal's good performance in terms of the adjustment program, made important contributions to market recovery.

IV. HOW TO MAKE A REAL ESTATE INVESTMENT

Portugal, lined with other continental legal systems such as France (propriété), Germany (Voll Eigentum) and England (freehold), adopted the concept of "full ownership" which is defined by the full and exclusive right of use, disposal, and fruition of the property.

1. INDIVIDUAL (DIRECT ACQUISITION)

The formalization of a real estate acquisition requires the compliance of some important steps, as follows:

1.1. INVESTIGATION

Investigate the property intended to be acquired by checking its commercial, legal, fiscal, environmental and urban status is essential for a clean and structured execution of the sale and purchase agreement.

Usually, it is done by commissioning due diligence procedures, which should ensure and guarantee that the property in question is not subject to any encumbrance, costs, or limitations (registered with the respective Land Registry Office), or that any impediments have been extinguished before or after the sale.

If the intention is to acquire a plot of land, the buyer should also verify, with the competent entities, the urban planning in all its different forms, as well as any restrictions and licenses.

If the intention is to acquire a building, or building unit, the buyer should also verify the use permit license which defines the purpose of the property.

1.2. SALE AND PURCHASE PROMISSORY AGREEMENT

Before the formalization of the real estate sale, it is common practice to celebrate a promissory agreement as an immediate binding document, in which case the signing of the definitive sale agreement is usually conditional upon the parties' compliance with several obligations.

The parties can also agree with a deposit and down payment of the property price. In the case of a default by the promissory seller, the promissory purchaser may receive twice the amount paid; if the default is caused by the promissory purchaser, the promissory seller can keep the amounts already received.

1.3. SALE AND PURCHASE AGREEMENT

The real estate sale is formalized either in a deed, signed before a notary, or by a certified private document, which can be signed in the presence of a lawyer.

Altogether with the deed, or certified private document, there is the Land Registry Office record, which is one of the main instruments of a real estate deal, destined to make public the property's actual legal status.

Due to the principle of the priority of registration, the first registered right is effective before third parties and prevails over their incompatible rights even if those rights have been established before the date of registration.

Accordingly, together with the sale and purchase agreement, the registry of the property acquisition is vital to assure the protection of the purchaser before third parties.

1.4. REAL ESTATE WARRANTY

According to Portuguese Law, the real estate seller (and the property builder, when applicable) is responsible for any defects or flaws in the property that may occur in a five-year period upon delivery. The purchaser must report the defect or flaw to the real estate seller or property builder within one year from the date of detection of the defect (always within the five-year warranty period). The problems that have arisen during this period cannot be the result of bad use by the purchaser.

There may be warranties with distinct deadlines when a conventional warranty is stipulated between the parties and is expressly stated in the sale and purchase agreement.

This legal warranty can also be refused by both parties, specifically if they agree to sell the property "as it is" at the moment of the sale.

2. SPECIAL PURPOSE VEHICLE (INDIRECT ACQUISITION)

The second form of real estate investment is the indirect acquisition of property, via a special purpose vehicle, previously incorporated, or acquired, for such purpose. This procedure requires the compliance of some steps, as follows:

2.1. DUE DILIGENCE

As in direct acquisition deals, in indirect acquisition deals it's also recommended the commission of a *due diligence* procedure by the purchaser, in order to i.) verify the property's legal status, as detailed above and to ii.) analyze the investment vehicle's commercial, financial, tax, corporate and legal status, ensuring the legal acquisition of equity stakes, as well as that no undesired obligations or rights are dragged along with the entity to be used as vehicle.

2.2. SHARE DEAL

This process involves the acquisition of equity stakes in investment vehicles, such as commercial companies (usually joint-stock and limited liability companies) and undertakings for collective investment of a contractual nature or of a corporate nature.

2.3. SALES GUARANTEES

In special purpose vehicles acquisitions, it is common practice by the seller to accept liability for a specific length of time for any infringement of its representations and warranties on the object of the sale and underlying assets.

V. TYPES OF SPECIAL PURPOSE VEHICLES

It is standard practice in Portugal to make real estate investments through one of these three vehicles which, in other words, represent the process of a special purpose vehicle acquisition deal: (i) commercial companies, (ii) real estate investment funds and, (iii) real estate investment companies.

1. COMMERCIAL COMPANIES

Joint-stock companies as well as limited liability companies are on the Portuguese frontline, representing the majority of the existing national commercial entities.

1.1. LIMITED LIABILITY COMPANIES BY SHARES (PLC)

In a PLC, share capital is divided up into shares, with a minimum initial amount of €50.000,00, and must, only at the moment of its incorporation, have a minimum of five shareholders, unless it is incorporated by another company, as its sole shareholder.

After the incorporation, restrictions to the minimum number of shareholders no longer apply.

In its most common composition, the company is governed by a General Meeting, the Board of Directors and the Sole Supervisor, who should be a Statutory Auditor.

In most PLC companies, the share transfer agreements require no special formalities and its register is executed directly at the company itself.

These commercial companies have a confidential advantage for investors, by keeping information about shareholders' identity away from public knowledge.

1.2. LIMITED LIABILITY COMPANIES BY QUOTAS (LTD)

Usually representing the small and medium sized companies, the LTD companies are the most common type of companies in Portugal due the inexistence of minimal initial share capital requirement and simpler functioning and structure, as well as the bigger control given to the founder partners.

Its share capital is divided up into quotas, with a minimum initial amount *per* quota of €1. The limited liability company can have or be incorporated by a sole quota holder (in which case the company must bear the corporate expression: "sole quota holder limited liability company by quotas"), or by any other number of quota holders.

Different from PLC companies, the information about the quota holders' identity is public, accessible through the commercial registry official records.

The quota transfer requires writing form and an official registry of the transmission.

2. REAL ESTATE INVESTMENT FUNDS

Over the last few years, these vehicles of real estate investment took up the Portuguese market, mostly due to its favorable tax regime.

The so called "*Fundos de Investimento Imobiliário*" ("FII") are autonomous assets under the joint ownership of individuals or corporate entities, usually called "unit-

holders." FII's are also divided up into identical investment units.

FII's must assume one of three capital variability forms:

i) Open-ended funds – with a number of investment units variable according to the market demand;

ii) Close-ended funds – with a fixed number of investment units, established at the moment of its emission, with the possibility of increasing or reducing its number if and when mentioned in the law and management regulation;

iii) Mixed funds – with a fixed number of investment units and variable number, included in two different categories.

FII's are a type of undertaking for collective investment of a contractual nature, which management and representation must be performed by third ones specialized in the real estate market.

FII's can be managed by real estate investment fund management companies with effective registered office and activity in Portugal.

The creation of these entities requires a formal process, which includes authorization and official supervision from Bank of Portugal ("*Banco de Portugal*") and of the Securities Commission ("*Comissão do Mercado de Valores Mobiliários*" or "CMVM").

The assets of a FII may comprise liquidity, real estate property and shareholdings in real estate companies.

3. REAL ESTATE INVESTMENT COMPANIES

In 2010, Portugal included in its legislation a possibility that already existed in most of European countries which consisted in forming FII's with a corporate form (aside of the contractual form previously mentioned).

The so-called "Sociedade de Investimento Imobiliário" ("SIIMO") are collective investment entities with legal personality, which may take the form of a public limited liability company of variable capital ("SICAVI") or fixed capital ("SICAFI")' and whose property assets is owned by such entity.

A SIIMO can be self-managed or managed by professional real estate investment fund management companies (as FII with contractual form). The standard practice in Portugal is to choose already existing investment fund management company.

Both SICAFI and SICAVI are subject to:

i) The regulations on the previously mentioned open-ended and close-ended real estate investment funds, respectively and,

ii) The applicable regulations set out in the Portuguese corporate legislation.

SIIMO's must have a minimum share capital of €375.000 divided into identical nominative shares with no nominal value.

Additionally, it is important to point out that the rules behind the incorporation of FII's (contractual form) are equally applied to the SIIMO's incorporation, as well as the applicable Portuguese corporate legislation.

VI. TAX REGIME

1. PROPERTY ACQUISITION

1.1. REAL ESTATE TRANSFER TAX ("IMPOSTO MUNICIPAL SOBRE AS TRANSMISSÕES ONEROSAS DE IMÓVEIS") AND STAMP TAX ("IMPOSTO DE SELO")

The acquisition of real estate is subject to two types of taxes, which must be paid by the purchaser to the tax authorities before

signing of the real estate acquisition agreement.

IMT – Real Estate Transfer Tax, which is calculated over the price of the real estate or its tax patrimonial value, if higher (which is uncommon).

IMT tax rates for housing buildings are progressive between 0% to 8% and fixed for plots for construction or other urban buildings (6.5%) and rural property (5%), or when the purchaser, not as an individual, has office at tax haven (10%). Nevertheless, Portuguese law foresees some exceptions or postponements on IMT payments, some of them applicable when the acquisition is made by using some of the special purpose acquisition vehicles identified above.

IS – stamp tax, calculated over the price, or the tax patrimonial value, if higher. IS tax rate is, in most frequent situations, fixed in 0.8%, although this rate can increase to 1% on acquisitions of real estate valued at lease at € 1.000.000,00, or when the purchaser, not as an individual, has office at tax haven (7.5%).

1.2. VAT ("IVA")

Under Portuguese law real estate acquisitions are exempted from VAT.

2. PROPERTY OWNERSHIP

2.1. PROPERTY TAX - "IMI"

IMI is levied on a property's taxable value and is payable by the property owners on 31 December of each year. Nowadays, IMI reaches a variable rate between 0.3% and 0.45% for urban buildings and plots for construction, a fixed rate of 0.8% for rural property, and a fixed rate of 7.5% for owners' resident in tax havens.

2.2. SPECIAL CONTRIBUTION

Special Contributions are required when properties are destined for the construction of new buildings and whenever the value of plots of land for construction increases significantly due to major infrastructure public works carried out (mostly in Lisbon, Porto and their outskirts). The applicable rate varies between 20% and 30% and is levied on the aforesaid increased value.

2.3. TAX ON INCOME FROM PROPERTY OBTAINED IN PORTUGAL BY NON-RESIDENTS

Income from property obtained in Portugal by non-residents (e.g. leases) is taxable at a special rate of 28% (applicable to individuals), or 25% (applicable to corporate entities), being in both cases subject to a 25% withholding tax.

VII. LEASING LEGAL FRAMEWORK

1. GENERAL ISSUES

In Portugal, leasing is, day by day, acquiring a more relevant economic weight.

On 14 August 2012, in compliance with the terms established in the memorandum of understanding executed by and between Portugal, the European Commission, the European Central Bank and the International Monetary Fund, a pack of Laws entered into force with the purpose of implementing structural reforms in the Portuguese legal framework of real estate lease to boost the market.

The real estate lease is divided into two types: (i) leases for non-housing purposes and (ii) leases for housing purposes.

2. LEASES FOR NON-HOUSING PURPOSES

The most relevant aspects of lease agreements for non-housing purposes,

usually for commercial or industrial purposes, can be freely stipulated by the parties, who are, accordingly, free to agree on issues related to duration, termination, and opposition to the renewal of lease contracts, with subsidiary application of the rules regarding leases for housing purposes.

According to the law, the lease agreements may be entered into for fixed term or be of non-specified duration. The last option is not commonly used in the property market in recent years. If entered on a fixed-term basis, the duration may be freely agreed between the parties. The agreement can be automatically renewable, unless the parties agree or any of them decide otherwise.

Maintenance works are freely regulated between the parties. In this particular case, if no provision is made by the parties, the landlord is responsible for the property maintenance.

The costs and expenses related to the property are freely agreed between the parties, who are also free to agree the criteria for updating them.

Parties can subject the transmission of tenant's contractual position to landlord´s permission, although, if nothing is stipulated, the transmission is possible in the most frequent situation of transfer of the commercial or industrial business carried out in the property ("*trespasse*").

Any party may cancel the lease agreement based on a serious breach of duty committed by the other. The legal system provides a non-exhaustive list of cases of breach justifying a landlord's decision to terminate the lease agreement.

Additionally, the contract can be simply terminated by means of written communication sent by the landlord to the tenant in situations of delay or lack of payment of the rent.

On all other serious breaches, the termination can be declared by the Court.

3. LEASES FOR HOUSING PURPOSES

The lease agreements for housing purposes, unlike the lease agreements for non-housing purposes, have less contractual freedom. Some of the most relevant matters are imperatively established in the law. That is the case of rules regarding the early termination and the opposition to renewal of the lease agreements which were, nevertheless, softened in 2012, favoring and strengthening the landlord position.

These lease agreements may also be entered into for a fixed term or be of non-specified duration. The information provided above on leases for non-housing purposes is also applicable here.

Regarding the fixed-term lease agreements, the tenant is entitled to oppose to the renewal of the lease, by means of a notice sent with a prior notice that may vary depending on the initial term or on the term of its renewal, as well as to terminate the lease agreement at any time and without justification, provided that 1/3 of the lease duration has elapsed, by means of a written communication sent to the landlord with a prior notice provided in the applicable law.

As to non-fixed term agreements, the law provides the conditions and the prior notices

that the landlord and the tenant must comply in order to legally terminate the agreement.

As in the non-housing lease agreements, any party may cancel the lease agreement based on a serious breach of duty committed by the other. Also, here the legal system provides a non-exhaustive list of cases of breach justifying a landlord's decision to terminate the lease agreement.

Additionally, the contract can be simply terminated by means of a written communication sent by the landlord to the tenant in eligible situations of delay or lack of payment of the rent.

On all other serious breaches, the termination can also be declared by the Court.

4. SPECIAL PROCEDURE FOR EVICTION

One of the ultimate goals of the urban lease regulation's reform in 2012 consisted of speeding up the procedure for eviction. A special eviction regime was established in order to ensure the effectiveness of the termination of lease agreements – regardless of its purpose – applicable when the tenant has not vacated the leased property on the date foreseen in the law or agreed by the parties.

This eviction procedure is specially used when the lease agreement was terminated by non-judicial means. The landlord can cumulate the request for eviction with the claim of payment of rents and other expenses and charges due by the tenant. This procedure takes place before an extrajudicial entity and is aimed to ensure fast procedures, although it can, under certain circumstances, be transferred to court.

VIII. URBAN REHABILITATION

To promote the properties' rehabilitation, the new reforms simplified the urban licensing procedure required for these operations as well as for termination of lease agreements when the landlord desires to perform rehabilitation works on the property.

There is a special procedure applicable to the prior licensing control regarding buildings that were built at least 30 years ago and that show high levels of deterioration. According to this procedure, the execution of works in such buildings does not require a construction license, usually a bureaucratic process, being that a prior formal communication to the competent entity is requirement enough to allow the works to commence.

In case the property is leased, and the landlord intends to carry out refurbishment works or deep restoration, in most situations, the landlord is entitled to terminate the lease agreement without having to resort to court and obtain the release of the leased property, provided that the landlord relocates the tenant or, alternatively, awards the tenant with the compensation legally foreseen.

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INTERNATIONAL LAWYERS NETWORK

PETERKA & PARTNERS

Buying and Selling Real Estate in Romania

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ROMANIAN LAW

I. Types of Real Property Transactions

A. Purchase of an undeveloped plot of land (agricultural);

B. Purchase of a buildable plot of land (with or without a building);

C. Purchase of a building without the land (with superficies right over the land);

D. Purchase of a flat (condominium);

E. Purchase of a company having real estate assets.

II. Major Content of the Purchase Agreement

The contract must include: parties' identities, description of the real estate (address, surface area, buildings, cadastral number and Land Book registry number), purchase price (which must be serious – not derisory, real – not fictitious, and determined or determinable), as well as the main obligations of the parties (i.e., to transfer the property rights and to pay the price).

The rest of the contractual provisions are, in principle, freely negotiated between the parties: conditions precedent, transfer date, risk allocation (with certain legal exceptions), guarantees, payment date, etc.

III. Conclusion of the Purchase Agreement

Validity requirements on the form of the purchase agreement. All *in rem* rights over real estate (including ownership) must be transferred through authenticated agreements concluded before a Romanian notary public, under the sanction of absolute nullity of the agreement. The notary public may be chosen by either of the parties. An agreement relating to rights *in rem* over a real estate property located in Romania must be governed by Romanian law.

The persons who sign the agreement before the notary public must have proof of identity (ID Card, Passport, etc.) and, if the case may be, proof of power of attorney (which must also be authenticated by a notary public and must expressly give power to sell/purchase the specific property). If the buyer/seller is a legal entity, proof of status of the company must also be provided.

The notary shall verify the status of the property and shall obtain an authentication excerpt from the relevant Land Book which shall block any further registrations in the Land Book until the agreement is registered after signing. All the Land Book registrations/de-registrations in respect of the ownership title shall be carried out by the notary public.

The parties will sign only one copy of the agreement which remains in the notary public's archives. The notary shall provide as many duplicates as necessary, which shall be only signed by him/her.

It should be noted that in Romania there are certain pre-emption rights or other statutory (imposed by law) limitations potentially applicable in relation to some specific categories of real estate properties. Examples include pre-emption rights of the State, of the tenants of agricultural land or public service providers (public schools, hospitals), neighbours of forested land, etc. Land near the borders may be sold only with the prior approval of the Ministry of Defence.

IV. Transfer of Ownership

As a general rule, the property right transfers automatically upon the execution of the agreement, unless the parties have otherwise agreed (e.g., until fulfilment of conditions precedent).

The registration in the Land Book is made for opposability purposes only and is to be carried out by the notary public following the execution of the agreement.

Certain rules shall come into effect after the finalization of the cadastral works on all land in Romania. Specifically, once the entire cadastral works for all land in Romania will be finalized (a date which is difficult to estimate at this stage), the registration of the property right transfers with the relevant Land Books shall no longer be performed for opposability purposes only but shall become constitutive of a right (i.e., the transfer will operate as of and on the basis of the registration with the relevant Land Book).

V. Agents

Both parties may use a real estate agent. In general, the agents conclude mainly exclusivity agreements.

The general commission on the market today is approximately 1-3% (depending on the value of the transaction).

VI. Forms of Ownership

In general, Romanian and EU individuals/entities may own land in Romania. While there may be some restrictions for other foreigners to own land in Romania, the practice for foreign investors is to incorporate a Romanian legal entity which has no restriction on owning lands.

The "right of ownership" gives the owner the power to possess, use and dispose of the property.

A. Acquisitions

A real estate deal in Romania may be made either (i) by way of an asset deal (direct acquisition of an asset) or (ii) by way of a share deal (acquisition of the shares in the asset's holding entity).

Share deals are often preferred to asset deals due to cost and tax optimization purposes, as they are not subject to the fees and costs entailed by an asset deal, as they do not entail the transfer of ownership of the real estate. Nevertheless, such a share deal, if the company holding the shares is a limited liability company, implies a longer duration of the procedure as there is a 30-day opposition period for any interested person to object to the sale of the shares.

B. Residential Property

The most frequent forms of ownership of residential property are:

1. **Sole ownership**: The owner is the only person authorized to control and dispose of the land in question.
2. **Common ownership**: More than one owner over the property; there are two types:
   - **(a)** joint ownership (ownership by two or more persons holding undivided – undetermined – shares over the property – such as ownership by spouses); no deed may be concluded without the consent of the other co-owner.
   - **(b)** co-ownership (ownership by two or more persons holding determined shares over the property) which, in turn, can be ordinary co-ownership (e.g., two buyers acquire 50% each of a property) or forced co-ownership (e.g., forced co-ownership of the owners of apartments in a building over the common parts of a building – stairs, lobby, elevator, rooftop,

etc.) – deeds may be concluded by each co-owner for its share of the property.

C. Commercial Property

Owners of commercial property are most frequently legal entities. The most commonly used entities under Romanian law are joint-stock companies (SA) and limited liability companies (SRL).

i. Limited Liability Company – SRL

1. Legal Entity

SRLs are the most commonly used vehicles.

An SRL is managed by directors who act under the control of the general meeting of shareholders. Shareholders may also be appointed as directors.

No restrictions on citizenship or residency apply for directors or shareholders.

2. Formation

The main steps for the establishment of an SRL are:

a. Applying for and obtaining reservation of the SRL's trade name,

b. Choosing a Registered Office,

c. Drafting and submitting the SRL's constitutive documents to the Trade Registry, and

d. Subscribing the share capital.

An SRL may be also incorporated by a sole shareholder with some restrictions:

(i) the shareholder may not be a sole shareholder in another company; and

(ii) the sole shareholder is not a legal entity which, in turn, has a sole shareholder

Timing: In principle, after all documentation is submitted, incorporation is completed within three (3) business days as of the filing of the registration with the Trade Registry (if no other issues arise and no additional documents are requested).

3. Costs of Formation

The administrative fees are approximately RON 1200 (approximately EUR 250).

4. Minimum Registered Capital

The minimum share capital is RON 200 (approximately EUR 45).

5. Limited Liability

The shareholders are liable for the obligations of the company up to a limit equal to the amount of their contributions to the company's subscribed capital.

ii. Romanian Joint-Stock Company – SA

1. Legal entity

The minimum number of shareholders of an SA is two.

An SA is more complex than an SRL. The supreme corporate body is still the general meeting of shareholders as in the case of an SRL.

The management of a joint-stock company is carried out:

(i) either by a director or a board of directors (one-tiered management) – the board of directors may delegate the management to one or more managers;

(ii) or by a supervisory board and a management board, (two-tiered management).

The board of directors, as well as the supervisory board, must hold quarterly meetings.

2. Formation

The main steps of the establishment of a joint-stock company are:

a. Applying for and obtaining reservation of the joint-stock company's trade name,

b. Choosing a Registered Office,

c. Drafting and submitting the joint-stock company's constitutive documents to the Trade Registry, and

d. Subscribing the share capital.

Timing: Once all of the documentation is available, incorporation is completed within three (3) business days as of the filing of the registration with the Trade Registry so long as no issues are identified/additional documentation required.

3. Minimum registered capital

The minimum share capital is RON 90,000 (approximately EUR 20,000).

4. Liability

The shareholders are liable for the obligations of the company up to a limit equal to the amount of their contributions to the company's subscribed capital.

VII. Financing

Financing is typically secured by way of bank loans. In most cases, banks will require securities (collateral) from the borrower.

Securities or collateral may consist of one or more of the following: mortgage of immovable assets (typically, but not necessarily the real estate which is bought with the loan); mortgage of movable assets (bank accounts, receivables, shares, cars, etc.), assignment of receivables for guarantee purposes or autonomous bank guarantees.

VIII. Payments and Costs. Taxes Involved in Real Estate Transactions

A. Asset deals: Related taxes

The following fees are due in an asset deal involving real estate:

(i) public notary fees for authenticating the SPA – up to 0.5% of the purchase price,

(ii) Land Book registration tax – 0.5% of the purchase price.

In practice, usually the purchaser bears all of the fees and taxes of the sale, but the parties may agree to split the costs between them. The seller usually pays the sale tax for sale of immovable property.

VAT shall apply to the purchase price if the land might be buildable (according to the urbanism certificate) or new buildings are being sold (or parts thereof). Standard VAT

is 19% but there are special VAT percentages in some cases (e.g., 5% for a natural-person buyer of a property under RON 450,000 – approximately EUR 100,000, provided it is his/her first property). Nevertheless, if both the seller and the buyer are registered for VAT purposes, VAT is not effectively paid as the reverse charge mechanism is applied.

B. Share deals: Related taxes

If the shares are sold at their nominal value, no special taxes shall be imposed. However, if the shares are sold at a price higher than their nominal value, the seller shall pay profit/revenue taxes on the difference between the nominal value and the value of the transaction.

Also, certain fees must be paid to register the transfer of the shares with the Trade Registry (approximately EUR 200).

IX. Examinations Before Closing

The buyer should make the relevant examinations in order to determine any deficiencies in the property right or in the property itself.

Pursuant to Romanian law, a legal conclusion on whether there is a valid title to certain real estate may be given only after examination of the whole chain of transfers in respect of the particular real estate. There is no rule under Romanian law that the last registered owner of the real estate is its true owner/holder. The registered owner is only presumed to own a valid title until proven otherwise by an interested person. If any of the current owner's/holder's predecessors' rights over particular real estate suffer from any defect in title, such defect survives the subsequent right transfer and affects the right of the current owner/holder.

Thus, under Romanian law, if the ownership title over real estate is cancelled, all subsequent acts of the ownership transfers might also be cancelled by Romanian courts, at the request of interested persons.

Cancellation of the subsequent acts may be requested at any time, no statute of limitations is provided by Romanian law in such cases, in consideration of the fact that property right is guaranteed under the Romanian Constitution.

Nevertheless, according to the Land Book Law, if no deficiency arises from the analysis of the relevant Land Book, a third party may no longer be deregistered after three years from the moment the last owner was registered in the Land Book. This provision is applicable only if the third party is at least the third owner registered for that particular Land Book – i.e., if the Land Book is newly opened, this should not apply, and the third party may be deregistered at any time. Consequently, in practice, as the safeguarding of concluded transactions is preferred, it becomes more difficult to amend the content of the Land Book and implicitly, to challenge the ownership title once the aforementioned conditions are met.

The seller should disclose any relevant hidden defects in the property itself or in the property rights.

If the buyer intends to build on the land, verifications should be made in order to assess the existence of restrictions on building in that area (general, zonal, and detailed urbanism plans). Note that a permit is, in most cases, needed for building, as well as for demolition.

If the acquired land is agricultural, its type may be changed to buildable, in order to be able to actually build on it, by requesting modifications to the zonal urbanism plans – if the land is outside the city limits. If the land is within city limits, modification of the zonal urbanism plans

is made automatically when requesting a building permit.

In the light of the aforementioned, it is strongly recommended to undertake a due diligence investigation prior to proceeding with real estate investments in Romania.

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INTERNATIONAL LAWYERS NETWORK

LIDINGS LAW FIRM

Buying and Selling Real Estate in Russia

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER RUSSIAN LAW

I. Types of real estate

- land plots;
- buildings, facilities, and other objects closely connected with land (i.e. objects that cannot be removed without detriment to their designation);
- constructions or developments under construction;
- objects qualified as real estate by operation of law (registrable aircraft, ships, inland-waterways vessels);
- residential and non-residential premises;
- car parking space.

Land plots and buildings and constructions constitute two separate types of real estate objects, according to Russian law. In practice, this means that a land plot and a building located on it represent two separate real estate items and can be owned by different parties and even on different titles (for example, right of ownership to the building and right of lease to the underlying land plot owned by another party). State registration of title to buildings, constructions on the one hand and underlying land plots on the other hand, is carried out separately, as well. However, there is a principle of "unanimous destiny of land plot and objects closely connected to it" commonly known in Russian law according to which the building inseparably follows the underlying land plot (see for more details section VII).

II. Right of ownership to real estate (title to real estate)

There are the following types of real estate ownership:

1. Public ownership:

– state ownership comprising
  - federal ownership (real estate owned by the Russian Federation);
  - ownership of constituent entities of the Russian Federation;

– municipal ownership;

– non-delimited public ownership (i.e. public ownership, which is not explicitly attributed to the ownership of certain particular public owners – federal or regional).

Land plots in state or municipal ownership can be sold only by tender held in the form of auction or without tender in certain cases provided by the law (generally when land plots provided for non-commercial, personal, agricultural purposes).

If title to the public non-delimited land plot is not registered, it does not prevent disposal of such land plot. Generally, such land plots are disposed by local authorities, executive authorities of constituent entities of the Russian Federation or federal executive authorities in cases provided for in the law.

2. Private ownership:

– individual ownership;

– co-ownership (simultaneous enjoyment of right of ownership to the same real estate item by several persons):
  - joint ownership – co-owners enjoy right of ownership to the real estate item in whole, without the opportunity to separate the co-owners' shares;

- shared ownership – each co-owner has precise separable share of ownership to the real property.

III. Data and documents on titles to real estate

Prior to making a real estate transaction, parties are supposed to obtain authentic and up-to-date information on the real estate item that is subject to transaction, evidence of existing titles, encumbrances, and other property details.

Right of ownership and other property rights to real estate, encumbrances of these rights, their commencement, transfer, and termination are subject to state registration in the Unified State Register of Real Estate (hereinafter – the "**Register**"). It includes the following information: the real estate objects; rights on real estate; protected and special-use areas; register books; tax map; document journals.

The Register is managed by the Federal Service for State Registration, Cadastre and Cartography (hereinafter – the "**Rosreestr**"). The official website of the Rosreestr - https://rosreestr.ru. Reference information on the real estate item such as location address, area, cadastral number, existence of registered rights and encumbrances is available to any third party on the website of the Rosreestr.

Upon the request of interested party, the following information can be provided in an extract from the Register:

- description of real estate item, including its location address, area, cadastral number, and permitted use;
- data on title holders;
- data on registered encumbrances;
- data on third parties' claims in respect of real estate items, legally asserted claims, and objections in respect of registered rights;
- data on existence of decision on withdrawal of real estate item for state or municipal needs.

A request for provision of extract from the Register can be filed with the Rosreestr in hard copy in person or by post, in electronic form by e-mail or by filling up a request form on the website of the Rosreestr or in hard copy filing with the multifunctional center. The extract from the Register can be provided in hard copy or in electronic form as well, and the respective form should be specified in the request. An extract shall be generally provided by the Rosreestr within 3-5 days from the receipt of request (3 for filing directly with the Rosreestr office and 5 for filing with the multifunctional center).

Documents confirming title to real estate registration.

IV. Sale and purchase of real estate

1. Preliminary agreement

Prior to entering into the main sale and purchase agreement (hereinafter – "SPA") the parties are entitled to conclude a preliminary agreement.

Under a preliminary agreement, parties agree to conclude the SPA in the future on terms specified in the preliminary agreement.

A preliminary agreement should contain conditions which allow the determination of a subject matter and other material terms of the SPA and should be concluded in the form provided for the SPA.

A preliminary agreement should specify a term for entering the SPA. If no term is specified, the SPA should be concluded within one year from

the date of conclusion of the preliminary agreement.

Should one party to the preliminary agreement fail to conclude the SPA, the other party is entitled to apply to the court to enforce conclusion of the SPA by the other party. The party failing to conclude the SPA shall reimburse damages resulting from such failure to the other party.

2. SPA

Under an SPA of real estate, a seller is obliged to transfer a real estate item (land plot, building, construction, apartment, or other real estate) to the ownership of a purchaser, and the purchaser is obliged to accept the real estate item and pay a certain sum of money (price) to the seller.

Material terms of the SPA:

– Subject matter of the SPA

The SPA should provide for the data uniquely identifying the real estate item that is subject to transfer to the purchaser under the SPA, including data on the location of real estate on a land plot or as a part of another real estate item. If no such data are specified, the SPA should be deemed not to have been concluded.

– Price

The SPA should provide for the price of the real estate item; otherwise, the SPA should be deemed not to have been concluded.

– Specific provision for sale of residential premises

An SPA of residential premises should provide for list of persons retaining rights to use such premises after transferring them to the purchaser under the SPA with specification of such rights.

Other important provisions:

– Payment conditions

If payment of price under the SPA occurs after the transfer of real estate to the purchaser (sale on credit), additional provisions such as method, terms, and amount of payment should be provided for in the SPA. In case a real estate item is sold “on credit,” it shall be considered mortgaged in favor of the seller until the full price is paid by the purchaser, unless otherwise provided by the SPA.

– Provisions in respect of real estate transfer

The seller is obliged to transfer the real estate item to the purchaser, and the purchaser is obliged to accept the real estate item from the seller. The transfer of real estate by the seller and its acceptance by the purchaser should be evidenced by a transfer and acceptance act sighed by the parties. The risk of loss of the real estate item passes to the purchaser at the moment when the transfer and acceptance act is signed; until then, the real estate item is at the seller’s risk.

Form of the SPA:

The SPA should be executed in writing by means of drawing up one document signed by the parties, otherwise the SPA is deemed invalid. Obligatory notarization of the SPA of real estate is not provided for in the law. The parties can notarize the SPA at their own will.

Rights to land plot when the building/constructions is being sold:

Under the SPA of building, construction, or other real estate item, the purchaser along with the title to such real estate item simultaneously acquires rights to a land plot where such building or construction is located, and which is required for their use.

If a seller has a title to a land plot where real estate being sold under the SPA is located and which is required for its use, the purchaser acquires a title to such land plot unless otherwise provided by the law.

3. Due Diligence

Within the due diligence procedure, the following legal risks are subject to examination, based on the following documents:

- Legal risks in respect of parties' powers to make transactions:
  - Constituent documents;
  - Registration certificated;
  - Powers to sign an SPA;
  - Necessary approvals, permits and consents;
- Legal risks in respect of title to real estate item:
  - certificate of state registration of title;
  - extract from the Register;
  - documents of title (for example, SPA);
- Legal risks in respect of prior owners:
  - documents - grounds for acquisition of titles by all prior owners;
- Legal risks in respect of compliance of real estate item with the purchaser's requirements
  - act on ranging of a land plot within particular category of land;
  - land management file/demarcation plan;
  - expert findings and competent authorities' reports;
- Legal risks in respect of existing encumbrances:
  - lease (with a term of more than a year);
  - mortgage;
  - easement;
  - attachment;
  - pending court proceeding;
  - preservation order.

4. Warranties

The party provided untrue warranties on circumstances significant for conclusion of the SPA, its performance or termination (including in respect of subject matter of the SPA, powers to conclude the SPA, compliance of the SPA with the applicable law, existence of necessary licenses and permits, its financial condition or in respect of third party) shall compensate to the other party on its request damages resulted from the untruthfulness of warranties or pay a penalty provided by the SPA. The party relying on untrue warranties also has a right to unilaterally terminate the SPA unless otherwise provided for in the latter.

Typical warranties in respect of real estate are the following:

- the seller is the registered sole owner of the real estate item;
- the real estate item does not have any encumbrances;
- the condition of the real estate item does not have any quality defects and does not need any repair works;
- there are no pending court proceedings in respect of the real estate item;
- all governmental approvals and permits for construction of the real estate item have been obtained;

- the seller has obtained all corporate approvals for acquisition and disposal of the real estate item;
- there are no third parties' claims in respect of the real estate item.

5. Parties' liability under the SPA

The seller's liability

Should the seller fail to transfer a real estate item to the purchaser, the latter has a right to:

- unilaterally terminate the SPA;
- request the transfer of the real estate item through a court order;
- claim for reimbursement of damages.

Should the seller transfer the real estate item of inadequate quality to the purchaser, the latter has a right at its own choice to:

- claim for pro rata decrease of the purchase price;
- demand the seller removes the defects at its own expense within a reasonable term;
- claim for compensation of the purchaser's expenses resulted from removal of defects.

In case of substantial non-compliance with the quality requirements, the purchaser has a right to unilaterally terminate the SPA and claim for repayment of the purchase price from the seller.

The seller shall transfer the real estate item free of third parties' rights unless the purchaser agrees otherwise. Should the seller violate said obligation, the purchaser has a right to:

- unilaterally terminate the SPA;
- claim for decrease of the purchase price.

Should the property be seized from the purchaser on grounds that existed before entering the SPA, the seller shall compensate damages to the purchaser unless they can prove that the purchaser knew or should have known about these grounds.

The purchaser's liability

Should the purchaser fail to accept the real estate item, the seller has a right to:

- request the acceptance of the real estate item by the purchaser;
- unilaterally terminate the SPA.

Should the purchaser fail to pay the purchase price the seller has a right to:

- request the payment of the purchase price;
- unilaterally terminate the SPA.

Contractual liability

The seller and the purchaser can agree upon contractual liability for violation of particular provisions of the SPA.

6. Share deal

Another method for acquiring real estate is a share sale – acquiring a share in a company holding title to real estate. A share deal can be performed by acquiring shares in a Russian joint stock company or by acquiring participatory interest in a Russian limited liability company. In a share deal, the purchaser acquires the target company with all its rights, obligations, and liabilities.

Real estate acquisition through a share deal may be preferable for the purchaser due to tax and other advantages of such a transaction. Sale of shares in a joint stock company or participatory interest in a limited liability company is not subject to VAT according to Russian legislation. Besides, share sales can be governed by foreign law selected by the parties to transaction, while asset deals are subject only to Russian law. A share deal allows parties to avoid state registration of transfer of real estate items belonging to the target company.

V. State registration

Transfer of title under the SPA is subject to state registration. State registration is normally done within 7-9 working days from receipt of documents required for state registration (7 for filing directly with the Rosreestr office and 9 for filing with the multifunctional center).

To register the transfer of title, the parties shall submit the following documents to the registration authority:

- an application for registration;
- an SPA or agreement/document – the ground for title transfer;
- documents confirming the applicants' authority (corporate documents, power of attorney, etc.);
- confirmation of payment of state duty;
- corporate and other approvals (if applicable).

Should one party to the SPA avoid state registration of the SPA, the other party has a right to apply to court to render a decision on state registration of title transfer. The party avoiding state registration of the SPA without a reasonable basis shall reimburse damages resulting from such avoidance to the other party.

The purchaser acquires the right of ownership from the moment of state registration of title transfer.

VI. Restrictions on sale of land

Russian law provides for several restrictions on ownership of particular types of real estate:

- Land plots taken out of circulation and owned by the Russian Federation cannot be privately owned and subject to real estate transactions (land plots occupied with state nature reserves and national parks; facilities of the Armed Forces of the Russian Federation, other armed forces, the Federal Security Service, the state guard authorities; nuclear facilities and storage facilities for nuclear and radioactive materials, etc.);
- Land plots of limited circulation and subject to state or municipal ownership cannot be privately owned unless otherwise provided for in the law (land plots within specially protected territories, forest lands; lands occupied with space infrastructure objects; lands underlying the sea and river ports, hydro-technical utilities, etc.).

Certain restrictions on ownership of land are provided for in respect of foreign citizens:

- Foreign individuals, apatrides and foreign legal entities cannot have a title to land plots located at the border territories the list of which is established by the President of the Russian Federation and at other territories as provided for in the law (within the borders of sea ports);
- Foreign individuals, apatrides, foreign legal entities and legal entities with a share of more than 50% belonging to foreign individuals, apatrides and foreign legal entities cannot have a title to land plots classified as agricultural lands and can only possess such land plots on lease terms.

VII. The principle of "unanimous destiny of land plot and objects closely connected to it"

Despite the legal distinction made between land plots and buildings located on them and considering them as separate property interests, one of the basic principles in the sphere of land law is the principle of "unanimous destiny of land plot and objects closely connected to it" which is as follows.

A person, when acquiring a title to a building or construction located at the land plot belonging to the owner of such building or construction, acquires the title as well to such land plot necessary for use of building or construction, unless otherwise provided by the law.

A person, when acquiring a title to a building or construction located at the land plot belonging to another person, acquires the right as well to use the respective part of such land plot necessary for use of building or construction on the same terms and to the same extent as prior owner did.

An owner of building or construction located at the land plot belonging to another person has a preemptive right to buy or lease such land plot.

Foreign individuals, apatrides, foreign legal entities – owners of buildings or constructions located at the land plot belonging to another person, have a preemptive right to buy or lease such land plot. However, the President of the Russian Federation can provide for the list of buildings and constructions that are not subject to the aforementioned rule.

VIII. State duties/transfer taxes payable on the purchase of real estate

– State duty:

State duty is payable for state registration of title transfer in the amount of 22 000 Rubles for legal entities and 2000 Rubles – for individuals.

– Value added tax (VAT):

The VAT is payable on sale of real estate at the rate of 20 % (comes into force as of January 1st, 2019) of full purchase price.

VAT is not imposed upon: sale of residential houses or premises and shares in such houses and premises;

- sale of land plots and shares in land plots;
- sale of shares in charter capital of companies holding title to real estate.

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About the firm

Lidings is a leading independent national law firm with a broad base of clientele in Russia and the CIS. The firm advises its predominantly international clients from its two offices in Moscow and St Petersburg. Since its launch in the mid-2000s, the firm has achieved impressive growth and built a noteworthy reputation. Lidings has followed a consistent strategy of growth to become a high-quality provider of legal services with a clear focus to advise almost exclusively international businesses active in Russia and the CIS. It has also been successful in establishing sector expertise in certain industries where global investors play an important part, such as pharmaceuticals and life sciences, automotive, energy, FMCG, and aviation.

The firm's significant footprint, accompanied by a growing degree of brand reputation in the domestic markets, has been recognised by a series of awards from independent global market analysts like The Legal 500 EMEA, Chambers and Partners, ILFR1000, Martindale-Hubbell, Who is Who Legal, and Best Lawyers.

Areas of practice

Antimonopoly, banking and finance, bankruptcy, and restructuring, corporate and M&A, criminal defense, dispute resolution, employment, government relations, intellectual property, real estate and construction, and tax and customs.

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INTERNATIONAL LAWYERS NETWORK

MILLER SAMUEL HILL BROWN

Buying and Selling Real Estate in Scotland

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SCOTTISH LAW

1. Introduction

This guide applies to real estate in Scotland only.

2. Tenure

Real estate, both commercial and residential in Scotland may be either of the following:

Freehold

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

Leasehold

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

3. Know your client (KYC)

It is necessary to carry out due diligence on the purchasing entity to comply with UK and European-wide Anti-Money Laundering Regulations. The documents which are required will vary depending on the purchasing entity, but they will need to establish the identity of the purchaser and its ultimate beneficial owner. Actual requirements are set out at greater length in Section 4.

4. Guide to purchase and sale of Residential Property

We are frequently asked by purchasers and sellers to answer many basic and wide-ranging questions concerning all types of residential property and investments. It is difficult to produce a comprehensive guide covering every aspect of a purchase/sale and conveyancing transaction. In these notes, we have attempted to highlight only the main topics. Each transaction has its own peculiarities and potential problems. We shall be pleased to answer more detailed questions and to advise as required.

INDEX

1. THE SURVEY

Ideally a purchaser should always obtain the most detailed survey report on the property to be purchased. Better to be “safe than sorry.” While a prospective purchaser is entitled to instruct their own report, generally, they may choose to rely on the home report referred to in the following section.

2. HOME REPORT

With a very limited number of exceptions (for example new build properties) all homes (all types) that are advertised for sale in Scotland from 1st December 2008 require a home report. This is a statutory requirement. The report consists of a pack of documents that will report on the condition of the property. It will contain

a valuation of the property, and a report on the home's energy efficiency. The responsibility for providing the Home report rests with the seller, who will be responsible for the costs involved in obtaining the information required and producing the report. A prospective purchaser will be able to rely on its contents and is entitled to ask the seller for a copy of the report. The report comprises three documents:

(1) THE PROPERTY QUESTIONNAIRE

This is completed by the seller and contains useful information helpful to a purchaser, for example, details of any alterations to the property, the council (local authority) tax banding, any managing agents' details, and details of repairs affecting the property.

(2) SINGLE SURVEY

Although instructed by the seller, the survey is prepared by a chartered surveyor and will report on the valuation of the home and its condition. A purchaser may rely on that survey and providing the purchaser is happy with the terms of that survey report and providing the purchaser's lender (if any) is also satisfied with the terms of that survey report, then a purchaser may feel it unnecessary to obtain and pay the cost of an independent report.

(3) THE ENERGY REPORT

Again, this is prepared by a chartered surveyor and will report on the energy efficiency of the property, its environmental impact and if appropriate will suggest ways to improve the property's energy efficiency.

Home reports dramatically change the level of information that a seller is legally obliged to have available when selling their home. The home report needs to be available to be exhibited to prospective purchasers before a property is marketed for sale.

We always advise that a prospective buyer should obtain the most detailed Report possible on a property, before proceeding with any purchase and should be comfortable and satisfied with the terms of any home report or survey instructed directly, before entering into a binding contract for the purchase of any property.

3. OFFER AND ACCEPTANCE – "MISSIVES"

When a written offer is submitted, that itself does not create a binding contract between the seller and purchaser. The offer for the property will, if generally acceptable to the seller as to purchase price and entry date, be accepted usually with legal qualifications. The offer, and any qualifications made by the two solicitors on behalf of their respective clients as part of the contract negotiations and the final acceptance will together constitute a binding contract between the seller and the purchaser (called "the missives"). Only after the final acceptance is issued will there be a binding contract and "missives will be concluded." The contract must be written. Verbal agreement is not sufficient to conclude a contract. It should be understood that individual purchasers and sellers do not usually sign the missives and the contract is made binding by the signature of the purchaser's and seller's solicitors.

4. TITLE DEEDS AND CONVEYANCING

Once there is a binding contract, the two solicitors (one for the seller and the other for the purchaser) will carry out the necessary conveyancing formalities and prepare the legal documentation. The purchaser's solicitor will receive and examine all the relevant Title Deeds of the property and will check the conditions, which apply to ensure that there are no unusual and exceptionally oppressive or onerous conditions. They will check to ensure that Local Authority Consents are in place for

any structural or other alterations to the property requiring consent. The existence of any structural alterations should be highlighted in the Survey/Home Report. During the Conveyancing process, checks are made to ensure, for example, that there are no previous Securities or mortgage deeds affecting the property, which will remain undischarged after the purchase has been completed, and to ensure that there are no court orders (such as a Bankruptcy Order) which prevent the seller from granting a good and marketable clear title to you. Similar procedures operate in reverse in the case of a sale. The seller's solicitors will answer any reasonable observations made on the conditions in the title deeds and searches.

The purchaser's solicitor will prepare the conveyance of title deed in favour of the purchaser, and after settlement of the transaction takes place, ensure that the purchaser's title is registered in the Land Registers. The registration system is electronic, and all deeds are now held electronically by the Scottish Land Registry.

5. LAND AND BUILDINGS TRANSACTION TAX (formerly Stamp Duty)

This tax has been recently introduced by the Scottish Government and replaces Stamp Duty. It is based on the price of the property purchased, and the level of tax has been increased for more expensive properties. Please ask us for a calculation of the tax payable when considering purchasing a property in Scotland.

6. MONEY LAUNDERING REGULATIONS

Every solicitor in Scotland must comply with The Law Society of Scotland's money laundering regulations. This means that if we have not acted for a client in the past, we must in every case obtain verification of identity. If the documentation required cannot be produced, then we may have to report the transaction to the relevant authority. We would also likely withdraw from acting. We will need to see the original of one of the following: UK passport, resident's permit issued to EU nationals, UK (or EU equivalent) photo driving license, Inland Revenue Tax Notification, firearms certificate, or suitable ID from client who reside outwith the EU and the original of one of the following: bank statement, utility bill, council tax bill, mortgage statement, land registry confirming house purchase, confirmation of house purchase from other solicitor, tenancy agreement or confirmation of address from Electoral Register, or the equivalent from clients residing outwith the EU. Clients from the EU and further afield will also be required to provide information about the source of funds to be used for their purchase. If the purchaser is buying or selling as a limited company, partnership, or other body, but not as an individual, we still need to carry out such money laundering checks, as are required by the laws in force at the time. We will supply prospective clients with details of the current requirements at the outset of the transaction.

7. INSURANCE

We recommend that buildings insurance on the property and if relevant life policies on purchaser's lives are effected (provided proper advice is taken and given) and, subject to that, put into force as soon as missives are concluded in any purchase because from that date a purchaser will be under a legal obligation to purchase the property and pay the purchase price.

8. GENERAL

Hopefully, we have covered some of the more relevant issues that may arise during a residential sale or purchase transaction. We did

not set out in these notes to answer every question but have simply dealt with some of the most often raised questions.

5. Purchase/Leasing of Commercial Property

The principles of commercial property practice in Scotland are not dissimilar to English practice. There will be differences in terminology, legal variances where the actual law differs in each country, and the Land and Buildings Transaction Tax payable. We would refer you to Fladgate LLP's excellent guide for general information, but should you have a specific query relating to purchase or leasing in Scotland generally, or indeed any planned purchase, sale, lease, or development of commercial property in Scotland, please refer your query to us and our experts will be pleased to assist you.

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INTERNATIONAL LAWYERS NETWORK

PETERKA & PARTNERS

Buying and Selling Real Estate in Slovakia

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SLOVAKIAN LAW

I. Types of Real Property Conveyance [2] Transactions

a) Purchase of an undeveloped plot of land

b) Purchase of a developed plot of land

c) Purchase of a building

d) Purchase of a flat

e) Purchase of non-residential premises

f) Establishing a right to build[3]

Note:

A separate form of acquiring real property (indirectly) is a share deal – acquiring control over the entity (see below) owning the real property through purchase of shares in such entity.

Conveyance of title to real property may also take the form of a donation (see below) or exchange contract (basically a mirrored purchase contract).

II. Formal Requirements

A contract for the transfer of real property (purchase, donation) must be in writing and the expressions of will of the parties must be contained in the same document.

The signature of the transferor (on a paper-form contract) must be certified by a notary or a municipality's registry department.

Exceptions apply in cases where (i) the state, a state body, a municipality, etc. is a party to the contract, (ii) the conveyance agreement is drafted in the form of a notarial deed or (iii) the conveyance agreement is drafted by an attorney-at-law (so-called "authorisation").

A transfer contract may also be concluded in electronic form – by means of guaranteed electronic signature. No signature certification is required in such case.

III. Contents

a. Mandatory Content

- The identification of the legal transaction at hand (purchase, donation, etc.), place and time of the legal transaction;
- Identification of the contracting parties;
- The purchase price;
- An exact description of the real property, i.e., a description of the
  - **land** – the details of the cadastral territory, the exact plot number, the land register "C" or "E", the type of land, and the area of the land;
  - **building** – the details of the conscription number and the plot number on which the building is erected;
  - **apartment** or **non-residential premises** – details of the number, floor number, entrance number and co-ownership shares in common parts and common facilities of the house and on the built-up and adjacent land, the conscription number and the plot

[2] Please note that for the purposes hereof, we focus on conveyance of real properties based on a contract (in contrast to other types of real property transfer, such as inheritance or in auction).

[3] The right to build is a *right in rem* related to a plot of land consisting in a right to have an above-ground or underground structure whether yet existing or existing in future. It is not considered as real property *per se* under Slovak law.

number on which the building is erected;

Note: Under Slovak law, the land (*solum*) and the building (*superficies*) constitute two distinct objects of ownership. Thus, the land and the building built upon it may be owned by different persons.

- Where the real property is jointly owned by several owners, the ownership title expressed as a fraction of the total (e.g., 1/2) must be stated;
- Specific required contents in respect to a contract for transfer of a flat, such as accession to the Agreement on management of blocks of flats.

b. Recommended Content

- Specific payment terms reflecting, e.g., loan, involvement of a bank, etc.;

  Note: To ensure that the purchase price is transferred to the transferor, the parties mostly use a deposit of the purchase price at a notary, attorney-at-law or bank (escrow account). The parties thus conclude a separate escrow agreement with the bank, notary or attorney-at-law. According to the escrow agreement the bank/notary/attorney-at-law is obliged to transfer the purchase price upon the fulfilment of the condition precedent(s) for the release of the purchase price detailed in the escrow agreement. These usually include submission of an official extract from the land register evidencing the registration of the transferee in the land register as the owner of the transferred real property (and additional content, e.g., that the real property is free from any mortgage and/or easement).
- Handover procedure details;
- Liability for defects – from extended liability (compared to statutory standard) to no liability (using an "as is" condition clause);
- Declarations, if necessary, regarding the required municipal decisions such as, for instance, the occupancy permit determining the purpose of the use of the real property;
- Detailed representations and warranties regarding the current ownership and substantial characteristics of the real property such as: access, connectivity to supplies (gas, electricity, etc.);
- Determination of the technical condition of the flat based on based on expert appraisal with specification of the repairs to be carried out within the next 12 months;

  Note: Collateral provisions may be agreed in the conveyance agreement dealing with specific requirements of the parties, such as (i) reservation of the ownership right (e.g., until full payment of the purchase price), (ii) repurchase clause, (iii) pre-emption right, (iv) trial purchase. A detailed description of these institutes exceeds the scope of this overview however they could be useful in some cases. We will gladly provide more detailed information upon request.

IV. Legal Title & Due Diligence

Legal Title

The legal systems that have historically governed the ownership of real property in the territory of the Slovak Republic have resulted in a situation characterized by fractioned ownership of lands and legal uncertainty due to the fact that the same lands can sometimes be concurrently recorded in different registers and even in the name of different owners.

The records of ownership recorded in the land registry do not represent definitive proof of ownership as these records are considered veracious until proven otherwise.

Thus, a review of the land register is of major importance where ownership status is concerned. In particular, in major transactions a detailed review of title records for the past 10 years is highly recommended.

Due Diligence

In addition, depending on the location and nature of the real property, the seller should conduct a detailed due diligence review focused on specific issues (as applicable):

- unrestricted right to transfer the real property, pre-emption rights, long-term lease of arable lands, existence of mortgage over the real property;
- specific historical forms of ownership, e.g., "Urbarium" and ramifications on the transaction or intended use;
- (non)existence of unresolved ownership restitution claims raised by entitled persons persecuted by the fascist/communist regimes;
- construction planning aspects/restrictions;

  Note: Construction, alteration as well as a change in use or the demolition of a building in most cases requires a territorial and (building) permit issued by the local building authorities. The building project has to comply with the local (or zoning, as the case may be) development plans. Therefore, with regard to the prospective plans of construction, the development and land use should be reviewed very carefully before the closing of the contract.
- environmental burdens and issues;
- access to utilities networks;
- public law limitations (civil defence structures, inundation area, etc.);
- sufficient access to the real property (e.g., public road connection).

V. Ownership Restrictions

In general, the ownership of arable land is, under current laws, reserved for the state or individuals or entities that are "local". A transferee may only acquire arable land if it fulfils the condition of having permanent residence or a corporate seat in Slovakia ten years before concluding the purchase contract. This fact must be certified by the local District Office and presented in the land registry proceedings. Nonetheless, this restriction has just recently been found in contradiction to the constitution and made ineffective and shall most likely be abolished and replaced.

VI. Transfer of Ownership

The transfer of ownership to real property in each case requires initiating a procedure before the local District Office (land registry department) on the basis of paper documents and/or documents in electronic form.

The proceedings for the entry of the ownership right in the land registry are instituted by means of an application filed by any party; the deadline for a decision on entry is 30 days, in "accelerated" proceedings 15 days.

A frequent instrument used in the conveyance of real property in Slovakia is a "geometrical plan" which is a set of descriptive data and geodetic layouts used for outlining the new boundaries of separated lands or a corridor of a possible easement, etc.

Note: Since a recent amendment to Slovak law, any errors in writing, calculation or other obvious errors can be rectified only through an amendment to the agreement.

The ownership is transferred to the transferee upon a decision of the land registry department (as of the date of application for entry in the case of flats).

VII. Forms of Ownership

In general, all individuals and legal entities can invest into and own real property assets. It is irrelevant if the owners and purchasers are resident or non-resident or which country they come from. It is only crucial that they have legal capacity.

The most frequent forms of ownership are:

1. **Sole ownership:** The owner is the only person with ownership right to the real property.

2. **Co-ownership:** More than one person owns an undivided share in the real property. Each co-owner is entitled to dispose over its share. In case of transfer, the other co-owners have pre-emptive right (save for transfers to close persons such as a child, etc.)

3. **Joint ownership of spouses:** Each of the spouses is entitled to a share of the joint property, but is not entitled to dispose of it independently, i.e., without the consent of the other joint owner (spouse).

Residential property is typically owned by individuals (90% of flats in Slovakia are in the ownership of individuals/inhabitants). Owners of commercial property are most frequently legal entities under either private or public law. The most commonly used legal forms are joint-stock companies (a.s.) and limited liability companies (s.r.o.). Also, forests and/or arable lands are, to a large extent, owned by the Catholic church.

VIII. Agents

The buyer or seller can both use the services of a real property agent. Currently there are several renowned firms on the market providing services for the intermediation of retail premises and industrial areas.

The agent commission is determined by agreement of the parties without specific limitations.

Caution is recommended when using local agents as the legal-technical quality of the documents used by them is generally not at a level ensuring clear distribution rights and obligations among the seller, buyer and the agent in case an issue should arise.

IX. Donations

Real property can be donated by means of a donation agreement. Please note that given the specific nature of the donation, the return of a gift can be demanded only if the beneficiary commits a gross violation of good morals against the donor or the members of their family.

X. Financing

The usual way of financing real property is a bank loan/mortgage for at least a part of the purchase price. A bank thus regularly insists on collateral.

Typically, a buyer has to pay a certain portion of the purchase price from its own sources (the use of such financial resources is usually a condition precedent to drawing the loan). For large development projects banks usually require establishing a mortgage over the real property, shares in the buyer-legal entity as well as a pledge over all kinds of possible claims the buyer is expected to possess in the future in connection with the real property such as rent, insurance payment, etc.

For special transactions, such as large individual properties or real property portfolios, a common alternative to a bank loan is the use of capital market products, for instance, bonds, receivables or credit derivatives.

XI. Costs and Taxes

The costs associated with the registration of the transfer are typically borne by the buyer. However, the seller usually has to bear the costs of deleting of existing mortgages (e.g., securing the seller's debts) from the land register.

The real property tax is a local tax the amount of which is determined by the respective local municipality for different types of land and premises.

The real property tax is paid for a tax period of a calendar year in advance. The purchaser shall report the acquired real property within 31 January of the following calendar year. The tax is payable upon receipt of the decision of the local municipality containing the calculation of the tax (within 15 days of the decision becoming final).

The transfer of real property may also involve many other tax aspects, particularly when a VAT regime applies. We strongly advise that tax advisors are involved in order to ensure that these aspects are dealt with comprehensively.

XII. Acquisitions

Real property can be acquired by way of an asset or a share deal. In the case of a share deal, the legal entities used for these purposes are mostly organized as limited liability companies or joint stock companies.

1. Limited Liability Company – s.r.o.

The most widely used legal form owing to its high flexibility, low capital requirement and relatively few obligations.

a) Legal Entity

- A legal entity acts autonomously, represented by executive director(s);
- Independently subject to taxation;
- The particular rights and obligations of an s.r.o. exist autonomously from those of the shareholders and the executive directors;
- The company's statutory body is one or more executive directors. The executive directors act in all matters on behalf of the company in the way of acting that is registered in the Commercial Register. The Foundation Deed (the Memorandum of Association, see below) may state that the executive directors constitute a collective body. The internal restriction of the executive directors' powers is not effective against a third party. Under Slovak law, a violation of these duties by an executive director

will not (alone) affect the validity of a contract with a third party, but the s.r.o. may hold the executive director in question liable for damages.

b) Formation

- The foundation act is a Memorandum of Association or Foundation Deed in the case of a sole shareholder. It has to be notarized;
- Setting up an s.r.o. is not complicated and can be accomplished easily;
- A supervisory board is not an obligatory company body.

c) Costs of Formation

Typically, the estimated total public fees (signature certification & Commercial Register fee) for the formation of an s.r.o. amount to approximately to €400 (€250 in the case of electronic filing). The attorney's fees for services rendered in the process of establishing and incorporating an s.r.o. vary depending on the number of shareholders, business authorizations sought and instruments the shareholders wish to put in place, such as a Shareholder Agreement, etc.

d) Minimum Registered Capital

The minimum registered capital required for an s.r.o. is €5,000. In the light of recent developments in Slovakia's corporate law, it is recommended to set up a company with capital reflecting the amount of liabilities assumed by the company in order to mitigate the risk that the company could be considered "in crisis" or even insolvent.

Nevertheless, at least 30% of each shareholder's monetary contribution and a half of the total registered capital must be paid-up before the company's registration in the Commercial Register. In the case of a sole shareholder, the registered capital has to be paid-up entirely.

e) Limited Liability

The shareholders of the entity are not personally liable for the company's debts. The shareholders however provide a guarantee for the company's debts up to the extent of their unpaid contribution in the registered capital.

2. Slovak Joint-Stock Company – a.s.

a) Legal Entity

- An a.s. (akciová spoločnosť) is a legal entity in which the shareholders are not liable for the debts of the company during its existence;
- It is more complicated to form and operate than an s.r.o. and additional costs arise in connection with keeping the register of shareholders;
- Hence, the rules for an a.s. are generally less flexible compared to the rules for forming a limited liability company;
- A company can be founded by one founding shareholder – a legal entity; otherwise there must be two or more individuals or legal entities;
- An a.s. may have the form of a private a.s. or, where its shares (or some of them) have been listed on the stock exchange in any EEA member state, a public a.s.;
- Registered shares may be issued as certified or book-entry securities, whilst bearer shares are issued in book-entry form only;

- Corporate bodies mandatorily include a General Meeting, a Board of Directors and a Supervisory Board;
- A General Meeting consists of all company shareholders and takes place at least once a year. It is positioned as the supreme body holding powers, e.g., in personal matters (electing, remunerating corporate body members) as well as deciding on the distribution of profits and amending the Articles of Association.

b) Formation

The foundation act is either a Foundation Deed or Foundation Agreement in the case the company is established without a call to subscribe shares or the minutes from the constituent General Meeting where the registered capital is subscribed by more shareholders on the basis of a call. All of these documents must include Articles of Association (By-laws) containing mandatory information and must be prepared in the form of a notarial record.

c) Costs of Formation

Typically, the estimated total public fees (signature certification and Commercial Register fee) for the formation of an a.s. amount to approximately €900 (€600 in the case of electronic filing). The attorney's fees for services rendered in the process of establishing and incorporating an s.r.o. may vary significantly depending on the number of shareholders, method of establishing, etc.

d) Minimum Registered Capital

The minimum registered capital required for an a.s. is €25,000. At least 30% of its subscribed registered capital must be paid up by the time of the submission of the proposal for registration to the Commercial Register.

e) Limited Liability

The shareholders of the entity are not personally liable for the company's debts.

Note: Persons acting on behalf of the company before the company's incorporation in the Commercial Register are liable for the obligations which arise therefrom – these obligations can be assumed by the company within 3 months from its incorporation, and then it is bound by such acts from when it began.

3. Other types of entities

There are three other types of business companies: a Limited partnership company (k.s.), an Unlimited partnership company (v.o.s.), and a Simple joint-stock company (j.s.a.) However, these forms are not very often used as vehicles in real property transactions.

A specific form of entity, a "flat owners' cooperative" is not unusual in Slovakia. However, it is more a residue from past cooperative ownership of blocks of flats. Only rarely is it used as an investment vehicle for developing blocks of flats today.

This overview is for information purposes only.

Under no account can it be considered as either a legal opinion or advice on how to proceed in particular cases or on how to assess them. If you need any further information on the issues covered by this overview, please contact Ms. Andrea Butašová (butasova@peterkapartners.sk) or Mr. Marián Lauko (lauko@peterkapartners.sk).

PETERKA & PARTNERS is a full-service law firm operating in Central and Eastern Europe providing one-stop access to an integrated regional service. The firm provides legal services to multinational companies active in the region, as well as leading local groups, providing them with complex legal solutions with exceptional commercial value.

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Buying and Selling Real Estate in Turkey

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER TURKISH LAW

1. Agreement Types

Pursuant to Turkish laws, a real estate sale and purchase agreement shall be in an official form and the transfer of ownership of real estate is only possible with an official deed and registry, which is signed at the Land Registry Directorates.

It is also possible to sign a real estate sale commitment agreement that sets forth the conditions of the sale before a notary public. It is advisable to annotate this agreement to the relevant land registry records to assert personal rights arising from this agreement to third parties. In case the real estate has been acquired by third parties, a lawsuit for the nullification of title deed can be filed. However, if the sale is not effectuated within five years of the annotation, the annotation will be automatically removed by the Land Registry Directorates pursuant to the Land Registry Law.

2. Buyer's Inspection

Due diligence at the Land Registry Directorates shall be carried out to determine if there are any encumbrances and limitations on the real estate, such as mortgages, attachments, rights in rem, lease annotation or any obstacle preventing the purpose of the sale. It is advisable for the buyer to inspect that the property tax for the real estate has been paid and the real estate has been constructed in compliance with the zoning plan.

3. Financial Obligations

The transfer and acquisition of real estate may give rise to title deed fees, annotation fees, stamp tax, notary fees, value added tax, income tax and corporate tax.

a. Title deed fee

The title deed fee is 4% of the purchase price and shall be paid equally by the seller and buyer. It is revised annually by the Ministry of Finance.

b. Stamp tax and notary fee

In case a real estate sale commitment agreement is signed before a notary public, a stamp tax of 0,948% and a notary fee of 0,113% of the purchase price shall be applied. Unless otherwise agreed by the parties, the buyer and seller shall be jointly liable for the payment of the stamp tax and notary fee.

The annotation fee is 0,683% of the purchase price and shall be paid in case of annotation of a real estate sale commitment agreement to the land registry records.

The rates are revised annually by the Ministry of Finance.

c. Value added tax

If commercial income is generated from the sale of real estate, the sale transactions shall be subject to VAT. VAT rates for residential real estate vary from 1% to 18% depending on the net area. On the other hand, the sale of commercial real estate shall be subject to VAT of 18%.

In the case that real estate has been owned by companies for at least a two-year period, the sale of such real estate shall be exempt from VAT. However, companies that are engaged in real estate trading business cannot benefit from VAT exemption.

d. Income tax and corporate tax

Capital gains generated by individuals from the sale of real estate shall be subject to income tax, which varies from 15% to 35%. However, if the term of

holding the title is longer than five years, the sale of such real estate shall be exempt from the income tax.

Capital gains generated by companies shall be subject to the standard corporate tax rate of 20%. However, 75% of capital gains shall be exempt from corporate tax provided that the real estate has been owned by the selling companies for at least two years.

4. Acquisition of Real Estate by Foreign Real Persons and Foreign Commercial Companies

The Land Registry Law regulates real estate acquisitions made by foreign real persons and foreign legal entities.

Foreign real persons are entitled to purchase real estate in Turkey, pursuant to the Land Registry Law. In accordance with Article 35/1 of the Land Registry Law, *"Foreign real persons who are citizens of countries determined by the Council of Ministers pursuant to international relations and the country's benefits may acquire real estates and rights in rem in Turkey provided that the legal restrictions are to be complied with."*

Foreign commercial companies, which are established pursuant to the relevant laws of their countries, are entitled to acquire real estate in Turkey only within the provisions of special laws such as the Law on Encouragement of Tourism.

However, according to Article 35/3 of the Land Registry Law, *"In case the country's benefits necessitate, the Council of Ministers is authorized to determine the acquisition of real estates of foreign real persons and foreign commercial companies which are established pursuant to the relevant laws of their countries in terms of country, person, geographical area, duration, number, proportion, qualification, area meter and quantity; limit, cease entirely or partially or forbid the acquisition."*

There are legal restrictions for foreign real persons and foreign commercial companies in acquisition of real estate as follows:

- Areal restriction: The total area of the real estate that a foreign real person may purchase cannot exceed 10% of the total area of private real estate within the related district and 30 hectares in total within Turkey.
- Territorial restriction: If the area desired to be purchased is within the borders of a military forbidden zone or military security zone, foreigners cannot acquire such real estate.
- In case the acquired real estate is in land form, foreign real persons and foreign commercial companies should submit the project that will be developed on the unconstructed real estate to the relevant ministries for approval within two years.

The real estate is subject to liquidation provisions in following cases:

- if the real estate is acquired in violation of the laws;
- if the relevant ministries and administrations determine that the real estate is used in violation of purpose of purchase;
- if the foreigners do not apply to the relevant ministry within the required time in case the property is acquired with a project commitment;
- if the projects are not realized within the required time.

In above-mentioned cases, if the liquidation process has not been conducted by the owner

within the period given by the Ministry of Finance, which shall not exceed one year, the liquidation shall be carried out by the ministry and the amount acquired as a result of the liquidation shall be submitted to the holder of right.

5. Acquisition of Real Estate by Foreign Invested Turkish Companies

Foreign-invested Turkish companies as defined below are entitled to acquire ownership of real estate in Turkey only if such acquisitions shall be in relation to scope of activities stipulated in their articles of association:

- If 50% or more shares are owned by foreign real persons, companies incorporated in accordance with the laws of foreign countries, or international institutions; or
- If foreign real persons, companies incorporated in accordance with the laws of foreign countries, or international institutions have right to assign or depose most of the persons having the management rights in that company established under Turkish laws.

However, acquisition of real estate in a military forbidden zone or military security zone or a strategic zone is subject to the approval of the commanderships. The acquisition is also subject to the governorate's approval, if the real estate is in a special security zone.

The companies with foreign capital outside the scope of above-mentioned companies are entitled to acquire real estate in Turkey with equal treatment to local investors.

It should be noted that if companies have real estate in Turkey and the shareholding structures have changed and the companies fall within the scope of the foreign invested Turkish companies as explained above; the companies shall notify such change to the Ministry of Economy within one month following the transfer of shares.

The governorate checks whether the companies use the real estate in accordance with their field of activity stated in their articles of association. If the governorate determines that the companies do not comply with such use, a period of six months will be given to the companies to provide the compliance with the regulation. In case of failure by the companies, the real estate shall be liquidated.

6. Necessary Documents for Application

The owners of the real estate or authorized representatives shall make an application to the relevant land registry directorates. Necessary documents for the application are as follows:

- Title deed of the real estate or detailed information about the real estate.
- Identification document or passport together with its translation.
- Property value statement document to be provided from the relevant municipality.
- Compulsory earthquake insurance policy.
- Photos of the seller and the buyer.
- If the power of attorney is prepared abroad, the original power of attorney and its certified translation.
- Signature circular of companies.
- Certified of authority of companies to acquire and sell real estates issued by relevant registry.

In addition to above given documents, buyers with foreign nationality shall also obtain potential tax numbers from Turkish tax offices.

7. Annual Cost for Ownership of Real Estate

The owners of real estate shall pay a real estate tax that varies from 0.1% to 0.6% of the tax-based market value determined by the relevant municipality and shall take out a mandatory earthquake insurance policy.

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Buying and Selling Real Estate in England, Wales, and Northern Ireland

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER BRITISH LAW

1. Introduction

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

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

We have however added footnotes to relevant paragraphs which seek to highlight some of the more salient differences with real estate transactions in Northern Ireland which we hope you will find useful. This does not obviate the need for specific legal advice which should be obtained in all cases.

2. Tenure[4]

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

Freehold

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

Leasehold[5]

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

Commonhold[6]

This is a relatively new type of real estate ownership. It allows perpetual "strata" ownership of a multi-occupied residential property by the individual unitholders, with joint responsibility over common areas and facilities. However, commonhold has, for various reasons, failed to gain traction in the marketplace and is rarely used. Residential apartments are, therefore, almost always owned under a long lease.

3. Know your client (KYC)

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

[4] In Northern Ireland there is an additional form of tenure – fee farm grant. This is a hybrid species of tenure where the title is effectively freehold but has some of the characteristics of a long lease, such as a rent and forfeiture rights. Since 10 January 2000 it is no longer possible to create a new fee farm grant, but many are still in existence.

[5] It is common for land to be held under a long lease in Northern Ireland. However, it should be noted that, since 10 January 2000, it is no longer possible to grant a new long lease (i.e. a lease for more than 50 years) of a dwelling house other than an apartment. It is also possible for a leaseholder to buy out their ground rent and obtain a freehold title, but this is not normally worth the expense as many restrictive covenants will still remain.

[6] This form of real estate does not exist in Northern Ireland, where residential apartments are also typically owned under a long lease. As noted above, it is still permissible to grant a new long lease of an apartment.

the identity of the purchaser and its ultimate beneficial owner

4. Individual stages in a real estate purchase

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

Before signing the purchase contract

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

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

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

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

Exchange of contracts

Once the contract has been negotiated and agreed and the buyer's investigations have been completed, the parties will then proceed to "exchange" formal written contracts. It is usual for a buyer to pay a deposit, often but not always of 10% of the purchase price on exchange, which sum is liable to be forfeited if the buyer does not "complete" (i.e. close) the purchase. Completion of the actual transfer of the real estate follows a pre-agreed period following exchange of contracts, typically about 28 days.

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

Registration of the buyer's title

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

5. Lender's requirements

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

- a satisfactory valuation from the lender's valuers;
- a satisfactory report on title from the lender's solicitors confirming that the lender will obtain a good and marketable title to the real estate;
- full information about the proposed borrower, including company accounts (where applicable); and
- where the real estate is bought as an investment, details of the occupiers of the real estate and the passing rents.

6. Leasing of commercial premises[7]

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

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

Long-term leases of commercial real estate are not uncommon, especially where there are plant and machinery tax benefits (capital allowances) that the freeholder wishes to retain or where the freeholder will not willingly part with the freehold (e.g. the Grosvenor Estate). Residential apartments are also owned by means of a long lease.[8]

The liabilities of a tenant will depend on what is agreed between landlord and tenant and are subject to negotiation. Generally, however, an occupational tenant would expect to be responsible for the costs of repairs, insurance, business rates (local taxes) and outgoings. There may also be an obligation to contribute by way of service charge for services provided by the landlord. The lease is also likely to prevent the tenant from making substantial alterations. The lease may also prevent the tenant from subletting or disposing of the lease

[7] In Northern Ireland, the majority of commercial leases are subject to the terms of the Business Tenancies (NI) Order 1996 which gives business tenants security of tenure and unlike in England and Wales the provisions of this Order cannot be excluded by the terms of the lease. Under the Order, as long as the tenant continues to perform their obligations under the lease, a lease of business premises will continue indefinitely unless either the landlord or the tenant serves a notice that they wish to determine the tenancy, or the tenant serves a notice requesting a new tenancy. The landlord can only bring the tenancy to an end if there is a legitimate reason, for example, that the premises have fallen into disrepair due to the tenant's failure to comply with the repairing obligations or that the landlord intends to carry out development works which cannot be carried out whilst the tenant is in possession of the premises. The Order also provides that, where the lease states that the tenant cannot alienate the premises or make improvements without the landlord's consent, it will be implied into the lease that such consent will not be unreasonably withheld or delayed.

[8] Please see note 2 above.

to a new tenant without the landlord's prior written consent.

The rent under an occupational lease generally reflects the open market letting value of the premises and, depending on the length of lease term, there may be rent reviews at predetermined intervals (typically five years). The rent under a building or ground lease, however, is usually nominal, reflecting the fact that a capital premium has been paid on the grant of the lease.

The occupying tenant of business premises normally has a statutory right to renew the lease on the expiry of the contractual term. This right can be excluded by agreement between the landlord and tenant by following a prescribed procedure.[9] Most underleases and short-term leases (e.g. five years or less) will exclude the right to renew.

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

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

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

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

A tenant taking a transfer of a lease from an existing tenant is unlikely to have the opportunity to negotiate the terms of the lease but will have to take it on its existing terms.

A tenant who takes a transfer of a lease originally granted before 1 January 1996 is likely to have to remain liable under its terms for the remainder of the lease period, even though it subsequently transfers it to a new tenant, if there is a subsequent default.[10]

An original tenant or a tenant who takes a transfer of a lease granted on or after 1 January 1996 is likely to have to guarantee any new tenant to whom it transfers the lease for the period that that particular tenant remains the tenant, but its guarantee will cease if the new tenant later transfers the lease to another party.[11]

7. Ownership structure

The choice of ownership structure is often tax driven. We look at tax in the next section but

[9] Please see note 5 above – this is not possible in respect of leases in Northern Ireland which are subject to the Business Tenancies (NI) Order 1996.

[10] These provisions do not apply to leases in Northern Ireland. An outgoing tenant will be relieved from any future liability under the lease if the landlord's consent is endorsed onto the deed. However, dependant on the terms of the commercial lease, it would not be uncommon for landlords to be able to require suitable guarantors for any incoming tenant if it is reasonable to do so.

[11] Please also see note 7 above.

here we focus on the non-tax facets of different types of ownership.

Personal ownership / Directly held

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

Disadvantages: Details of land ownership are held on a central, searchable register at the Land Registry. If owned through a nominee (be they a corporate entity or trustees of a bare trust), only the nominee's details appear on the title but UK corporate nominees have had to disclose their ultimate beneficial owner on a separate public register (see below) since June 2016 and, under current proposals, non-UK corporate nominees will also have to do so with effect from 2021. A UK Will and UK Property and Financial Affairs Lasting Power of Attorney should be considered, to avoid a loss of control over the property in the event of death or incapacity. The asset will be exposed to claims from creditors and potentially also on divorce or relationship breakdown.

Company registered in UK

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

Disadvantages: Since June 2016, those owning more than 25% of the ultimate beneficial ownership of a company must appear on a publicly searchable register held at the UK's Companies House. Corporate governance documentation, such as company articles and possibly shareholders' agreements, may be required in order to regulate who controls the company in the event of death, divorce or incapacity. The shares owned by the ultimate beneficial owner of the company will still be taken into account in the event of financial claims but pre-emption rights in the company's articles may prevent the shares being transferred to satisfy creditors.

Company registered offshore (i.e. outside UK)

Advantages: The jurisdiction may not have introduced public registers of ultimate beneficial owners. The use of a nominee to hold shares may prevent the identity of the ultimate beneficial owner being disclosed.

Disadvantages: Annual running costs can be high. It is proposed that provisions requiring the disclosure of ultimate beneficial ownership, similar to the rules that apply to UK companies, will be introduced in 2021.

Partnerships

Limited partnerships are private arrangements whose terms do not appear on any central register. The identity of the partners is not disclosed unless the partnership is a Limited Liability Partnership, in which case the members of the partnership will appear on a publicly searchable register at Companies House.

Trusts (UK or offshore)

Advantages: Common law jurisdictions often have a significant body of law associated with trusts and their operation, providing certainty as to how they can be used. Trust assets can benefit successive generations. Often beneficiaries do not hold a fixed share of trust assets, so a beneficiary's death or incapacity does not affect the administration of the trust's assets.

Disadvantages: The trust model may, in the opinion of some, confer insufficient control on the person contributing the wealth to the trust structure. In certain trust jurisdictions (especially the UK), the law may be perceived as allowing the beneficiaries to have too much influence. The trustees' fiduciary obligation to

act in the best interests of the beneficiaries may prove too constraining.

8. Tax implications of ownership structures

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

- In England and Northern Ireland stamp duty land tax (**SDLT**) at rates that differ significantly depending on whether the real estate is commercial or residential.
    - For commercial real estate, the rate of tax is 0% on the first £150,000 of the purchase price, 2% on the next £100,000 and 5% on the remaining amount.
    - For residential real estate, the rates are 0% on the first £125,000 of the purchase price, 2% on the next £125,000, 5% on the next £675,000; 10% on the next £575,000 and 12% on the remaining amount. The relevant rates for purchasers of additional residential real estate (whether buy-to-let property or second homes) are 3%, 5%, 8%, 13% and 15% respectively. First-time buyers of properties worth up to £500,000 may pay a reduced rate of SDLT. The government intends to publish a consultation in January 2019 on a new SDLT surcharge of 1% for non-residents buying residential property in England and Northern Ireland.
    - With regard to leases, a 1% rate of SDLT will be due on the net present value of the rent, above £125,000 (residential) or £150,000 (non-residential/mixed), which is calculated using a formula that takes into account various factors, including the fact that rents to be received in the future have a lower value than rents received immediately.
    - For commercial leases, where the net present value exceeds £5m, the rate of SDLT for the proportion of the net present value above £5m is 2% rather than 1%
    - A 15% SDLT rate applies when residential real estate costing more than £500,000 is acquired by certain "non-natural persons" (**NNP**s). These include companies and partnerships with a corporate partner but not trustees. Relief from the 15% charge (with the effect that the normal rates apply) may be claimed by NNPs carrying on real estate development or using real estate for commercial renting to third parties. Conditions apply.
- In Wales, land transaction tax (**LTT**) is payable instead of SDLT. The two taxes (and the reliefs that apply) are broadly similar but there are differences:
    - For commercial real estate, the rate of tax is 0% on the first £150,000 of the purchase price, 1% on the next £100,000, 5% on the next £750,000 and 6% on the remaining amount.
    - For residential real estate, the rates are 0% on the first £180,000 of the purchase price, 3.5% on the next £70,000, 5% on the next £150,000, 7.5% on the next £350,000; 10% on the next £750,000 and 12% on the remaining amount. Purchasers of additional residential real estate pay an additional 3% on each band as is the case for SDLT. There is no first-time buyer's relief in Wales.

  - With regard to commercial (but not residential) leases, a 1% rate of LTT will be due on the net present value of the rent above £150,000. Where the net present value exceeds £2m, the rate of LTT for the proportion of the net present value above £2m is 2% rather than 1%.
  - Unlike in England, NNPs of residential real estate do not pay an enhanced rate of LTT.

- Annual Tax on Enveloped Dwellings (**ATED**) came into effect on 1 April 2013 and is currently payable only in respect of residential properties owned by NNPs worth in excess of £500,000 on 1 April 2012 (or at acquisition if later). For ATED tax year 2018/19, the valuation date changes to 1 April 2017 for properties held on that date. ATED is an annual charge of up to £226,950 per year (as at ATED tax year 2018/19), calculated by reference to real estate value bands. Rates increase in line with the Consumer Prices Index each year. Relief may be claimed by NNPs carrying on real estate development or using real estate for commercial renting to third parties, commercial trade purposes or as employee accommodation. Conditions apply.
- Liability for ATED-related Capital Gains Tax (**ATED-related CGT**) of 28% on any gain when residential real estate is sold. If residential real estate is subject to ATED it is also within the scope of ATED-related CGT. Conditions apply.
- For residential properties owned by non-resident persons, Non-Resident Capital Gains Tax (**NRCGT**) may be payable at rates of between 18% and 28% (depending on total UK income and gains) on gains realised on a disposal of the real estate that have accrued on or after 6 April 2015. Conditions apply. ATED-related CGT takes precedence if it applies.
- With effect from 6 April 2019, CGT will be extended to UK commercial real estate (whether the owner is UK resident or not) and to entities that derive their value from UK real estate (whether UK resident or not). The tax will be levied on gains made since that date. ATED-related CGT and NRCGT will cease to apply.
- Income tax (**IT**) is payable by individuals on rental income. Various deductions are permitted against rental income, including interest payable on a loan to purchase or improve the real estate. However, from 6 April 2017 a phased withdrawal of interest deductibility applies to individuals (but not companies). Capital allowances may also be available for commercial real estate.
- UK resident companies are liable to corporation tax on their profits (rental income, capital gains or trading income). The rate of corporation tax is 19% from 1 April 2017 and will be 17% from 1 April 2020.
- Inheritance tax (**IHT**). Non-UK domiciled individuals are liable to IHT on their UK situated assets, which includes UK real estate. Holding UK situated assets on death, or gifting them in lifetime, can give rise to IHT liabilities of 20% or 40%, based on the open market value of the asset or, in relation to lifetime gifts, the loss in value caused to the giver's estate by the gift. Since 6 April 2017, it is no longer possible to avoid an IHT exposure by holding UK residential property

through an offshore company – the company is now effectively transparent for IHT purposes if it is the equivalent of a close company and its value is attributable, directly or indirectly, to UK residential property. Trusts holding shares in offshore companies with UK residential property interests require review, as they can now be subject to periodic charges to IHT and give rise to IHT issues for settlors who are also beneficiaries. Loans made to third parties to facilitate the purchase of UK residential property can, in certain situations, cause the lender to have an IHT exposure. Certain debts, however, remain deductible when calculating the value of an asset for IHT purposes.

- Value added tax (**VAT**). This is applicable to commercial real estate only and is payable at the standard rate of VAT, which is currently 20%, unless it is possible to structure an acquisition as a transfer of a going concern (**TOGC**). A TOGC is generally available to a purchaser of investment real estate, but there are conditions that include the buyer registering for VAT and submitting quarterly VAT returns to the UK's revenue authorities.

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

	Ownership by Offshore Company	*Ownership by Individual*
ATED	Yes, annual charge, depending on value	No
ATED-related CGT	Yes, potentially at 28%, depending on value	No
CGT	Yes, potentially at 20% (if ATED-related CGT does not apply)	At rates of between 18% and 28%. Relief may be available if property used as main residence
IHT	Participators in offshore company have IHT exposure	Yes, immediate exposure
IT	Rental income taxed at 20%. Mortgage interest will remain deductible	Rental income taxed at 20%/40%/45%. Deductibility of mortgage interest being phased out
SDLT	Potentially at higher flat 15% rate if purchase price >£500,000	Stepped rates between 0% and 10%. Higher rates apply to purchases of residential buy-to-let and second residences

9. Expenses

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

- Land Registry fees ranging from £20 to £910, depending on the value of the real estate. This is significantly less than the registration or cadastral fees payable in most other European countries.[12]
- Legal and other professional fees, which are generally agreed at levels to reflect the purchase price and professional input. These fees will bear VAT at the then current rate (currently 20%), even for overseas investors. Each party usually meets its own professional advisers' fees unless agreed otherwise. A tenant who is subletting or transferring the lease will usually be required to pay the landlord's professional fees for the consent to the subletting or transfer.
- The seller, not the buyer, pays the selling agent's fees. These typically vary from 1%-3%, depending on whether the real estate is commercial or residential, with fees for auction sales generally higher than for private treaty sales. Payment of the agent's fee is normally conditional on completion of the sale.
- Some buyers may instruct a buyer's agent to help them find a suitable property. The fee payable to the agent normally varies from 1-3%. These "finder's fees" are common in the high-end London residential market, where there is often stiff competition for prime real estate.
- Fees incurred in obtaining finance.
- Miscellaneous expenses such as search fees of approximately £1,000-£1,500 per property and bank transfer fees.

10. Constraints on development

Town planning legislation

Development may not be undertaken without planning permission obtained under the Town and Country Planning Act 1990.[13]

"Development" may take one of two forms:

- the making of a material change in the use of land or of an existing building; or
- the erection of new buildings or the extension or other alteration of existing buildings.

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

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

Other controls

The development and use of buildings may be governed by other statutory controls which regulate the quality and form of construction. Building regulations cover the technical

[12] In Northern Ireland, depending on the purchase price, Land Registry fees for the registration of a purchase range from £80 to £535. Where the land is being registered for the first time, a fixed fee of £110 is payable. Additional fees will also be chargeable, for example, on the registration of a mortgage or a right or burden attached to the land.

[13] This Act does not extend to NI, which is instead governed by the Planning Act (NI) 2011. Applications for Planning Permission are made to the local council and there is a subsequent right of appeal to the Planning Appeals Commission against a refusal of permission or a condition imposed. All structural works of whatever nature, whether internal or external, also require Building Control Approval from the local council.

standard that building works need to meet and the procedures that need to be followed.

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

Disclaimer

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November 2018

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International Lawyers Network

SHUTTS & BOWEN LLP

Buying and Selling Real Estate in the United States - Florida

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER FLORIDIAN LAW

I. STANDARD FORMS OF AGREEMENTS

A. Purchase and Sale Agreement sets forth the complete terms of the purchase and sale including, among other things, price, security deposit, allocation of costs of the transaction, date for closing, inspection period, financing, title contingencies, escrow information, representations, warranties, covenants, and default provisions.

1. Either party's attorney can prepare the initial draft of the Purchase and Sale Agreement.
2. FARBAR Form – this is the pre-printed form of Purchase and Sale Agreement typically used in Florida for residential real estate transactions; parties can freely negotiate the terms and provisions contained in the FARBAR.
3. The assignment of a Purchase and Sale Agreement can be prohibited or restricted if expressly stated in the document (for example, seller can restrict buyer to only being able to assign contract to an entity related to buyer).

B. Letter of Intent, like a term sheet, is sometimes utilized in commercial transactions to outline the basic terms of a transaction before drafting and negotiating a Purchase and Sale Agreement.

1. Beneficial because allows parties to put to paper key terms to deal, which helps facilitate agreement on the remaining terms.
2. Signing letter of intent adds level of formality and gravitas to negotiations.
3. Letters of Intent may or may not be binding depending on the language utilized; they are usually non-binding.

C. While utilized in other states, an Offer to Purchase is not commonly used in Florida.

II. BROKERS

A. There are four general types of brokers:

1. Residential Brokers
   a. Sell homes, condos, vacant lots
2. Commercial Brokers
   a. Office buildings, vacant land, shopping centers, apartment buildings, raw land, warehouses, industrial facilities. Multi-family Apartments: include Retail, Office, and Industrial subcategories.
3. Leasing Brokers
   a. Specialize in leased properties (tend to focus on commercial properties, which includes retail, office, and industrial).
4. Mortgage Brokers
   a. Facilitate mortgage lending in both residential and commercial transactions
   b. They typically receive commission based on a percentage of the loan amount or a flat fee

B. Must be licensed in Florida and they are regulated by state law

C. Real estate brokers usually enter into listing agreements with sellers, and they typically receive a commission based upon a percentage of the sales price (generally 6%, but commonly negotiated); if there is a co-broker, the listing broker

will usually share the commission with the co-broker.

D. Real estate brokers are paid by the seller, and they owe fiduciary duties to the party that they represent.

III. BUYER'S INSPECTIONS

A. Residential: Prior to Closing, the Buyer will typically perform property inspections including inspection for structural issues, radon, asbestos, pest infestation or damage, title searches, survey, and in certain rare circumstances, lead paint and underground storage tanks (for oil or propane). Buyers should also order municipal lien/open permit searches to confirm there are no outstanding governmental violations, liens, or fines and to confirm that all alterations and renovations have been completed in compliance with permits and all permits are properly closed out.

B. Commercial: In addition to the inspections described above for residential buyers, commercial buyers also usually obtain an environmental inspection (Phase I, and if necessary, Phase II), and a land use and zoning/permitting analysis.

C. The Purchase and Sale Agreement typically designates an inspection period (also known as due diligence period), during which buyer has a specified amount of time (usually 30-45 days) to conduct the above referenced inspections as well as investigate any title issues or zoning and land use concerns; buyer generally may terminate the contract during this inspection period for any or no reason and receive a return its initial deposit.

IV. SURVEYS

A. As-Built Surveys – depict the improvements over a given parcel of land and can be utilized both prior to construction and post-construction.

B. ALTA/ACSM – standards by which surveyors are held; many lenders require that the surveyors meet these standards and requirements (these are national requirements, not just Florida).

C. Benefits of Surveys

1. Ensure property actually exists
2. Determine relationship of property to other properties
3. Ensure the record boundary lines are actually the ones being occupied/ used
4. Determine physical location of improvements and easements
5. Determine whether there are any encroachments on the property

V. FORMS OF OWNERSHIP

A. Residential Property is usually held in a nominee trust, an estate planning trust, or an individual's own name (especially if the property is the owner's homestead so that the owner is afforded certain homestead rights and protections provided under Florida law). Joint owners may take title as:

1. Tenants in Common (each own 50%);
2. Joint Tenants with rights of survivorship (they own the property jointly and upon the death of one of the joint tenants, the property automatically passes to the surviving joint tenant(s)); or

3. Tenants by the Entirety if the owners are married (they each own the undivided whole of the property and if one spouse dies, the property automatically passes to the other spouse).

B. Commercial Property may be held as follows:

1. As the Owners pursuant to the forms set forth in A above, (highly unusual for commercial properties to be held in an individual's personal name for liability purposes)
2. General Partnership/Joint Venture
3. Limited Partnership
4. LLPs
5. LLCs (has become the most common form of ownership)
6. Business Trusts
7. Business Corporations
   (i) C corporation
   (ii) S corporation

VI. FORM OF DEED

A. General warranty deed – most protection for buyer

1. Grantor warrants title for all times that the property has existed, including before grantor took title to the property
2. Most likely to see this form of deed in the residential context

B. Special warranty deed – middle-level protection for buyer

1. Grantor warrants title for the period that grantor has owned the property
2. Most likely to see this form of deed in the commercial context

C. Quitclaim deed – least protection for buyer

1. Contains no warranties of title
2. Typically used for gifting property or for situations where necessary to correct title defects or issues
3. Title companies do not like to insure quitclaim deeds

VII. CLOSING COSTS/ADJUSTMENTS

A. Documentary Stamp Taxes (Doc Stamps) – levied on documents that transfer interest in Florida Real Property (i.e. deeds)

1. In most counties in Florida, the documentary stamp taxes are calculated at the rate of $0.70 per $100 of purchase price; in Miami-Dade County the rate is $0.60 per $100 of purchase price plus an additional $0.45 surtax per $100 of purchase price on documents transferring property other than a single-family residence
2. The documentary stamp tax and, if applicable, the surtax, is paid to the Clerk of Court when the deed is recorded; the Clerk then sends the money to the Department of Revenue.

B. Title Insurance Commitment, Title Policy, and Municipal Lien Searches

1. The cost of the title insurance commitment is usually paid by Seller, even if ordered by the Buyer or Buyer's attorney.
2. The premium for the title insurance policy is a promulgated rate based upon the purchase price for the property being purchased. The

attorney for the party that is responsible for paying for the title insurance premium generally is the agent that issues the title insurance policy. Whether the Buyer or the Seller pays for the title insurance premium is negotiable, but in most counties in the Florida, the custom is for the Seller to pay for the title insurance premium. The main exceptions are Miami-Dade County and Broward County, where the custom is that the Buyer is responsible for paying the title insurance premium.

3. The cost of the municipal lien searches (also known as lien letters) is usually paid by the Seller.

C. Inspections, Survey, Due Diligence, and Financing Costs are usually the responsibility of the Buyer.

D. Real property taxes, association maintenance fees, special assessments, rents, and operating expenses are usually prorated as of the closing date, with the Seller responsible for those costs/revenues incurred prior to the closing date and the Seller responsible for those costs/revenues incurred from and after the closing date.

VIII. OTHER CLOSING DOCUMENTS

A. Bill of Sale – conveys personal property (i.e. refrigerator, washing machine, appliances, equipment, etc.); usually does not get recorded.

B. Seller's Affidavit – also can be referred to as title affidavit, lien affidavit, gap affidavit, or some combination of these terms i.e. title, lien, and gap affidavit.

1. Title Company will typically require on Title Commitment as a requirement for Title Policy to be issued.

2. Purpose of the Affidavit is for Seller to provide assurance to the Title Company and the agent for the Title Company that no liens or other encumbrances have been placed on the property in the past 90 days and that no work has been performed the cost of which is remains unpaid; this is important because there is a gap period between when the Title Commitment is issued by the Title Company and when the Title Policy is issued.

C. FIRPTA Affidavit – IRS requires

1. Proof that grantor is a US entity paying US taxes

2. If Seller is a foreign entity not paying US taxes, the transferee/settlement agent must withhold 15% of the purchase price and remit it to the IRS to ensure that taxes will be paid on the income if any taxes are owed.

3. One important exception to FIRPTA withholding is a transferee/settlement agent is not required to withhold when the Buyer is purchasing a home and the purchase price is not more than $300,000.

D. Assignments

1. Can include Assignment of Leases, Assignment of Contracts, Assignment of Bulk Buyer Rights, etc.

(i) Would typically see these in the context of buying and selling a commercial building

(ii) Both buyer and seller usually sign these assignments.

E. Closing Statement – also typically called Settlement Statement

1. Sets forth the purchase price, closing costs and prorations of the transaction as debits and credits to Buyer and Seller.

2. Will usually include the financing costs for the Buyer's loan; provided, sometimes in a commercial transaction, the Buyer's lender will have its own, separate loan closing statement.

IX. RECORDING REAL ESTATE DOCUMENTS

A. Deeds need to be witnessed by two witnesses and notarized

1. Only the Grantor signs the deed (not the grantee)

2. Regarding recording, Florida is a Notice state, i.e. last bona fide purchaser without notice who pays value has priority

3. Must record the original of the deed (cannot record copies, except with e-recording but must have original in possession)

B. Other than the Deed, most other conveyance documents are not recorded; sometimes a limited liability company affidavit is recorded to evidence authority for execution of the Deed

C. If the conveyance is a condominium unit which requires the approval of the condominium association, then the condominium association approval is usually recorded with the Deed

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Buying and Selling Real Estate in the United States - Massachusetts

ILN REAL ESTATE GROUP

KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER MASSACHUSETTS LAW

I. STANDARD FORMS OF AGREEMENTS

A. Offer to Purchase sets forth buyer's offer of price, date for closing, contingencies for inspections, financing etc. and date for signing a formal purchase and sale agreement. Seller may accept or reject.

B. Purchase and Sale Agreement sets forth the complete terms of the purchase and sale.

C. **Note**: In Massachusetts an Offer to Purchase may be enforced as a binding contract even if it contemplates the execution of a Purchase and Sale Agreement.

II. BROKERS

A. All brokers in Massachusetts whether they are working with the buyer or the seller represent the seller unless the buyer enters into a separate Buyer's Broker or Dual Agency Agreement.

B. Seller usually pays the brokers commission unless negotiated otherwise.

III. BUYER'S INSPECTIONS

A. Residential: Prior to Closing, the buyer performs property inspections including inspection for structural issues, radon, asbestos, pest infestation or damage, title, and in certain rare circumstances, lead paint and underground storage tanks (for oil or propane). Buyers should also check the town/city building file on the property to make sure all alterations and renovations have been completed in compliance with permits and all permits are properly closed out. Buyer or its lender will also obtain a plot plan of the premises.

B. Private Septic. If the property is on a private septic system (rather than municipal sewer), then seller has to provide buyer with a Title V inspection (with passing results) from the town in which the home is located.

C. Commercial: In addition to the inspections performed by residential buyers, commercial buyers also usually obtain a survey, an environmental review, and a use and zoning/permitting analysis.

IV. FORMS OF OWNERSHIP

A. Residential Property is usually held in a nominee trust, an estate planning trust, or an individual's own name. Joint owners may take title as:

1. Tenants in Common (each own 50%);
2. Joint Tenants with rights of survivorship (they own the property jointly and the survivor ends up with 100%); or
3. Tenants by the Entirety if the owners are a married couple (they each own the undivided whole of the property).

B. Commercial Property may be held as follows:

1. As the Owners pursuant to the forms set forth in A above, (highly unusual for liability purposes)
2. General Partnership/Joint Venture
3. Limited Partnership
4. LLPs
5. LLCs (most common)
6. Business Trusts
7. Business Corporations
   i. C corporation
   ii. S corporation

V. THE "CHECK-THE-BOX" REGULATIONS

A. Treas. Reg. §1.7701-1 *et seq*. provides that domestic business corporations are *always* classified as corporations for Federal income tax purposes; GPs, LPs, LLCs, LLPs and business trusts are automatically classified as partnerships (with pass-through treatment) *unless* they "check-the-box" on Form 8832 electing to be taxed as corporations.

B. C corporations are subject to a "double tax," once on the corporate level, and again on dividends or distributions to shareholders. S corporations are taxed only at the shareholder level, with a few exceptions. Partnerships "pass-through" income or loss to the partners. Single-owner LLCs and business trusts are "disregarded entities."

VI. DISTINGUISHING FEATURES

A. Nominee Trust

1. Fiduciary relationship between "trustee" and beneficiaries listed on an unrecorded schedule.
2. Trustee has no power to deal with the trust property except as specifically directed by beneficiaries – legally an "agent" for beneficiaries.
3. Third parties are entitled to rely on certificates signed by trustees of record.
4. Beneficiaries may terminate or amend trust at any time.
5. On termination, the trust property is conveyed to beneficiaries.
6. Advantages
    1. Beneficiaries are undisclosed (privacy).
    2. Trust property can be effectively conveyed by assignment of beneficial interests. Useful for intra-family gifts.
    3. No income taxation on trust level; "pass-through" to beneficiaries.
7. Disadvantages
    1. No limited liability for beneficiaries.
    2. Sole trustee and sole beneficiary may not be identical – merger will result.
    3. Poor draftsmanship can result in trust being treated as a "true trust," which may result in the trust being subject to tax on capital gains and undistributed income and inability to pass through losses.
    4. Ancillary probate for deceased non-Massachusetts beneficiaries (who are deemed to own Massachusetts real estate).
    5. Potential for fraud by beneficiaries.
    6. Creation of a partnership if two or more beneficiaries.
    7. Deeds excise tax on transfer of beneficial interest (DD 95-2).

B. General Partnership/Joint Venture

1. GP is an agreement (oral or written) among two or more people to engage in business.
2. A joint venture is a GP which is limited to a specific project or business.
3. Governed by Massachusetts Uniform Partnership Act, G.L. c. 108A.
4. In absence of written agreement, a numerical majority of partners control decision-making.

5. Limited transferability of interests.
6. Limited life. Withdrawal of partner dissolves partnership, but partnership can be reconstituted.
7. Advantages
    1. Simplicity, informality.
    2. Pass-through treatment.
8. Disadvantages
    1. No limited liability. Partners are jointly and severally liable for partnership liabilities. New partners liable only for future obligations; retired partners for past obligations.
    2. Limited transferability of interests.
    3. Conveyancing issues:
        (i) If title to real estate is in the name of the partnership, any partner may convey title in the name of the partnership. A BFP may rely on the deed, notwithstanding any limitations on the partner's authority (G.L. c. 108A, §10(1)).
        (ii) If title in the name of less than all partners (and the record does not disclose the partnership's rights), the named partners may convey title to a BFP, notwithstanding the existence of an undisclosed partner (G.L. c. 108A, §10 (3)).
        (iii) If title in the name of all the partners, all must sign the deed. (G.L. c. 108A, §10 (5).
        (iv) Attachments against partners individually can affect the partnership's title if the claim relates to a partnership liability.
    4. Fiduciary duties – self-dealing, corporate opportunities. Can be modified by contract.

C. Limited Partnerships

1. A statutory entity governed by G.L. c. 109. Creation requires filing of a brief certificate of limited partnership.
2. Limited partnership is managed and controlled by general partners (GPs). Limited partners (LPs) are passive investors.
3. Certain extraordinary actions can require approval of LPs.
4. Written limited partnership agreement not required but highly advisable.
5. Advantages
    1. Limited liability for LPs.
    2. "Pass-through" tax treatment. No entity-level tax.
    3. Names of LPs not publicly disclosed.
6. Disadvantages
    1. Unlimited liability for GPs, but a limited liability entity, such as an LLC or a corporation, can be a GP.
    2. Unlimited liability for LP who takes part in control of business or knowingly permits his name to be used in the name of the limited partnership.
    3. Limited transferability of interests requires consent of all partners to admit a new LP; unadmitted transferees are entitled to distributions but have no other rights as LP.
    4. Fiduciary duties.

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1. A general partnership that files a registration form with the Secretary of State under G.L. c. 108A, §§45-47.
2. Same advantages and disadvantages as a general partnership, but partners have limited liability.
3. Must renew LP status by annual filing with Secretary of State.

E. LLCs

1. Governed by G.L. c. 156C. Requires filing of certificate of organization naming manager (of if no manager, at least one person authorized to sign filings with the Secretary of State).
2. Very flexible, can be member-managed or manager-managed.
3. "Pass-through" tax treatment, unless it elects to be taxed as a corporation.
4. Single-member LLCs can be treated as "disregarded entities" for tax purposes.
5. Written operating agreement unnecessary, but highly desirable in most cases.
6. Advantages
    1. Limited liability and pass-through tax treatment.
    2. Less formality than a corporation. No minute book, stock ledger, etc. Query: Is that an advantage or disadvantage?
    3. Flexibility. Operating Agreement can create (i) a "corporate model" LLC, with officers and a board of managers elected by members (like a corporation); (ii) a "partnership model" LLC, with management by the members (like a general partnership); (iii) an "autocratic model" LLC, with one or more managers having sole control of the LLC (like a limited partnership); or (iv) any combination of the above.
    4. Can limit or eliminate fiduciary duties.
7. Disadvantages
    1. Limited transferability. Effectively disqualifies LLCs from being public companies.
    2. Operating agreements can be complex and expensive to create.
    3. Uncertainty as to "corporate veil" doctrine.
    4. Uncertainty re legal status in other states.

F. Business Trust

1. An unincorporated organization governed by the common law, but subject to regulation under G.L. c. 182.
2. Written declaration or agreement of trust and all amendments must be filed with the Secretary of State and the clerk of every municipality in which trust has a usual place of business and recorded in the registry of deeds if it owns real property.
3. Trustees are the managing body of the trust and may delegate duties to officers. Shareholders may elect trustees, but this may give rise to personal liability. *See* Paragraph 4 below.
4. Trustees have personal liability for contracts, but typically limit liability to the trust assets. Shareholders who participate in excessive control or

management may be personally liable, as partners, for the debts of the trust.

5. Shares are represented by certificates, which are freely transferable subject to applicable securities laws.
6. The existence of a business trust may be subject to the Rule against Perpetuities. Many trusts have specified dates of termination.
7. Advantages
    1. Free transferability of interests.
    2. Limited life.
    3. May elect "pass-through" treatment.
    4. Once popular, now uncommon outside the utility, mutual fund and REIT industries.
8. Disadvantages
    1. Potential unlimited liability.
    2. Fiduciary duties.

G. Business Corporations

1. Statutory entity – G.L. c. 156D.
2. C corporation taxable as an entity (max. Federal tax, 35%; Mass., 8%).
3. S corporation gives pass-through of income and loss (Federal and Mass.) *pro rata* based on shareholdings.
    1. Requires election by all shareholders.
    2. One class of stock.
    3. 100 shareholder maximum.
    4. Shareholders must be individuals (no non-resident aliens), certain trust and estates, certain tax-exempt entities.
4. Advantages
    1. Limited liability of shareholders by statute.
    2. Free transferability of stock.
    3. No deeds excise tax on sale of stock.
    4. Pass-through treatment for S corporations.
    5. S corporation dividends are tax free to extent of basis.
5. Disadvantages
    1. Double-taxation for C corporation.
    2. No pass-through of C corporation loss. S corporation losses limited to shareholder's basis (*plus* loans to corporation and corporate liabilities assumed by S corporation shareholders). Guaranties not considered as debts.
    3. Unlike partnership, S corporation allocation of income and loss is inflexible.
    4. Mass. "sting tax" to "big" S corporations with over $6 million in income (1.87%) or $9 million (2.8%). (G. L. c. 63, §32(b)).
    5. Corporation excise tax lien (G.L. c. 62C, §51).
        i. (NOTE: excise tax lien now also applies to *unincorporated entities* electing corporate tax status).
    6. Two-thirds shareholder vote required to approve sale of all or substantially all assets. (G.L. c. 156D, §12.02).

7. Dissolution by Secretary of State – but reinstatement possible. (G.L. c. 156D, §108). Note that assets can be sold after dissolution as part of "winding up."
8. Corporate signatories: President or Vice President *and* Treasurer or Asst. Treasurer, who may be the same person. (G.L. c. 156D, §8.46). Corporate vote authorizing other officers may be recorded.

VII. FORM OF DEED

A. The common deed in Massachusetts is the Quitclaim Deed whereby the Seller gives covenants as to Seller's period of ownership only.

VIII. CLOSING COSTS/ADJUSTMENTS

A. Seller usually pays the transfer taxes due at the time of the conveyance to the Commonwealth of Massachusetts. The tax is $4.56 per $1,000 of sale proceeds.

B. **Note**: In a few jurisdictions in Massachusetts the tax is higher.

C. **Note**: In Nantucket and Martha's Vineyard, there is an additional land bank tax that is paid at the time of conveyance.

D. Buyer and Seller adjust for water, sewer, gas/oil, electricity and taxes. In addition to the foregoing, if the property is commercial property, adjustments are also made for rents, third party operating expenses and common area maintenance expenses.

E. Land that has been subjected to agricultural purposes may be subject to certain taxes and payments if it the agricultural purposes are terminated.

F. Withholding Tax – Foreign Seller

- 10% of amount realized (subject to reduction in certain situations (i.e. maximum tax liability on disposition is less than amount required to be w/held; installment sales rule exception, l/c or bond is posted etc.)
- Buyer becomes withholding agent and must remit by the 20th day of the date of transfer; file Form 8288

IX. OTHER CLOSING DOCUMENTS

A. Residential Properties: Seller has to have a smoke/carbon monoxide inspection performed by the town/city fire department and provide a certification at Closing.

B. Title V Inspection Certificate – if the property is on a private septic system.

C. Buyer has to obtain a municipal lien certificate from the Town/City where the premises are located stating the current status of real property taxes payments and balances due. This certificate also advises if water and sewer charges are due.

D. Residential Property – If the property is to be used as a principal place of residence, the buyer may want to consider filing a Homestead Exemption.

E. Sales by a Corporation are subject to the seller's procurement of a Tax Lien Waiver. The Commonwealth of Massachusetts has an inchoate lien on the real and personal property of a seller if the sale of the property constitutes a sale of all or substantially all of the seller's assets in the Commonwealth and the waiver advises the buyer that the lien has been waived and all taxes have been paid.

X. RECORDING REAL ESTATE DOCUMENTS

A. Title Documents are recorded on a county basis in Massachusetts. In other states, title documents are recorded in the towns and city records.

B. Unlike most other states in the United States, Massachusetts has two recording systems.

   1. Registered Land. Some property is registered land whereby real estate documents are filed with the Registry District of the Land Court within each county in which the premises are located. Registered Land means that the land has been certified, all documents affecting registered land are confirmed at the time of filing, and the Commonwealth of Massachusetts guarantees the title to the property. The Land Court issues a certificate of title certifying title to the owner of each registered property.

   2. Recorded Land. Unless the property is registered, it is recorded land and is recorded with the Registry of Deeds in the County where the premises are located.

XI. ANNUAL COSTS FOR PROPERTY OWNERSHIP

A. Property Insurance

B. Real Estate Taxes

   A. Ad Valorem/Town & City Assessments

   B. Rental Properties (Florida – tax on rental income)

   C. Personal Property Taxes (Cars, Boats, etc.)

NOTE: The tax implications of Foreign Purchases and ownership of US-based real estate are outside the scope of this outline.

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INTERNATIONAL LAWYERS NETWORK

HOWARD & HOWARD ATTORNEYS

Buying and Selling Real Estate in the United States - Michigan

ILN REAL ESTATE GROUP

QUICK TIPS FOR CONVEYANCE OF REAL PROPERTY IN MICHIGAN

I. STANDARD FORMS OF AGREEMENTS

A. Offers to Purchase that are accepted by sellers are the typical form of purchase contract for residential properties. The offer, often negotiated before being signed by all parties, sets forth the offered price, proposed closing date, buyer's inspection and financing contingencies, type of deed conveyance (warranty, special or quit claim), etc. Any proposed change by seller to the buyer's offer is considered a counter-offer.

B. Negotiated Purchase and Sale Agreements are typically utilized when commercial or industrial properties are bought and sold.

II. BROKERS

A. Buyers and sellers are not required to use a real estate broker or real estate salespersons (a/k/a agents) in connection with the sale of real estate. All real estate brokers and agents must be licensed by the state of Michigan. All real estate agents, while being licensed themselves, must be associated with a licensed broker.

B. In most residential transactions, the broker and agent must disclose which party they are representing. Brokers and agents may, through a statutory dual agency disclosure, represent both the buyer and the seller in a residential transaction.

C. In the typical transaction, the seller pays its broker a full commission and seller's broker will share that commission with the buyer's broker, if any.

III. BUYER'S INSPECTIONS

A. Residential. It is typical that a buyer is provided with a 5 to 7-day window to have the property inspected. The skill level of residential home inspectors varies greatly. Inspectors should review the structural elements, roof, windows, soundness of foundation, mechanical equipment (AC and heating units, hot water tanks, etc.) and check for radon gas, asbestos, and pest infestation. In older homes, especially in rural areas, the inspection should look for old fuel oil tanks that can lead to environmental issues if they were not properly closed. It is wise to hire an attorney to review the seller's title to the property and that review (whether or not an attorney is hired) is much more definitive if a survey of the property is obtained (showing encroachments, easements or restrictions that might affect the ability to add on to the home later, etc.).

B. Adverse Possession/Boundary Disputes. A survey obtained during the inspection period should assist in determining any potential adverse possession claims or boundary line disputes (*e.g.* encroachments by a fence, a shed, etc.). Adverse possession and acquiescence to a particular boundary line may happen after 15 years of uninterrupted possession (or location of a fence or boundary marker). A boundary line can be re-established by agreement (through conduct or writing) without a 15-year waiting period.

C. Private Septic. If the property is on a private septic system (rather than a municipal sewer), then, depending on the locale, a certificate of inspection from the

local municipality or health department may be required.

D. Seller's Disclosures. For improved residential property, the seller is required to provide a seller's disclosure statement where the seller discloses certain conditions (water infiltration, condition of heating unit, etc.) of which it is aware. For houses built before 1978, a lead paint disclosure is also required.

E. Certificates of Occupancy and Building Permits. Some cities and townships require that a home be inspected to verify that it meets the applicable building codes before it can be sold. If code violations are cited, the parties often negotiate a price reduction if the seller is not willing or able to cure the violation(s). A buyer should also check the municipality building department to determine if there are any open permits for work that have not been approved through a final inspection.

F. Commercial: In addition to the inspections performed by residential buyers, commercial buyers also usually obtain a survey, an environmental review, and a use and zoning and/or permit compliance review. Depending on the municipality, a certificate of occupancy may also be needed before commercial property can be transferred. If commercial tenants occupy the premises, a thorough review of the leases is advised (buyers are advised not to rely on rent rolls or lease summaries) and it is not uncommon for commercial leases to contain a right of first refusal to buy the property that must be complied with or waived before a sale can proceed. A certificate from the commercial tenants certifying the exact lease and all amendments thereto and that the seller-landlord is not in default are often obtained as part of the due diligence.

IV. FORMS OF OWNERSHIP

A. Typically, residential property is held in a trust or an individual's name. If held in a trust, the trust may be either irrevocable or revocable. Irrevocable trusts typically cannot be modified or terminated by the grantor without the consent of all of the beneficiaries or court approval. In Michigan, trusts are generally governed by the Michigan Trust Code, MCL 700.7101 *et seq*. Joint owners to property may take title as:

1. Tenants in Common. Tenants in common each hold a separate and distinct interest in property but share a right of possession. There is no right of survivorship. In other words, if property is owned by two individuals, and one individual dies, the deceased's interest reverts to his or her estate, and not the other owner.

2. Joint Tenants. Joint Tenants hold equal and undivided interests in property, with a right of survivorship. In other words, if property is owned by two individuals, and one individual dies, the deceased's interest reverts to the other owner of the property.

3. Tenants by the Entirety. A married couple can hold real property as tenants by the entirety, where each spouse holds equal and undivided interests in the real property, with rights of survivorship.

B. Commercial property may be held as follows:

1. By an individual pursuant to the forms set forth in IV A. above (not recommended for liability purposes).
2. General Partnership ("GP")/Joint Venture.
3. Limited Partnership ("LP").
4. Limited Liability Partnership ("LLPs").
5. Limited Liability Company ("LLCs") (most common).
6. Corporation:

(i) C corporation; or

(ii) S corporation.

V. TREASURY REGULATIONS

A. Under Treas. Reg. §301.7701-1 *et seq.,* corporations are always classified as corporations for federal income tax purposes. On the other hand, GPs, LPs, LLCs (with more than one member), and LLPs are classified as partnerships for federal income tax purposes, unless they elect to be taxed as corporations.

B. C corporations are subject to a "double" income tax because they are taxed at the corporate level, and shareholders are taxed on the dividends they receive from the corporation. Subject to certain exceptions, S corporations are generally taxed only at the shareholder level. Partnerships and LLCs pass through their income and losses to the partners of the partnership. All entities except for C corporations generally avoid double taxation.

VI. DISTINGUISHING FEATURES

A. GP/Joint Venture

1. A partnership is an association of two or more persons to carry on as co-owners of a business for profit. MCL 449.6. A partnership is a distinct legal entity, separate from its owners.
2. GPs (sometimes referred to as copartnerships) generally must file a certificate of partnership in the county where the partnership conducts its business. MCL 449.101.
3. A joint venture is a partnership which is limited to a specific duration or scope.
4. GPs are governed by the Michigan Uniform Partnership Act, MCL 449.1 *et seq.* ("MUPA").
5. Although not required by statute, it is strongly recommended that partnerships have a Partnership Agreement. A Partnership Agreement sets forth the duties and obligations of the partners towards one another and to the partnership. Absent a Partnership Agreement, the MUPA creates default rules governing the relationship between partners. For example, absent an agreement to the contrary, the MUPA provides that partners will share equally in the partnership's profits and losses, and that all partners have equal rights in the management of the partnership. MCL 449.18 (a); MCL 448.18(e).
6. Absent a Partnership Agreement to the contrary, partnership interests are generally transferable. However, the transfer of an ownership interest in a partnership only transfers the right to

receive distributions, and not any other rights of ownership (including the right to participate in management). MCL 449.27.

7. The withdrawal of a partner dissolves the partnership. MCL 449.29

8. Advantages

   1. A partnership is a pass-through entity. The partnership passes through its profits and losses to the partners and there is no entity level income tax.

   2. Partnerships can be informal, depending on the partnership agreement (or lack thereof).

9. Disadvantages

   1. Partnerships are not limited liability entities (like an LLC or a corporation). The partners of a partnership are jointly and severally liable for partnership liabilities. MCL 449.15.

      Conveyancing issues:

      (i) Any partner of a partnership may generally convey title to partnership real estate (*i.e.* title to the real estate is in the partnership's name). A purchaser may rely on a deed signed by any partner, so long as the partner who executed the deed is carrying on in the usual way of business of the partnership, unless (i) the conveying partner lacks the authority to make the conveyance, and (ii) the purchaser has actual knowledge of the fact that the conveying partner lacks such authority. MCL 449.9.

      (ii) If title to real estate is in the name of multiple partners in their individual capacities, all such partners must sign the deed.

   2. Fiduciary Duty. Partners have a duty to render true and full information to the partnership. MCL 449.20.

B. LPs

   1. A LP is a statutory entity governed by the Michigan Revised Uniform Limited Partnership Act ("MRULPA"), MCL 449.1101 *et seq*. The MUPA also applies to LPs, except to the extent that it conflicts with the MRULPA.

   2. In order to form a LP, a Certificate of Limited Partnership must be filed with the Michigan Department of Licensing and Regulatory Affairs ("LARA"). MCL 449.1201(a).

   3. A LP must have at least one general partner and one limited partner. MCL 449.1101(8). General partners have managerial authority over the business. Limited partners are generally not liable for the obligations of the partnership, unless (i) the limited partner is also a general partner or, (ii) the limited partner takes part in the control of the business. MCL 449.1303(a).

   4. Certain actions may require approval of the limited partners.

   5. A written limited partnership agreement is not required but strongly recommended.

6. Advantages

    1. The limited partners of the partnership have limited liability. MCL 449.1303(a).

    2. A LP is a pass-through entity. The LP passes through its profits and losses to the partners and there is no entity level income tax.

7. Disadvantages

    1. Full liability for general partners, however, a limited liability entity, such as an LLC or a corporation, can serve as a general partner. MCL 449.1403.

    2. A limited partner who takes part in the control of the business may be subject to unlimited liability. MCL 449.1403(a). A limited partner who "knowingly permits his or her name to be used in the name of the limited partnership", except under certain circumstances permitted by statute, is liable to creditors of the LP, provided that the creditors do not have actual knowledge that the limited partner is not a general partner. MCL 449.1303(d).

C. LLP

1. Similar to GPs, except with more limited liability for partners. Specifically, except for certain carve outs, a debt, obligation, or other liability of an LLP is solely the debt, obligation, or other liability of the registered LLP. MCL 449.46(1). However, a partner in a registered LLP will be liable for the partner's own negligence, wrongful acts, omissions, misconduct, or malpractice, or that of any individual who is under the partner's direct supervision and control, that results in a debt, obligation, or other liability of the registered LLP. MCL 449.46(2).

2. Partners in an LLP have some liability protection, but not as much protection as limited partners in a LP.

3. Must file an application to register an LLP with LARA.

D. LLCs

1. Governed by the Michigan Limited Liability Company Act, MCL 450.4101 *et seq*. An LLC must file Articles of Organization with LARA. MCL 450. 4202.

2. LLCs are very flexible and can be tailored to the needs of the members. LLCs can be member-managed or manager-managed. Profits, losses, and distributions can generally be divided in any manner agreed upon by the members with certain restrictions.

3. LLCs receive pass through income tax treatment, unless the LLC elects to be taxed as a corporation or is a disregarded entity.

4. A written Operating Agreement is unnecessary, but strongly recommended. This document describes how the LLC will be managed and operated. Operating Agreements can be drafted in a manner that best suits the needs of the company and its members.

5. Advantages

    1. Unless otherwise provided by law or in an operating agreement, the members and mangers of an LLC

have limited liability. MCL 450.4501(4).

2. There is no entity level income tax on an LLC. The profits and losses of the partnership are passed through to the members.

3. LLCs have fewer statutory requirements than a corporation and are generally more flexible.

4. There are very few statutory requirements about what must be contained in an Operating Agreement. Operating Agreements can be as simple or as complex as the members desire. However, Operating Agreements generally cover issues like management, membership, income or loss allocations, cash and property distributions, and transferability of ownership.

5. The Operating Agreement can limit or eliminate the duties members owe to each other.

6. Disadvantages

1. In order to enjoy some of the benefits of an LLC, the members must create a tailored operating agreement. It can be expensive to have an attorney draft a complex operating agreement.

E. Corporations

1. A corporation is a statutory entity. Corporations are governed by the Michigan Business Corporation Act, MCL 450.1101 *et seq*.

2. Corporations must file Articles of Incorporation with LARA. MCL 450.1202 *et seq*.

3. A "C" corporation is subject to double income taxation. It is taxed at the entity level, and then the shareholders are taxed on dividends.

4. An "S" corporation passes through income and losses *pro rata* based on ownership. S corporations are generally not taxed at the entity level. S corporation status requires:

1. Election by all shareholders.

2. The filing of form 2553 with the Internal Revenue Service.

3. Only one class of stock.

4. A maximum of 100 shareholders.

5. Only certain individuals or entities may be shareholders. Shareholders may be individuals, certain trusts, and estates, and may not be partnerships, corporations, or non-resident aliens.

5. Directors and officers owe a fiduciary duty to the corporation. They must: (i) perform their duties in good faith, (ii) with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and (iii) in a manner he or she reasonably believes to be in the best interests of the corporation. MCL 450.1541a(1). Shareholders generally do not owe a fiduciary duty to other shareholders (unless the duty is set forth in a shareholder agreement).

6. Advantages

1. Shareholders have limited liability for acts of the corporation.

2. Shareholders can generally freely transfer their stock (unless subject

to a shareholder agreement stating otherwise).

3. S corporations receive pass through income tax treatment (no double taxation)
4. S corporations may lead to savings on self-employment taxes.

7. Disadvantages

1. C corporations are subject to double income taxation.
2. A C corporation cannot pass through its losses to its shareholders. IRC 172.
3. Unlike an LLC, S corporation allocations of income or loss are rigid.
4. The Michigan Business Corporation Act is more stringent than other applicable entity statutes in terms of requirements applicable to corporations.
5. Certain corporate activities require shareholder approval including, amending the Articles of Incorporation (except under certain circumstances) (MCL 450.1611(3)), adopting a plan of merger or share exchange (MCL 450.1703a(1)), and selling all or substantially all of the corporation's assets outside of the ordinary course (MCL 450.1753). Most changes require approval from the majority of shareholders and may require approval from an affected class of shareholders. Shareholder agreements may require approval from a greater percentage of shareholders for certain actions.

VII. FORM OF DEED

A. The common deed in Michigan is the "warranty deed" where the seller warrants title. The "special warranty deed" is becoming more accepted and popular whereby the seller gives warranties against title defects arising during seller's period of ownership only. Quit claim deeds are also frequently used where the seller conveys whatever interest it has and provides no warranties of title, in which case the buyer should obtain and would be relying entirely on title insurance to address title defects.

VIII. CLOSING COSTS/ADJUSTMENTS

A. Seller usually pays the transfer taxes due at the time of the conveyance. There is a standard county tax of $0.55 per $500 of consideration, however, a county with a population over 2 million may charge as much as $0.75 per $500. The state transfer tax is $3.50 per $500 in consideration. There are several transfer tax exemptions mostly involving family or related party transactions with little consideration.

B. Buyer and seller adjust for water, sewer, gas/oil, electricity and taxes. Depending on what part of the state the property is located, proration of taxes varies by local custom. The most common methods for pro rating taxes are: (1) paid in advance, due date basis (favors seller), (2) calendar year and (3) paid in arrears, due date basis (favors buyer). With retail or multi-family commercial properties, closing adjustments also include, among others, rents, management/operating expenses and common area maintenance expenses.

C. Certain lands used for agricultural purposes pay reduced taxes that, in some instances, may be clawed back if the agricultural use is terminated.

D. Standard federal income tax withholding for sellers who cannot provide a non-foreign FIRPTA affidavit.

IX. OTHER CLOSING DOCUMENTS

A. Residential Property – If the property is to be used as a principal residence, the seller should rescind any PRE or "Personal Residence Exemption" seller may have (results in lower property taxes) and the buyer should promptly file a PRE form with the local assessing unit.

B. If the property is leased (residential or commercial/industrial), if the lease is to be terminated at or before closing, a lease termination instrument signed by the tenant should be provided and if the lease(s) is to continue, an "assignment and assumption of lease(s)" instrument should be executed by the seller and buyer.

C. Title insurance is always recommended and an effective review of title to the property is nearly impossible without a title commitment (and copies of all exceptions to the seller's title that survive closing) being provided, which commitment is the basis for the title policy issued at closing. Typically, the seller pays the premium charged to issue the title insurance policy. Buyer is responsible for a title policy required for any purchase money financing.

X. RECORDING REAL ESTATE DOCUMENTS

Deeds and any other documents evidencing an encumbrance on title are recorded at the Register of Deeds for the County where the property is located.

XI. PROPERTY TAXES

A. Real Estate Taxes

1. Real property is assessed for taxes based on its true cash value that is to be determined annually by the local assessing unit. The assessed value is to represent 50% of the true cash / fair market value.

2. Michigan has a "cap" on increases in a property's taxable value that is tied to inflation. The taxable value stays low (no more than 5% increase annually) regardless of any increase in the FMV of the property and is reset to equal assessed value anytime there is a non-exempt "transfer of ownership." A transfer includes (with a few exceptions) the sale of stock or membership/partnership interests (not a deed) in the entity having title to the property.

3. Only businesses pay personal property taxes and they are structured the same way and subject to the same "cap" as real property. There are many exemptions that apply to personal property, depending on the value and/or the type of personal property involved.