# International Comparative Legal Guides

# Real Estate 2020

A practical cross-border insight to real estate law

**15th Edition**

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# International Comparative Legal Guides

# Real Estate 2020

## 15th Edition

Contributing Editor:
**Dan Wagerfield**
**Norton Rose Fulbright LLP**

# Expert Chapter



# Q&A Chapters

# From the Publisher

Dear Reader,

Welcome to the 15th edition of *The International Comparative Legal Guide to: Real Estate*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to real estate laws and regulations around the world, and is also available at www.iclg.com.

This year, one expert chapter focuses on the use of technology and artificial intelligence in real estate legal services.

The question and answer chapters, which in this edition cover 28 jurisdictions, provide detailed answers to common questions raised by professionals dealing with real estate laws and regulations.

As always, this publication has been written by leading real estate lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editor Dan Wagerfield of Norton Rose Fulbright LLP for his leadership, support and expertise in bringing this project to fruition.

**Rory Smith**
**Group Publisher**
**Global Legal Group**

# Preface

It is a great pleasure to have been asked to be contributing editor of this, the 15th edition of *The International Comparative Guide to: Real Estate 2020*.

Can I start this short introduction to the Guide by thanking Iain Morpeth of Ropes & Gray LLP for his years as contributing editor, his insightful articles and his team's contributions to the chapters on England and Wales. It is clear I have some big shoes to fill.

Today's real estate investment market is an increasingly international one. As investors look beyond their domestic markets, they must grapple with a range of issues, including property market transparency risk, political risk and currency risk. Central to their success in any given jurisdiction, however, is an understanding of local real estate laws and how real estate transactions are structured. The aim of the Guide is to provide that understanding.

Covering 28 countries, we hope you find the Guide a useful reference point when considering cross-border real estate transactions and we encourage you to contact us with any suggestions you may have as to how we might improve future editions.

**Dan Wagerfield**
**Partner & Global Co-Head of Real Estate**
**Norton Rose Fulbright LLP**

# Is Technology Set to Revolutionise the Delivery of Real Estate Legal Services?

Norton Rose Fulbright LLP

Dan Wagerfield

## Introduction

The way that real estate legal services are delivered is changing.

There are a number of reasons for this but, in common with other legal disciplines, at the heart of the transformation is "legal tech" (or technologies designed to help with the work of lawyers).

What is driving this phenomenon, how is the technology being deployed, how rapid might the change be and what does the future hold?

## What are the Drivers?

The use of technology to help lawyers provide legal services is nothing new. The telephone, the fax, personal computers, email, the internet and mobile apps all take their place in the succession of technological developments that, along with the rest of the business world, the legal sector has embraced.

In the last two years, however, the pace of change has been almost exponential, with transformative effect, and for the first time the industry is seeing technology employed in the front line work of lawyers, as opposed to simply helping with back office functions, such as billing, knowledge management or file storage. A good example of the latter is **Intapp**, which manages everything from pricing to time recording and automating financial processes.

In terms of the macro drivers, there is more technology in law because, well, put simply, there is more technology. If, as it is claimed, computing power doubles roughly every 18 months (a phenomenon known as "*Moore's Law*"), on the assumption that the legal industry will keep pace with advances in technology in the rest of commerce, and indeed society, this alone goes some way to explaining the recent explosion of legal tech.

But, of course, the growth of computing power on its own does not explain the transformation. To work, these new technologies need data in the form of digital information (or information converted into a computer-readable format) and data is not in short supply. According to a report published by "IBM Marketing Cloud", 90% of all the digital data that exists today was only created in the last two years.

With increasing digitisation and the rapid advances in technology, the scene is set, but what of technology in legal services and real estate legal services in particular? What is driving that?

Away from the macro drivers, there are perhaps three other factors worthy of note.

### Demographics

This is the fact that increasingly the lawyers who now find themselves in leaderships positions, and able to determine how any particular transaction is resourced, are from the more tech-savvy, "internet generation". For this cohort of decision makers, technology is not something they mistrust, or even something that must be reluctantly employed to increase cost-efficiency and maintain profitability; it is simply part of the business (and social) world they have grown up in. They get it and feel comfortable using it.

### Cost efficiency

In his book "*Tomorrow's Lawyers: An Introduction to Your Future*", Richard Susskind describes the ever-increasing pressure on law firms to deliver more legal services for less money. The global financial crisis forced many businesses to look at their legal spend and demand more for their money. Many legal service providers, when set this challenge, turned to technology for help.

In order to bring technology in, lawyers "unbundled" transactions, separating purely administrative or repetitive tasks from the analysis and advice required. For the former, the "legal tech" market developed products to allow the lawyers to outsource the administrative or repetitive work to technology, in an effort to save cost and maintain profitability.

### Time to transact

Real estate has become and will remain a truly international, cross-border, asset class. Not only are the largest deals getting larger, bigger cross-border deals tend to involve more stakeholders and advisors, which poses a challenge in terms of speedy coordination and collaboration. Being able to conduct the due diligence and ultimately close transactions quickly may provide a competitive advantage.

If technology can be used to speed up the data extraction, and help coordinate large teams across time-zones, that could be the difference between winning a bid and losing it. In fact there is evidence that some on the sell side require the use of technology, be it for data extraction or legal project management, as a means of ensuring their transaction is not held up by the sheer weight of analysis and review needed.

## How is Technology being Deployed?

There is a baffling array of technologies out there (and, in all likelihood, in the time it takes you to read this chapter there will be a few more). It would be impossible to cover all the technologies here so, as to how "legal tech" is being deployed in real estate legal services, this chapter will look at two examples: the application of artificial intelligence (AI) in real estate due diligence; and automated document production.

### AI in due diligence

Much of what real estate lawyers do, particularly at the beginning of a transaction, is look at data, make sense of it and extract elements of it on which they add value by providing their expert opinion.

The manual sifting of this data, which sometimes still takes the form of original paper documents, takes a significant amount of time, and (in the traditional legal construct) time equates to money. The cost associated with the due diligence needed on a large portfolio of properties is considerable, and the amount of data that attaches to land and land use is not going to get any smaller.

Typically, the approach is to select a sample of properties, maybe at random or based on value, and use junior lawyers or paralegals to perform a manual, time-intensive review to identify and extract the key information. The problem is not just the time this takes. Often, each individual on the due diligence team will approach the task in a different way. Unless the process is very carefully designed and actively managed (which all adds time and cost), the result is often an inconsistent data set. And more often than not, the results are delivered in a report written in prose, severely limiting further data analysis.

Here, the legal tech sector has developed software that not only speeds up the review and extraction process, with all the benefits that brings in terms of saving time and labour cost, it also improves the end result. It does this in two ways. Firstly, it can review the whole data set, removing the need for sampling. In this way, the software can build a much better understanding of the portfolio and the risks for the client. Second, it virtually removes human error, because algorithms do not get tired, bored or distracted.

By way of example, intelligent machine learning platforms, such as **iManage Ravn**, **Kira Systems** and **Leverton**, are now routinely deployed by lawyers on large-scale real estate due diligence exercises and lease portfolio management. Often misunderstood (and mistrusted), their functionality goes way beyond simply searching for key words. Often, the software will stop a little way into the review process, present the results of its search to the user and ask the user if it is doing the right thing. With the benefit of the answers, it goes back and refines the search. In other words, it "learns". Most systems come pre-loaded with a large number of real estate terms, cutting the time needed to train it.

Once extracted, the platform can present the data in a number of user-friendly and interactive formats, with hyperlinks back to the document and the clause from which the data was taken, allowing users easy access to interrogate the data further. Some platforms go further, linking the addresses of the properties to web-based map applications, allowing the user to see the geographic spread of the assets within the portfolio, or including functions that put critical dates within a document into a calendar, with the ability to set notifications and reminders. In this respect, the potential to inform, and possibly even replace, existing lease or property management systems hints at the direction of travel for these platforms.

### Automated documents

Again, automated document production is not a new concept. Platforms such as **HotDocs** have been around for some time.

In short, document automation removes the need for the draftsman to manually draft or mark up a paper precedent document. Instead the draftsman completes an on-screen questionnaire and the technology spits out a draft.

Early attempts at document automation simply removed the need for a pen. They were adept at producing a rough first draft, with all the "blanks" in the precedent document completed, but the technology did little more than that and the end result often needed careful review, to tailor it to the exact requirements of the transaction or the asset. As the technology improved, so answering a question in a particular way would call up an alert, suggest a certain course of action, or take the user into a separate set of questions, the answers to which would result in a much better, more complete, first draft.

Some benefits of automation are clear, others perhaps not so. There is a time-saving benefit, particularly when preparing numerous documents which share the same information or details (such as the parties, their company registration numbers or the address of the property). Automation also brings more rigour into the drafting process, often flagging if key information is missing or reminding the user of the consequences of including or omitting certain provisions. Far from simply reducing human error, automated documents can (and do) serve as useful learning tools for junior lawyers who can see, at a glance, on the screen (in a way they could not if they were using a pen and paper) the effect of the information they input.

**LeasePilot** is an example of the latest generation of automation software. Engineered exclusively for commercial leasing, this platform does not simply leave the user with a first draft. It is equipped to inform the drafting through multiple rounds of negotiation and document revision. As documents go, leases have a high number of what software programmers call "dependencies". These dependencies are clauses or provisions that need to change if other parts of the lease change. As negotiations proceed and changes are agreed, determining these dependencies and amending the draft document is usually the preserve of the seasoned real estate lawyer, usually with red pen in hand and the printed document before him.

LeasePilot is the first platform that is designed to handle the inherent complexity of commercial lease negotiation and amendment.

Just as with the due diligence tools mentioned above, intelligent document automation brings substantial efficiencies to what is still, for many, a somewhat antiquated process. It also creates a data set that can be used as the starting point for other similar transactions.

## The Pace of Change

Despite the number of available technologies out there and an awareness that those legal professionals that adopt legal tech will have a competitive advantage over those that do not, the adoption rate amongst legal professionals is slow.

In a survey conducted for *The Lawyer's* 2019 "Global Real Estate 50" report, 97% of the firms interviewed agreed (and 66% agreed "strongly") that the use of technology will be a defining factor in the future success of their real estate department. And yet there exists a lag between that almost universal recognition of the importance of legal tech, and its adoption.

The gap reflects some real constraints on the adoption of legal tech, chief amongst which is the culture of legal practice and its lack of openness to change. The ability to try something different is not an intuitive or natural behaviour for the mainstream legal sector, particularly in such a conservative area such as real estate.

The result is that many suppliers of real estate legal services are ignoring legal tech altogether (or simply paying it lip service).

Some see it as a threat to their (to date) successful business model which has the lawyer as the sole reviewer, analyst, problem solver and adviser. (Susskind refers to this as the "denial" stage in the take-up of disruptive technology, with many legal service providers hoping that the legal market will revert to 2006, before the global financial crisis, when there was a great deal more non-price sensitive work about.)

Others believe, with some justification, that the technology on offer today (if not the whole predicted impact of technology in the legal sector) is being overhyped. They point to the "dot-com bubble" or even the claims made by the advocates of GM crops, as evidence that the resulting reality rarely matches the hype.

Certainly the experience of many in both private practice and in-house, is that off-the-shelf AI products rarely live up to expectations.

## What Does the Future Hold?

It is fair to say that, where legal tech is being deployed in the delivery of real estate legal services, it is focused on efficiency and automation as opposed to delivering "new types of law".

Many of the technologies in place today simply digitise certain parts of existing, traditional, legal workflows and resource allocation. In other words, they "pave the cow path"; they have not had a truly transformative effect on service delivery.

Yet, given *Moore's Law* and the trend of ever more intelligent software, there is little doubt that technology will, ultimately, reshape the way in which legal services are delivered. Culture and a lack of confidence in AI's ability to match human intelligence and decision-making may act to slow the transformation, but technology will produce unprecedented innovation in legal services.

Some predict that legal tech will ultimately remove the need for lawyers altogether. Certainly, if you are a lawyer, *"Tomorrow's Lawyers: An Introduction to Your Future"* does not make for very comfortable reading. We have yet to see the full transformative potential of technology but it seems the legal professionals that will survive the transition will be those that are able to harness the power of technology and combine it with human talent, and not those that buy a clever piece of software.

In short, the job description of a legal professional and, as a corollary, the skillset they need, will shift to become much more interactive with technology and collaborative with technologists and data analysts.

This shift has already started to happen. Some larger legal practices (the author's firm, Norton Rose Fulbright, included) are partnering with legal technology consultants, or creating their very own, client-centric technological innovation teams, in an effort to use technology not just to mine for data or automate, but to change the whole relationship between the lawyer and the client as part of a new legal service paradigm.

As lawyers are very much the architects of that paradigm, to misquote Mark Twain, "*the reports of our demise have been greatly exaggerated*".

**Dan Wagerfield** is a real estate lawyer based in London and Global Co-Head of Real Estate. With over 20 years of experience, Dan focuses his practice on real estate transactional work, including investment, development, secured lending, and landlord and tenant matters, acting on behalf of private and public sector clients.
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# Argentina


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The Argentine Constitution of 1853 and various treaties on human rights to which Argentina is a party expressly provide for the right to private property. Real estate in Argentina is governed by the Argentine Civil and Commercial Code (the "Code") and by other specific laws, *i.e.*: Law No. 13,512 on Horizontal Property (*Propiedad Horizontal*); Law No. 24,441 governing Trusts; Law No. 23,091 on Urban Leases; Law No. 13,246 on Rural Leases; Law No. 17,801 on Real Estate Registers; and Building codes of each province, etc. Also, the Rural Lands Law No. 26,737 (the "RLL" or the "RL Regime") imposes limitations to the foreign ownership over property or possession of rural lands by foreign individuals or legal entities.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

This is not applicable in Argentina.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

No. International laws are not relevant to real estate in Argentina, with the exception of applicable treaties on human rights (please refer to question 1.1) and general rules provided by investment protection treaties.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Foreign ownership of rural land in Argentina is subject to the RLL (enacted on December 22, 2011) and its implementing regulations provided by Decree No. 274/2012 and Decree No. 820/2016, respectively. The RLL (i) defines rural lands as any piece of land outside the urban grid, regardless of its location or destiny; and (ii) imposes limitations to the foreign ownership over property or possession of rural lands, which is deemed as any acquisition, transfer, assignment of possessory rights, whatever the type, name and extension of time imposed on the parties, in favour of, among others, foreign individuals and/or legal entities. The RLL states that foreign entities are those in which more than 51% of the stock (or a number of votes sufficient to prevail in the entity's decision-making process, independent of their stock holdings) is held by foreign individuals and/or legal entities. Transactions over land subject to the RLL are subject to an authorisation certificate issued by the Rural Lands Registry. Procedures are carried out by the purchaser and information regarding the purchaser of the land, the description of the real estate to be acquired, and other additional requests must be fulfilled. According to the RLL, foreign ownership of rural land shall not exceed 15% of the total amount of "rural lands" in the Argentine territory. This percentage is to be calculated also in relation to the territory of the province or municipality where the relevant land is located. Ownership by the same foreign owner shall not exceed 1,000 hectares of the "core area", or the "equivalent surface" determined according to the location of the land. The Inter Ministerial Council of Rural Lands (*Consejo Interministerial de Tierras Rurales*), the enforcement agency of the new law, defines the "equivalent surface" considering: (i) the proportion of "rural lands" in relation to the municipality, department and province; and (ii) the potential and quality of rural lands for their use and exploitation. Likewise, under security zone regulations, foreign ownership in certain areas of national security, such as border zones, requires the prior consent of the relevant federal agency, which is normally granted, although, it may take some time to obtain. In principle, acquisition of real property in the City of Buenos Aires (a practice that is being followed by other local jurisdictions) by a foreign entity (in particular, when more than one asset is being acquired) may require the registration of a branch of such foreign entity before the public registry ("IGJ").

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The types of rights over land recognised in Argentina are outlined in laws passed by the Argentine Congress, mainly in the Code, which include: ownership; co-ownership; usufruct; easements; timeshare; private cemetery (graveyard); surface (surface area – *superficie*); horizontal property; and real estate condos (*conjuntos inmobiliarios*).

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

No. As a general rule, buildings are attached to the real property forming an indivisible unit. The only exception is the right of surface that may allow separation of land and the construction over it.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

No, there is no split between legal title and beneficial title in Argentina.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

In general, all land related to real estate rights (and its encumbrances) over such property must be registered with the local real estate registry applicable to the jurisdiction where the land is located.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no title insurance system in Argentina.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

In Argentina, a legal title is effective from the date of grant. However, real estate rights over land that are not registered in the real estate register of the relevant province are not effective against third parties.

**4.4 What rights in land are not required to be registered?**

Most contractual rights over property (other than rights *in rem*) do not need to be registered. Some exceptions may apply to leases.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period following first registration or different classes of title on first registration in Argentina.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Ownership is transferred to the buyer upon the date on which the notarial deed of conveyance (*escritura pública*) is executed. The Code provides that possession by the acquirer is not required for the conveyance of legal title in: (i) mortgage deeds; and (ii) easements.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Priority against third parties is obtained through timely registration of the notarial deed of conveyance deed with the real estate registry of the relevant province. Priority among different registrations is granted by the date and order number of the notarial deeds given by the real estate registry at the time of the deed filing.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

In Argentina there are 24 real estate registries, one real estate registry for each Argentine province and another one for the City of Buenos Aires. Each real estate registry has its own particular rules and regulations.

**5.2 How do the owners of registered real estate prove their title?**

The owners of registered real state prove their title to real estate (*i.e.*, notarial deed of conveyance and transfer of the property) through the certificate that the real estate registry of the applicable jurisdiction issues stating that the title to real estate has been duly registered.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Transactions relating to registration cannot be completed electronically, but certain filings may be accessed online. Broadly speaking, information on ownership is not available online in the City of Buenos Aires' registry, though, it is possible to obtain the identity of the owners of a given property online. For purposes of requesting registration, a copy of the notarial deed of conveyance together with a formal petition should be submitted to the relevant real estate registry.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, compensation can be claimed under general rules of tort liability.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions on public access to real estate registers, but requests for information can only be signed by certain professionals (*i.e.*, lawyers, notary publics, engineers, accountants, surveyors or real estate brokers).

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

(a) Selling and purchasing agents (or realtors)
A real estate broker may intervene as intermediary on behalf of either the seller or the purchaser.

(b) Lawyers
Legal advice is recommended in connection with negotiation or execution of any binding document. Lawyers usually provide tax and foreign exchange advice for transactions involving international parties.

(c) Notaries
The deed of conveyance has to be executed before a notary public, who is responsible for verifying that the seller has good title on the property.

(d) Others
A surveyor (*agrimensor*) should check whether the boundaries of any property located outside city centres as described in the real estate registry correspond to the parties' understanding of the same.

**6.2 How and on what basis are these persons remunerated?**

Some of the persons detailed above, such as notaries, may have regulations on fees depending on local rules and regulations; although, in many cases these regulations are not followed by the parties involved. In general, fees are agreed as a percentage of the transaction price.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

In recent years, there has been a great interest from the private sector in the issuance of debt and equities in the domestic and international capital markets, and several programmes of mortgage loans for housing construction have grown in importance, mainly as a result of the Pro.Cre.Ar programme, the launching of new loans with UVA and UVI (household units) and new mortgage loans from banks like Banco Ciudad or Banco Nación.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

During the 2008 to 2015 period, the construction sector's growth decelerated due to, among other factors, the financial crisis that struck the international markets, which resulted in the absence of credit for investors, increased foreign exchange restrictions, and continued depreciation of the US dollar *vis-à-vis* the Argentine Peso. In addition, it is worth mentioning that, due to the aforementioned restrictions, during this period the private financial sector did not increase the sources or amount of finance granted for real estate investments.

Since the administration change at the end of 2015, the current government has announced and executed several significant economic and policy reforms that have resulted in the revitalisation of the capital market and in an increase of interest from the private sector in the issuance of debt and equities in the domestic and international capital markets. A top priority for the current government is attracting foreign direct investment.

In spite of these efforts, due to foreign exchange regulations, lack of financing options and high inflation rates, there has been a great reduction in construction and real estate activity in general. In fact, an overview of the real estate market information would show few residential sector transactions in recent years.

The commercial office sector has suffered for similar reasons, in addition to slow business activity in general. The rural sector has also experienced a decline in investment, following a series of government policies that have restricted meat exports and fixed wheat and soy prices.

The hotel sector, which originally benefitted from the tourism boom in Argentina, ended up suffering due to an increase on costs as a consequence of inflation and the decrease of the competitiveness originally favoured by foreign exchange.

Among other significant development transactions, Consultatio Real Estate is developing "Catalinas Norte" which, at 150 metres, will be the tallest building in the City of Buenos Aires, to be used as office space.

"Nordelta" is a luxury housing project being developed by Consultatio Real Estate in Tigre, Province of Buenos Aires. Nordelta is a city centre comprised of 23 gated communities, a golf course, shopping centre, private schools, hotels, offices and other services. Currently, there are more than 30,000 people living in Nordelta. It is estimated that over USD 1 billion has been invested in the development, and the project is still being further developed and exploited.

A similar city centre is currently being developed in Escobar, Province of Buenos Aires. The development, "Puertos del Lago", will consist of 20 gated communities over 1,440 acres of land.

Grupo Monarca is developing the following projects, which are currently under construction: Condo "Pradera Santa Bárbara"; Condo "Ribera Nordelta"; and Condo "Pasionaria San Isidro", in addition to housing developments within "Nordelta". All of the aforementioned are residential housing complexes.

Grupo ODS developed the "Artmaría" project in Puerto Madero, which was started in 2009 but was not finished until 2014. Artmaría is made up of five main buildings comprising a mixture of residential and office space.

TGLT S.A. is currently involved in the development of several residential complexes, namely: "Astor Palermo"; "Astor Nuñez"; "Forum Puerto Norte"; "Venice"; and "Forum Alcorta", among others.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Yes, big surfaces for hypermarket in the construction of houses and working spaces are slowing down in Argentina, starting to focus on the worldwide trend of small premises with little footage and amenities with low or premium (for high income public) expenses. For more information, please refer to question 10.8 below.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

Execution of the deed of conveyance between the buyer and seller and registration of such deed with the local real estate registry are required to transfer real estate; once executed, the deed should be filed for registration at the relevant real estate registry. Beforehand, parties may execute a preliminary contract (*Boleto de Compraventa*). Regulations state that sellers must inform the tax authority about every offer, negotiation or transfer involving real property for an amount exceeding ARS 300,000 (approximately USD 5,000).

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

Yes. Under the general duty of good faith, applicable to any contract, the seller should reasonably disclose any encumbrance or hindrance which may impede the buyer from fully enjoying the property. Additionally, the parties generally agree by contract to these kinds of representations and warranties, whereby the seller ensures that it has good title. In addition, disclosure is required by the consumer protection law.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Please refer to question 7.4 below.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Real estate transactions are customarily negotiated on an "as is" basis. However, the Code provides for certain implied warranties on a sale granted by the seller to the buyer. These warranties consist of the following: (i) that the seller has good title and the property is free of encumbrances (*Garantía de evicción*); and (ii) that the property has no hidden defects (*Garantía por vicios redhibitorios*).

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The liabilities that the seller retains post-sale are the warranties described in question 7.4 above for a period of three years after the ownership of the land is transferred to the buyer.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

There are certain legal charges attached to real property relating to municipal and provincial taxes, expenses and maintenance of building common areas and the charges levied by the utilities companies.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

On January 1, 2019, Decree No. 609/2019 of the Argentine Executive Branch (the "Decree 609") was published in the Official Gazette which re-established foreign exchange controls, and authorised the Argentine Central Bank ("BCRA") to regulate the cases in which prior approval will be required for the purchase of foreign currency with Argentine Pesos in the Foreign Exchange Market ("FX Market") and imposed obligations of mandatory repatriation for foreign financings and exports of goods and services. On that same date, BCRA, issued Communication "A" 6770 (the "Communication"), which implemented the measures adopted by the Argentine Executive Branch, by means of establishing certain specific regulatory requirements. Effective as from January 1, 2019 until December 31, 2019, the Communication establishes that the financial indebtedness with non-Argentine residents must be transferred and sold for Argentine Pesos in the FX Market. Also, financings granted by local financial institutions in foreign currency to clients from the private non-financial sector must be sold for pesos in the FX Market upon disbursement. The restriction to access the FX Market for the payment of obligations agreed to as of January 1, 2019 does not include payments by clients of financings in foreign currency granted by local financial institutions, including payments for purchases made with credit cards in foreign currency.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Mortgages and trusts are the most common collateral in connection with real estate. A mortgage remains in full force and effect until all secured amounts have been paid in full or the mortgage is otherwise cancelled by mutual agreement. However, unless extended, the registration of a mortgage will automatically expire 20 years as from the registration date.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Mortgages may be realised by judicial or private procedures. Regarding judicial procedures, the mortgagee may commence an ordinary declaratory trial, an expedited trial, a mortgage expedited trial or a provincial foreclosure trial.

If the debtor issues mortgage letters (*letras hipotecarias*), the mortgagee may realise it by private procedure without the contribution of the debtor. The mortgagee may: a) request directly from the register the issuance of a second copy of the deed; or b) require the payment of the debts that exist on the property regarding ordinary expenses, taxes and fees that weigh on the property. If the debtor does not pay the debt within 10 business days from the request, the mortgagee may auction the property as if debt- free. In such case, the lender may order itself, without court intervention, a public auction sale of the property by an auctioneer appointed by and with the usual conditions of that

place. Notices must be published. The base of the auction will be the amount of debt at the time of the sale.

### 8.4 What minimum formalities are required for real estate lending?

There are none, except for the registration of mortgages or trusts over land with the relevant real estate registry.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Trusts are also widely used as security devices. A trust will be formed upon the transfer of ownership in trust of a property by a settlor to a trustee who will undertake to exercise the rights in respect of it for the benefit of certain beneficiaries. The trust property forms a separate estate from both the trustee or the settlor's estate (except in the case of fraud). The trust's duration may not exceed 30 years. The benefits of the trust in guarantee in relation to a mortgage include the following: the property remains in bankruptcy, separate from the debtor's assets; an out-of-court foreclosure is allowed; and the rotation of beneficiaries is easier.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

In general, security can be avoided in limited cases related to the debtor's insolvency situation.

Any creditor of the borrower may file at any moment a fraudulent conveyance action under the Code seeking avoidance of any transfers for consideration having the effect of provoking or aggravating the insolvency of the debtor entered into by and between the debtor and a third party who knew or should have known the insolvency situation of the debtor at the time of the transaction (the "Fraudulent Conveyance Action"). If the Fraudulent Conveyance Action is successful, the action is binding only against the plaintiff and up to the amount of its credit. If the assets under the fraudulent transaction are lost for the creditor, a third party acting in bad faith may be liable for the damages caused to the plaintiff; and a third party acting in good faith may be liable for the amount of its enrichment. The statute of limitations for the filing of a Fraudulent Conveyance Action expires after two years from the date on which the transaction was known or should have been known. The plaintiff has the burden of proof in the fraudulent conveyance action.

If the debtor is adjudicated bankrupt under the Argentine Bankruptcy Law 24,522, as amended (the "ABL"), the court will fix the date of the debtor´s payment cessation or commencement of insolvency (*fecha de cesación de pagos*), which may be a date that may not go back more than two years from the date of filing of the petition for the debtor's reorganisation, or of adjudication of bankruptcy (if bankruptcy is adjudicated directly). The period between the date determined by the court as the general payments cessation date and the date of the filing of a petition for reorganisation or the adjudication of bankruptcy is defined as the claw-back period (*período de sospecha*) (the "Claw-back Period").

The granting of security (*e.g.*, mortgage, pledge or any other preference) in respect of debts not due and not secured under their original terms made by the debtor within the Claw-back Period are void. In addition, any other transactions detrimental to the debtor's creditors made by third parties with knowledge of the debtor's insolvency during the Claw-back Period are voidable (the "Avoidance Action"). The third party has the burden of proving that the transaction did not cause any detriment to the debtor's creditors. The statute of limitations for the filing of an Avoidance Action expires after three years from the bankruptcy adjudication.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

A borrower can frustrate enforcement actions by lenders and creditors in general by filing a restructuring proceeding under the ABL. The ABL provides for two restructuring proceedings: (i) the out-of-court restructuring agreement; and (ii) the reorganisation proceedings.

Upon admission by the court of either an out-of-court restructuring agreement or reorganisation proceeding, all pre-petition claims and actions in connection with unsecured monetary claims are stayed. An out-of-court restructuring agreement or reorganisation plan to which more than 50% of the unsecured creditors (on a headcount basis) and more than 66% of the unsecured credits (in principal amount) consent, and which is endorsed or approved by the court, will be binding on all unsecured creditors of the debtor (whether they have consented to the restructuring or not).

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

Filing of a petition for confirmation of an out-of-court reorganisation agreement does not have any effect on the enforcement rights on the collateral of creditors secured with a mortgage or guarantee trust on real estate.

Upon commencement of a reorganisation proceeding, in order to enforce any rights on claims secured with a mortgage or pledge, secured creditors must first file proof of claims in the reorganisation proceedings. Admission of a reorganisation proceeding does not trigger the automatic stay of actions seeking the foreclosure of the collateral on pre-petition claims secured with a mortgage and does not produce the consolidation of the mortgage foreclosure proceedings pending as of the commencement date before the reorganisation proceedings court.

Commencement of a reorganisation proceeding does not itself affect the rights and remedies of secured creditors on the collateral; provided that in case of manifest need or urgency (taking into consideration the convenience for the continuation of the business activities of the debtor and the protection of the creditor's rights) in any mortgage foreclosure proceeding, the court may order a temporary stay of the realisation of the collateral and a temporary suspension of any injunction enjoining the use of the collateral by the debtor, in both cases for a term of not more than 90 business days. Any compensatory interests accrued during the term of the stay or suspension not satisfied out of the proceeds of the realisation of the collateral will enjoy the preference of administrative expenses in liquidation.

Upon enforcement of the collateral, the proceeds will be applied to the repayment of principal and interests accrued as of the payment date, provided that if the proceeds are not sufficient to cancel all amounts due, any remaining balance will be deemed unsecured and, therefore, subject to the restructuring terms.

In reorganisation proceedings, claims secured with guarantee trusts are (*de facto*) subject to a similar treatment as claims secured with a mortgage.

In the event of liquidation (bankruptcy), secured creditors having filed proof of claims may request to the court the realisation of the collateral and satisfaction of their secured claims at any time. After prior notice to the receiver, the court will decide whether admitting or denying the request which, if admitted, will proceed at an ancillary proceeding (special liquidation proceeding). For other applicable procedures in an event of bankruptcy, please refer to question 8.9 below.

However, the receiver may request court authorisation to satisfy the secured credit in full, with liquid funds available if maintenance of the collateral is beneficial for the creditors. To this effect the court may authorise the receiver to grant other securities or sell other assets.

Immediately upon bankruptcy adjudication, the receiver may continue with the business activities of the debtor. During the term of continuation, enforcement of collateral needed for the business exploitation is stayed when: (i) the secured credit is not due as of the bankruptcy adjudication date and the receiver performs the obligations due after such resolution in due time; (ii) the secured credits are due as of the bankruptcy adjudication date but the security is not admitted by a final and non-appealable resolution; or (iii) the secured creditor consented to the stay of the enforcement. In addition, in case of continuation, the court may also order the stay of collateral enforcement proceedings at the request of an employees' cooperative (formed for purposes of acquiring the debtor's business) for a maximum term of two years.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

A share pledge agreement over said shares should be duly executed in accordance with the provisions of Section 2,219 *et seq.* of the Code. In order to perfect such pledge, the pledgers should deliver to the secured parties or the security agent, if any, simultaneously with the execution of said agreement the following: (i) the share certificates issued by the company, representing the shares, which the security agent shall hold and keep until all and each of the secured obligations have been completely and timely complied with, to the secured parties' entire satisfaction or the security created by such agreement is otherwise released; (ii) a certified copy of the notice to the company giving notice of the creation of the pledge on the shares, as provided in Section 215 of the Argentine Companies Law No. 19,550, as amended, together with the company's receipt therefor; (iii) a certified copy of the relevant pages of the company's stock ledger, evidencing the registration of the pledge created on the shares in the name of the secured parties or security agent, if any, for its own benefit and for the benefit and in favour of the secured parties; and (iv) a letter from the president of the company or an attorney-in-fact being duly empowered and authorised for that purpose, acknowledging the creation of the pledge.

Upon the occurrence of an enforcement event under said pledge agreement, the secured parties or the security agent, if any, may proceed to the foreclosure of the pledge created on the shares without any further demand or judicial or extrajudicial notice, by selling such shares in a public auction announced by the secured parties or the security agent, if any, (or its agent or representative thereof) with a prior notice of 10 business days published on one day in legal newspapers of the jurisdiction where such shares should, in accordance with the pledge agreement, be located.

Simultaneously with creation of said share pledge, parties may agree on a special form of disposition (*procedimiento especial de venta*) pursuant to the provisions of Section 2,229 of the Code.

According to such section, the secured parties or the security agent, if any, could sell such shares based on a certain base value given to such shares at the debt maturity date, as said by a mutually appointed third-party expert or by means of any other mutually agreed procedure or, if not otherwise agreed, by a third-party expert appointed by a judge by a simple petition formulated by the secured parties or the security agent, if any.

The sale of such shares may be made through a special process mutually agreed by the parties, which could consist of selling said shares by a mutually appointed third-party expert or by the secured parties or the security agent, if any, whether directly or through an appointed third person at prices arising from certain negotiation segments or upon reports indicating current market values at the time of selling, published either by certain specialised business chambers or by any other mutually agreed designated publisher.

If not agreed to the contrary, these alternatives shall be optional for the secured parties or the security agent, if any, together with the possibility of selling the shares in a public auction as mentioned above.

The secured parties or the security agent, if any, could acquire the shares sold in a public auction or through a private selling or an award process.

Once the sale is completed, the secured parties or the security agent, if any, shall have accountability duties which can be judicially impugned. In any event, such procedure does not affect the validity of such sale.

The foreclosure of privately issued and distributed securities not admitted to public offering implies an offer to purchase the securities to the general public and, hence, would be subject to the prior approval by the Argentine Securities Commission (*Comisión Nacional de Valores*) ("CNV").

When a creditor has been adjudicated bankrupt, realisation of the collateral will be subject to the ABL.

Pursuant to the ABL, to the extent the creditor requested, and the court admitted, the special liquidation proceeding (please refer to question 8.8 above), the court will forthwith order the realisation of the collateral by public auction. Secured creditors acquiring the collateral in the auction may set-off the purchase price with their credits after having granted guarantee of the preferred creditor. If the secured creditor does not request the special liquidation proceeding, then the collateral will be realised upon any of the general available liquidation alternatives as further described below, in which event the security interest will be attached to the proceeds of the collateral realisation:

(i) Individual Public Auction: individual sales are made by public auction; provided that the court may also order the sale through a bidding process in the manner contemplated above, as deemed advisable.

(ii) Private Auction: secured creditors with real property security interests may realise the collateral by private auction if permitted under the terms of the security; provided that if the private auction is conducted after the publication of the notices informing the bankruptcy adjudication, then prior notice of the private auction must be given to the court under penalty of voidance of the auction.

(iii) Private Sale: the court may authorise the private sale of the collateral after notice to the receiver if more beneficial to the estate due to the nature of the asset, its reduced value or the failure of the auction. Private sales could be delegated to the receiver or a third party.

(iv) Securities: securities listed on securities exchanges or trading on over-the-counter markets must be sold at the exchange or market authorised by the court after notice to the receiver.
The foreclosure of privately issued and distributed securities not admitted to public offering implies an offer to purchase the securities to the general public and, hence, would be subject to the prior approval by the CNV.

## 9 Tax

As a preliminarily matter, please bear in mind that Law 27,430 (the "Tax Reform") introduced several amendments to the Argentine tax regime, including the Income Tax Law (and indirectly, Property Sales Tax), Value Added Tax, Procedural Tax Law, among other taxes. Several of such amendments have not been regulated and their scope is not yet clear. In addition, regarding such amendments, case-law or tax authorities' opinions have not yet been issued. As a result, in certain cases our comments below refer to a reasonable position that should be confirmed once the regulation is issued.

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Yes, they are subject to a transfer tax. Please see the answer to question 9.2 below, for the applicable transfer taxes to the sale of real estate located in Argentina.

### 9.2 When is the transfer tax paid?

Income Tax or Property Sales Tax may apply depending on the beneficiary of the income and the date of acquisition of the property.

| Beneficiary | APPLICABLE TAX depending on DATE OF ACQUISITION | | Payment of the tax in charge of |
|---|---|---|---|
| | Until December 31, 2017 | From January 1, 2018 onwards | |
| **Legal entity incorporated in ARG** | **Income Tax** (30% during fiscal years beginning prior to December 31, 2019. 25% from such date onwards). | **Income Tax** (30% during fiscal years beginning prior to December 31, 2019. 25% from such date onwards). | Taxpayer files its tax return at the ending of the fiscal year including the income and deducting costs, expenses, etc. However, the public notary taking part in the operation should make a withholding upon the payment of the price as an advance tax payment. |
| **ARG-resident individual** | **Property Sales Tax** (1.5%) on the price, unless certain exceptions apply.[1] | **Income Tax** (15%) on the price after deducting acquisition cost and allowed amortisations – if any – unless certain exceptions apply.[2] | Taxpayer files its tax return at the ending of the fiscal year including the income and deducting costs, expenses, etc. However, the public notary taking part in the operation should make a withholding upon the payment of the price as advance tax payment. |
| **Legal entity incorporated abroad (without a permanent establishment in Argentina)** | **Income Tax** (the taxpayer is allowed to choose between 17.5% applicable on the price or 35% on the real gain).[3] | **Income Tax** (the taxpayer is allowed to choose between 17.5% applicable on the price or 35% on the real gain).[4] | Argentine payer/public notary make the withholding of the tax. |
| **Foreign-resident individual (without a permanent establishment in Argentina)** | **Property Sales Tax** (1.5%) on the price if it is demonstrated that the seller is an individual. | **Income Tax** (15%) on the price after deducting acquisition cost and allowed amortisations – if any.[5] | Argentine payer/public notary make the withholding of the tax. |

**Table footnotes**:

1. Indeed, if the Argentine resident individual: (i) carries out a business selling real estate; (ii) builds and sells under the "Commonhold Property regime"; (iii) parcels with the aim to urbanise; and/or (iv) develops the so-called "*Conjunto Inmobiliario*" (Country Clubs, Industrial Parks, etc.), then **Income Tax** applies at a 5%–35% rate.
2. Indeed, if the Argentine resident individual: (i) carries out a business selling real estate; (ii) builds and sells under the "Commonhold Property regime"; (iii) parcels with the aim to urbanise; and/or (iv) develops the so-called "*Conjunto Inmobiliario*" (Country Clubs, Industrial Parks, etc.), then **Income Tax** applies at a 5%–35% rate.
3. If Argentina and the country of the foreign resident have entered into a treaty to avoid double taxation, such treaty may establish ceilings to the rates applicable according to Argentine income tax law.
4. If Argentina and the country of the foreign resident have entered into a treaty to avoid double taxation, such treaty may establish ceilings to the rates applicable according to Argentine income tax law.
5. If Argentina and the country of the foreign resident have entered into a treaty to avoid double taxation, such treaty may establish ceilings to the rates applicable according to Argentine income tax law.

**Stamp Tax**

Stamp tax is a provincial tax levied on public and private instruments executed in Argentina. If the instrument is executed abroad, the Stamp Tax applies to the extent that negotiated assets are located in Argentina or the agreement/operations have effect within Argentina. In general, this tax is calculated on the economic value of the agreement and the parties who executed the document are severally and jointly liable for its payment. In general, the provinces and the City of Buenos Aires establish withholding regimes through which a notary public is obliged to withhold and pay the tax to the authorities. The average general rate across the different jurisdictions is 1%; however, when the agreement refers to real estate, the rate is higher (*e.g.*, in the City of Buenos Aires, while the general rate is 1%, the one applicable to the sale of real estate is 3.6%).

Offers accepted tacitly by means of an act (for example, payment, delivery of documents, issuance of an invoice, etc.) or those written documents which do not reproduce the content of the offer, its enunciations or its core elements should not be under the scope of Stamp Tax in certain provinces.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Yes, transfers are subject to income tax. Please refer to the answer to question 9.1 above.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

As a general principle, the transfer of real estate is excluded from the scope of VAT. However, constructions and works made on the parties' own or third parties' property are included in the scope of this tax. As a result, if the company/person that built on their own/third party's property sells such property, VAT applies only on the price of the constructions or works but not on the value of the land or the value of existing constructions or works. In other words, in these cases, VAT taxes the construction or works on the property but not the property itself.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

The transfer of funds to and from bank accounts in Argentina is subject to the **Tax on Debits and Credits on Bank Accounts** at a rate of 0.6% for each debit/credit. Thus, when a buyer transfers the respective funds from its account in an Argentine financial institution, he/she will be subject to the collection of the tax (at a 0.6% rate); and when such funds are accredited in the seller's bank account, the tax is triggered again (at a 0.6% rate). Thus, the tax applicable to the operation is 1.2%. If the funds are transferred between accounts in financial institutions abroad, in principle, this tax is not applicable.

In addition of transfer taxes, please be aware of the following taxes:

**a) Tax on presumed minimum income:**

This tax applies to all assets of Argentine companies and other entities, such as Argentine trusts (*fideicomisos*); common investment funds, and permanent establishments of foreign entities and individuals in Argentina. The tax only applies if the total value of the assets exceeds ARS 200,000 at the end of the entity's financial year. In this case, the total value of the assets will be taxed at the rate of 1%.

Foreign beneficiaries are taxed at a 1% rate for (i) their urban properties to the extent they are exploited through an economic activity, and (ii) their rural properties.

Normal corporate income tax is allowed as a payment on account of this tax. Also, any tax payable under this heading is allowed as a credit against normal corporate income tax for the following 10 years.

According to Law No. 27,260, published in the Official Gazette on July 22, 2016, this tax has been abrogated for fiscal years starting as from January 1, 2019.

**b) Personal Assets Tax:**

The Personal Assets Tax Law No. 23,966, as amended, provides that all individuals domiciled in Argentina are subject to a tax upon their worldwide assets. Individuals not domiciled in Argentina are only liable for this tax upon their assets located in Argentina.

Foreign beneficiaries do not have to pay this tax regarding real estate that was subject to tax on presumed minimum income, as explained in a).

The tax rate is of 0.25% on the value of the assets exceeding the amount of ARS 1,050,000.

**c) Other taxes:**

Please bear in mind that the provinces, the City of Buenos Aires and Argentine municipalities collect property taxes and other taxes that remunerate the rendering of public services (*e.g.*, tax remunerating lighting, sweeping, cleaning services).

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes, the sale of shares corresponding to Argentine companies that are owners of real estate, in certain cases, receive a different tax treatment under Income Tax. If the shares are sold by an Argentine-resident entity, the same rate would apply that is applicable in the case of real estate (*i.e.*, 30% for fiscal years beginning prior to December 31, 2019, and 25% from such date

onwards). If the shares are sold by Argentine individuals, the applicable rate would be 15% of the price, after the deduction of the acquisition cost.

If the shares are sold by foreign residents (whether individuals or entities), the rate would be 13.5% on the price or 15% on the "real gain", in both cases to the extent that they do not reside in a non-cooperative jurisdiction or the funds do not come from non-cooperative jurisdictions. (The Argentine Tax Authority publishes a list evidencing which jurisdictions are considered as non-cooperative.) Otherwise, a 31.5% rate would apply.

Given certain conditions, the results from a sale, transfer or disposition of shares, securities representing shares and certificates of deposit of shares that are carried out through stock exchanges or stock markets authorised by the Argentine Securities and Exchange Commission are exempted.

In addition, the sale or transfer by foreign beneficiaries of shares or other participations in foreign entities when at least 30% of its value derives from assets located in Argentina, will be taxable at a rate of 15% calculated on the actual net gain or at a rate of 13.5% of the sale price, in proportion to the value that corresponds to the Argentine assets. Having said that, indirect transfers would not be taxed, to the extent that it can be proved that the transfer was carried out within the same economic group, according to regulations which issuance is pending. This tax on indirect sales will only apply to participations in foreign entities acquired after the entry into force of the tax reform.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

It is crucial to ensure that (i) there is not any seizure freezing the assets of the seller or any other kind of lien on the real estate to be acquired, and that (ii) there is no tax debt (at provincial or municipal level) levied on the asset to be acquired.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Leases are governed by the Code and the Urban Leases Law ("ULL"). Furthermore, in November 2016, the Senate approved a new bill on leases (the "Bill") submitted by the Federal Executive Branch that amends some of the provisions of the Code. Certain law provisions (the bulk of them aimed to protect the lessee) are considered public policy and therefore mandatory for the parties. Lease contracts need only be in writing. A notarial deed or registration is not required.

**10.2 What types of business lease exist?**

The types of business leases that exist are urban leases, rural leases and commercial leases, each of which is governed by a different set of rules.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

(a) Length of term
The ULL provides for a minimum term of three years for urban business commercial leases. Any lease contract entered into for a shorter term than the legal minimum will be considered as executed for the minimum term irrespective of its actual provisions. Under the ULL, lease agreements are also subject to a maximum term of 10 years. Furthermore, the Code provides for a minimum term of two years for urban business commercial leases and it extends the maximum term to 50 years.

(b) Rent increases
Parties are free to agree staggered price mechanisms unless this implies some way of indexation (for example, a rent increase by means of a clause taking the inflation index into account would be void).

(c) Tenant's right to sell or sub-lease
A tenant may sub-lease in whole or in part the leased premises unless otherwise agreed. It is customary, though, to include an express prohibition to sub-lease in the agreement.

(d) Insurance
Usually, parties agree that the tenant must insure the property.

(e) (i) Change of control of the tenant
There are no mandatory provisions on this matter under applicable law.
(ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)
There are no mandatory provisions on this matter under applicable law.

(f) Repairs
The regulation of this matter is generally left to the parties, but the general principle reflected in the Code is that the tenant shall be responsible for carrying out minor repairs and regular maintenance of the leased property. The tenant is also responsible for those repairs arising from the tenant's fault or wilful acts. Any defects in the structure of the property or more serious repair works must be borne by the landlord.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

VAT is applicable to rentals of all types of real property (other than that used for the lessee's personal housing) if the rental income exceeds a minimum amount. However, there are some exemptions, and the tax treatment must be analysed on a case-by-case basis. For other taxes, please refer to question 9.1 above.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

In addition to usual termination clauses (term expiration, default, breach of contract, etc.), termination of the lease is triggered by the total destruction of the leased property. In all cases where the termination is not caused by the fault or wilful misconduct of the parties, such termination will not result in any obligation for compensation, except for the repayment of all sums paid in advance. Notwithstanding the minimum terms indicated in the answer to item (a) of question 10.3, after the first six months of the lease have elapsed, the tenant has a legal

right to terminate the lease prior to the expiry of the minimum contractual term. In order to benefit from this right, the tenant must give the landlord notice of its decision to terminate the lease at least 60 days prior to the date on which it intends to vacate the property. Should the tenant exercise this right during the first year of the tenancy, it is also obliged to compensate the landlord in the amount of one-and-a-half months' rent. This compensatory payment is reduced to one month's rent after one year of tenancy.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The fact that the title to the freehold property is transferred does not affect the underlying lease; the lease contract remains in full force and effect against the new owner of the property.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green leases are not common in Argentina. However, parties are free to agree to these kinds of obligations.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Yes, through different housing and working options, the maximisation of common spaces and the minimisation of private spaces are starting to combine in Argentina to respond to the current demand especially of young people.

Casa Campus is the first company in Argentina that is currently involved in the development of several co-living residences, namely: "Casa Congreso"; "Casa San Telmo – Balcarce"; "Casa Pilar – Suites"; "Casa Pilar – Araucarias"; "Casa San Telmo – Independencia"; and "Casa Palermo – Cabrera", among others.

In reference to co-working, there are several companies that are already providing these services in Argentina such as: "WeWork"; "Urban Station"; "La Maquinita"; "Belephant"; and "GOWORK Coworking", among others.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Please refer to question 10.1 above.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, they do not, as long as the premises are used in accordance to what was agreed in the lease contract.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Length of term

The ULL and the Code provide for a minimum term of two years for residential leases. Any lease contract entered into for a shorter term than the legal minimum will be considered as executed for the minimum term irrespective of its actual provisions. Under the ULL, lease agreements are also subject to a maximum term of 10 years. Furthermore, the Code extends the maximum term for residential leases to 20 years.

(b) Rent increases/controls

Please refer to question 10.2 (b) above.

(c) Tenant's rights to remain in the premises at the end of the term

The applicable laws do not provide any rights to the tenant to remain on the premises at the end of the term. The Code only provides that if the landlord does not comply with its obligations, the tenant can early terminate the lease contract.

(d) Tenant's contribution/obligation to the property "costs" e.g. insurance and repair

Although there are no mandatory provisions on this matter under applicable laws, usually parties agree that the tenant must insure the property and pay bills and ordinary expenses. Regarding repairs, the regulation of this matter is also generally left to the parties, but the general principle reflected in the Code is that the tenant shall be responsible for carrying out minor repairs and regular maintenance of the leased property. The tenant is also responsible for those repairs arising from the tenant's fault or wilful acts. Any defects in the structure of the property or more serious repair works must be borne by the landlord.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Yes, a landlord is entitled to terminate a residential lease if the tenant: (i) changes the purpose of the premises agreed in the lease contract; (ii) fails to preserve the leased premises, or its abandonment; and/or (iii) does not pay the agreed rent, during two consecutive periods. The ULL provides that, prior to the complaint of eviction for non-payment of the rent, the landlord must reliably notify the tenant of the amount due, granting for it a term that may not be less than 10 calendar days counted from the reception of the summons, noting the place of payment.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Urban development in Argentina is basically governed by

provincial and municipal zoning regulations and building codes; therefore, they differ in each jurisdiction.

The Federal Government sets the minimum environmental standards for the protection of the environment, and the provinces and municipalities establish specific standards and implementing regulations. The Argentine Constitution forbids the introduction of hazardous waste into the country. Federal laws relate to various environmental issues, such as industrial and waste management and disposal, air, land and water pollution, etc. The provinces have also enacted environmental laws requiring companies to prepare and file environmental impact statements in order to obtain the relevant permits.

Certain provinces, such as the provinces of Buenos Aires and Santa Fe, have enacted specific regulations for the so-called "large commercial areas", which apply to supermarkets, malls, shopping centres and department stores (large retailers).

The right to private property is guaranteed by the Federal Constitution. However, both the Federal Government and the provinces are empowered to governmental taking (*expropiacion*), provided that the following requirements, among others, are met: (i) the Federal Congress (or provincial legislature as the case may be) must enact a law declaring the public interest triggering the taking; and (ii) prior and due compensation must be paid to the owner. The compensation may be judicially determined should the parties fail to agree on it. In principle, loss of profits is not compensated, though case law has loosened this restriction in certain special circumstances.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

National and local governments may force a landowner to sell their land to any of them. According to national proceedings, the land should firstly be declared of "public use". After that declaration, an administrative procedure to determine the scope of the compelled sale and to value the property begins. If the landowner does not agree with the conclusions of such procedure, the government must fill in a judicial claim to force the sale. The judicial decision will only rule on the price of the land. The price only includes the "objective price" of the property and direct damages of the expropriation; personal circumstances or lost profits are not taken into account.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Control of proper zoning, land use, building codes and other restrictions are carried out by provincial and municipal authorities. Environmental compliance is controlled at the federal, provincial and municipal level. The provinces have recently begun to work actively on these matters. Buyers usually obtain reliable information on environmental matters through due diligence on existing administrative or judicial cases and from any claims initiated before administrative authorities. Further, prospective buyers usually inspect the property on site.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

It is not possible to provide a complete list of permits and licences required for the use of real estate because there may be as many regulations as the number of Argentine provinces and municipalities.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Building or use permits are regularly obtained, although it can be a lengthy process. The cost of, and timing for the issuance of, building or use permits has to be analysed on a case-by-case basis.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

Please refer to question 12.3.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

There are national and local regulations on the protection of historic monuments. In general, the declaration of "public use" of a particular property only limits its use but should the conservation of the historic monument be jeopardised, the government may compel the sale.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Argentina has no national register on pollution or contamination.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

If damage to the environment is determined, clean-up (or remediation) will be mandatory.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The Federal Government has taken some general measures in order to reduce electricity and gas consumption by means of charging higher tariffs when consumption increases are detected.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Argentina is not a party to Annex 1 of the Kyoto Protocol, so there are no mandatory reduction targets applicable to activities held in Argentina.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Please refer to question 13.1.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

No, there are no rules of national application on this matter, although there are some local laws which aim to improve the sustainability of both newly constructed and existing buildings, *i.e.*, Law No. 13,059 of the Province of Buenos Aires regarding thermal isolation for new private and public buildings; Law No. 4,428 of the City of Buenos Aires regarding green terraces for existing buildings; and Ordinance No. 8,757 of the City of Rosario regarding efficient use of energy for new buildings.

## Acknowledgment

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# Austria


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Real estate law in Austria is subject to various legal requirements depending on the subject matter at hand. The main laws (except those regarding leases, zoning, environmental and tax matters mentioned in sections 9, 10 and 12) are the following:

- General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* or ABGB);
- Land Register Act (*Allgemeines Grundbuchsgesetz*);
- Condominium Ownership Act (*Wohnungseigentumsgesetz*);
- Real Estate Developer Act (*Bauträgervertragsgesetz*); and
- Building Acts (*Bauordnungen*) of the nine federal provinces of Austria.

In addition, regulations issued by federal provinces governing land purchase by foreign investors are of importance.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Austria is a federal republic consisting of nine federal provinces with a civil law legal system.

Judges in Austria are independent in the performance of their judicial duties and are only bound by legal provisions (but not precedent cases) in their decisions.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws may be of relevance in connection with the determination of the law applicable to real estate agreements and for the determination if a party could be subject to sanctions.

Pursuant to Regulation (EC) No. 593/2008 (Rome I), the contractual parties are generally free to elect the law applicable to real estate transactions except for the respective *in rem* rights, which are always subject to Austrian law in case of properties located in Austria. To the extent that the law applicable to the agreement has not been determined by the parties, Austrian law generally applies (as the law of the country where the property is located).

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Under the applicable land transfer regulations, the transfer of property rights to foreign investors may require an approval by the regional land authority. In this respect, each Austrian federal province has its own legal framework defining the applicable restrictions as well as the approval process.

If the necessary approval is not obtained, a transfer of ownership cannot be registered in the respective land register and the contemplated transaction cannot be completed (as real estate ownership is generally obtained only through registration of the purchaser in the land register).

A major exception to the restrictions regarding real estate transactions with foreign nationals relates to citizens of member states of the European Union (EU) and European Economic Area (EEA). Persons and companies from these states are treated equal to Austrian nationals.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Austrian law generally recognises the following types of rights over land:

**Sole ownership (freehold)**
One person has the right to use, exploit and exclude others from the property at his or her sole discretion. The sole owner of a property can thus exclusively decide to use, let, sell or encumber all or part of the property.

**Co-ownership**
In such cases, the individual co-owners are entitled to fictitious shares in the property (i.e. the ownership right is divided, but not the property itself). If no administrator is appointed by the co-owners, they must jointly make decisions regarding the property. A majority is usually sufficient for decision-making in administrative matters.

**Condominium ownership**
In addition to being a co-owner of the entire property, a condominium owner has the right of sole use and enjoyment regarding

a specific unit in the property (e.g. a flat), which he or she may freely dispose of without the other co-owner's agreement. Condominium ownership is not created automatically but must be established, typically through a condominium agreement signed by all co-owners and subsequent registration in the land register.

**Easements**
A distinction is made between "property easements" and "personal easements". Property easements grant the respective owner of a property certain rights in relation to another property. Personal easements relate to specific persons.

**Superstructures**
Please see question 3.2 below.

**Building rights**
Please see question 3.2 below.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

According to Austrian law, the principal of *superficies solo cedit* generally applies: the owner of a plot of land is automatically the owner of the buildings erected on it. This principal of inseparability of land and building ownership is only overruled by two exceptions, namely the existence of superstructures (*Superädifikate*) and building rights (*Baurechte*).

Superstructures are buildings on someone else's land, usually on a contractual basis, which are not intended to remain there permanently. In practice – following generous court rulings regarding the prerequisites for creating superstructures – they frequently appear like permanent buildings.

Building rights are the right to construct a building on or beneath the ground surface of someone else's land, such as an underground parking garage. This right may be granted for a limited time only (between 10 and 100 years) and must be registered in the land register.

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

Austrian law provides for the possibility to split the legal title from the beneficial title. Only the legal owner is entitled to register its ownership right with the land register and has the power to dispose of the real property.

We are not aware of any proposals to change this concept.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

All land plots within the federal territory as well as all rights *in rem* associated therewith have to be registered in the land register which is publicly and electronically accessible and maintained by district courts.

By viewing the land register, it is possible to readily identify who owns a specific land plot and whether third party rights *in rem* (e.g. mortgages, easements, etc.) have been established.

### 4.2 Is there a state guarantee of title? What does it guarantee?

The Austrian land register system follows both an "intabulation principle" as well as a "principle of trust" on registration:

On the one hand, the acquisition, transfer or deletion of *in rem* rights may only be accomplished by a registration in the land register (with certain exceptions such as acquisitive prescription) and, on the other hand, persons may generally rely on the correctness and completeness of registered facts and are legally protected in doing so (except for cases of bad faith) without them having to examine specific documentation in the document archive (*Urkundensammlung*) maintained by the district courts.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

In addition to the right of ownership, easements, mortgages and building rights are also established upon their registration with the land register.

(Contractual) rights not registered with the land register only apply *inter partes* between the contractual parties. In order for these rights to take full effect *vis-à-vis* third parties, a registration with the land registry must be performed.

### 4.4 What rights in land are not required to be registered?

The most important exceptions to the general intabulation principle are superstructures (as described in question 3.2 above) and lease agreements which only need to be registered outside the applicability of the Austrian Tenancy Act (*Mietrechtsgesetz* or MRG) in order to automatically bind legal successors of the landlord (including in insolvency scenarios).

### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

The Austrian land register does not provide for any probationary period and/or different classes or qualities of title following the first registration.

The specific prioritisation of rights and encumbrances generally derives from the registration hierarchy in the land register, whereby the point in time of the respective application to register with the competent district court is decisive. Registered rights generally take priority over unregistered rights.

### 4.6 On a land sale, when is title (or ownership) transferred to the buyer?

For obtaining ownership to real property, the system of property transactions in Austria requires a contractual or legal obligation and an act of disposal. In most cases, contractual transactions such as a purchase agreement serve as titles. The actual acquisition of ownership arises only through its entry into the land register, thus not by merely taking possession of the property. Entry in the land register therefore has a constitutive effect.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The priority of a right *in rem* entered into the land register is dependent on its ranking. The ranking of the respective right is determined by the time at which the respective land register application arrives at the competent court. Parties can further contractually agree on granting priority to a certain right or encumbrance.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There is only one uniform land register in Austria, which contains all properties and rights associated therewith. The land register consists of the main book and the document archive.

**5.2 How do the owners of registered real estate prove their title?**

Proof of ownership is usually provided by submitting an extract from the land register confirming the ownership right.

In case the entry into the land register has not yet occurred, a duly executed purchase agreement with all signatures of the contractual parties duly notarised may be used as a proof of title.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

All land register applications must electronically be submitted to the competent district courts by attorneys-at-law or public notaries.

The following documents (at a minimum) are required for the registration of ownership rights (in electronical form):

- a document evidencing the acquisition of the ownership right;
- a notarised declaration of conveyance from the existing owner (usually included in the purchase agreement);
- a statement regarding the calculation of relevant taxes; and
- an approval document from the competent local land transfer authority.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Damages caused by errors of district courts may lead to public liability (*Amtshaftung*). Claims for damages would have to be filed against the Republic of Austria.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Anyone may gain access to the register and obtain excerpts even without specific legal interest in this respect. Only documents submitted after 2006 are generally electronically available, older documents need to be physically obtained at the respective district court.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

The most important party to a real estate transaction is considered to be the trustee (generally an attorney or a notary public). The trustee is, *inter alia*, obliged to ensure that (i) the ownership of the purchaser is entered into the land register, (ii) the seller receives the purchase price after all contractual conditions have been fully met and, if necessary, (iii) the financing credit institution is secured by mortgages.

Further, real estate agents are usually involved in the facilitation of a property acquisition.

**6.2 How and on what basis are these persons remunerated?**

The costs in connection with a trusteeship can be individually negotiated and depend on the complexity of the transaction, the quality expectations of the parties as well as the transaction volume.

Typically, a certain percentage of the purchase price is agreed upon.

The commission of the real estate agent has to be within the limits set by a regulation of the Federal Ministry of Economics and Labour, i.e. a maximum of 3% of the purchase price from each party to the transaction.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Generally, real estate financing is provided by banks via loans. Restrictions on who may provide financing in relation to real estate transactions mainly stem from banking regulations that restrictively regulate the commercial granting of loans.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Due to a generally stable political and economic framework, the demand for Austrian real estate is rising. Even though real estate prices have increased significantly over the past years, Austria is still considered to be a place for non-speculative real estate investments, in particular as the demographic development and expected urban conurbation (with Vienna being constantly ranked as one of the world's best cities to live in) results in a situation where demand exceeds the offer.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Although top retail real estate locations have remained strong with stable rent levels, there has been a general decline in shopping streets. The development of office, retail and residential real estate slowed throughout 2019, a trend that might continue in 2020.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

A binding agreement is concluded through offer and acceptance, i.e. through a mutual declaration of intent by the parties. As a rule, there are no special formal requirements in this context.

For property transactions, however, a conveyance declaration must be issued in notarised form. In most cases, the purchase agreement itself will contain this declaration and will be executed in compliance with this formal requirement.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

Even though there is no general duty to disclose information for the seller, Austrian case law assumes fraudulent intent of the seller if information was withheld to the potential purchaser that would otherwise typically be disclosed and/or could reasonably be expected to be disclosed in fair business dealings (potentially resulting in damage claims or a rescission of the contract).

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller is generally liable for misrepresentation in case any untrue statements of the seller induces the purchaser to enter into the agreement, and, as a result, the buyer suffers a loss. In cases of unremedied material misrepresentations, a rescission of the contract could be possible.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

The seller usually warrants unencumbered ownership of the land property. In addition, purchase agreements usually contain further representations and warranties regarding potential liabilities for false statements as well as defective or faulty performance of the seller, including those relating to dedicated use of the purchase object according to zoning provisions and building regulations, public legal permits, pending disputes, defects or inherited liabilities, environmental issues, administrative and corporate approvals, arrears in operating costs, taxes and duties, etc. These warranties are generally given to apportion the risk for unknown circumstances.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller remains liable for the warranties with regard to the property set out in the purchase agreement. Unless otherwise agreed by the parties, the warranty period amounts to three years as of the date of handover of the property. Further, all costs in connection with the use of the property (e.g. operational costs, taxes, insurance premiums, etc.) incurred up to the handover date are usually borne by the purchaser.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In addition to paying the purchase price, the buyer is obliged to pay real estate transfer tax (generally 3.5% of the purchase price) as well as land register registration fees (generally 1.1% of the purchase price for the registration of the ownership right and an additional 1.2% for the registration of mortgages).

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## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

According to the Austrian Banking Act (*Bankwesengesetz*), lenders require a banking concession issued by the Austrian regulator (Financial Market Authority) in order to provide financing to borrowers. Certified concession of a lender resident within the EEA jurisdiction will be held equivalent.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Mortgages over real property typically serve as collateral for real estate financings. In addition, the following security instruments are typically considered:

- pledges over shares in the asset holding entity;
- pledges over movable assets in the real estate (e.g. FF&Es);
- pledges over accounts;
- assignments over receivables; and
- assignments of the benefit of major contracts (e.g. insurance contracts).

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Mortgages are generally enforced by way of a judicial foreclosure procedure if the underlying secured claim is not duly and timely paid. The enforcement of the mortgage is exercised by the court after granting the execution title and the registration of the sale in the land register.

In order to avoid court proceedings, the mortgagee and the mortgagor can alternatively sign a notarial deed suitable for immediate execution. Such deed is a title enabling the mortgagee to commence the foreclosure sale of the property.

Another option for the mortgagee to realise a mortgaged property without involving court proceedings, is the freehand sale of a pledged property in case the mortgagor has given to the mortgagee a power of attorney to sell the real estate in case of default of payment.

### 8.4 What minimum formalities are required for real estate lending?

The minimum requirement for real estate lending is a bank concession of the lender according to the provisions of the Austrian Banking Act (*Bankwesengesetz*). The loan agreement is not subject to formal requirements (unless the borrower is a consumer). Mortgage agreements must be notarised.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

A right of lien to properties is established through the entry of the mortgage in the land register. If a debtor grants multiple creditors a right of lien to the property, the creditor whose right is registered first – and therefore has the better ranking – takes priority in the satisfaction of a claim to the proceeds of a sale.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Security taken by a lender is avoided or rendered unenforceable, *inter alia*, in the following events:

**Repayment**
Although the mortgage is not cancelled and continues to exist until its cancellation has been entered in the land register, after repayment of the mortgage the debtless mortgage would be rendered unenforceable.

**Destruction of the pledged real property**
The right of lien to real properties is automatically cancelled in the event of destruction of the pledged item. If the item is restored, the lien is also restored.

**Waiver**
Security taken by a lender usually is automatically cancelled when the lender waives his claim for the secured debt against the borrower. This can take place explicitly or tacitly, e.g. by returning the pledged item to the borrower without reservation.

**Avoidance**
Securities taken by a lender prior to the opening of insolvency proceedings concerning the debtor's assets may be challenged and voided under certain circumstances.

**Fraud**
If the borrower was led to conclude a contract based on wrong information intentionally presented by the lender, he or she may file for an annulment of the contract.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

There are generally no legal actions to frustrate enforcement action by a lender. The borrower can only try to delay the enforcement by negotiating a grace period for the repayment of the loan.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

As of the opening of insolvency proceedings against the borrower, no entries into the land register are permitted. A previously acquired lien of the lender, however, will not be affected. In such case, the lender is entitled to separate the pledged property from the rest of the assets of the borrower and enforce its claims by selling the property in a forced auction and use the proceeds to settle all outstanding debts.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

In general, a pledge over shares which have an exchange price or market price can be enforced through a private sale. If this is not the case, pledges over shares can be enforced either by public auction or (subject to valuation) private sale. The appropriation of pledged shares is not permitted under Austrian law (*lex commissoria*).

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Real estate transfers are generally subject to a real estate transfer tax at a rate of 3.5% of the tax base which is generally the value of the consideration (such as the purchase price, the exchange or trade, highest bid in forced sales, etc.).

Further, a land register registration fee generally amounting to 1.1% of the consideration (e.g. purchase price) is to be paid by the buyer. The registration fee for the registration of mortgages amounts to 1.2% of the secured amount.

### 9.2 When is the transfer tax paid?

In general, the real estate transfer tax is due no later than on the 15th day of the second month following the signing of the purchase agreement. The registration fee on the other hand, is due upon registration with the land register. Typically, the real estate transfer tax and the registration fee are paid to the escrow agent within two weeks after the execution of the purchase contract.

### 9.3 Are transfers of real estate by individuals subject to income tax?

In general, profit realised through selling of real property is taxed with a flat tax rate of 30% (thus this profit is not to be added to other dutiable income).

Tax exemptions are granted for properties continuously used as a permanent residence by the seller for at least two years after acquisition, or for at least five years during the past 10 years.

Profits from the sale of real estate by a corporate entity are subject to corporate income tax at a flat rate of 25%.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Real estate transactions are generally not subject to any VAT. However, if the selling party is an entrepreneur, it may opt to treat the sale as VAT taxable.

Entrepreneurs typically take this option into consideration if they have reclaimed input tax regarding the real estate (which would otherwise have to be refunded) within the past 10 years for real estate acquired prior to 1 April 2012 or the past 20 years for real estate acquired after such date.

The current VAT rate is 20% of the purchase price.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

The seller is generally responsible for the fees of his own lawyer. All other costs, taxes, fees and charges associated with the trusteeship as well as the execution of the purchase agreement in the land register are usually borne by the purchaser.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

By carefully structuring a share deal, land transfer tax can be avoided. Further, as in case of a share deal the identity of the actual property owner does not change, no registration fee is to be paid.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

The most important tax issues which are to be taken into consideration by a purchaser in the course of a real estate transaction are, in particular, the following:

- current calculation of the depreciation of the real estate;
- interest expense deduction; and
- real estate transfer tax.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

Lease agreements for business purposes are mainly governed by the MRG and, to the extent that the MRG is not applicable, by the ABGB.

The lease provisions contained in the ABGB are largely non-mandatory and can be freely negotiated by the parties. The contrary is the case with MRG provisions aimed to protect the tenant.

In particular the following lease relationships are fully excluded from the application of the MRG and thus subject to the provisions of the ABGB:

- lease agreements relating to rented objects in a building with no more than two independent apartments or commercial premises;
- certain lease agreements with a maximum term of six months;
- lease agreements relating to employee accommodation;
- lease agreements related to holiday accommodation; and
- lease agreements within the scope of certain business operations (e.g. accommodation, parking spaces, airport and shipping operations, warehouses, etc.).

The following lease agreements are only subject to a partial application of the MRG:

- leased premises which are under condominium ownership, to the extent that the leased premises are located in a building that was built on the basis of a building permit granted after 8 May 1945;
- leased premises which were built through a loft conversion or a build-up on the basis of a building permit granted after 31 December 2001; and
- leased premises which were built new through an extension on the basis of building permit granted after 30 September 2006.

Depending on the applicability of the MRG, the law could, in particular, provide for mandatory restrictions on the landlord's termination rights, the maximum amount of rent, as well as maintenance obligations. Within the scope of a partial applicability of the MRG, mainly termination restrictions of the MRG regarding the lease agreement apply.

### 10.2 What types of business lease exist?

Austrian law generally differentiates between two forms of lease agreements, namely lease agreements (*Mietvertrag*) where an object is leased for use only and leasehold agreements (*Pachtvertrag*) where an object is leased for use and profit. Several conditions must be met for the qualification of a lease agreement as leasehold (with the Austrian Supreme Court taking a strict view) so that the majority of leases with regard to business premises constitute lease agreements.

In general, different legal requirements apply to these forms of lease agreements, where significant variations appear with regard to rent control (maximum amounts), duty to repair and maintain the premises, reimbursement for operating costs, as well as certain limits on lease termination and term duration.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

**Length of term**

The term of lease agreements with regard to business premises may be freely determined and extended between the parties. Minimum term periods only apply to residential leases within the scope of the MRG (minimum period of three years). Under the MRG, a fixed term is only legally enforceable for the landlord if agreed in writing (signed by both parties).

**Rent increases**

In general, the amount of the rent payable for business leases may be freely determined between the parties.

**Tenant's right to sell or sub-lease**

In general, the tenant is entitled to transfer the leased premises by way of subletting, unless otherwise agreed between the parties. In practice, however, transfer and subletting are usually prohibited. For leased premises which are subject to the full scope of the MRG, only the subletting of the entire leased object (thus not parts thereof) can be prohibited.

**Insurance**
The insurance necessary for the property and buildings (e.g. fire, water pipe, storm, hail and third-party liability insurance) is normally taken out by the property owner and charged to the tenant as operating costs. Insurances that relate directly to the leased premises (e.g. household, burglary and public liability insurance) are usually taken out by the tenant at its own expense.

**Repair**
In general, landlords must keep the leased property in a condition that allows the lessee to enjoy uninterrupted use. This obligation includes the maintenance of general parts and the prevention of serious damage to the health and wellbeing of residents. Outside the full applicability of the MRG, landlords may lawfully assign these obligations in full or in part to their tenants. A breach of these obligations entitles the lessee to claim damages or a rent reduction.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Written lease agreements for business purposes are generally subject to stamp duty (*Rechtsgeschäftsgebühr*) according to the Austrian Stamp Duty Act (*Gebührengesetz*). The stamp duty amounts to 1% of the calculation basis. In case of lease agreements concluded for an indefinite period of time, the stamp duty is calculated on the basis of three annual rents (including service charges, operating expenses and VAT). For fixed-term lease agreements, stamp duty is calculated on the basis of the rent for the entire term up to a maximum of 18 years (again, including service charges, operating expenses and VAT).

Whether or not VAT is to be applied to a lease agreement depends on specific circumstances. Basically, services rendered by entrepreneurs in Austria for a valuable consideration are subject to VAT. Lease agreements relating to the letting of commercial premises are excepted from this principle and are treated as tax-exempt without the right to claim input tax. The landlord may voluntarily opt into the VAT system. In this case, the landlord is entitled to reclaim from the tax authority VAT billed for services in relation with the letting activity as input tax.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Fixed-term lease agreements end through expiry of the agreed tenancy period. They may not be terminated before unless otherwise agreed by the parties (exceptions exist only with regard to residential leases, where the tenant is entitled to termination after one year of the lease has lapsed).

Indefinite lease agreements within the scope of MRG may be terminated by the tenant by serving notice of termination. The landlord, on the other hand, may only terminate the agreement for important reasons by means of a court proceeding. Important reasons according to MRG are, in particular, rent arrears, significantly detrimental use of the leased premises and prohibited subleasing.

If the lease agreement relates to business premises, the period of the lease may be chosen and also extended at will; no minimum period for the lease or the respective extension is necessary. For residential leases on the other hand, the MRG stipulates a minimum term of three years. The agreement may be extended as many times as the parties wish but only by another three years in each case.

In the event of an early termination, the party at fault may be held liable for damages resulting from the early termination. In addition, some lease agreements contain a contractual penalty for such cases.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

According to the provisions of the MRG, the buyer enters into the existing lease when the entire business is sold. The original tenant, however, continues to be liable for any obligations until the transaction becomes effective.

In case of a sale of leased premises by the landlord, the buyer will generally replace the landlord under the existing lease, thereby assuming his rights and obligations under the lease. However, the former landlord may remain liable to the buyer depending on the terms agreed to in the purchase agreement.

In case a termination right is triggered by the sale, the former landlord could become liable towards the tenant for damages arising out of the early termination.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

In order to contribute to green leases, building owners/landlords are required under the Act on the Submission of an Energy Performance Certificate (*Energieausweis-Vorlage-Gesetz*) to provide the buyer/tenant with an energy certificate prior to selling/letting their properties. The characteristics of the building described in the energy certificate become an integral part of the purchase or lease agreement and consequently could form the basis for corresponding warranty obligations on the part of the seller/landlord.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

The trend towards workplace sharing has long outgrown the start-up scene and has become popular in Austria. From a practical perspective, it is not always easy to reconcile the business needs with the time restrictions of the MRG.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

As more extensively described in section 10 above, Austrian tenancy law is governed on the one hand by the provisions of

the ABGB and on the other by those of the MRG. While ABGB generally applies to lease agreements, MRG contains special mandatory provisions regarding renting of apartments or individual parts of apartments or commercial premises and business premises.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, there are no differences in this context.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

**Length of term**
As described above in question 10.3, if the agreement is subject to the provisions of the ABGB, the parties are entitled to freely agree on the duration as well as prolongation of the lease agreement. The MRG on the other hand stipulates a minimum term of three years for the lease of residential premises.

**Rent increases/controls**
When a lease agreement is not (or not fully) subject to the provisions of the MRG, the amount of rent is governed by the market (supply and demand) and may be freely agreed between the parties. Different rules apply, however, within the full scope of the MRG, where statutory upper rent limits must be adhered to. These rent limits apply, in particular, to lease agreements regarding premises in buildings erected on the basis of a building permit granted before 30 June 1953. The basis for determining the rent is provided by fixed prices which are defined separately for each federal province by means of a regulation adjusted by various surcharges and deductions for the specific lease object (e.g. for features, location, infrastructure, etc.). The rent is further reduced by 25% if the lease agreement is concluded for a limited period.

**Tenant's contributions/obligations to property costs**
Lease agreements usually stipulate that all charges and taxes, in particular operating and ancillary costs, are to be borne by the tenant. If the lease is not subject to the full scope of the MRG, all charges and taxes can be passed onto the tenant. In cases where the full scope of the MRG applies to the lease agreement, however, only specific operating costs (e.g. land tax, power and water supply, chimney sweep, drain clearance, waste disposal, insurance costs, etc.) listed exhaustively in the MRG can be passed on to the tenant.

**Maintenance/Repair**
If the lease agreement falls within the scope of the ABGB or the partial scope of the MRG, the landlord is obliged to maintain the leased object at its own costs. Only the responsibility of carrying out minor repairs (small improvements requiring little time and effort) lies with the tenant. This general duty of maintenance can be, and typically is, contractually deviated from and passed onto the tenant. If the lease agreement falls within the full scope of the MRG, the landlord is only responsible for maintaining the building shell and the common parts of the building (e.g. external walls, external windows, roof, stairwell, front door, etc.). The tenant on the other hand is obliged to maintain the leased object at its own costs. The scope of this duty cannot be contractually limited.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

If the lease agreement falls within the (full or partial) application of the MRG, the landlord may only terminate the lease agreement for good cause. Such good cause includes, *inter alia*, default of payment, detrimental use of the leased object or the urgent need of the landlord or his relatives to personally use the leased object.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Austrian provisions regarding building, regional planning, zoning, as well as related matters concerning the use of land are subject to state legislation and thus differ between each of the nine federal provinces (in certain instances even between the respective communities within these provinces).

In addition, federal laws are to be obeyed and approvals under these laws may have to be obtained (e.g. heritage protection laws, air traffic safety laws, forest protection laws, etc.).

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Various laws (e.g. the Railroad Expropriation Act and various road, electricity and water laws) make government expropriation of real estate possible. Due to strict protection regulations of property ownership rights in Austria, however, compulsory purchases or condemnations of real estate are only admissible if a significant public interest exists (e.g. road or railway construction) and only with compensation. As a general rule, the amount of compensation will be determined by an independent court on the basis of an expert opinion.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The requirements relating to building measures vary according to the location of the envisaged building project as every Austrian federal province has enacted its own building, planning and zoning laws. Applications are thus generally made to local building authorities of each federal province. Which specific authority is responsible for a particular matter is to be examined on a case-by-case basis.

All information necessary in connection with construction matters may be requested from the respective competent authority.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

According to the building acts of the federal provinces, a building permit (*Baubewilligung*) must be generally obtained prior to the constructing of a new building and/or reconstruction of existing buildings. The building acts provide exhaustive lists of cases where such permit is required.

After the completion of the building, a notice of completion (*Fertigstellungsanzeige*) must be filed with the competent building authority. The building may only be used after a notice of completion has been submitted to the building authority.

Should the building be located on a protected zone, a permit from the Monument Protection Authority might also be necessary. According to the Trade Act (*Gewerbeordnung*), an operation permit (*Betriebsanlagengenehmigung*) is additionally required in case plants and/or facilities are operated for business purposes.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

If all necessary legal requirements for obtaining a building/use permit are fully met, an enforceable legal right to such permit exists under Austrian law. The building permit cannot be obtained in other ways, in particular, not by a long use of an unapproved building.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The time and costs necessary for obtaining a building/use permit vary depending on the nature and size of the building project, the state of the application made, as well as the competent authority.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The protection and development of historic and cultural buildings is governed by the Austrian Heritage Protection Law (*Denkmalschutzgesetz*) which is administered by the Federal Heritage Commission (*Bundesdenkmalamt*). Subsidiary provincial heritage laws, which differ between the nine federal provinces, may also apply. Existing heritage protection of real estate is generally included in the publicly available land register.

In general, all building measures in protected buildings (e.g. modification, reconstruction, destruction, etc.) require the prior approval of the Federal Heritage Commission. Further, each transfer of ownership in such protected and cultural buildings is to be notified to the Federal Heritage Commission.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

The Federal Act on the Remediation of Contaminated Sites (*Altlastensanierungsgesetz*) requires two registers to be kept: (i) the register of contaminated sites; and (ii) the register of suspected contaminated sites. The register on contaminated sites contains old landfill sites and abandoned industrial sites which have been reported as suspected contaminated sites and where investigations have shown that they pose a significant risk to human health or to the environment. The register of suspected contaminated sites lists properties in respect of which either old landfill sites and abandoned industrial sites have been reported or where there are sufficient grounds to suspect a significant environmental hazard due to previous use. Both registers are not conclusive and cannot replace thorough due diligence for obtaining reliable information on contamination.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

An environmental clean-up will generally become mandatory if the tolerated levels provided by the respective federal provides are exceeded. As a general rule, the so-called "polluter pays" principle applies to environmental clean-ups (e.g. the party that causes pollution is primarily responsible for its clean-up and the costs associated therewith). In certain instances – mainly, if they agreed to or tolerated the pollution – the owner of a polluted land plot and his or her legal successor may also be held liable in the second degree.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The energy certificate (*Energieausweis*), more closely described under question 10.7 above, contains information on the type of construction and use of a building as well as on its overall energy efficiency.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The 2020 Climate & Energy Package is a set of binding legislation to ensure that the EU meets its climate and energy targets for the year 2020. The package sets three key targets:

- 20% cut in greenhouse gas emissions (from 1990 levels);
- 20% of EU energy from renewables; and
- 20% improvement in energy efficiency.

The Austrian Federal Energy Efficiency Act (*Bundes-Energieeffizienzgesetz* – EEffG) complies with the need under the laws of the EU to boost energy efficiency. In addition to obligation schemes, a series of measures (e.g. regional residential building grants, energy and environmental grants and federal funding instruments) are in place. The national framework needs to be reconfigured for the period between now and 2030 in order to take account of developments within the EU in the energy efficiency sector.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

In Austria, an integrated energy and climate strategy for the period up to 2030 and 2050 is currently being developed which will have to be implemented consistently. Current greenhouse gas scenarios show that the measures taken so far are not sufficient for Austria to meet long-term European and international targets even if greenhouse gas emissions have been declining in Austria since 2005 (the main reasons for this decline are reductions in the emissions from the energy production sector, as a result of an increased use of renewable energy sources combined with energy efficiency measures. It also seems to be that the mild weather conditions have led to a lower demand for heating in households).

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

For entrepreneurs willing to make an active contribution to climate protection, the Austrian government offers special support and subsidies.

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# Belgium

ALTIUS

Lieven Peeters

## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The *Belgian Civil Code* contains the principal rules on real estate rights such as sale, easements, (co-)ownership, lease, construction law, etc., as well as on liens and mortgages on real property. The latter includes the rules on the opposability of a real estate transaction towards third parties.

Other legislation (e.g. zoning and environmental laws) is more fragmented. Especially, as it often concerns a Regional competence implying that each Region (i.e. Flanders, Brussels or Wallonia) has its own legislation on the topic.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Belgium is a civil law country, meaning that jurisprudence is not law-making. However, jurisprudence often has an important interpretative value.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Real estate is primarily governed by national laws. International law may come into play in cross-border transactions where one or more parties are subject to foreign law, such transactions may also impact the formalities (e.g. apostilling documents) or if certain requirements are translated from an EU Directive into Belgian laws.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are no general restrictions on real estate ownership as every natural or legal person is normally entitled to own real estate.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Belgian law recognises several types of rights over land, mostly created by contract. However, some are created by law or acquired by statute of limitation.

Ownership is the most complete right over property. Bare ownership is the situation where the property is encumbered with a right *in rem* in favour of a third party.

Belgian law also recognises several usage rights which might either be of a personal nature (e.g. lease), or *in rem* (e.g. usufruct, right to build, long-term lease, easement).

Both a mortgage and mortgage mandate constitute a security right over a property. Whereas the first is opposable towards third parties as it is registered, the latter is a purely contractual right.

Noticeable are also pre-emption rights which can be created either by contract or by law, as well as option rights that are of a contractual nature.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

A right to build or long-term lease right allows a party to build and own constructions without being the owner of the land itself.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Belgian law does not recognise, as such, a split between the legal title and the beneficial title.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

All land is registered in the land registry. In addition, rights *in rem* over land (and certain personal rights, e.g. lease agreements for more than nine years) are transcribed or registered in the mortgage register.

**4.2 Is there a state guarantee of title? What does it guarantee?**

In Belgium, there is no state guarantee of title.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

All deeds transferring or designating rights *in rem* on immoveable property, including any deeds regarding co-ownership, as well as lease agreements exceeding nine years are to be transcribed in the mortgage register. In addition, mortgages are registered in the mortgage register.

**4.4 What rights in land are not required to be registered?**

The rights not listed under question 4.3, such as lease agreements not exceeding nine years, sale and/or purchase options, mortgage mandates, etc.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

No probationary period exists in Belgium, neither are there any real classes of registration. However, concerning mortgages, the time of registration is crucial to determine its rank towards other mortgages on the same property.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Although ownership normally transfers at the moment that an agreement is reached on the sale, it is customary to stipulate that the transfer of ownership and risk shall be postponed until the execution of the authentic deed which will be opposable to all third parties as of its transcription in the mortgage register.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Unless in the event of bad faith, the time of transcription or registration of the right in the mortgage register is decisive to determine the priority of one right over another (e.g. in case of a double sale, if multiple mortgages are granted over the same property, etc.).

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There is one land registry ("*kadaster/cadastre*") and a mortgage registry (recently renamed "*kantoor rechtszekerheid/bureau sécurité juridique*") which is divided into different administrations per geographic area.

**5.2 How do the owners of registered real estate prove their title?**

Only the mortgage register provides a beginning of proof of ownership. An extract of the mortgage register containing all transcriptions and registrations over the past 30 years (being the statute of limitation for positive prescription) can be obtained by an interested party.

The land registry is a tax instrument which provides a presumption of ownership at best.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

In principle, real estate transactions are mandatorily completed by a notary public who shall automatically take the necessary steps for the (electronic) registration of the transfer at the land registry.

Information on ownership is not electronically accessible.

Legislation was passed that a sale *intra parte* could be completed electronically (if certain conditions are met) and to allow public auctions online (e.g. www.biddit.be).

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

No compensation can be claimed from the mortgage registry. You can ask for a correction or rectification to be made. The notary public is liable for any mistake attributable to him.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Upon payment of a fee, anyone can request an extract from the mortgage register. The request should specify the immoveable property and the person(s) to which it relates as the extract shall only contain information on the transcribed rights of those persons over such property, as well as on the mortgage(s) encumbering such property.

The mortgage registry can also provide copies of deeds transcribed or registered in the mortgage register.

It is common market practice that the seller provides this information to the buyer.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Lawyers usually assist the buyer and/or seller in the due diligence process and the drafting of contractual documents (LOI, sale and purchase agreement, review of the deeds, etc.). A considerable amount of transfers of professional real estate takes place through share deals instead of an asset deal.

An asset deal cannot proceed without the assistance of a notary public for the authentic deed and subsequent registration formalities. Each party is entitled to appoint its own notary public.

Other parties that could be involved are real estate brokers, architects, environmental advisors, etc.

**6.2 How and on what basis are these persons remunerated?**

The fees of the notary public are determined by law and depend upon the purchase price. The fee is to be split if multiple notaries public are involved.

Other parties are free to determine their own fee.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Private persons mainly finance their acquisitions through still cheap debt.

For a long time, the Belgian real estate market has been seen as a stable market taking into account its size and the limited availability of seizable real estate products. The presence of the EU institutions and other international organisations in Brussels do attract international investors. International (pension and insurance) funds occupy the market together with the Belgian REITs. Institutional investors searching for yield redirect bond investments to real estate.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The appetite for investors remains high, due to the comparatively high real estate yields compared with neighbouring countries; there are still decent real estate yields compared to low yielding bonds and high-valued equity markets.

Logistics and retail will continue to experience the effect of increased online sales in 2019.

Retail remains under the spell of the millennials, forcing a lot of retailers to rethink their organisation. On average the lease of a shop for Belgian retailers represents 11% of its costs side (being the second largest item after 22% for labour). The increased availability of retail m² and the reduced expansion drive of several retailers have put the rent levels under pressure. On average, in the top locations a decrease of 7.5% is to be noted and of 10% shopping centres; in general, the decease is over 15%. Take-up of retail space fell with 15% in 2019 compared to 2018.

In logistics the first "city logistics" products are under serious development.

Flexible working, different tax regimes and mobility issues will be key factors in the office market determining the key locations. Connectivity and digital infrastructure are essential.

The Belgian market has seen "co-working" office spaces, a real estate product which still has to show its robustness for investors, double in size; currently 3.3% of office spaces are labelled "co-working" and agents predict that this could grow to 10%. This product is now extended into mixed co-work/co-house products so that the boundaries between the various sectors disappear.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Retail is under the spell of the millennials, forcing a lot of retailers to rethink their organisation. The new challenges are mainly stemming from e-commerce which is causing investors to be more cautious of major investments in this sector currently, with the exception of products in prime locations.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

Agreements between parties on price and the object used to be sufficient for transfer of real estate. However, over the last decades, several regulatory formalities were installed of which non-compliance is sanctioned with the sale potentially being declared null and void. The formalities differ between the Regions and relate to information that should be provided to the buyer prior to the sale (e.g. town planning information, soil certificate, EPC, PIF, etc.).

An authentic deed is required for the opposability of the sale towards third parties and contains information on the ownership history, pre-emption rights, fuel tanks, post-intervention file, as well as mandatory fiscal notifications.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller has no explicit duty of disclosure aside from the information mentioned above. The duty to disclose by the seller is to be seen in combination with the duty of the buyer to be informed. Belgian law does require parties to act in good faith which implies that other relevant information may have to be disclosed to a potential buyer.

It is to be noted that legislation was passed to adapt the Code of Economic Law ("CEL") regarding abuse of economic dependence, prohibited terms and unfair market practices in a B2B context, which could also come into play in case not all useful information is not properly disclosed.

Sale agreements usually contain a provision that the seller shall not be liable for any visible or hidden defects in the property, except to the extent the seller was aware of the hidden defects.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Liability for an untrue or misleading statement can be established, but the burden of proof is high, especially if the seller made no contractual guarantees and has disclosed all the information in its possession.

The sale can be declared null and void if the buyer establishes the deceit of the seller or error. If the seller acted in bad faith (possibly during the pre-contractual phase), the buyer may claim compensation.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Contractual warranties in an asset deal are often limited to the seller's knowledge (e.g. regarding polluting activities that have taken place at the property, regarding easements that apply, etc.).

The agreement usually contains some informative provisions describing the current situation of the property without giving any guarantees in that respect (e.g. current use of the property, whether certain taxes are imposed such as vacancy tax, etc.).

The warranties and guarantees do not substitute a proper due diligence carried out by the buyer.

In respect of an asset deal the notary will carry out a title search covering a 30-year period in order to establish evidence of ownership of the seller (see question 5.2).

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Such liabilities are very limited and often relate to environmental and town planning matters (e.g. soil pollution of which the clean-up obligations of the seller continue post-sale, liability for any illegal constructions, etc.). In share deals, such post-closing potential liabilities will be negotiated more frequently.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In addition to the purchase price, the buyer ordinarily has to pay the costs related to the real estate transfer (e.g. notary fees, transfer tax, registration duties, etc.).

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The Civil Code contains the main regulations on loan contracts and securities. There are no different rules between residents and non-residents, but more protective rules exist in favour of consumers.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Lenders usually require a security to protect themselves. In Belgium, a limited mortgage over the property is often used in combination with a mortgage mandate for the remainder to lower the costs thereof.

Other securities that may be used are pledges over receivables and bank accounts, share pledges, parent guarantees, etc.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Mortgaged property can only be realised if (i) the debt is due, (ii) the mortgagee has an executable title, and (iii) the mortgagee complies with the procedure of executive seizure of real property by which, as a final step, the judge of seizure appoints a notary public who will be responsible for the (public) sale of the property.

Careful drafting of the mortgage title is essential as it can only serve as an executable title if it contains all information to verify whether the debt is due. Otherwise, an additional court order is required which slows down the realisation process.

**8.4 What minimum formalities are required for real estate lending?**

There are no minimum formalities. However, often, a lender shall require a mortgage and/or mortgage mandate which are authentic deeds to be executed before a notary public. A mortgage should also be inscribed in the mortgage register.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

By taking out a mortgage, the lender becomes a preferential creditor up to the secured amount.

A mortgage mandate does not give the lender the status of preferential creditor. It shall contain triggering events upon which occurrence the lender may convert the mandate into a mortgage; the borrower should immediately notify the lender of the occurrence of such event.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

In principle, the security cannot be avoided or rendered unenforceable.

However, a Belgian bankruptcy judgment may contain a hardening period of a maximum of (in principle) six months prior to the bankruptcy judgment. Certain transactions (e.g. security granted) that occur during this hardening period can be declared unenforceable against the bankrupt estate.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

In principle, there are no specific actions that the borrower can take to frustrate an enforcement action by the lender. However, the borrower can always try to reach an amicable solution with the lender to stop the enforcement action or use regular procedural actions if it did comply with its own obligations.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

If the lender has taken out a security, the lender becomes a

privileged creditor up to the amount of the security. See also question 8.6.

If the debt of the borrower is larger than the secured amount and if the debt (and secured amount) exceeds the proceeds of the secured good – or if the lender did not take out any security – the lender has no special position in the borrower's insolvency procedure (for the excess) and shall be proportionally paid together with the other unprivileged creditors of the remaining proceeds of the bankrupt estate.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

A share pledge can be realised at the occurrence of an event of default by the borrower. Such event shall usually be defined in the share pledge agreement. In principle, and in accordance with the Financial Collateral Law of 15 December 2004, the realisation of the share pledge does not require a prior notice or judicial decision.

If agreed by the parties and despite an insolvency procedure, an event of default may entitle the lender to appropriate the shares that constitute the security.

The courts may retrospectively check the conditions for the realisation of the security.

## 9 Tax

**9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?**

All real estate asset deals are subject to transfer tax or VAT.

The amount of the transfer tax is different for each Region and depends upon the type of right being transferred:

- Full ownership: 10% in Flanders; and 12.5% in the Brussels Capital Region and the Walloon Region, but more advantageous regimes exist for, e.g., real estate developers, individuals purchasing their own house, etc.
- Right *in rem*: 2%.

The agreement usually provides that the acquirer is liable to pay the transfer tax. However, all contracting parties are jointly liable towards the tax authorities.

**9.2 When is the transfer tax paid?**

The transfer tax should be paid within four months after the sale and purchase of the property. In practice, it is paid at the time of the execution of the authentic deed before the notary.

**9.3 Are transfers of real estate by individuals subject to income tax?**

In general, a real estate asset deal by individuals is not subject to income tax if the individual acts as a *bonus pater familias* and the transfer is part of the normal administration of its assets.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

An asset transfer of 'new' constructions (as defined in the VAT Code) is subject to 21% VAT (exceptions do exist, e.g. social housing at 6%), instead of transfer tax. The purchase price payable by the buyer is increased by VAT; subsequently the seller has to pay the VAT to the VAT administration.

If the new property is sold by one entity, the VAT is imposed on both the new constructions, as well as the land. If the ownership of the land and the constructions is split between different entities (e.g. by means of a right to build), the land is transferred under transfer tax and the constructions under VAT.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

The main tax cost in an asset deal is the transfer tax or VAT. Furthermore, there are the notary costs which also include the transcription and registration cost for the mortgage register.

If the seller is a company, it shall be subject to corporate income tax on the capital gain created by the disposal of the property.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

Unlike an asset deal which is subject to transfer tax or VAT, there is no specific tax (related to the underlying real estate) imposed on a share deal of a real estate SPV, exceptions to be made for special regimes such as Belgian REITs.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

The tax aspect is an important element in deal structuring, e.g. choice between share or asset deal, split sale whereby one entity purchases the bare ownership of the land (at 10%/12.5%) and another entity a right *in rem* (at 2%), etc.

It is not uncommon to obtain a prior tax ruling from the tax authorities in this regard if a less straightforward structure is used.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Following the latest Belgian State reform, the Regions (Flanders, the Walloon Region and the Brussels Capital Region) became competent for commercial lease law. Until such Regional regulations are adopted, the Federal law remains applicable.

Currently, the following regulations are relevant:

- general Belgian lease law included in the Civil Code which is applicable to office leases;
- Commercial Lease Act of 30 April 1951 (the "CLA") which is likely to be adapted in the coming years in the three Regions; and
- Flemish Decree of 17 June 2016, the Walloon Decree of 15 March 2018 and the Brussels Ordinance of 25 April 2019 on short-term commercial leases.

**10.2 What types of business lease exist?**

Belgian lease law provides a special regime for retail premises under the CLA and for retail premises that are let for a short term.

The lease of any other business premises (e.g. offices, warehouses) is subject to the general lease law included in the Belgian Civil Code.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

In this section, we will only describe the typical provisions (often reciting the mandatory law) included in retail lease agreements subject to the CLA:

(a) Length of term: usually entered into for nine years, as this is the mandatory minimum term under the CLA.

(b) Rent increases: lease agreements are generally subject to annual indexation on the basis of the official health index. At the expiry of every three-year period, each party is entitled to request an adjustment of the rent before the Justice of Peace if it can be shown that the normal rent is at least 15% higher or lower than the contractually determined rent as a result of new circumstances.

(c) Tenant's right to sell or sublet: often contractually prohibited. Such prohibition is invalid if the tenant transfers or subleases the lease agreement in full together with the transfer or sublease of its goodwill (the prohibition remains valid if the landlord lives in part of the leased premises).

(d) Insurance: generally the tenant is required to take out the necessary insurances in relation to its own liability, its activity and the leased premises. If the leased premises are part of a larger complex, the landlord often takes out the insurance policy for the building and charges the costs *pro rata* to the tenant.

(e) (i) Change of control of the tenant: change of control clauses are unusual. Proper wording would be essential as it may not impair the rights of the tenant under the CLA. (ii) Transfer of lease as a result of a corporate restructuring (e.g. merger): usually commercial lease agreements do not contain a clause in this regard.

(f) Repairs: deviating from general lease law, the landlord often requires that any maintenance and repair works regarding the leased premises are borne by the tenant, except for works related to the structure of the building.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Until recently, lease agreements were, in general, exempt from VAT and subject to registration duties. However, there were always exceptions such as the immoveable VAT lease, warehouse lease, business centres, etc.

On 4 October 2018, the optional system for the application of VAT on lease agreements for professional real estate as of 1 January 2019 was approved.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

By law under the CLA, the tenant under a commercial lease is entitled to terminate the agreement at the expiry of every three-year period with six months' prior notice. Therefore, agreements often expire either at their termination date or at the end of a three-year period.

The landlord may not terminate the agreement early unless explicitly provided for in the lease agreement and only to actually run a commercial activity in the premises itself or by a family member/subsidiary of the company.

If terminated because of a default of the tenant or landlord, the termination of the agreement should be requested in court.

The retail tenant has a preferential right to renew the lease agreement at its expiry. This right can be exercised three times for a period of nine years each. If the renewal is refused, the tenant is entitled to a lump sum indemnity varying between zero and three years' rent, depending on the reason for non-renewal.

In other business leases, parties are free to stipulate termination modalities, be it that in practice a termination possibility at the end of each three-year period is most common, unless parties agreed on a longer fixed term.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The CLA entitles the tenant to transfer its lease agreement together with its goodwill, but the original tenant shall remain severally liable with the new tenant for the obligations that stem from the original lease (for its original duration).

Assuming the landlord transfers the leased property by means of an asset deal, the landlord remains liable for any non-compliance prior to the sale of the property.

The landlord's obligations post-sale should be assessed in view of (i) the lease agreement and whether it allows the assignment on behalf of the landlord, and/or (ii) the transfer agreement of the lease (especially if the tenant would be a party hereto).

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green leases are not yet common practice and, if existing, they often concern new or newly renovated buildings. More often, some clauses can be found where both sides, landlord(s) and tenant(s), cooperate to reduce the environmental footprint of the building and provide for an effort obligation on either side.

For certain property types (e.g. residential premises, offices), an information duty is imposed on the landlord who should provide its tenant with a valid energy performance certificate (EPC). In the near future, this obligation shall extend to other non-residential premises.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Recently, both the Flemish, the Walloon and the Brussels government have adopted a decree (or Ordinance) on short-term

commercial leases which are commonly referred to as "pop-up commercial leases".

As stated before, the volume of flexible co-working space is in an upward trend estimated to achieve 10% of the available office space and further volumes are to be expected. New co-living and working concepts are popping up on the market which stem from the student housing concept, whereby the borders between working, socialising and living become vague.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Residential lease law became a competence of the Regions. New regulations have been adopted in each of them.

Currently, the main laws are:

- Act of 20 February 1991 on lease agreements regarding the main domicile of the tenant;
- Brussels Ordinance of 27 July 2017 on the regionalisation of the residential lease agreement;
- Walloon Decree of 15 March 2018 on the residential lease agreement; and
- Flemish Decree of 15 November 2018 on leases for residences or parts thereof.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

The Regional lease regulations provide for additional rules for co-tenancy in relation to joint and several liability, the acceptance of additional tenants and the termination of the lease agreement.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Length of term: residential leases are generally entered into for nine years. However, short-term leases with a maximum of three years are also possible.

(b) Rent increases/controls: rent is often subject to annual indexation at the official health index. Although often not contractually defined, parties are entitled to request a rent revision every three years.

(c) The tenant's rights to remain in the premises at the end of the term: for nine-year residential lease agreements, it is mandatory law that if no notice is given prior to the termination of the lease agreement, the agreement is automatically extended for another three years.

(d) The tenant's contribution/obligation to the property "costs": minor repair and maintenance works are borne by the tenant, other repair and maintenance works are the landlord's responsibility. The real estate property tax cannot be imposed on the tenant if the leased premises are the domicile of the tenant.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Except in case of a contractual default by the tenant, in which case the termination should be requested in court, the landlord is entitled – be it under variation in the three Regions – to terminate the agreement:

- at any time by giving six months' prior notice, to occupy the good itself or by its relatives;
- at the end of the first or second three-year period by giving six months' prior notice, to carry out major renovation works in the leased premises (in the Flemish Region under certain conditions at any time after the first three-year period); and
- at the end of the first or second three-year period by giving six months' prior notice and paying compensation of, respectively, nine or six months' rent.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Following the Belgian State reforms, the Regions have become almost exclusively competent for zoning and environmental matters, including granting permits and ensuring permit compliance.

The most important regulations are:

- Flemish Decree of 25 April 2014 on the unique permit;
- Brussels Town Planning Code as of the Ordinance of 4 April 2019; and
- Walloon Territorial Development Code of 20 July 2016.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Several expropriation regimes exist in Belgium (both Federal and Regional regulations). The Belgian Constitution establishes that expropriation may take place for public interest purposes only and in return for appropriate and prior compensation.

Furthermore, certain public authorities have a pre-emption right over certain properties. The price and sale conditions are most often those agreed upon with the initial buyer who would purchase the property if the pre-emption right would not be executed.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Depending on the size of the permit (town planning and/or environmental), the permit is granted at the Municipal, Provincial or Regional level. Infringements are detected and, where appropriate, sanctioned by the Regional inspection services.

Buyers can request the town planning information regarding the property, the content of which differs slightly between the Regions.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Though slightly different between the Regions, in general, the following type of licences (sometimes being several parts/sections of the same permit) must be obtained:

- Building permit.
- Allotment permit (only when a division in plots of land is needed).
- Environmental permit (only when the construction relates to classified installations).
- For retail establishments or commercial complexes, a socio-economic permit.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Town planning regulations are of public order, so if a permit is required no implied permission can be obtained. Carrying out such works without a permit, exposes the principal, as well as the architect and/or contractor(s) to penalties.

Constructions that date back prior to the first Town Planning Act of 29 March 1962 enjoy a presumption of permit. Some Regional legislation also provides in statute of limitation periods for certain building infringements.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The principal cost in relation to the building permit is the fee of the architect, whose assistance is mandatory for most permit applications. Furthermore, an administrative fee of which the amount varies between the Regions is due.

The time to obtain a permit varies between the Regions and depends on the size of the project. The maximum time in first instance is 210 days (this includes possible extensions).

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Protection of historic monuments is a competence of the Regions, who all have their own legislation.

The main obligations relate to the preservation of the monument, as well as prohibitions to alter or damage the monument. In return, owners or users may be entitled to certain subsidies or fiscal advantages.

**12.8 How can, e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

All Regions have legislation on soil pollution, be it with variations.

A valid soil certificate should be present at the time of the sale.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

The Regional legislation on soil pollution contains different triggers that require a soil investigation, and where appropriate, clean-up measures. The most important triggers are:

- transfer of a right *in rem*;
- termination of a so-called risk activity (i.e. listed as potentially polluted);
- (periodic) investigation if a risk activity is carried out; and
- occurrence of an event of damage.

Other environmental clean-up measures (e.g. asbestos removal) may be required under the Well-being Act of 4 August 1996 if there is a risk to the wellbeing of the employees employed at the site.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The three Regions have adopted a Regional climate plan and implemented the Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (EPB).

Usually, the energy performance that is required, depends on the nature of the construction works (e.g. new construction, invasive renovation, non-invasive renovation, etc.).

The EPB that needs to be achieved also varies from the type of construction (schools, offices, governmental buildings, etc.).

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The EU Directive 2003/87/EC has been transposed into Belgian law by means of several cooperation agreements between the Federal State and the three Regions, as well as by means of various Regional regulations, which, *inter alia,* include a mandatory emission trading scheme.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

In Belgium, the main focus in emission reduction targets are the European and international goals (e.g. the Walloon Climate Decree of 20 February 2014 refers to such reduction targets as an objective).

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Promoting sustainable development is key for the Federal State and the three Regions. They all have comprehensive sustainable development programmes. Next to that, they advocate for sustainable public tendering, which implies that sustainable development must be taken into account when issuing a public tender.

Several subsidies and tax cuts are in place which promote sustainable development and construction.

**Lieven Peeters** is partner and heads the (corporate) real estate practice at ALTIUS. He is a renowned expert in the field of real estate and construction and has a deep knowledge of contracts law and general commercial law.
Lieven advises his clients in all aspects of complex real estate transactions, including: the structuring of real estate projects; real estate M&A; sale-and-leaseback transactions; joint ventures; leasing; and split structures. Lieven has advised on various major transactions in the Belgian market involving: large shopping centres and several logistic centres; office buildings; commercial properties; large inner-city (re-) developments; on other real estate niche products (including senior citizens' housing and mixed-use projects).
Lieven is a member of various professional organisations in Belgium and is also MRICS. Lieven is recognised as a real estate expert in various directories and surveys (*Chambers Europe, The Legal 500, World Leading Experts in Real Estate, PLC Which Lawyer, Best Lawyers, Who's Who Legal*).

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ALTIUS' real estate & regulatory practice gives our clients a clear advantage by using its in-depth sector know-how to advise on issues concerning private law (property issues, rights *in rem*, etc.) and public law (town planning and zoning rules, building and allotment permits, soil issues, expropriation and public domain issues).
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Our team brings a strategic perspective to help optimise deal benefits and to lead our clients through the entire property life cycle. We make sure that legal and commercial interests are protected and that risks are limited. We combine our legal advice with practical transaction assistance throughout each complex and innovative structure.

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# Costa Rica


Hernan Cordero B.


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main laws that govern real estate in Costa Rica are: a) the Civil Code; b) the Notarial Code; c) the National Registry Regulations; d) the National Cadastral Law; e) the Transfer Tax Law; f) the General Law of Urban and Sub-Urban Leases; g) the Adverse Possession Law; h) the Maritime Zone Law; i) the Regulatory Law of the Touristic Gulf of Papagayo; and j) the Income Tax Law.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The impact is low. Local custom is a non-written source of our legal system, which shall only be used to make interpretations, to limit and/or integrate the recognised written sources. Judicial precedent or "jurisprudence", as it is commonly known in our system, is not a source of our private law legal system, which is primarily based on statutory law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws are not directly relevant to real estate in our jurisdiction. However, international treaties duly approved by the Costa Rican Congress rank higher than local laws, thus they should be considered (if applicable). There are also international laws that may become relevant, especially those related to taxes.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

The general rule is that there are no legal restrictions on ownership of real estate by particular classes of persons. Real estate ownership is an individual right strongly protected by our Constitution. This same protection is also granted by the Constitution to non-resident persons and/or foreigners. The only exception to the general rule is with regards to shoreline property. The Maritime Zone Law specifically limits ownership of properties located within the first 200m adjacent to the shoreline for: i) foreigners that 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/or entities constituted or established by foreigners; or v) corporations in which more than 50% of the stock capital is owned by foreigners.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

In Costa Rica, the types of rights available are: a) ownership rights: those that have been formally registered before the Property Registry and are subject to transfer, mortgage and liens, guarantees and development possibilities such as subdivisions and condominium; b) possession rights: those acquired through an occupation of rights that can also be transferred following formalities, but which have no public effect in front of third parties. Such possession has to be proven as being public, pacific and without interruption for more than 10 years; and c) use rights: those which grant only the use and enjoyment of a property, such as i) "usufruct" in which the person that uses the property is not the owner but has a right to use and benefit during a certain defined timeframe, ii) "lease agreements" in which someone has right to use the property by means of a formal rental relationship with the owner, iii) transformation and disposition of the right, and iv) exclusion and defence rights. The usufruct and the lease right are both contractual between the parties.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Yes, there are several scenarios where the right to a real estate diverges from the right to a building constructed thereon. The first example is pursuant to the "Accession Right". This right establishes that property does not limit itself to the land, as it also extends to whatever is located above or below it. It allows the owner or a third party to build whatever is legally authorised on the land and it shall belong to the land where it was built. If a third party builds something on such land, the construction belongs to the land on which it was built.

Another example is pursuant to a registered "Usufruct Right" over a property where the real estate diverges from the right to a building constructed. Thus the owner of the absolute fee simple title over the land may grant a third party the usufruct right in order for this third party to use and enjoy the land and/or the construction thereon as his/hers, for a specific time period or for his undetermined lifetime.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Yes. In accordance with our legislation, there are two types of split between legal title and beneficial title.

The first type is known as "usufruct" and "bare ownership". Chapter III, Articles 287–289 and 335, of the Costa Rican Civil Code, regulate these types of title forms.

Usufruct is the real right of use that someone has on the property/asset that belongs to another person for a certain period during their lifetime.

Bare ownership is the right that the person has on a property/asset in which their relationship with it is only to be the owner. As an owner, he/she has a controlling ownership over the property/asset, but does not hold the possession or enjoyment as this has been assigned on behalf of a third person in the form of a usufruct.

The bare owner will have the full property (title, possession and enjoyment) when the usufruct beneficiary dies or the timeframe lapses.

The second type is "trust ownership", which is regulated by means of the Commercial Code under Article 633 and others.

In accordance with the trust ownership, one or more persons transfer a property/asset to another natural person or legal entity which will serve for a defined timeframe as a "Trustee". This agent shall administer the property/asset for the benefit of the person or persons that transferred title, but shall retain an administration or guarantee on behalf of a third party called the beneficiary.

A trust ownership shall have a limited term and shall be operated by means of conditions, responsibilities and obligations, with the prerogative that upon fulfilment of the conditions it shall be returned to the original owner or follow instructions on behalf of the beneficiary.

There are no proposals to change this.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

Title registration in Costa Rica is based on a Registry System. This system applies to the entire territory and therefore all properties must be registered in it. Notwithstanding the above, not all properties have been registered to this date. In order to be able to register this unregistered land, a Civil or Agricultural Adverse Possession Proceeding must be implemented.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no state guarantee of title *per se*. Our Registry System operates under the principle or notion of "good faith" and is based on a rebuttable presumption that grants the registered rights over real estate the condition of valid rights.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

In general, all rights in land are compulsorily registrable to have legal effect against third parties. Article 459 of the Civil Code establishes the following rights in land as compulsorily registrable: a) titles of dominion over property; b) all liens, encumbrances or rights that limit property, such as usufruct rights, easements and any other real estate rights or limitations that affect land; c) lease agreements (may be registered); d) condominium or co-property rights; and (e) mortgages. The most immediate and significant consequence for non-registration of these rights and/or limitations to land is that they may not be enforceable before third parties.

**4.4 What rights in land are not required to be registered?**

Possession rights are not required to be registered, unless they need to be enforced before third parties.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

Yes, there is a probationary period following first registration, provided in Article 16 of the Adverse Possession Law, which is of three years, meaning that during this period any affected party can oppose and challenge such registration in front of the same Judge that handled such registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Our Civil Code establishes that ownership of land is transferred upon the execution of the purchase and sales deed granted by both seller and buyer before a Costa Rican Notary Public (in Costa Rica, Notaries Public must be registered attorneys-at-law and fulfil a much more complex function than what Notaries Public usually fulfil in common law countries. For example, only Notaries Public can execute the purchase and sales deed required to formally transfer the real estate property at the Property Registry). This purchase and sales deed shall be filed and registered before the National Registry in order for it to be valid, effective and enforceable against third parties. However, upon execution of the purchase and sales deed, the transfer of ownership is enforceable by both parties.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Pursuant to Title VII, Chapter I of our Civil Code, the Real Property Registry shall apply the general principle of "first in time, first in priority". Upon registration of a document with the establishment of right (transfer or property, lien or limitation), the Real Property Registry shall provide "real time" publicity to these acts or contracts.

Notwithstanding the above, acts which obtain a first priority over others (subsequent acts or contracts) may be challenged during an established statutory period which will depend on the act or contract being granted and registered. In addition, there are certain liens that might have a priority interest over a previously registered right, such as liens imposed due to taxes and/or condominium fees in arrears.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

As established in question 4.5 above, the official registration of real property is made through one centralised Registry System that is administered by the Real Property Registry of the Costa Rican National Registry. This system applies to the entire territory and therefore all properties must be registered in it.

**5.2 How do the owners of registered real estate prove their title?**

Owners of registered real estate prove their title by means of a certification that can be issued either by the Real Property Registry or by a Notary Public. Properties are identified before the Real Property Registry through a specific real estate number ("*folio real*" in Spanish). A certification (consultation document issued by the Real Property Registry) of the real estate number will provide all the information pertaining to the property, such as, but not limited to location, current owner, boundaries, registered area, cadastre plat number, as well as all rights and liens affecting the property. This real estate number certification and the information it contains is publicly available information and can be obtained physically at the National Registry and/or electronically.

Based on the above, the Real Property Registry does not issue a physical title document to the owners of a registered real estate; however, upon request, it can issue a real estate number certification together with the above-indicated information, including the owner and relevant information and this is how owners prove their title.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Unfortunately, at this moment in time, transactions relating to the registration of real estate cannot be completed electronically. However, this is expected to become a reality soon. A pilot programme was recently conducted in which, a selection of notaries were allowed to electronically file and electronically complete some transactions related to the registration of real estate. Some areas of the National Registry are exclusively working with electronic documents already.

In order to register ownership rights before the National Registry, a true first copy of the purchase and sales deed executed by and between the parties before a Notary Public should be filed, along with confirmation of payment of the applicable transfer tax and registration fees. Court rulings or resolutions which grant ownership to a specific party are documents that also have to be filed for real estate-related rights to be recorded.

As indicated above, information on ownership of registered real estate can be obtained both physically and electronically.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, compensation can be claimed from the National Registry if it makes a mistake. All compensation claims need to be filed through an Administrative Law Suit against the National Registry.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions on public access to the information in the National Registry. A buyer can in fact obtain all the information they might reasonably need regarding encumbrances and other rights affecting real estate by a search of the Register.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Other parties involved in real estate transactions are: (a) Notaries Public (which are, as indicated above, registered attorneys-at-law): responsible to execute the purchase and sales deed which is registered before the National Registry; (b) attorneys-at-law: execute the due diligence process and provide legal advice on legal matters and make disclosures that may affect the transaction. Both Notaries Public and attorneys-at-law are usually the same person and/or work together; and (c) Real Estate Brokers: assist both the buyer or seller or both, to buy or sell a property. It is customary for Brokers to provide advice and/or services related to: fair market value; inspection of the property; follow-up on closing details, etc.

**6.2 How and on what basis are these persons remunerated?**

(a) Notaries Public are remunerated at closing. Their legal fees are established pursuant to a pre-established table and are approximately 1% of the real estate transaction amount.

(b) Real Estate Brokers are also remunerated at closing, pursuant to a previously negotiated real estate commission. Although this real estate commission is not legally established, it is normally between 5% and 6% of the real estate transaction amount. It is also customary that the Real Estate Broker receives from the parties the equivalent to 13% sales tax for the real estate commission, which he collects and pays to the Government.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

There is no change in the sources or the availability of capital to finance real estate transactions. In general terms, the main sources for real estate financing are: (a) Public and Private Banks and other supervised financial institutions; (b) Private Lenders (not registered as banks or financial entities); and (c) Private Funds or Investors.

The main source of capital in our market is without a doubt our banking system (Public and Private Banks along with other supervised financial institutions); however, in some areas where the predominant buyers are foreigners, that source is Private Lenders, who offer loans to buyers or developers in order to acquire the land or finance part of the acquisition of real estate. These funds from Private Lenders are usually targeted to foreigners and/or unqualified buyers, who do not have access to capital – readily available – through the local banking system, due to the highly strict regulations applicable to Public and Private Banks.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Commercial and rental property has been more likely to sell due to a section of the population, jointly with an important foreign investment component, looking to expand their real estate portfolio abroad. The current economy encourages taking risks, turning markets like ours into a very appealing alternative. As well as Costa Rica having been known worldwide mainly for its stable democracy that abolished its army in 1948, the country has welcomed foreigners, is located three to five hours away from most major U.S. cities, has a low property tax compared to other countries, and has a very good quality of life. With institutions like PROCOMER (public institution devoted entirely to International Trade) and CINDE (Costa Rican Investment Promotion Agency), our government makes a solid effort to present our country to the world as the perfect place to invest. The sectors/areas that have been of the most interest recently are Free Trade Zone System Regimes and second homes in the Guanacaste province, specifically near the coastline.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Since the crisis of 2008, the real estate market in Costa Rica has been undergoing a slow but steady recovery process. In most market sub sectors, we have seen important growth in the past few years. Nevertheless, due to significant development in the Greater Metropolitan Areas where the capital of San José is located ("GAM"), specifically in the housing, commercial, office and retail submarkets, some of these areas are experiencing excessive supply and as a result, some slowdown is being perceived. This is particularly true with regards to the commercial, office and retail submarkets. Nevertheless, there is still a mild appetite for these sub sectors, but with a higher dose of caution.

In areas outside of the GAM, such as the Central Pacific ("*Puntarenas*") or North Pacific ("*Guanacaste*"), there has also been a slowdown in submarkets such as housing (second homes) and leisure (hotel and resort development). Nonetheless, this slowdown has not been due to excessive supply or lack of appetite but instead due to a lack of new products because of a lack of infrastructure such as roads, water and aqueduct systems. Thus, there is still an increase of investors from abroad looking for these products, both for investment purposes and for retirement purposes. The government is investing important resources in a long-term solution for the water issues that have been affecting some of most attractive areas in the North Pacific. The Daniel Oduber International Airport located in Liberia, Guanacaste has been expanded and is receiving more international flights than in previous years.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The minimum formalities for the sale and purchase of real estate are: both buyer and seller should have sufficient power of attorney to sell and buy, respectively; and they must execute a transfer deed before a Notary Public. The transfer deed needs to be executed in Spanish, and it shall include the following basic information: proper identification of the parties; description of the transaction; purchase price; and a complete description of the property's information. This transfer deed shall represent both parties' clear intent to sell and buy the property, respectively. Once the transfer deed is executed, the Notary Public shall file a copy before the National Registry. All transfer taxes and registration fees must be duly paid in order for the transfer to be recorded.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller is not under a duty of disclosure. Notwithstanding the above, real estate transactions are based on a principle of "good faith" that applies to both parties of the transaction.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, the seller can be liable to the buyer for misrepresentation.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Sellers do not usually give contractual warranties to the buyer. Based on our civil law legal system, warranties are usually found in the law. Nevertheless, these warranties are never a substitute for the buyer to carry out their own due diligence, which begins by retaining the services of a reputable real estate attorney before entering into an agreement.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Yes. The seller warrants that the buyer will enjoy legal possession of the property in an undisturbed and unpossessed way. This can be inferred as a "warranty of good title". The seller also warrants that the property is sold and transferred free of hidden effects. These are warranties that are found in the Costa Rican Civil Code.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer's only responsibility is to come up with funds for the closing to pay for the sale price. Those funds must come from a legal source and must present documentary evidence of source of funds. The buyer also needs to execute an affidavit in front of a Notary Public indicating under oath where those funds come from. The buyer must act based on the established principle of "good faith".

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The main regulation concerning lending money to third parties for real estate purposes is the Civil Code of Costa Rica. Additionally, other parties such as SUGEF (Regulatory Bureau for Financing Entities) and the Central Bank of Costa Rica (regulator of all exchange and interest rates in Costa Rica) may also apply. There is no legislation that regulates lending specifically to finance real estate. Basic lending guidelines and regulations that SUGEF applies to financial institutions are going to apply to any type of financing. In addition, there are no specific differences in these lending guidelines (between residents and foreigners) even though during the last few years, lending institutions have tightened their internal procedures to lend to foreigners as a result of the 2008 economic crisis and increasing compliance rules and regulations. This will also apply to individual and corporate entities.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

There are several ways in which a lender can take securities or collateral in Costa Rica in order to guarantee a loan. Some of the most common securities or collaterals are described as follows:

a) **Common Mortgages**: The borrower provides a property as a security for a specific loan. In the mortgage agreement, the lender and borrower agree on all terms such as: mortgage grade; lender's name; borrower's name; loan amount; term; advance payment penalty; interest; loan currency; place of payment; waiver of previous proceedings in case of an auction; and the characteristic contractual clauses that will govern the operation. The mortgage lien imposed over a registered property is also recorded before the National Registry in the Mortgage Section of the Real Property Registry. The mortgage will be recorded and it will appear on the property's real estate number certification and the recording will last until it is either: a) cancelled by the lender due to full payment from the borrower; or b) adjudicated by a Judge due to a foreclosure process in which it is legally proven that the borrower has not paid or has violated any of the loan terms.

b) **Mortgage Certificates**: A mortgage certificate has the same legal force as a Common Mortgage. The Real Property Registry issues the mortgage certificate that identifies the amount for which the certificate is issued and unlike the Common Mortgage where there is an established lender, these certificates may be transferred by mere endorsement. In such cases, the mortgage certificate will also appear as a lien on the property's ownership entry. This type of guarantee is used mainly for bank transactions due to the fact that the "Certificates" can be exchanged as commodities, meaning that any person that holds such title when the loan term expires is entitled to collect the amount owed. It is important to note that mortgage certificates have a 10-year statute of limitations, which needs to be reviewed in time in order to avoid a non-payment from the borrower. There is no limit as to the amount on a Common Mortgage or a mortgage certificate. Before agreeing to this type of guarantee, the lender usually requests a formal appraisal on the property, in order to identify the approximate value of the property. Once the lender has this information, he will be able to determine in accordance with loan politics the amount that he should lend. In any of the above-indicated securities, the lender is not allowed to take automatic possession on the assets mortgaged or pledged if the borrower is at default. In such cases, the lender has to execute the guarantee through an established judicial process.

c) **Guarantee Trusts**: According to the Costa Rican Commercial Code, all legal assets or rights that are subject to commerce may be placed in a trust. Under this structure, a third-party Trustee shall hold the title of the assets placed in trust and shall execute the Trust Agreement according to the instructions expressly indicated in such document. There are new legal guidelines that apply for Trust Guarantees, which will affect if these could be used as a guarantee on behalf of a Private Lender.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Once the lender has secured securities such as a Common Mortgage, a mortgage certificate, or a pledge over registered assets and the borrower breaches the terms and conditions established in the loan agreement, the lender shall then execute each collateral or security according to the established procedure in the Collection Law (*Ley de Cobro Judicial*). This law establishes a summary proceeding for these types of securities in which the lender will not have the right to take direct or automatic possession over the assets given as collateral. Instead, they will have to request the execution of a public auction and shall obtain payment from the funds obtained at the auction(s). With regards to Guarantee Trusts, the trust agreement itself shall create the enforcement procedure in case a borrower breaches the terms of the loan agreement. For this purpose, the Guarantee Trust shall validly create an execution proceeding similar to that established in the Costa Rican Collection Law; however, it being executed directly by the same Trustee. This procedure shall take less time than the regular enforcement of a registered security. As mentioned above, there are recently approved legislations and guidelines that prevent all lending transactions from using Guarantee Trusts as a security. This would require further analysis in order to verify who is the lender, who is the creditor and who is the borrower.

**8.4 What minimum formalities are required for real estate lending?**

The minimum formalities to secure a real estate loan – if formally secured – shall be according to the Civil Code and Property

Registry which requires signing and constitution, in favour of the lender, a Common Mortgage, a Mortgage Certificate imposing a lien on the property offered as a first degree guarantee, or transferring the property into a Guarantee Trust guarantee that will hold such real estate in "fiduciary ownership" during the length of the loan.

Other formalities include that the owner of the property should have sufficient power of attorney to impose such lien on the property, and must execute a deed before a Notary Public as established above. The deed needs to be executed in Spanish, and it shall include the following basic information: loan amount; payment information; the lender's information; and a complete description of the property's information. Once the deed is executed, the Notary Public shall file a copy before the National Registry. All taxes and registration fees must be duly paid in order for the lien to be recorded.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The real estate lender is protected from claims based on the registration proceedings and recording in the Registry. Formalisms and proper documents – when the loan is granted – are mandatory and the guarantee deeds shall be registered in order to have legal effect before third parties. This means that if the lien (Common Mortgage, Mortgage Certificate) is duly registered, the lender shall have a priority interest over any other lender. Notwithstanding the above, there are certain legal liens, which might have priority interest over a secured loan, such as liens imposed due to taxes and/or condominium fees in arrears.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

The main circumstances are those directly linked with mistakes of procedure or defect of form in which the correct process is not drafted, executed or followed correctly.

In Costa Rica, all documents that need to be recorded for publicity purposes such as, but not limited, to mortgages, trust property or other warranties, shall follow formalities to comply in a form of a public deed. If the deed is not drafted fulfilling the specific requirements that the law indicates, or if it does not comply with the correct formalities, including bad legal advice or lack of registration, these could cause the lender to proceed and claim defects, demurrer or exceptions of different kinds.

Proper notification procedures may also cause delays or even extinguishment of the right to collect or claim such security. It is recommended when lending or granting securities to foreigners to have a valid notification domicile in Costa Rica.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

The main actions would be those related to procedural deferments or delays that cause an impossibility to notify the defendant, ruled by the Judicial Notification Law "*Ley de Notificaciones Judiciales Ley 8687*".

Another action would be a defect or lack of formalities on the notification, causing the borrower to file for an invalidity or nullity of such notification, according to Article 9 of the Judicial Notification Law.

The third type of actions are those such as exceptions regulated within Article 298 of the Costa Rican Civil Code, such as prescription, payment exemption, expiration, and others. These can cause a delay in any foreclosure process.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The official declaration of an insolvency process or a corporate rehabilitation process has, among others, two very specific effects: a) cease of common and moratorium interests; and b) all financial obligations become due. A real estate lender that has a registered mortgage lien against a property has a privilege over "common" creditors. It is deemed as a preferred or preferential creditor. These creditors take precedence over common creditors. One aspect that is worth mentioning is that the base for the public auction must be established by an appraiser appointed by the court regardless of what was agreed upon in the mortgage document. Real estate lenders may be forced to contribute to expenses related to collaterals and, proportionally, to those made in the common interest of all creditors.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

The lender is not allowed to dispose or take control of the shares unless the established execution process is followed. In order for this execution to be valid, it should follow the established due process. Any agreement that violates the above due process is considered null and void. Nevertheless, in case there is a non-fulfilment on behalf of the debtor, the lender can enforce the security either through a court of law or through a private executor ("*corredor jurado*") and recover regular and delayed payment interest.

In addition, collateral security can be taken over shares through a trust agreement. As established above, the shares are transferred to the Trustee who will execute the trust agreement according to the instructions expressly indicated in such document.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

In accordance with the Transfer Tax Law, transfers of real estate are in fact subject to a transfer tax equal to 1.5% levied on the highest of: a) the fiscal value of the property; and b) the established sales price. The seller and buyer are both liable in equal parts. However, payment of transfer tax is commonly part of the negotiation between the parties.

### 9.2 When is the transfer tax paid?

The transfer tax shall be paid within 15 business days of the date and time of the transfer deed (taxable event).

### 9.3 Are transfers of real estate by individuals subject to income tax?

In general terms, no. However, if an individual sells real estate which is directly linked to a lucrative activity carried on by this individual, then the proceeds of that sale could be considered as

taxable income. The applicable principle is that the law excludes capital gains from gross income, unless the gains are derived from goods or rights that are part of the taxpayer´s lucrative activity, or when the gains come from an ordinary activity.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

As established, the Regulation of the Law of Value Added Tax, Article 12, Incise 3, the transfer of real estate is not subject to VAT because it is a transaction subject to the transfer tax (1.5% of the sale price) according to Law No. 6999, Real Estate Transfer Tax Law, of September 3, 1985, and its reforms and the Law No. 7088, Tax Readjustment and Resolution 18th Central American Tariff and Customs Council, of November 30, 1987, and its reforms.

Nevertheless, services associated with the transfer of real estate such as notary fees, brokers fees, etc. are subject to 13% VAT.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

Starting July 1, 2019, Costa Rica has new rules related to capital gains. Capital gains derived from the disposal of a property are taxed at a 15% tax rate. Owners that became property owners prior to July 1, 2019, have the alternative to pay 2.25% of the purchase price instead of 15% on the gain. There is a whole new chapter that regulates the taxation of capital income and capital gains of Costa Rican source. It is highly advisable to retain the services of a tax advisor and/or an accountant to obtain proper professional advice regarding these new rules.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

Taxation is basically the same. However, it is important to take into consideration that when and if the company or corporation decides to distribute dividends among its members/shareholders, there will be an additional 15% withholding/dividend tax, on top of any ordinary income tax – if applicable – to be paid by the company or corporation.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

First and foremost, a buyer should confirm the status of property taxes related to the real estate he/she is interested in. Property owners must file every five years a property tax declaration declaring land and construction values when applicable. A copy of this declaration should be included as a due diligence item. There are also some properties that are subject to a tax commonly known as "luxury home tax". The Buyer should always request from the seller, evidence that the tax has been paid or the evaluation showing that the property is not subject to the tax.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The main law that regulates lease of business premises is the General Law of Urban and Sub-Urban Leases. Our Civil Code is supplementary to this law. It is important to understand and to take into consideration that there are a vast number of rules in the General Law of Urban and Sub-Urban Leases that cannot be waived, even if the parties agree to do so. Moreover, all rights granted by this law in favour of the tenant cannot be relinquished.

**10.2 What types of business lease exist?**

The General Law of Urban and Sub-Urban Leases is applicable to commercial leases, industrial leases, etc.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

Typical provisions for lease of business premises are: (a) length of term: a minimum three-year term in favour of the lessee (able to terminate the lease with a three-month notice); (b) rent increases: to be determined by the parties. All types of increases are authorised, always with a reasonable limit to avoid abusive increases; (c) an express authorisation from the landlord is required for the tenant to sub-lease. However, it is possible for the tenant to transfer their lease rights if they sell the business through a "commercial establishment sale", following all the formal legal requirements established by the Commercial Code; (d) insurance: parties to the contract are allowed to determine who shall be responsible for insurance; (e) if the tenant is an entity, chance of control of the entity shall not affect the lease agreement; for all legal effects, the entity remains the tenant. If the tenant is an individual, they will not be allowed to assign or sublet without the previous and express authorisation from the landlord, unless this possibility has been included as a provision in the lease agreement; and (f) repairs. The landlord has the legal duty to provide to the tenant a peaceful enjoyment of the premises and to keep it this way. All required repairs to keep this condition shall be performed by the landlord. These repairs are known as "required". Parties to the contract are allowed to determine who shall be responsible for repairs that are required due to ordinary wear and tear but this obligation must be stated in the contract, otherwise it will become the landlord's responsibility as well.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Income tax is to be paid on income generated by rent by the landlord of a business lease. The landlord must also pay property or real estate taxes.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Commercial leases are usually terminated upon expiration of the term and/or by either party. There are circumstances in which payment default forces early termination of a lease. Provisions related to extensions or renewals are typically included in the lease agreements.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Yes, the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest, if they have sold following the legal procedures established by law. Nevertheless, they will be liable for pre-sale non-compliance even after the sale.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green provisions are not typically part of lease agreements in our jurisdiction. However, parties to a lease agreement could include them at will. Recently, these have been included on land subject to wind and solar projects in accordance with Energy Law No. 7200.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Yes. There is a noticeable trend towards more flexible space for occupiers, especially for short-term working spaces. Meeting rooms, offices, learning rooms, etc. are offered for rent even by the hour. This trend is more noticeable in the Great Metropolitan Areas than in the rest of the country. On the other hand, co-living has yet to become a trend in our country.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The main laws that regulate lease of residential premises are: a) the General Law of Urban and Sub-Urban Leases; b) the Civil Code; c) Law No. 9160; and d) the Code of Civil Procedure.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the laws do not differ in cases where the premises are intended for multiple different residential occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Length of term: the General Law of Urban and Sub-Urban Leases contains a mandatory term of a minimum of three years. This term must be interpreted in favour of the tenant, who is allowed to terminate the contract prior to the expiration of this mandatory term with written notice given to the landlord three months in advance; and

(b) Rent increases/controls: when the rent is in foreign currency, the rent must remain the same for the whole term of the contract. When the rent is in Colones, the rent will be revised at the end of each year of the contract, based on the rules contained in Article 67 of the General Law of Urban and Sub-Urban Leases. In general terms, if the accumulated inflation rate of the 12 months prior to the expiration of each year of the term of the contract is equal to 10% or less in that country, the landlord can increase the rent up to 10% per year. If the rate is above 10%, a Government office shall determine the increase but it cannot be a) less than 10%, or b) more than the inflation rate.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Yes, there would be rights for a landlord to terminate a residential lease. The main or principal right would be lack or non-payment of the rent. The necessary steps to achieve vacant possession if the circumstances existed for the right to be exercised are outlined in Law No. 9160, which is a special law that contains the proceedings for small claims related to very specific matters related to leases. There are only two reasons that will allow a landlord to access this expedited process: a) expiration of the contract's term; and b) lack of rent payment, utilities and/or Condominium Owners Association fees. Other rights must be exercised based on the Code of Civil Procedure. Article 6 of Law No. 9160 indicates that once the Court has admitted the claim, the eviction order shall be issued along with the preventive retention of the tenant's assets if requested by the petitioner. Fifteen days will be granted to the defendant to present admissible, relevant and useful evidence. The tenant must continue to deposit the rent in the Court's account. The defendant will only be authorised to object to the claim based on payment, statute of limitations and non-expiration of the contractual term. Within 15 days after the objection is filed, the Court must call for an oral hearing. This is considered as a very positive change *versus* the previous "paper" hearings.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main laws which govern zoning, permitting and related matters concerning the use and occupation of land are: the Constitution; the Urban Planning Law; the Organic Environmental Law; the Expropriation Law; the Construction Law; the Condominium Law; the Architectural Heritage Law; and local regulatory plans. In Costa Rica, the administrative organisation in charge of urbanism is the Urbanism Directorate (part of the National Institute of Housing and Urbanism) and the Ministry of Planning. These two entities have the legal power to elaborate the National Plan for Urban Development. However, the implementation of national policies is in fact developed at Municipal level.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Yes, the Government can force landowners to sell their land. Nevertheless, Article 45 of the Constitution includes an essential guarantee to one of the most relevant rights there is: private property. This Article reads: "Property is inviolable; no one may be deprived of its property except for a legally proven public interest upon prior compensation in accordance with the law...". The price set-up mechanism is established by law based on certain appraisals executed in accordance with the standardised price table issued by the Tax Administrator. The owner of a property, who is being expropriated by the Government, in accordance to the General Administrative Public Law and its by-law, can challenge such appraisal. Such law will also regulate the process and the way in which the landowner gets paid once the final resolution is issued. Due to the established Constitutional right, these processes normally take significant time.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

For the most part, real estate and construction departments of the Municipal Governments are in charge of controlling land/building use and/or occupation. The National Institute of Housing and Urbanism is the entity that controls land/building use at national level. Environmental regulations are overseen by the National Environment Technical Secretariat ("SETENA") and the Ministry of Environmental and Energy ("MINAE").

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

The main permit required for building works would be a building permit. Requesting and obtaining a zoning authorisation from the Municipal Government is the way to start. A water availability letter from the Water Department is also indispensable. Special licences may be required if a commercial activity is to be developed on the real estate. The Health Department must issue a sanitary permit for the Municipal Government to issue a business licence, and liquor licences are required for sale of liquor.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Yes, building/use permits are commonly obtained in this jurisdiction and granted by the local Municipality, including zoning and final construction permits. Implied permission cannot be obtained in any way.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The building permit fee is 1% of the project value. The time involved in obtaining a building permit is generally within four weeks of the initial application. This timeframe extends considerably if the approval of SETENA is required.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Yes, there are regulations on the protection of historic monuments in this jurisdiction. The National Museum of Costa Rica through its Archaeology Department, the National Environment Technical Secretariat and the Ministry of Environmental and Energy regulate all matters concerned with historical monuments. This can affect the transfer of real estate or the development of such property. There is a by-law that establishes the process to request an inspection from the National Museum in order to verify if the historical monument can be saved or preserved. By law, all property that is affected by historical monuments is subject to a lien and prohibited from being developed unless authorised by such entity.

**12.8 How can, e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Information pertaining to contamination and pollution of real estate is not easy to obtain. Perhaps an Environmental Impact Assessment ("EIA") process is the proper way to obtain this kind of information. The main objective of an EIA is to determine the environmental feasibility and impact of the project. There is no public register of contaminated land in our jurisdiction.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

According to SETENA and MINAE, any party that affects the environment is subject to strong sanctions and fines. Clean-up requirements and procedures are issued and enforced by these two entities and it is mandatory to compensate for any pollution, economically or through the restitution of damaged areas.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The new Code of Construction issued by the Engineering and Architectural Bureau regulates and enforces new constructions based on their environmental impact, including energy-saving measures and security patterns. Additionally, there are new electric guidelines on interconnection to the grid based on the Distributed Energy by-law, which was recently introduced, allowing net metering though self-generation of solar and wind renewable energy.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Costa Rica has adopted an Open Government Policy. The National Environmental Information System ("SINIA") was created under the National Geo-Environmental Information Center ("CENIGA") of the Ministry of Environment and

Energy, with the goal to promote an open data policy for all relevant climate information available for any citizen. The Paris Agreement, coming out of COP21, will be legally binding for Costa Rica starting in 2020. Under the aforesaid Agreement, our country will be part of, starting in 2016 and until 2020, a process of legal, institutional and organisational change. Costa Rica have internationally committed to having a National Adaptation Plan.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

Yes, there are national reduction targets for greenhouse gas emissions. On September 30, 2015, under the United Nations Convention framework for Climate Change, Costa Rica submitted its Intended Nationally Determined Contribution with an unconditional target to keep net greenhouse gas emissions below 9.37 MtCO2e emissions by 2030. Costa Rica reconfirmed its aspirations to become carbon neutral by 2021.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Yes, there is a new Code of Construction issued by the Engineering and Architectural Bureau which regulates and enforces new constructions based on their environmental impact, such as energy-saving measures, water consumption components, waste treatment plant requirements and the possibility to reuse water through recollection of rainwater procedures.

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***Cordero & Cordero Abogados*** is a full-service law firm that specialises in Business and Financial Law in Costa Rica. Among our main areas of practice are: Banking & Finance; Corporate and Contract Law; Foreign Investment; Real Estate; Insurance & Reinsurance; Mergers & Acquisitions; Civil Litigation Practice; Intellectual Property; Labour & Immigration; Energy; and Information Technologies & Telecommunications. The firm, established in 1940, currently has offices in San José and Guanacaste, and has been ranked by international directories such as *Chambers & Partners*, *ILFR* and *The Legal 500* and is currently referred to by the *U.S. Commercial Service* as well as other regional bar associations. ***Cordero & Cordero Abogados*** is a member of the prestigious *International Lawyers Network* (www.iln.com), an association of 91 high-quality, full-service law firms with over 5,000 lawyers worldwide.

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# Cyprus



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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

- **The Immovable Property (Tenure, Registration & Valuation) Law, Cap. 224** deals with all matters relating to the tenure, registration, disposition and valuation of immovable property within the framework of the Cyprus land registration system.
- **The Acquisition of Immovable Property (Aliens) Law, Cap. 109** imposes restrictions on the acquisition of immovable property in Cyprus by non-Cypriots. These restrictions have been removed altogether for EU citizens and are little more than a formality for others (see question 2.1 below).
- **The Immovable Property (Transfer and Mortgage) Law, No. 9/65** regulates mortgages of immovable property and sales of mortgaged property. It requires mortgages to be registered at the Department of Lands and Surveys. It provides for transfer fees payable on the transfer of immovable property.
- Under **the Immovable Property Tax Law, Cap. 322** and **the Immovable Property (Towns) Tax Law, No. 89/62**, immovable property tax is payable each year by all owners of immovable property in Cyprus, assessed on the taxpayer's total holding of immovable property on 1 January of each calendar year.
- **The Capital Gains Tax Law, No. 52/80** provides for Capital Gains Tax at the rate of 20% on inflation-adjusted gains realised from the disposal of immovable property in Cyprus, including gains from the disposal of shares in private companies which own such property. In accordance with recent amendments, a full exemption from capital gains tax was granted for the sale to an independent party of immovable property consisting of land, or land with a building or buildings, which will be acquired from an independent party at market value from 16 July 2016 until 31 December 2016. That is, regardless of when the property will be sold, in essence it is enough that it has been bought up before 31 December 2016, and therefore no capital gains tax will be payable. The exemption does not apply to immovable property that was acquired not by purchase or by purchase agreement but by a donation/gift or by way of an exchange.
- **The Rent Control Law, No. 23/83** safeguards tenants' rights in specified geographical areas (usually urban) provided such premises were completed and rented for the first time prior to a specified date. It is not applicable to non-Cypriots renting properties in Cyprus. Leases exceeding 15 years may be registered with the Department of Lands and Surveys and registration should be effected within three months of the signing of the lease.
- **The Sale of Immovable Property (Specific Performance) Law of 2011** sets out the remedy of specific performance for Purchasers depositing a duly stamped copy of the Contract of Sale at the Department of Lands and Surveys within six months from the date of its execution. Registration of the Contract of Sale prevents the Vendor from transferring the property elsewhere or encumbering it for as long as the Contract is valid and legally effective. Should the Vendor fail to transfer the property pursuant to the Contract of Sale, the Purchaser may obtain from the Court a specific performance order enforcing the transfer the property in his name.
- **The Compulsory Acquisition of Property Law, No. 15/1962** sets out the circumstances and the conditions upon which national or local government bodies may acquire property, in the public interest and by showing just cause, on the proviso that the owner receives compensation equal to its market value. The same law includes a provision that properties compulsorily acquired should be returned to their owners if the purpose for which they were acquired is not realised within three years of the date of acquisition.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Cyprus is a common law jurisdiction and has adopted the Anglo-Saxon system as a result of having served as a British Colony. Although the area of Real Estate Law has been substantially codified in statutes, the common law principle of *stare decisis* is still applicable. Consequently, Cyprus courts are bound to follow decisions of courts at a higher level and in the absence of local precedents, English case law is persuasive and, in some circumstances binding.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

There is no international law directly affecting real estate in

Cyprus. On a peripheral level, Cyprus has commitments under its double taxation agreements which relate only to the taxation of income and gains from property.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Non-EEA nationals or companies wishing to acquire immovable property must obtain the permission of the Council of Ministers. Such permit is granted to *bona fide* applicants to acquire a flat or a house or a piece of land not exceeding three donums (approximately 4,014m$^2$) for the erection of only one house for use as a residence only by the buyer and his family. As of May 2013, the Ministry of Interior has allowed ownership of up to two properties, which can be two residences or one residence and commercial premises with a floor area of up to 100m$^2$.

The buyers are entitled to occupy the property during the examination period of their application which may take as little as 14 days.

Members of the family of an original buyer may also purchase their own property, provided that they are both financially and residentially independent of the buyer. Permission is granted for personal use, and not for letting or commercial use. This rule is relaxed for international companies, which are allowed to acquire business premises as well as houses or flats as residences for their members or directors.

Once the permit has been issued and the property has been registered in the buyer's name, there is no further restriction and the property may be sold or disposed freely. Furthermore, the legal heir may have the property registered in his name without any additional permit.

It should be noted that a Non-EEA national incorporating a Company in Cyprus would allow him to purchase an indefinite number and type of properties in the same manner as an EEA national.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Land may be held freehold (estate in fee simple) or leasehold. Unlike other jurisdictions, joint ownership of property is not recognised in Cyprus and the applicable mode of owning property collectively is tenancy in common whereby each owner owns an undivided share of the property.

Part IIA of the Immovable Property Law provides a framework for the ownership, possession and enjoyment of the various units in a building of joint ownership by their respective owners, as well as the relations between them and their rights and obligations.

The following legal interests over land may be created:

- legal mortgage;
- easement; and
- rent charge.

Contractual rights affecting land can also be created, such as leases, licences to occupy and options and pre-emption rights.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

The answer to this question is negative. The land and any buildings erected are inseparable for title purposes and there is no concept of dual ownership. The owner of the land owns anything erected on it.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Primarily, there can be no split between the two. However, it could be said that in cases where the legal title is registered in the name of a Trust, the ultimate beneficial owner of the Title Deed is the beneficiary himself although much would depend on the terms of and the nature of the Trust as such can be discretionary.

Another scenario where there is a divergence between the legal and beneficial title is in cases where the Title Deed to a real estate is transferred to another party; however, the original owner retains the right to use and exploit the property during his lifetime.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

All land is registered in the Republic of Cyprus.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no state guarantee of title. The registered owner of the land is the undisputed owner subject to the right of the power of the Director of the Department of Lands and Surveys to rectify errors and/or omissions.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

It is not compulsory to register rights acquired in land (for example, by a Contract of Purchase or mortgage), but these rights have no value or only have a diminished legal status unless they are registered.

**4.4 What rights in land are not required to be registered?**

A Licence to use land and an Option to Purchase Agreement are rights in land which are not required to be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no issue with regards to unregistered land as such does not exist. However, a registrable right in land that is filed first at the Land Registry would rank prior to others filed later, i.e. such as a mortgage.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Title is transferred in the name of the buyer on conclusion of a simple procedure which takes place at the regional Land Registry in the presence of the seller and the buyer or their authorised representatives. Subject to the buyer agreeing to the description of the land transferred to him and the seller confirming that the selling price has been paid, the title transfer is completed. If there is a Contract signed between the parties, it will provide the framework and the timescale within which the title transfer will take place. The buyer may only judicially enforce his legal right to transfer of the title, provided the duly executed and stamped Contract is deposited with the Department of Lands and Surveys for Specific Performance. It is not necessary, however, for a Contract of Sale to be signed between the parties in order for a transfer of Title Deed to take place.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The priority of rights is generally determined by the date of creation. For example, registration of a judgment made under the Civil Procedure Law (known as "memorandum" or "memo") will take precedence of the same or a mortgage filed at a later date.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

The initial and main responsibility of the Department of Lands and Surveys is the registration of immovable property on the island. It has regional offices in the six major cities of Cyprus and the same rules and requirements apply to all.

**5.2 How do the owners of registered real estate prove their title?**

Each registered owner is issued a two-page document on completion of the registration of a real estate in the name of the owner. It is essentially a true copy of the official Land Registry Records and contains information regarding the real estate such as its registered owner, its size, its location and the lands' office reference.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Transactions relating to real estate cannot be completed electronically at this stage; online navigation to a registered plot of land with imaging is available at http://www.moi.gov.cy/moi/dls/dls.nsf/dmlservices_en/dmlservices_en?OpenDocument. Further online services regarding the Department of Land and Surveys (DLS) are to become available at the Government Gateway Portal (Ariadni): https://cge.cyprus.gov.cy/re/public/.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

There is no codified scheme of compensation set up in statutory form; however, an individual may file an action for damages for negligence in the Court.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

The names of the registered owners of property, as well as any encumbrances filed on real estate, are considered confidential data and therefore access to this information is only allowed to the owners themselves and any authorised representatives. Access to the records of a particular individual can be granted in the context of a legal action filed in Court or to a Judgment Creditor.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

The principal professional advisers in a real estate transaction are the following:

- Lawyers: The commercial terms are usually negotiated between the parties or their property agents, whereas the lawyers involved will put them in a legal context in the form of a Contract of Sale. The lawyer of the buyer will usually verify the ownership of the real estate by the seller as well as carry out an official search to confirm the registration of any encumbrances over the property as well as the availability of all necessary permits with reference to buildings erected thereon.
- Real estate agents: Sometimes a real estate agent is involved in making the initial introduction of the real estate to the prospective buyer.
- Engineer/Surveyor: The buyer may also employ qualified engineers to carry out structural or other surveys or surveyors to verify the market value of the real estate.

**6.2 How and on what basis are these persons remunerated?**

The remuneration of these persons is usually connected with the value of the transaction as well as the time spent on the transaction, although in most instances, a fixed fee is agreed between the parties.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

There is a noticeable increase in the availability of capital to finance real estate transactions, which are mainly funded from abroad, either by individual or institutional investors. Immigration Programmes offered by the Government and

connected to investment to real estate have also contributed to such to a great extent. Although the market is mainly driven by cash buyers, financial institutions have recently started offering more competitively priced loan products.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Strong interest from foreigners, and predominantly from non-EU buyers, continued to be a driving force for the housing market this year. During the year to Q1 2019, the nationwide residential property price index rose by 4.3% (2.9% inflation-adjusted), its 10th consecutive quarter of y-o-y growth, according to the Cyprus Statistical Service (CYSTAT). In fact, it was the biggest annual rise since Q2 2008. Areas of most interest are residential premises first and, secondly, commercial premises.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Demand for residential properties from foreign investors has been growing steadily although we have also seen a rise in investment in tourist premises such as hotels.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

Normally, a Contract of Sale is executed between the parties so that they are legally bound to complete the transaction. However, it is not obligatory to have a written Contract of Sale in order for a real estate transaction to take place. Stamping the Contract in accordance with the provisions of the Stamp Law and depositing it at the Department of Lands and Surveys under the Sale of Immovable Property (Specific Performance) Law of 2011 avails the buyer with the additional protection of a specific performance order. The Contract of Sale must be filed at the Land Registry within six months of signing.

The Contract of Sale sets out the description of the property, the amount of the purchase price and the mode of payment, as well as the completion date. There is no official requirement for certification or witnessing of the signatures of the parties on a Contract of Sale.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

There is no duty of disclosure on the seller. The buyer should incorporate warranties and conditions in the Contract of Sale so as to protect his interests

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, he can be liable if his actions fall within Section 19 of the Contract Law, Cap. 149 which provides that when consent to an agreement is caused by coercion, fraud or misrepresentation, the Contract is voidable at the option of the party whose consent was so caused. This remedy is not available if the party to whom the misrepresentation was made had the means of discovering the truth with ordinary diligence, or if it did not cause the party concerned to consent to the agreement.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Warranties given by sellers usually cover matters such as the legal ownership of the property, any encumbrances filed on the title, availability of planning and building permits, the ability to deliver clean Title Deeds and the timely completion of the property, if under construction.

The buyer though should always carry his own due diligence.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Yes, provided there are clauses to this effect; however, in general, all liabilities are satisfied with the completion of the transfer of the title at the Land Registry.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer is liable to pay the stamp duty on the Contract of Sale and the transfer fees (where the purchase price is not subject to VAT). A buyer is also obliged to provide documents that justify his "Source of Funds" under the Anti-Money Laundering regulations so that the bank of the seller can accept the funds in Cyprus.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

There are no regulations specifically concerning the lending of money to finance purchases of real estate, although the Immovable Property (Transfer and Mortgage) Law includes provision for the mortgaging of real estate as security for loans.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The most commonly granted security over immovable property is a mortgage. A mortgage does not constitute an estate in land but a contractual right for the benefit of the lender and a charge on the immovable property.

Where the borrower is a company, creating a charge over any of its property must be registered with the Registrar of Companies. An additional security for the real estate lender would be to file a floating charge as well as seek personal guarantees by physical persons.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

As from 17 April 2015, the 2014 amendment to the Immovable Property (Transfer and Mortgage) Law, No. 9/65 has been put into effect so as to allow lenders to proceed with the forced sale of mortgaged property. The procedure for liquidation of a mortgage may commence provided the debt has become due and payments have been delayed for more than 120 days. A series of procedural steps must be undertaken by the lender within a fixed-time framework which significantly improves the timescale within which a forced sale can be achieved. This is a vast improvement of the previous procedures which allowed a debtor to delay the sale of the mortgaged asset for as long as 10 years or more.

**8.4 What minimum formalities are required for real estate lending?**

Nowadays, banks place great emphasis on the repayment ability of the borrower as well as on having significant personal contribution of funds which equals (as a matter of practice) at least 30% of the selling price or the market value of the property (whichever is the minimum).

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

A lender is protected by filing a mortgage on the real estate asset and ensuring that the borrower received independent legal advice at the time of entering into the Loan Contract.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Such circumstances include if the lender fails to register his security with the Land Registry and other charges are filed in priority, or the borrower disposes the asset.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

If the mortgaged property is the primary residence of the borrower, there are certain provisions within the law which prevent the borrower from selling it.

It is important to make reference to the mortgage-relief scheme for struggling homeowners, Estia, which was officially launched on 2 September 2019 with the opening of applications for the scheme which will be accepted until the end of 2019.

The stated purpose of Estia is to assist, support and protect vulnerable households who have mortgaged their primary residences houses for their loans and at the same time reduced the high number of bad debts.

It applies to loans (mortgages) that were deemed non-performing on 30 September 2017. Loans designated as non-performing after that date are not eligible. The primary residence which is mortgaged must have a maximum market value of up to €350,000.

The Estia scheme applies to the first mortgage on a residence, and covers loans or credit facilities regardless of currency.

Other terms and conditions also apply.

The loans will be written down to the market value of the primary residence and then the borrower will have to pay two-thirds of the rescheduled loan every month and the taxpayer (the state) is going to subsidise one-third of the monthly instalments on that rescheduled loan.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

In such cases, the real estate lender should notify the receiver so as to register his claim in terms of priority.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

In cases where a pledge applies to the shares, the lender is entitled to acquire them. The practice is that he would have registered a floating charge at the Company Registrar which would allow him to appoint an administrator and thus take any necessary steps to protect his interests.

## 9 Tax

**9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?**

Transfer fees are payable by the buyer to the Department of Lands and Surveys on the date of transfer of the Title Deed in his name. Although the fee is usually calculated on the purchase price, DLS may impose higher transfer fees if the valuation department decides that the market value of the property at the time of purchase exceeds the purchase price. The applicable rates are 3% on the first €85,000, 5% on the next €85,000 and 8% on any excess above €170,000.

As a result of special measures introduced by the Government to further revive the property market (a) if VAT was paid on the property, no Property Transfer Fees are payable, and (b) if VAT was not paid on the property, the Property Transfer Fees are reduced by 50%.

**9.2 When is the transfer tax paid?**

Transfer tax is paid at the time of transfer of the Title Deed to the property in the name of the buyer

**9.3 Are transfers of real estate by individuals subject to income tax?**

Transfers of real estate are not subject to income tax unless the individual selling has made multiple transactions in real estate and thus is considered as "trading in land".

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

VAT is chargeable at the standard applicable rate on the first sale of new buildings or parts of buildings and the land on which

they stand if the application for a planning permit was submitted after 1 May 2004. No VAT is charged on subsequent sales, or on the sale of undeveloped land or the leasing or letting of immovable property.

A reduced rate of 5% applies for the first 200m² of residences to Contracts concluded from 1 October 2011 onwards for the acquisition or construction of residences to be used as the acquirer's primary and permanent place of residence for the next 10 years. A grant is available to provide for an effective rate of 5% for Contracts concluded prior to that date.

From 2 January 2019, the sale of non-developed land is subject to VAT at the standard rate when supplied in the course of business.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

Capital Gains Tax (CGT) is levied at the rate of 20% on gains realised from the disposal of immovable property in Cyprus.

Gains can be subject to income tax if the buyer is considered to be carrying out multiple transactions and therefore considered as "trading in land".

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

Gains on disposal of shares in unlisted companies are subject to CGT if (and only to the extent that) they derive from immovable property in Cyprus. Capital Gains Tax also applies on the sale of shares of companies that indirectly hold Cyprus-situated immovable property at least 50% of whose value derives from the market value of immovable property situated in Cyprus.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

It is important to give some thought as to his future purchasing activity as well as the use of the real estate purchased. It may be prudent to purchase the real estate in the name of a company as that could reduce his tax liability when selling the real estate or renting it out.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Leases are governed by the Contract Law, subject to restrictions introduced by the Rent Control Law, which protects tenants against eviction, controls the adjustment of rents and regulates relations between landlords and tenants. Individuals who are not citizens of Cyprus and legal entities controlled by non-residents are not covered by the rent control provisions.

Leases exceeding 15 years may be registered with the Department of Lands and Surveys, and registration should be effected within three months of signing the lease, provided this is allowed by the lease agreement. Registered leases afford the tenant certain advantages, including the right to trade the lease.

Under the Acquisition of Immovable Property (Aliens) Law, third country nationals and Cyprus companies controlled by them require permission from the Council of Ministers before entering into a lease of immovable property for a period exceeding 33 years.

**10.2 What types of business lease exist?**

There are no specific types of business leases. The parties to the lease agree the terms of such bases on what they have specifically agreed between them.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

Such provisions are a matter for agreement between the parties.

(a) The duration of the lease can range from months to years.

(b) There is similar variability in the length of the initial rental term and the provisions relating to review.

(c) Assignment of the lease, or subletting of the whole or part, are typically permitted subject to the landlord's prior consent, subject to certain conditions being met.

(d) There are no legal obligations on either party with regard to insuring the leased premises and the matter is freely negotiable between a landlord and tenant.

(e) (i) In the same way, provisions regarding the change of control of the tenant and the transfer of the lease as a result of a corporate restructuring are negotiable.

(ii) Where the lease is for a whole building, repair and decoration are usually the tenant's responsibility. If the lease is for part of a building, the tenants are usually liable for internal repair and decoration of the parts they occupy.

(f) Landlords are usually liable for external and structural repairs of the whole building and repair and decoration of the common parts, with provision for recovery of the costs via a service charge.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Personal or corporate income tax as well as "Special Contribution for Defence" (commonly referred to as "SDC tax") is applicable on rental income.

Income tax is payable at the individual's marginal rate or the standard corporate tax rate (12.5%) on the gross income less a deduction of 20%.

SDC tax is payable at 3% on the gross income less a deduction of 25%.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Business leases are usually terminated by agreement, on expiry of the contractual term of duration.

In certain instances, the Rent Control Law will be applicable, which allows a business tenant to remain in possession of the premises after the tenancy agreement has expired and to receive compensation in certain cases of eviction should the Rent Control Tribunal decide so.

In such an instance, he would become a "statutory tenant" and can only be evicted from the premises providing specific statutory provisions apply. Rent increases are defined by an

order issued by the Council of Ministers and are currently set to "0". The Rent Control Act is not applicable to non-Cypriots or tenants of premises situated outside certain "controlled" areas (mainly geographical areas within municipal boundaries or premises which have been completed and rented for the first time after 31 December 1999).

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

It depends on the relevant contractual provision agreed by the parties.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green leases are extremely rare in Cyprus and there is not enough data to provide examples.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Usually, businesses occupy their own distinct workspaces, although recently there are trends in the market for shared short-term working space with communal business facilities such a reception and conference rooms.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

See question 10.1 above.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

There are no different laws for multiple residential occupiers. However, there are some specific provisions which only apply to commonly owned buildings which require the formation of a building committee so as to take several decisions for the maintenance of the building and the responsibilities of the owners as to the commonly owned areas.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

See question 10.3 above.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

If there is a lease agreement in place which has not yet expired, the expiration will occur according to the provisions of the lease agreement.

If the tenant remains in possession of the premises after the lease agreement has expired, he would become a "statutory tenant" and can only be evicted according to the provisions of the Rent Control Law as described above in question 10.5. This applies only for premises situated in certain "controlled" areas.

If there in no lease agreement in place, then the tenancy is from month to month. Once again, it depends on whether the premises are situated in certain "controlled" areas which would mean that Rent Control Law would apply.

It is considered rather complicated to achieve vacant possession in Cyprus.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The Town and Country Planning Law of 1972 and subsequent amendments provides for the zoning and planning of land in Cyprus. It provides, among other things, for the preparation of Development Plans, control of development and designation of areas of historic, architectural and environmental interest.

The Streets and Buildings Law is the main law which regulates the construction of all building and civil engineering works.

These two laws together, define the development and building control system of Cyprus.

Cyprus has enacted a number of statutes which harmonise local legislation with European Directives in order to protect the environment. Such areas include water quality, atmospheric pollution and climate change, noise, nuclear radiation, waste disposal, packaging, conservation of flora and fauna and assessment of the environmental impact of proposed projects in the process of issuing the necessary permits.

Furthermore, the Civil Wrongs Law Cap. 148 provides remedies against the torts of nuisance, trespass and negligence.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Article 23 of the Constitution of the Republic of Cyprus, protects the right of ownership and the peaceful enjoyment of property by both Cypriot and non-Cypriot nationals. Thus, compulsory acquisition or imposition of restrictions on immovable property is strictly regulated by the Compulsory Acquisition Law, No.

15/62. National or local government bodies may acquire property, in the public interest and by showing just cause, but only on payment of immediate compensation to the owner which is calculated at the market value at the time of publication of the acquisition notification.

### 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Contact details for the relevant authorities are as follows:

- Department of Planning and Housing – http://www.moi.gov.cy/moi/tph/tph.nsf/index_gr/index_gr?opendocument.
- Department of Land and Surveys – http://www.moi.gov.cy/moi/DLS/dls.nsf/dmlindex_en/dmlindex_en?OpenDocument.
- Department of Environment – http://www.moa.gov.cy/moa/environment/environment.nsf/index_en/index_en?OpenDocument.

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

All buildings require planning permission and a building permit.

At first instance, planning permission must be obtained from the Planning Authority.

Subsequently, a building permit must be obtained from the local municipality or district administration office.

Once a building is completed, a Certificate of Final Approval is issued certifying adherence to the terms imposed by the building permit.

A division permit must also be acquired if more than one units are erected on a single or more plots of land, defining how the Title Deed(s) are divided into separate Title Deeds for each unit.

Once the Certificate of Final Approval of the Division Permit is issued, these documents are filed with the District Land Registry which will then carry out its internal processes to issue a separate Title Deed for each unit.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Building and use permits and licences are necessary for any building development and there is no concept of implied permission being obtained in any way.

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

Applications for planning permission may be submitted by the owner or authorised representative, to the competent Planning Authority. The Planning Authority must come to a decision with respect to an application within a period of three months from its submission although sometimes examination may take longer depending on the complexity of the case. The fee payable depends on a range of factors, including the scale and nature of the project. The department has developed a web-based tool for fee calculations which can be accessed at http://feecalc.tph.moi.gov.cy/. The application for a building permit can be submitted to the appropriate local authority depending on the location of the immovable property, and the review of the application and issue of the all the permits takes from six months to a year.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

The Antiquities Law, Cap. 31, provides for the protection of historic monuments and antiquities. Part II provides that the Council of Ministers may, on the recommendation of the Director of the Department of Antiquities, designate any building, site or object as an ancient monument. Any site so designated may not be altered without official consent, and it is a criminal offence to damage, deface or litter a historic monument. In addition, the surrounding area may be designated as protected, in which event any proposed construction, demolition, felling of trees or similar activity may not be undertaken without the appropriate permit. Alternatively it may be compulsorily acquired (see question 1.1). Compensation is provided to owners of private property that is designated as an historic monument and grants are also available for maintenance and restoration.

### 12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

There is no public register of contaminated land. Should a potential buyer wish to obtain such information he may do so by private investigation.

### 12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

The Waste Law No. 185 (I)/2011, the Packaging and Packaging Waste Law 2002–2006, the Management of Waste From Extractive Industries Law No. 82(I)/2009 and the relevant regulations and decrees issued under the abovementioned laws provide a strict framework for the avoidance of environmental pollution. Failure to comply with the provisions of the law corresponds to three years' imprisonment and/or financial fines of €500,000, and/or an extrajudicial fine of €4,000. In the case of severe danger to human health or the environment, administrative sanctions of a maximum of €4 million are imposed. Further remedies for an aggrieved claimant would be available in civil law under the common law tort of nuisance whereby he could apply to the Court for an injunction requiring the party responsible for the environmental pollution to remedy the nuisance.

### 12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.

The Law Regulating the Energy Performance of Buildings (Law No. 142(I) of 2006) and the relevant regulations regulate the assessment and management of the energy performance of buildings in Cyprus. It provides a methodology for calculating the integrated energy performance of buildings, sets minimum standards for the energy performance of new buildings and existing buildings undergoing substantial renovation, establishes procedures for the energy certification of new and

existing buildings (and, for public buildings, prominent display of this certification and other relevant information), and establishes standards for periodic inspection and maintenance of energy-converting equipment such as boilers and heating and air conditioning systems.

## 13 Climate Change

### 13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).

Since 1997, Cyprus has been a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) and since 1990, the Kyoto Protocol, both ratified by the Cypriot Parliament under ratification Law No. 12(III)/2003. Although it was not included in Annex 1 of the UNFCCC or Annex B of the Kyoto Protocol, as an EU Member State, Cyprus has to limit emissions of GHG under the Effort Sharing Decision, which is Decision No. 443/2009/EC of the European Parliament and the Council, and was entered into force on 25 June 2009.

Regulatory measures implemented within national legislation include the licensing of industrial plants and the granting of the relevant Air Emission Permits which are materialised through the provisions of the Air Pollution Control Law (Law No. 187(I)/2002) as amended by Law No. 180(I)/2013. The Permits granted include operating conditions such as the obligation to install air pollution abatement techniques and not to exceed the set air emission standards. According to the aforementioned Law (Law No. 187(I)/2002), before the granting of an Air Emission Permit, there are technical requirements to be satisfied for any machine or equipment used by the industrial plants. Furthermore, any material (including fuels) used by such machines or equipment should meet standard requirements of quality.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

As per Decision No. 443/2009/EC of the European Parliament and the Council, all EU Members States are obliged to collectively reduce 20% the emissions of carbon dioxide via an emissions trading scheme. Annex II of the aforementioned decision 406/2009 which makes reference to the greenhouse gas emission sets out each Members State's target with Cyprus having a target of a 5% reduction by 2020 compared to 2005. Cyprus has a yearly allowance of approximately 5.9 million tons of carbon dioxide per year until 2020. It is important to mention that each year an inspection is carried out in each Member State by independent verifying inspectors and in 2015, Cyprus saved 900,000 tons of carbon dioxide emissions out of the yearly allowance. Consequently, Cyprus has the right to trade and/or sell this amount.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

There are no other relevant measures.

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As an investment and immigration lawyer, Demetris represents clients from all over the world, including banks and large Cypriot and foreign corporations, as well as smaller companies and entrepreneurs. He acts as a consultant on property investment in the Republic of Cyprus and he consults with international firms and foreign lawyers on immigration law.

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Demetris earned his Bachelor of Laws (LL.B.) degree from the University of East Anglia in England. He then qualified as a Barrister at Law of the Honourable Society of Gray's Inn, one of the four Inns of Court in London and is a member of the Cyprus Bar Association (First Rank achievement). He is fluent in Greek and English.

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Andreas Demetriades & Co LLC Law Firm was established in July 1970 by the Head of the Firm and practising Partner, Mr. Andreas Demetriades, ex-Minister of Justice of the Republic of Cyprus, ex-Member of the Parliament and President of the Paphos Legal Bar Association for three consecutive terms of office.

It is one of the largest law firms in the District of Paphos and well respected within the community of lawyers in the whole of Cyprus. It is acknowledged across Cyprus for delivering specialised assistance in real estate transactions and legal support in EU citizenship via investment cases.

The primary goal of the Firm is to provide confidential, high-quality, prompt and cost-effective legal services that meet the demands of the modern specialised legal practice and to be constantly up-to-date with all developments related to its fields of practice.

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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Real estate in England and Wales is underpinned by two main pieces of legislation: the Law of Property Act 1925; and the Land Registration Act 2002.

The 1925 Act introduced major reforms to pre-existing real estate law in order to consolidate and modernise it. It is wide-ranging and establishes general principles, such as the estates and interests in land that can exist at law.

Ownership of land and many of the rights and burdens which affect it must be registered at the Land Registry, a government agency. The land registration regime is set out in the Land Registration Act 2002 and accompanying regulations.

However, these two Acts are not all-inclusive and other legislation governs various aspects of real estate law and practice, such as the execution formalities for contracts and deeds.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The law in England and Wales comprises legislation, common law and equity. Common law – generally the body of law built up by the precedent of the courts – is therefore an important element in modern real estate law. It is continually developing and plays a critical part in the application and interpretation of legislation.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Real estate is governed by the law of domestic jurisdictions. As a result, legal formalities and requirements relating to it are largely untouched by international laws. In fact, increasing legislative devolution within the UK is having more of an impact in some of these areas than international law.

However, real estate transactions are not ring-fenced and many other areas of law which impact on real estate have an international element. For example, environmental principles, laws and policies in the UK often derive from a web of international agreements, EU legislation and UK law. Any impact of international law on these related areas will have repercussions for real estate transactions.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Not at present. Any person over the age of 18, of whatever nationality, may buy and sell freehold land without restriction. Similarly, any corporate entity, wherever established, may hold and dispose of freehold land provided that it has the corporate power to do so. This is subject to any applicable UK, EU or UN sanctions in force at any time.

Looking ahead, the government has published a draft bill requiring any overseas entity that owns, or wants to own, UK land to identify its beneficial owners in a new register. Any overseas entity that does not comply will not be able to register at the Land Registry as the legal owner of land and, if already registered, will not be able to sell, charge or lease the land for a term of more than seven years. The proposed new register is on course to go live in 2021.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Several categories of rights over land are recognised in England and Wales:

(a) Ownership rights. There are three types of ownership interest: freehold; leasehold; and commonhold. Of these, commonhold is not widely used.

(b) Legal rights over land that must be created by deed, such as legal charges.

(c) Equitable rights. Many are created by contract, such as agreements for sale, options and agreements for lease.

(d) Rights that can arise without any documentation, such as "prescriptive" rights arising as a result of a long period of use without challenge.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Divergence would arise where freehold land is subject to a lease

of a building or part of a building on the land. The freehold and leasehold interests would co-exist for the period of the lease but the divergence would end on the termination of the lease.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Yes, there is a split between legal and beneficial title to land in England and Wales.

If there is more than one legal owner of land the beneficial interest is held "on trust" for themselves. The legal owner(s) can also hold the beneficial interest on trust for one or more third parties.

Only the legal title is registrable at the Land Registry. However, beneficial interests can be protected with a "restriction" against the legal title to protect the beneficiaries' interests.

The Law Commission recently considered whether beneficiaries under trusts of land should be able to record their interests in the land register but decided not to pursue the idea. We refer, in question 2.1 above, to a proposed new beneficial ownership register – this would be separate to the land register.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

Yes. Unregistered land in England and Wales must be registered on the occurrence of one of several "triggers", including a transfer, the grant of a lease for more than seven years and the grant of a mortgage.

The Land Registry is aiming for 100% registration by 2030. At present, just under 14% of land remains unregistered.

**4.2 Is there a state guarantee of title? What does it guarantee?**

Yes, a registered title is guaranteed by the state. In general terms the Land Registry is required to indemnify anyone against loss caused by mistakes in the register (or in search results), even if the mistake is the result of forged documents. The Land Registry has the right to recover payments from third parties wholly or partly responsible for the mistake.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

The Land Registration Act 2002 specifies the dispositions that must be substantively registered in the land register. These include: the transfer of freehold land or a lease with more than seven years to run; the grant of a lease of over seven years; and the grant of a legal charge.

The consequences of non-registration will depend on whether or not it is a first registration:

(a) if it is, the legal interest reverts to the disponor after a specified period; and

(b) in the case of registered land, legal title does not pass until a disposition is registered.

The disposition would also lose priority to any other registered ahead of it.

**4.4 What rights in land are not required to be registered?**

There are two main categories of rights that are not required to be registered in the land register:

(a) "overriding interests" which include most leases of seven years or less and the interests of person in actual occupation; and

(b) minor or equitable interests such as contracts for sale, interests under a trust of land. However, while not required to be registered, these should be protected by recording a notice or restriction on the register.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

When an application to register a disposition of registered or unregistered land is submitted, registration is not instantaneous as the Land Registry will examine the application to ensure that it is satisfactory. If satisfied, the Land Registry will register the disposition with one of four classes of title:

(a) Title absolute – which is the best quality of title.

(b) Possessory – where the title is based only on adverse possession of the land for the requisite period.

(c) Qualified – where the title is qualified because of a defect, such as a missing title document.

(d) Good leasehold – where the Land Registry is satisfied as to the title to a lease but has not seen the lessor's title to grant the lease.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Buying and selling land is usually a two-stage process.

The first stage ends with a contract to buy and sell land. It is not an immediate transfer of ownership but commits the parties to the transaction and passes beneficial ownership (and therefore risk) to the prospective buyer. The second stage ends with payment of the purchase price and the transfer of legal ownership, subject to the registration requirement.

It is possible (but not usual) for the two stages to be concluded simultaneously.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The basic rule is that priority of rights is determined by the date of creation.

However, special priority rules apply in relation to registrable dispositions of registered land for value. When such a disposition is registered, the only interests that take priority to it are "overriding interests" and interests that have been protected by a notice on the register – see question 4.4.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There is one land registry: HM Land Registry.

**5.2 How do the owners of registered real estate prove their title?**

Title to registered land is proved by the information recorded in the land register. Official copies of a registered title can be obtained as evidence of title.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Currently, the only transactions that can be completed electronically are certain types of legal charge and discharges of charges. The Land Registry has several projects underway to extend electronic conveyancing further.

Applications to register, on the other hand, can be submitted electronically in most cases. The documents needed to be provided for registration will vary depending on the transaction, the parties and whether or not the land is already registered. Many of the documents must be in a prescribed form.

The land register is held in electronic format and ownership information can be accessed electronically.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, see question 4.2.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions on public access to the land register and the documents referred to in them, although commercially sensitive information can be withheld from copies of leases and other documents.

The land register is not conclusive and a buyer would need to conduct numerous other searches and enquiries to obtain all the available information relating to a property. These would include a local authority search, formal enquiries of the seller and a physical survey of the property.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Solicitors attend to exchange (of the sale contract) and completion (of the transfer and ancillary documentation). The seller's solicitors usually prepare the draft documents and, in addition to negotiating the documents, the buyer's solicitors investigate title (including raising enquiries and searches) and deal with post-completion matters including payment of stamp duty land tax (SDLT) and registration. Local lawyers may be engaged to provide foreign legal opinions.

**Agents** market the property and agree the main commercial terms at the outset of the transaction. They may continue to assist the parties in agreeing commercial matters throughout the sale process.

**Surveyors** may be engaged to carry out structural surveys, undertake environmental or other technical due diligence or provide a valuation.

**6.2 How and on what basis are these persons remunerated?**

Solicitors (and accountants used for structuring or tax mitigation purposes) are typically remunerated by reference to hourly rates, sometimes subject to a cap or fixed-fee arrangement. Agents and surveyors generally operate on a fixed-fee structure, the former as a percentage of the sale price.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

The debt market for property finance remains strong. London continues to receive foreign capital investment, with an increasing amount of capital from domestic and overseas investors directed towards regional centres, such as Manchester and London satellite destinations, as large-scale infrastructure projects (high speed rail and Crossrail) bring improved transport links. In 2018, London saw record levels of overseas investment, predominantly from Asia, and whilst outbound investment from mainland China fell (due to controls imposed by the Chinese government), capital influx from private Hong Kong-based investors, South Korean investors and Japanese investors increased, and consistent investment from the Middle East continued. To date, in 2019, investment levels and deal volume have fallen sharply (probably due to political uncertainty over Brexit) with total investment volume Q1–Q3 2019 at less than £30 billion, the lowest since 2012.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

There is continued appetite in the private rented sector (PRS), with over 32,000 homes completed by the end of Q2 2019, a 34% increase on the same period in 2018. Savills estimates that the PRS sector could grow to 1.7 million units in the UK, so there remains considerable scope for growth. The dominant markets for UK PRS are London and the North West (together these regions hold 78% of completed PRS units) but schemes like L&G's Chelmer Waterside in Chelmsford demonstrate the potential of strong regional employment centres with good transport links.

Investment activity across the industrial and logistics sector also continues. Take-up in London and the South East totalled

3.92 million sq. ft. in the first half of 2019, a 60% increase above the long-term average for the period and region and just 4% below the record high 2018 figures. Whilst large deals have happened in 2019 (such as Altitude at Milton Keynes where Amazon has taken 574,000 sq. ft.), there was a fall in the average deal size due to the absence of large freehold land deals such as those to Aldi, B&M and Lidl in 2018.

The appetite for flexible working space remains strong (see question 10.8), as does the market for data centres. Despite the uncertain political climate, student accommodation remains attractive. Large deals have completed in 2019 including iQ's forward funding of almost 2,000 student homes in Leeds and Coventry and Chapter's acquisition of Paul Street East, near Old Street, London.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Aside from the general slowdown in 2019, the UK retail sector in particular continues to become less attractive to investors, driven by both online competition and high-profile insolvency or restructuring processes (such as Debenhams, Arcadia Group and Patisserie Valerie). Whilst "destination" retail offerings such as outlet centres and the London high street are more resistant, UK shopping centre transactions for the first half of 2019 totalled £567 million, against £913 million traded over the same period in 2018. Notable transactions in the retail sector this year include the acquisition of Kensington Arcade and neighbouring 127 Kensington High Street by Ashby Capital for approximately £200 million and Intu's £186 million sale of 50% of its Derby centre to Cale Street Investments.

The residential market in Central London has also fallen in 2019 (but is supported to an extent by the weak currency).

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

English law requires that an agreement for the sale of land is in writing, contains all matters expressly agreed in one document (although terms may be incorporated by reference) and is signed by all parties. Transfers (and certain other documents, including leases) must be deeds and, in the case of registered land, a transfer is required to be in a prescribed form and registered at the Land Registry in order to confer legal title on the buyer.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The common law principle of *caveat emptor* means that the onus is on the buyer to investigate title to the property and raise enquiries. Title covenants given by a seller on a transfer require disclosure of encumbrances of which it is aware and latent defects, but there is no general duty of disclosure.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, if the untrue statement induced the buyer to purchase and the buyer suffers loss as a result.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Sellers generally do not give contractual warranties on the sale of a property, although note the implied title covenants (see question 7.5) and the potential liability for misrepresentation (see question 7.3). Where the acquisition of property is via the purchase of shares in the property-owning company, the share purchase agreement would typically include contractual warranties, which are intended both to apportion risk and to elicit disclosure of information from the seller but are not considered a substitute for the buyer carrying out its own due diligence (even where warranty and indemnity insurance is used).

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Property is generally transferred with **full title guarantee** or (less commonly, for example if the seller is a trustee) **limited title guarantee**. When these covenants for title are used, they imply statutory warranties, although these can be modified by agreement.

In both cases the seller warrants that it has the title it purports to sell. Full title guarantee also implies that the property is free from encumbrances (other than those the seller does not know and could not reasonably be expected to know about) and limited title guarantee implies that the seller has not encumbered the property.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Typically, buyers will give an indemnity covenant in the transfer to comply with the seller's ongoing liabilities.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

Lending to finance commercial real estate is generally not subject to regulation. The exception is where the borrower is an individual, when the lending may be subject to the Consumer Credit Act 2006. Lending institutions regulated by the Financial Conduct Authority, one of the UK's financial regulators, will also be subject to the standards prescribed it.

More generally, lending activity undertaken by banks and insurance companies is subject to regulatory capital requirements and this can have a bearing on the nature and amount of lending undertaken by such entities.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Lenders can take a variety of measures to protect their investment, depending on their risk appetite and to provide alternative enforcement options:

(a) The security package required by the lender may include:
  (i) A charge over the real estate asset.
  (ii) A charge over the rights of the owner in relation to the asset and associated key contracts.
  (iii) A third-party guarantee.
  (iv) A charge over the shares in the property-owning entity/borrower and its assets.

(b) The loan agreement may impose:
  (i) Limitations on the borrower's ability to dispose of or grant other security over its assets and other restrictions in relation to the assets.
  (ii) Financial covenants relating to the financial performance of the asset which is being financed.

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

There are statutory rights of sale and possession for mortgagees of real estate assets under the Law of Property Act 1925 but these rights will also usually be set out in the security document. The mortgagee will be given the power to appoint a receiver to take possession of the property and sell it. There is no need to apply to the court to exercise these rights. The lender can choose to take the proceeds of lettings instead of selling the property.

Alternatively, a sale of the property may be achieved by selling the shares in the property-owning entity by enforcing the share security.

### 8.4 What minimum formalities are required for real estate lending?

There are no formalities for real estate lending but there are certain formalities – such as execution, notice and registration requirements – that must be complied with to ensure that the security is valid and has the required priority against third parties.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Protection against claims by other creditors is linked to the type of contractual protections that the lender has put in place and the security taken. As indicated in question 8.2, the lender may prohibit the borrower from taking on additional financial liabilities, disposing of its assets or granting other security. The security package itself affects the ability of other creditors to make a claim against the secured assets.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Certain transactions entered into by a company within a specified period before insolvency may be set aside, or otherwise adjusted by an order of the court, under the provisions of the Insolvency Act 1986. Possible grounds for challenging a transaction include that a transaction is at an undervalue or a preference.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Although there is no statutory power to stop a sale, it may be possible for the borrower to challenge enforcement on various grounds, such as the lack of sale at best price or unfairness under the Consumer Credit Act 1974. A borrower may also be able to apply for postponement if it becomes apparent that it can repay the sums due within a reasonable time.

A borrower may also use a rehabilitative insolvency process in a way that impacts on a lender – see question 8.8.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

"Liquidation" is a distributive process, whereby the assets of an insolvent entity are distributed amongst its creditors in order of priority prior to the entity being wound-up.

"Administration" is a rehabilitative process. Where there is a better chance of recovery for creditors if the company continues to trade, it will enter into administration whilst an insolvency practitioner seeks to sell any part of the business as a going concern. During that period, a statutory moratorium applies preventing secured creditors from enforcing their security without the consent of the administrator or the leave of the court.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Where the lender has taken security over shares, they would also take a stock transfer form executed in blank so that they could enforce by completing that transfer form to transfer the shares to a purchaser and apply the proceeds of sale towards the secured debt.

It is also possible to appropriate and take ownership of the shares *in lieu* of the secured debt, provided a fair method of valuation of the shares is agreed.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Stamp duty land tax (SDLT) is payable on acquisitions of a chargeable interest in land. The terms "acquisition" and "chargeable interest" are both widely defined and include sales, grants of new leases, surrenders and re-grants of any estate, interest or right in or over land (subject to a few exceptions).

The rate of SDLT will depend on whether the subject matter is residential or non-residential/mixed-use. For residential property, the rate will also depend on the nature of the purchaser and whether this would be an additional residence for them.

It is the purchaser who is liable for the tax, at the appropriate rate:

Non-residential/mixed-use:

| Rate per band | Consideration band |
|---|---|
| 0% | £0–£150,000 |
| 2% | £150,001–£250,000 |
| 5% | Over £250,000 |

Residential use:

| Rate per band | Consideration band |
|---|---|
| 0% | £0–£125,000 |
| 2% | £125,001–£250,000 |
| 5% | £250,001–£925,000 |
| 10% | £925,001–£1,500,000 |
| 12% | £1,500,001+ |

A potential 3% SDLT surcharge may be payable for a second/additional residential property. A higher rate of 15% applies to residential purchases over £500,000 by certain corporate vehicles (although there are exemptions).

SDLT in relation to new leases is calculated by reference to the "net present value" of the total rent payable over the term of the lease as well as the lease premium.

SDLT is charged on land and property in England and Northern Ireland. Land and Buildings Transaction Tax applies to property in Scotland and Land Transaction Tax applies to property in Wales. These regimes are similar but not identical to SDLT.

### 9.2 When is the transfer tax paid?

The time limit for paying SDLT is 14 days from the "effective date" of a transaction. The effective date is the earlier of completion of the transaction or "substantial performance" of the contract (the point at which the buyer or tenant takes possession of a property, makes the first payment of rent or pays a substantial amount of the purchase price).

### 9.3 Are transfers of real estate by individuals subject to income tax?

Generally, transfers by individuals are not subject to income tax, but individuals are subject to income tax on rental profit received from rented property.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The starting point is that supplies of UK land are exempt from VAT, with some exceptions such as the transfer of the freehold of a new (being less than three years old) or partially-completed building (which can either be standard-rated or zero-rated depending on the circumstances).

A property owner can elect to charge VAT on supplies of commercial property. This means that VAT is charged to the tenant or buyer at the standard rate (currently 20%) on the rental income or purchase price (unless the transaction is a transfer of a business as a going concern – such as the sale of a property rental business – in which case the sale is outside the scope of VAT). The seller is required to account to the UK tax authority for VAT on the supplies it has made, less its recoverable VAT, at the end of each VAT period.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Gains realised on a direct or indirect disposal of UK land are subject to capital gains tax (for individuals) and corporation tax (for companies), subject to any exemptions and reliefs.

***Individuals***

Both UK and non-UK resident individuals are subject to capital gains tax, which is charged at 18% or 28% on residential property, depending on the individual's tax band and subject to applicable reliefs (including private residence relief), and 20% on other chargeable assets (including commercial property and indirect disposals).

***Companies***

The current tax position for UK and non-UK resident companies is now aligned, so that any gain realised on a direct disposal of UK land or an indirect disposal of a "UK property rich" entity, will be subject to UK corporation tax on the chargeable gain. The current rate of UK corporation tax is 19%, but this is expected to fall to 17% with effect from April 2020.

***Collective investment vehicles (CIVs)***

With the extension of the UK corporation tax regime to direct and indirect disposals of UK land to non-UK residents, the UK introduced a separate regime for CIVs. They may be able to make certain tax elections the aim of which is to ensure that, so far as possible, the tax on any gain which would otherwise arise at the level of the CIV, is instead borne by the investor (and the investor will be able to benefit from any investor tax exemptions).

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

While the capital gains tax treatment of a direct or indirect disposal is broadly similar, there is currently a difference in respect of SDLT and VAT. SDLT does not currently apply to indirect purchases of real estate, such as the purchase of a property-owning company. Instead, if a property is held by a UK company and the company is sold, stamp duty is payable at 0.5% of the purchase price. In addition, transfers of shares are currently exempt from VAT, whereas the transfer of an interest in land may be subject to VAT (at either 0% or 20%).

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

A buyer of real estate should always consider:

(a) the VAT position of a commercial property;
(b) any capital allowances (the tax equivalent of depreciation for capital expenditure) that may be available to reduce future tax on income; and
(c) SDLT.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The Landlord and Tenant Act 1954 gives security of tenure to occupying tenants of business premises at the contractual expiry of their lease so that, unless the landlord can show one of a limited number of grounds such as an intention to redevelop, the tenant can call for a new lease on substantially the same terms. Generally, the tenant will be entitled to compensation (based on the rateable value of the premises and the duration of occupation) in the event that it is required to vacate. It is possible to "contract out" of security of tenure by the service of prescribed form notices and declarations within certain timeframes.

The Landlord and Tenant (Covenants) Act 1995 (1995 Act) amends the "privity of contract" rule so that any tenant is automatically released from its obligations as tenant on a sale (provided, if a landlord's prior consent is required, it has been obtained) and a landlord would be released on a sale if it is reasonable in the circumstances and the correct release procedure is followed.

**10.2 What types of business lease exist?**

There is no standard form lease although most registrable leases must contain certain clauses prescribed by the Land Registry.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

The provisions contained in a commercial lease will depend on the nature of the premises (age, use, condition and whether it is a lease of part or whole). The following would be typical for an office lease within a building, which is usually let on a fully repairing and insuring (FRI) basis:

- **Length of term**: 10–15 years, possibly with break rights (usually but not always tenant-only). More agile tenants, such as start-ups or tech companies, may want shorter leases.
- **Rent increases**: every five years on an upward-only open-market basis. Stepped rent or annual index-linked increases are also seen.
- **Tenant's right to sell or sub-lease**: assignment or underletting of whole is usually permitted with landlord's consent (not to be unreasonably withheld) subject to conditions, such as the rent being fully paid. Assignment of part is usually prohibited and subletting of part(s) may be limited.
- **Insurance**: typically, the landlord insures the building and the tenant contributes proportionately.
- **Change of control**: such provisions are rare.
- **Repairs**: the tenant typically covenants to repair the premises and to contribute proportionately to repair and maintenance of the building via a service charge. If the lease is of the whole building the tenant may insure and repair the entire structure.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

SDLT is a one-off tax payable at the commencement of the lease by the tenant.

VAT is an ongoing tax payable by a tenant on rent where the landlord has elected to waive the commercial property VAT exemption. The landlord has to account to the UK tax authority for VAT and the tenant may, depending on its VAT status, be able to recover VAT.

The landlord's rental income will be subject to income or corporation tax (as applicable). Rent should be a deductible expense for the tenant.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

If a lease does not have security of tenure (see question 10.1) it will expire and the tenant must vacate on the contractual expiry date (unless a contractual renewal right has been exercised). Tenants with security of tenure can "hold over" after contractual expiry and seek statutory renewal.

Leases typically include forfeiture provisions under which the lease can be terminated by the landlord for tenant default (non-payment of rent, breach of covenant and insolvency), subject to certain statutory protections for the tenant.

Break rights (usually in favour of the tenant only) allow the lease to be terminated on a particular date.

Otherwise, landlords and tenants may negotiate a surrender or, if the tenant is insolvent, its liquidator may terminate by disclaimer.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Under the 1995 Act, a tenant is automatically released on assignment (see question 10.1), although may be required to guarantee the obligations of its immediate successor under an authorised guarantee agreement.

Original landlords are not automatically released but can apply for a release from the tenant (not to be unreasonably withheld).

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green lease obligations are not typical, although there is increasing focus on the energy efficiency of buildings – see question 12.10. Some leases restrict alterations that may adversely affect the building's EPC rating.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Yes, both co-working and co-living arrangements are becoming increasingly popular. The Collective, London, for example, contains 550 rooms, and is said to be the world's largest co-living building.

In Q3 2019, the co-working sector occupied 20 million sq. ft. of office space across central London, which is nearly 8% of total stock.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

There are two types of lease for residential premises:

(a) long leases granted for a premium and with a low or nominal "ground" rent (long leases); and

(b) short-term leases or tenancies at a market rent (tenancies).

Each type is regulated by its own complex legislative regime, generally intended to provide protection to tenants.

In the case of long leases, the Landlord and Tenant Act 1985 provides protection in relation to the level of service charges and the Landlord and Tenant Act 1987 gives tenants a right of first refusal in certain circumstances if the landlord want to dispose of its interest. The Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993 give tenants the right to "enfranchise" – to acquire the freehold – and the Commonhold and Leasehold Reform Act 2002 entitles tenants to take over the management of their building.

The main legislation for regulating tenancies is the Rent Act 1977 (RA 1977), the Housing Act 1988, and the Housing Act 1996. Each provides a different level of tenant protection and which will apply depends on when a tenancy was granted.

The government is considering a number of legislative changes both in relation to long leases and tenancies, aimed at further protecting tenants. Note also, that residential tenancy law in England and Wales is diverging.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

Some laws only apply to multi-occupied properties. For example:

(a) in terms of long leases, some of the rights referred to in question 11.1 – such as the right of first refusal and right to manage – only apply in the case a multi-tenanted building; and

(b) as for tenancies, "Houses in Multiple Occupation" are governed by the Housing Act 2004 and most are regulated through a licensing regime run by the local housing authority.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

For long leases, a typical term would be a minimum of 99 years, usually with the right to a new lease at the expiry of the initial term. The rent would typically be a nominal or low "ground" rent (as a premium would have been paid). Property costs incurred by the landlord would be recovered through a service charge levied on the tenant.

Tenancies are either for a fixed term or are periodic, usually running on a month-by-month basis. Longstanding tenancies governed by the RA 1977 have the benefit of regulated rents. Otherwise, the amount of rent during the fixed term of a tenancy will be governed by its contractual terms. If the tenancy is periodic, the landlord has the right to adjust the rent once a year. Property costs incurred by the landlord are typically included in the rent.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

In terms of long leases, the landlord's right to terminate is very limited. While most leases include an express right to forfeit if the tenant is in breach, there are statutory rules and limitations on the exercise of that right.

In the case of tenancies, the landlord's rights to terminate will depend on when the tenancy was granted as this will dictate which protection regime applies – see question 11.1. The default position for tenancies granted since 1997 is that they are "assured shorthold tenancies" (ASTs). In general terms, the landlord of an AST has the right to regain possession of the property at the end of the fixed term on giving two months' notice. If a tenant remains in occupation after the fixed term expires, the landlord can recover possession under a fast-track "no fault" procedure, provided certain conditions have been met.

The government is considering the abolition of ASTs and if it does so, possession will only be regained on specific grounds, such as non-payment of rent, through a more cumbersome court procedure.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The Town and Country Planning Act 1990 and the Planning Act 2008 set out a framework for maintaining planning control in England & Wales.

The Planning (Listed Buildings and Conservation Areas) Act 1990 imposes a stricter regime for the demolition of or alterations to buildings with historic or architectural significance.

The Housing and Planning Act 2016 introduces various planning reforms which simplify the requirements for neighbourhood and local planning.

The Environmental Protection Act 1990 regulates the deposit, treatment and disposal of waste and liability in respect of contaminated land.

The Environmental Permitting (England and Wales) Regulations 2016 requires certain types of activities to have a permit.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Certain bodies have statutory compulsory purchase powers, for example under the Compulsory Purchase Act 1965. In order to exercise the powers, the acquiring authority must usually show that the compulsory acquisition of land will be in the overall public interest and fair compensation should be paid, taking into account market value and possibly factors including the costs of relocating businesses.

### 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Land use and occupation is primarily overseen by the local planning authority (LPA). In certain circumstances, the Secretary of State is entitled to "call in" and decide an application, for example if it conflicts materially with national policy. Nationally, significant infrastructure projects are always determined by the Secretary of State. Planning application documents and decision notices can be obtained from the relevant LPA.

The principal bodies responsible for the regulation, protection and general improvement of the environment are the Environment Agency (EA) and Natural Resources Wales (NRW), although in some cases the Health and Safety Executive and local authorities (LAs) carry out these functions. The EA/NRW and LAs must keep public registers of environmental information. These registers are available for inspection by any member of the public. The public can also request environmental information from public authorities and bodies carrying out a public function (such as utility companies), subject to various exceptions including commercial confidentiality.

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

Planning permission is generally required for any "operational development" (which includes building, engineering, mining or other operations in, on, over or under land, including demolition) or a material change of use of land. A planning application may not be required for such development if it falls within the scope of permitted development rights granted by statute. A development consent order is required (rather than planning permission) for nationally significant infrastructure projects.

Building regulations approval may be required to certify that the relevant works comply with minimum standards under the Building Act 1984.

Listed building consent may be required to carry out works to a listed building. Failure to obtain (and comply with) listed building consent is a criminal offence.

An environmental permit may be required where there are water or effluent discharges, waste storage, emissions or chemicals used at a site either for building works or use of the site. Additionally, if building works are undertaken near to a watercourse, a specific environmental permit for such works may be required.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

It is usual for planning permissions and building regulation consents to be obtained in England and Wales. If they are not, the Town and Country Planning Act 1990 specifies the period of time within which breaches of planning can be acted upon by a local authority. If no enforcement action is taken within the specified time limits, the building will become immune from further enforcement action.

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

The cost varies depending on the scale, complexity and nature of the work to be carried out, as provided for in the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 (as amended).

There are statutory time limits for decisions, specified in the Town and Country Planning (Development Management Procedure) (England) Order 2015, but commonly a longer period is agreed in writing with the applicant. The statutory time limit is eight weeks for most types of development and 13 weeks for major development. If the works are likely to impact the environment, a 16-week limit applies. The maximum time permitted for a decision to be made is 26 weeks under the government's planning guarantee, where no time period has been otherwise agreed with the applicant.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

The Planning (Listed Buildings and Conservation Areas) Act 1990 creates special controls over the destruction or alteration of buildings, objects or structures that are considered of historical or architectural significance, as well as conservation areas. Similarly, the Ancient Monuments and Archaeological Areas Act 1979 provides the legislative framework for protection of "Scheduled Monuments", although certain works affecting them may be permitted with the Secretary of State's consent.

Due to the additional planning restrictions which apply to listed buildings, historic monuments and properties in conservation areas, their commercial value may be affected, although the very nature of the real estate does not prevent it from being transferred, nor are alterations to protected buildings unusual.

### 12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

Local authorities and the EA/NRW must keep public registers of contaminated land. A site not being registered is by no means an assurance that the land is not contaminated as the land may not have been inspected. Buyers may also commission environmental consultants to undertake an environmental report as part of the due diligence process. There are various levels of environmental report, depending on the nature of and risks identified at a site.

### 12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

If contamination is identified which is causing significant harm or there is a significant possibility of harm to human health or the environment, the local authority, or for more complex cases the EA or NRW, will issue a remediation notice to the appropriate persons to enforce clean-up action. It is a criminal

offence not to comply with the terms of a remediation notice. A planning authority may also impose a planning permission condition that environmental clean-up is carried out before a development can proceed.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

An Energy Performance Certificate (EPC) is required for any property (residential or commercial) that is constructed, altered, sold or let. These are issued and registered by commercial energy assessors and provide information about the energy efficiency of the premises and detail where improvements can be made to increase the rating and improve the energy efficiency of the premises. EPCs are valid for 10 years unless any alterations are undertaken.

Since 1st April 2018, minimum energy efficiency standards (MEES) regulations have prohibited landlords from granting a new tenancy of a privately-rented commercial or domestic property with an EPC rating below "E". Properties already let on that date must comply from 1st April 2020 in the case of domestic property and 1st April 2023 in the case of commercial premises.

It is mandatory for any building occupied by public authorities or institutions providing public services to show a Display Energy Certificate.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The Energy Savings Opportunity Scheme (ESOS), implemented in July 2014, applies to large UK companies and non-public sector organisations subject to certain exemptions. ESOS requires qualifying companies to carry out energy saving assessments, conduct energy audits and identify where energy savings can be made in their business.

ESOS is supplemented by the EU Emissions Trading Scheme and, until recently, the CRC Energy Efficiency Scheme which has now closed.

A Streamlined Energy and Carbon Reporting (SECR) framework was also introduced on 1st April 2019. This applies to large companies and limited liability partnerships.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

The Climate Change Act 2008 was amended in June 2019 to set a new target of net zero greenhouse gas emissions by 2050.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Please see question 12.10 above.

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NORTON ROSE FULBRIGHT

# Finland


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The Code of Real Estate (Fi: *maakaari*) regulates the acquisition and registration of real estate and liens on real estate. The Real Estate Formation Act (Fi: *kiinteistönmuodostamislaki*) regulates the formation of real estate units, the creation of easements and other cadastral procedures. The Real Estate Register Act (Fi: *kiinteistörekisterilaki*) regulates the real estate register.

The Housing Companies Act (Fi: *asunto-osakeyhtiölaki*) regulates residential housing companies but can be partially applied to other real estate companies.

The Act on Land Lease (Fi: *maanvuokralaki*) regulates the leasing of land areas.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Finnish real estate laws are codified, and courts are under the duty to interpret the law. Some rights to natural resources (e.g. fishing) on government land have been recognised as local customary law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

There are no relevant international laws.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are no restrictions on ownership outside the province of Åland Islands, where ownership is restricted to residents of the province.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Rights over land can be separated to title, special rights that can be registered, easements and mortgages. Purely contractual rights are recognised, but not given preference over registered rights. A lease on land is considered a special right that can be registered. Other special rights include an agreement between the joint titleholders of a real estate on the possession of the real estate or the right to extract mineral resources.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

It is possible to register a delimitation on the components of real estate, so that a building or other construction does not belong to the real estate but has a separate owner. If the divergence in ownership is not registered, creditors have the right to assume that buildings belong to the real estate.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

This split is not recognised under Finnish law.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

All land is required to be registered. All rights in land that bind third parties can be registered.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no state guarantee of title, but the law confers public faith in the land register. The state is liable for damages that have been caused by errors committed by officials in upholding

land registries, and for damages caused when fraudulent information has been entered in the registries.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

A land lease right or other use rights pertaining to real estate properties are compulsorily registrable if (i) the right is transferable to a third party without the permission of the landlord, (ii) there are buildings belonging to the tenant on the leased property, and (iii) buildings may be built on the property by the tenant.

**4.4 What rights in land are not required to be registered?**

Rights such as easements, real estate liens (Fi: *kiinnitys*), joint possession (Fi: *hallinnanjako*) and joint arrangements (Fi: *yhteisjärjestely*) are not required to be registered; however, it is highly recommended that such rights are registered in order to solidify their status and enforce the right against third parties.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

All land in Finland is registered.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

The title is transferred to the buyer by a deed of sale. The transfer of ownership (and possession) is regularly agreed on in a deed of sale, and usually involves a clause stipulating that ownership and/or possession is transferred to the buyer simultaneously with the payment of the purchase price.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

In general, it can be stated that earlier rights defeat later rights. In principle, this also concerns registered rights, e.g. example easements, real estate liens, joint possession (Fi: *hallinnanjako*) and joint arrangements (Fi: *yhteisjärjestely*).

Earlier mortgages pertaining to real estate properties have priority over mortgages registered later. However, the priority order of mortgage rights may be amended by an application which the mortgage holder has accepted.

Unregistered earlier rights do not obtain priority unless those who invoke registered later rights have acted in bad faith.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

It can be said that there are three land registries in Finland. One for the title to the property, one for encumbrances (e.g. mortgages) and one for easements, city plans and the origin and formation of the properties. All of these registries are operated by the National Land Survey of Finland (Fi: *maanmittauslaitos*).

**5.2 How do the owners of registered real estate prove their title?**

The ownership of the seller is warranted by an excerpt from the land register and all real estate transactions are verified and registered.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Electronic real estate transactions are executed by filling in a form at an online service provided by the National Land Survey of Finland. Transactions are verified by the parties of the transaction by using online bank user identification or other means of strong identification. The title to the property in question is transferred to the purchaser automatically and there is no need to file for the title. Electronic real estate transactions are, however, seldom used by real estate investors, construction companies and other professional operators.

As all real estate transactions are verified, no further documents need to be provided to the land registry for registration.

The information specified in question 5.1 can be accessed electronically.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

There is a possibility of compensation for mistakes under certain strictly limited circumstances.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions in terms of access to the relevant registers. The buyer has an opportunity to obtain relevant information without the consent of the seller. Access to the relevant information is achieved by a search of the register.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

A real estate transaction, if not completed electronically, must be verified by a notary. The notary's duty is to verify the sale and purchase agreement, the ownership/title of the property in question and the identity and the authority to execute of the signatory of each party.

Typically, other parties involved in real estate transactions are the legal or other advisors of the seller and the buyer, and real estate agents brokering the transactions.

**6.2 How and on what basis are these persons remunerated?**

The notary verifying the real estate transaction is entitled to receive a small remuneration for their services.

Legal advisors are often remunerated on an hourly basis. Real estate agents often act on a commission basis.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

In the last few years the real estate market has been very active and the influx of capital, domestic and foreign, has meant that transaction values and volumes have increased. The most active buyers have been domestic and foreign real estate funds.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Real estate investments are mainly concentrated in the capital city area and a few other larger cities. The Helsinki metropolitan area is considered a primary real estate market and the Tampere and Turku regions are following behind as secondary markets. There is interest from investors in secondary and tertiary markets but such investments rarely include international parties. The housing and assisted living sectors have been active in the past few years as well as traditional commercial and office space areas. The hotel sector in the major cities is another active area.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Investors and developers can be considered to be attracted to all market subsectors.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The Code of Real Estate regulates the formalities for the sale and purchase of real estate. A sale of real estate shall be concluded in writing and the deed shall include the following mandatory information:

(1) the intent to convey;
(2) the real estate to be conveyed;
(3) the seller and the buyer; and
(4) the price or other consideration.

In addition, each sale and purchase of a real estate is obligated to be verified by a notary.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

In the Code of Real Estate, there is a general duty to disclose all matters that affect the sale price. Size and condition of buildings and structures are mentioned as examples. Information on land use planning, building permits and restrictions on land use, liens and other restrictions on ownership are also specifically mentioned.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Misrepresentation results, in general, in the liability to return part of the sale price as a price reduction or the whole sale price if the sale is cancelled. The seller can also be liable for damages. The buyer is entitled to demand cancellation if the misrepresentation is essential in view of the entire sale. A price reduction is calculated according to the price that the object of sale should have had at the time of the sale.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Seller's warranties in real estate transactions cover various areas, such as environmental issues, lease agreements and other agreements related to the property, easements and servitudes. The purpose of the warranties given by the seller is to give information to the buyer and to protect the buyer from risks that may transpire. Sale and purchase agreements often include a clause wherein the buyer states that they have concluded a due diligence and have been given information on the property.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller's liabilities after the sale are often limited with contractual clauses that protect the seller. The polluter of a property retains statutory liability for the pollution of the soil regardless of ownership.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In a real estate transaction, the buyer is obligated to pay the transfer tax.

To obtain registration of title, the buyer should apply for it after the transaction has been completed.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

There are no regulations for real estate financing other than banking regulations.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

A lien on the real estate is usually considered sufficient.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Common proceedings include the executive auction sale of real estate, but it is possible even after court proceedings to try to market the property as a regular object for purchase. Without the consent of the mortgagor, there are no options for enforcement other than court proceedings.

**8.4 What minimum formalities are required for real estate lending?**

There is no specific regulation on real estate lending.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

The priority order of mortgage liens protects lenders. In case of a default and a resulting executive auction sale of real estate, the creditors are satisfied in the priority order set out in the register for encumbrances.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Such circumstances are hardly imaginable. The documents establishing the security would have to be fraudulent or created in comparable circumstances.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

It is possible to appeal to the district court against measures taken by the bailiff; for instance, on the grounds that the auction price was considerably below market price. These kinds of appeals generally fail but have, in some instances, stalled enforcement for the duration of the process.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

The insolvency of the borrower does not impact the position of a real estate lender in so far as the lender has lien on the real estate.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

Shares can be pledged as a collateral. The rights of the lender are agreed upon in a lien commitment. It is common that if shares are used as a security, the lender has the right to appropriate the shares in case of insolvency of the borrower.

## 9 Tax

**9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?**

Transfer of real estate is subject to a transfer tax, which is 4% of the purchase price. According to the Code of Real Estate, the buyer shall be liable for the transfer-of-assets tax levied on the sale.

**9.2 When is the transfer tax paid?**

The transfer tax must be paid within six months from the signing of the sale and purchase agreement.

**9.3 Are transfers of real estate by individuals subject to income tax?**

The seller must pay an income tax for the profit, which is calculated either on the basis of the seller's purchase price or on 60% of the purchase price for real estate that the seller has owned for more than 10 years. The capital gain tax rate is 30–34%, so the seller can pay up to 20% of the purchase price as income tax.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

Transfers of real estate are not subject to VAT.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

There are no other taxes.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

The transfer tax for the transfer of ownership of a company is 2% of the purchase price. Therefore, it may be tax-efficient to own properties within a company and then transfer the ownership to the company.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

The owner of real estate must pay a yearly real estate tax that is based on the value of the land and buildings. The tax on buildings is based on the type of building, i.e. the current use of the building and its size and amenities. If buildings have been

converted to other uses, e.g. industrial to office, the tax administration might not be informed of the conversion, which may have resulted in too little taxes being paid.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The Act on the Leasing of Business Premises (Fi: *laki liikehuoneiston vuokrauksesta*) comprehensively covers the basic requirements and regulates the tenancy even if the parties do not themselves deem that it is necessary to record every term of the tenancy in an agreement.

**10.2 What types of business lease exist?**

The Act on the Leasing of Business Premises covers all types of business leases, e.g. office spaces, business premises, restaurants and hotels. The legislation is flexible in terms of variety of the type of premise leased.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

(a) The length of the term of the lease is not regulated. The length of the term may be either fixed or in force until further notice.

(b) Rent increases are typically tied to the cost-of-living index of Finland. The rent is typically adjusted annually or bi-annually.

(c) A common clause in a lease agreement is that the tenant may not assign the lease, re-let or transfer the possession of the lease to a third party (sub-lease) without the landlord's consent.

(d) Most often, the lease agreement obligates the tenant to take out insurance against loss or damage, liability insurance and loss of profits insurance, insuring the use of the object of the lease and the tenant's property. The landlord shall have the property insured by conventional full value property insurance.

(e) (i) According to the legislation, the tenant, in case of a transfer of business, has the right to transfer the lease right; however, often, the clause involving the restriction on the right to transfer the lease or the possession of the object of the lease includes a stipulation whereby this also applies to a transfer of business.
(ii) In a corporate merger, lease agreements are transferred by law to the recipient company.

(f) Repairs and maintenance of the object of the lease are agreed on a case-by-case basis. Usually a lease agreement involves a maintenance rent which covers most of the maintenance of the object of the lease. Alternatively, the lease may be double net or triple net where the tenant shall assume some or even all of the maintenance costs. Typically, double or triple net leases are involved in properties with a single or a few tenants.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Rent is not generally subject to VAT. The parties can choose that the rent is subject to VAT in order to enable the landlord to deduct VAT on input costs, if the business in the rented premises is subject to VAT.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Business leases are usually terminated mutually by the parties or at the expiry of the lease term.

In case the tenant is declared bankrupt and the bankruptcy estate has not underwritten the obligations of the tenant under the lease agreement, the landlord has the right to terminate the agreement. The bankruptcy estate is responsible for the obligations of the lease if they resume use of the leased premises.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The tenant shall not transfer his leasehold without consent expressed in the lease agreement or given separately by the landlord. Therefore, unless such consent exists, the tenant is liable for their obligations under the lease.

The landlord has a right to transfer the leasehold to a third party.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green lease policies are becoming more common to property owners and this is reflected in lease agreements. To accomplish the aspiration of sustainability, the terms and conditions of modern lease agreements regularly refer to the tenant's obligation to ensure that all operations within the object of the lease are carried out in compliance with environmental legislation and with other environmental recommendations and orders issued by the authorities that are binding upon the tenant.

Eco-efficiency is promoted in lease agreements to ensure support for sustainable development. It is common practice to attach environmental programmes to lease agreements.

The enforceability of environmental and green policies given by a landlord has not quite yet been tested in Finland.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Flexible space solutions are not very common in Finland. There are, to certain extent, shared spaces in residential buildings and offices.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The lease of residential premises is regulated by the Act on Residential Leases (Fi: *laki asuinhuoneiston vuokrauksesta*).

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

Persons living together as spouses are jointly responsible for the obligations of a lease agreement, even if the lease agreement has been made in the name of only one of the spouses.

Otherwise, the law does not regulate multiple different residential occupiers. In general, this means that lease agreements are made jointly by the different occupiers. This can be accomplished by entering into an agreement wherein all of the occupiers are tenants or by entering into one main lease agreement, in which the main tenant then sub-leases to the other occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) The length of the term of the lease is not regulated. The length of the term may be either fixed or in force until further notice.
(b) Rent increases are typically tied to the cost-of-living index of Finland. Before the rent increase can take effect, the lessor shall notify the tenant in writing of the new rent and the date on which it will take effect.
(c) If a tenant with a non-fixed-term lease encounters substantial difficulty in obtaining another dwelling by the removal date, the court can, at the tenant's request, defer the removal date by up to one year.
(d) The tenant typically has home insurance that covers the tenant's liability for accidental damage caused to the premises. Usually the tenant has no obligation to repair the premises. All repairs, alterations or upkeep measures should be specifically agreed.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The landlord shall have the right to rescind the lease agreement:
(1) if the tenant neglects to pay the rent within the time prescribed by law or agreed on;
(2) if the leasehold is transferred or the apartment or part of it is otherwise assigned for another person's use, contrary to the provisions of this Act;
(3) if the apartment is used for any other purpose or in any other manner than that provided when the lease agreement was made;
(4) if the tenant creates a disturbance with his or her way of life or allows others to do so in the apartment;
(5) if the tenant fails to take good care of the apartment; or
(6) if the tenant violates provisions or regulations for the maintenance of public health and order in the apartment.

The landlord shall not rescind the lease agreement on the grounds referred to above if he has not issued the tenant with a written caution.

Should the tenant not move out of the leased premises once the agreement has been terminated appropriately, the landlord has to apply for a court order to evict the tenant. If the tenant resists, enforcement of the court order can take months.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main law that governs zoning and permitting is the Land Use and Building Act (Fi: *maankäyttö- ja rakennuslaki*), which governs the role of the state and municipalities in land use planning and regulates permits for buildings. The Water Act (Fi: *vesilaki*) governs construction on water, use of ground or surface water and other use of water-covered areas. The Nature Conservation Act (Fi: *luonnonsuojelulaki*) governs nature reserves and protected species. The Environmental Protection Act (Fi: *ympäristönsuojelulaki*) governs the permitting of activities that might result in environmental degradation. The Land Extraction Act (Fi: *maa-aineslaki*) governs the extraction of land for construction purposes.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Municipalities or the state have, according to the Land Use and Building Act, the right to expropriate land "when the general need so demands". This right has been used, e.g. to acquire land for the purposes of planning industrial premises or residential buildings on the land. This kind of expropriation is mostly used in areas without a detailed plan, because then the expropriation price does not consider the planned future use of the expropriated land. The expropriation price is determined according to the Expropriation Act (Fi: *lunastuslaki*) and is calculated on the sale prices of properties of similar use.

Municipalities have, under the Land Use and Building Act, various powers to expropriate land to enable the execution of a local detailed plan. The expropriation price is determined according to the local detailed plan in question.

Separately, the Pre-emption Act (Fi: *etuostolaki*) gives municipalities the right to buy any property that can be developed for residential or recreational use at the same price at which the deed of sale has been registered.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Municipalities have building inspectors that control permits, use and occupation. Environmental regulation is controlled by environmental authorities either on the municipal or state level. The municipal building authority (Fi: *rakennusvalvonta*) is a reliable source of information on the current accepted use of buildings.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

The main permit required for building works or other similar use of real estate is a local detailed plan or a granted right to deviate from it, or, absent a local detailed plan, a decision on the special preconditions for granting a building permit according to the Land Use and Building Act. Building works also require a building permit, which is of a technical nature and only limitedly open to appeal. To change the use of a building requires a building permit if the change is considered significant.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Building permits are obligatory and are also required to change the main use of a building. Implied permission could be obtained in the first half of the 20th century before changes in legislation but is not obtainable anymore.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

If a local detailed plan incurs significant value on real estate, the owner is obligated to pay a percentage of it as development compensation to the municipality. The development compensation is at maximum 60% of the added value. It is also possible to conclude a land use agreement between the real estate owner and the municipality on the details of the increase in building rights and the compensation due to the municipality. Changing a local detailed plan or obtaining a deviation from it takes at least a few months and involves significant planning costs. The costs of the permits are not significant in comparison.

A building permit is typically obtained in a few weeks.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Municipal plans may protect the facades of buildings. The Act on the Protection of Buildings (Fi: *rakennussuojelulaki*) regulates the protection of buildings and monuments with specific historical value, where protection can be extended to the interior. As change of use usually requires a building permit, the property developer may be subject to extensive requirements to protect the building before the permit is obtained.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Environmental authorities have a public register on contaminated or potentially contaminated soil. Decisions and reports by environmental authorities are also public and can be obtained by anyone. There is no guarantee on the reliability of the information.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

According to the Environmental Protection Act, clean-up is required when there is danger to health or the environment. The responsibility is primarily on the polluter and secondarily on the occupant of the contaminated area.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

New residential or commercial buildings are under very strict requirements for energy efficiency. The energy efficiency of old buildings must be improved, if feasible, when carrying out repairs or conversion of the building. The requirements are monitored during the granting of building permits.

The energy performance of a building is assessed via energy certificates, which are mandatory for almost all residential and commercial buildings.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The European Union Emissions Trading System is the primary measure. There are complementary regulation and incentive programmes on energy efficiency and the use of renewable materials or sources of energy.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

A goal set out in the Climate Act (Fi: *ilmastolaki*) is to reduce emissions by 80% compared with 1990 levels by the year 2050.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

There are no such measures.

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Project Law Attorneys Ltd serves comprehensively in situations calling for expertise in property law and in the various stages of the life cycle of properties. The firm's proficiency extends from land use agreements, urban planning and the formation of a property to the planning agreements for construction projects and contract practices in the implementation phase of projects.
Project Law's core areas of expertise are: Business Premise Lease Arrangements and Transactions; Land Use and Real Estate Development; Construction Agreements and Project Delivery; Dispute Resolution; Corporate Law; and Environmental Law.
Project Law also counsels on issues related to soil contamination, lease of completed business premises and legal advice on the conversion of intended use of historical buildings.

Project Law's team has vast experience in the real estate market and the personnel have comprehensive knowledge of the procedures and practices, operators and interest groups of the core areas of expertise.

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PROJECT·LAW

# France

Tirard, Naudin

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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

In France, real estate is governed by several laws and regulations which are codified differently depending on their aims and objectives: The "*Code de l'urbanisme*" ("Planning Code") provides rules harmonising the use of French territory which is considered the common space of the Nation.

- The "*Code de la construction et de l'habitation*" ("Construction and Housing Code") consolidates construction, development and social housing rules.
- The "*Code civil*" ("Civil Code") contains rules, among others, relating to the definition of ownership, transfer of ownership for consideration, by gift or by death as well as rules governing the use and lease of real estate properties.
- The "*Code de commerce*" ("Trade Code") and the "*Code rural*" ("Rural Code") include specific rules applying to real estate used for commercial and/or agricultural purposes.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Because France is a civil law country which does not recognise the concept of legal ownership *versus* beneficial ownership and has never ratified the Hague Convention on the recognition of trusts, a trust cannot directly own a real property located in France.

Nevertheless, it does not mean that a trust cannot be used to indirectly hold a French real property.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Strictly speaking, international laws are not relevant in France in matters of real estate law (in particular, in matters relating to planning, construction and housing rules).

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

No legal restriction specifically applies to the ownership of real estate by particular classes of persons.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Several rights over land are recognised in France, some of which are purely contractual between parties.

First of all, the full ownership ("*pleine propriété*") of French real estate can be shared between usufruct ("*usufruit*") and bare-ownership ("*nue-propriété*"). Several joint-owners may hold the usufruct, the bare-ownership and/or the full ownership of the same French real estate ("*indivision*").

On the other hand, mortgages ("*hypothèques*") (legal or contractual), and lender's pledges ("*privilège du prêteur de deniers*") can be registered on a French property.

Real estate rights are also given to the user of the property, whether it is used for free ("*mise à disposition gratuite*") or rented out. Rights are, however, substantially different depending on the leasehold: "*bail d'habitation*" (housing lease); "*bail commercial*" (commercial lease); "*bail professionnel*" (professional lease); "*bail rural*" (rural lease) "*bail à construction*" (construction lease); "*bail emphytéotique*" (long-term lease); and "*concession*" (concession).

Finally, easements ("*servitudes*") granted by the law or ancestral customs may apply to French real estate.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

There are some cases where the right to a real estate diverges from the right to a building constructed thereon, such as the "*droit de superficie*" (land tenure) and the "*division de la propriété en volume*" (division of the property into several units).

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

As explained in the answer to question 1.2 above, there is no split between legal title and beneficial title in France. Consequently, a trust cannot be registered with the "*Cadastre de France*" (land register) as the owner of a French property. There is no proposal to change this.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

All land, as well as all rights relating to French real estate (except lease agreements not exceeding 12 years) should be registered with the "*Cadastre de France*" (land register) in order to be enforceable against third parties.

**4.2 Is there a state guarantee of title? What does it guarantee?**

Strictly speaking, there is no state guarantee of title.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

All rights listed in the answer to question 3.1 above are compulsorily registrable, except lease agreements not exceeding 12 years.

**4.4 What rights in land are not required to be registered?**

Lease agreements which do not exceed 12 years are not required to be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Between parties, the ownership is transferred under the terms of the sale agreement. As a general rule, however, it is enforceable against third parties after the registration of the sale with the "*Cadastre de France*" (land register).

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The first registered buyer prevails over the others. Assuming different purchasers register on the same day, the first signed agreement prevails. The rank of priority relating to liens on the property, such as "*privilege du prêteur de deniers*" (lender's pledges) is also determined depending on the date of completion of the purchase agreement.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

The "*Cadastre de France*" (land register) is a framework of maps and administrative files registering all real estate properties located in each French town. The register was created at the beginning of the 19th century. For historical reasons, the region of Alsace-Moselle benefits from special treatment.

**5.2 How do the owners of registered real estate prove their title?**

Proof of real estate ownership is governed by the principle of freedom of evidence. The burden of proof is on the plaintiff in the claim action.

With respect to the modes of proof, the presentation of a title of ownership entails a presumption of property which can be reversed by the contrary proof.

For the courts, the proof can also be brought back by the legal presumption indicated in article 552 of the French Civil Code under which property of the ground carries the property of the top and the bottom.

It can also be constituted by indices such as the cadastre or the payment of property taxes.

Ownership by virtue of possession ("*Usucapion*") is also the most widely used means of reporting evidence of real estate ownership. Proof of *usucapion* may be established by any means.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

The transfer of French real estate should be registered with the register either by a French *notaire* in the case of a private sale or by a French judge in the case of auction.

The information on ownership of registered real estate cannot be accessed electronically.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

No compensation can be claimed from the registry if a mistake has been made. However, in theory, the *notaire* may be held responsible.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

One may obtain information relating to the transfer of French real estate by gift, by death and by sale. The date and price of transfer, as well as the identity of each new owner is provided. All mortgages and liens put on the property are also detailed, including their amounts, dates, beneficiaries and the levees' date.

This information can be obtained by way of a request to a French administration called "*Service de la Publicité Foncière*" using a form n°3233-SD.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Several parties may be involved in a real estate transaction in France. The real estate brokers are the first to appear on the scene. They allow potential purchasers and sellers to meet. They also provide all information on the property to the buyer. As opposed to the situation in the UK, no general survey on the property is, as a general rule, carried out in France. It is the responsibility of the buyer to find out information regarding the property. Only a few compulsory survey certificates are issued before the acquisition.

*Avocats* may be involved in the process of purchasing a property in France, as well as the purchase of shares of a company which owns, directly or indirectly, French real estate properties. They represent their own clients during the negotiation period and the preparation of the legal documentation.

The French *notaires* are "*officiers ministériels*" (ministerial officers) who benefit from a monopoly of executing and registering (with the "*cadastre*") all transfers of French properties. The sale of shares of companies (French or foreign) owning directly or indirectly French real estate having a market value exceeding that of their French movable assets, signed outside France, should also be reiterated with a French *notaire*. Other sales of shares are not in the scope of the *notaires*' monopoly.

Real estate technicians can be appointed by the potential purchaser in order to carry out the non-compulsory survey and due diligence work on the property.

Finally, sales of properties by auction may be executed and registered to the "*cadastre*" by a French judge.

**6.2 How and on what basis are these persons remunerated?**

Fees of real estate brokers (between 1% and 5% depending on the nature and amount of the sale price) as well as those of *avocats* (depending on their diligence) are negotiable.

*Notaires* receive compulsory fees determined by the law depending on the market value of the property sold. A degressive rate scale applies with a marginal rate of 0.814%. When two *notaires* are involved in the transaction, one representing the seller, the other representing the purchaser (this is our recommendation in order to avoid a conflict of interest), compulsory fees are shared between both *notaires*. Fees due to the *notaires* upon the reiteration of the sale of shares of a company owning a French real estate property signed abroad should, however, be negotiated.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Exceptionally low loan interest rates have continued to sustain a high demand for real estate in France in 2019. Indeed, the amount of loans borrowed to finance residential real estate has reached a new high of €1.060 billion.

This has, however, led to a significant increase in the duration of the loan borrowed with an average duration of 229 months and a decrease in the part of equity for each transaction which, on average, sits at 14.3% of the overall amount of the transaction. Another consequence of the low loan interest rates is that real estate prices continued to rise in 2019. For example, the average price per $m^2$ in Paris has reached a new high of €10,115.

Some, however, fear that the continued rise of the real estate prices may lead to individuals postponing their acquisition, which could result in a slowdown in real estate transactions in the coming years.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Since the beginning of 2019, the number of real estate transactions, whether for residential or business purposes, has seen a significant increase compared to 2018. As an example, the investments in commercial real estate for the first nine months of 2019 amounted €23.7 billion which corresponds to a 21% increase compared to the first nine months of 2018.

This means that the French real estate market is still considered attractive for investors.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

As explained in section 8 below, a real estate wealth tax ("IFI") applies on real estate properties or rights held by resident or non-resident individuals of France. Coupled with an increase in the taxation of rental income for non-residents in the recent years (in addition to French income tax, social contributions are now due by non-resident individual investors on French source rental income, at a rate of 17.2% for non-EU residents and 7.5% for EU residents; see question 10.4 below), one may expect that this may curb the interest of foreign investors in French real estate in the coming year. However, this does not prove to be the case, considering the current high demand for French real estate, causing the market prices to continue increasing.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

As explained above, the French *notaires*' monopoly means that parties rely on them to execute the minimum formalities for the sale and purchase of real estate.

The *notaire* should verify that:

- the real estate property is duly owned by the seller. For example, the apparent owner of the property could only own the usufruct and the bare-owners may not have been involved in the negotiation process;
- the mortgages registered on the property being sold do not exceed the sale price of the property; and

- all compulsory certificates relating to the absence of legionella, woodworm, lead poisoning and asbestos, as well as the conformity of gas and electrical fittings, etc., have been provided by the seller.

The *notaire* should also exercise all formalities relating to pre-emption rights that might apply as a result of the law to the town or other public authorities (e.g.: "*droit de préemption urbain*", "*droit de préemption de la SAFER*").

It may be appropriate to rely on the *notaires* for low-value transactions relating to French real estate; however, we recommend being assisted by a French *avocat* for larger scale transactions.

The *notaire* does not represent either the seller or the buyer, one of his main tasks being to make sure that taxes are paid.

Assuming the shares of the company owning the real estate are sold, due diligence should be performed by parties in order to verify the situation of the French real estate and the financial situation of the company sold. These verifications are performed in practice by French *avocats*.

### 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

The seller has, as a general rule, very few duties of disclosure, and the *notaire* will not necessarily protect the purchaser. As explained before, it is the responsibility of the purchaser to investigate the property to their satisfaction. This is always reiterated in the standard sales agreement proposed by the French *notaires*. This is why it is recommended for both the seller and the buyer to engage their own *avocat* to ensure that everything is carried out to their satisfaction.

### 7.3 Can the seller be liable to the buyer for misrepresentation?

In France it is rare that a seller is held liable for misrepresentation relating to the acquisition of real estate. The buyer would need to demonstrate that the essential reason he/she was interested in purchasing the property was misrepresented in order to invalidate the acquisition, according to the new article 1112-1 of the Civil Code. Assuming the agreement was valid, it is voidable by application of the new article 1187 of the Civil Code if at least one condition precedent provided in the agreement was not met before the completion date.

It should be noted that in France, as a general rule, a private pre-purchase agreement is signed between parties, providing several conditions precedent which should be met prior to the signing of the purchase agreement before the *notaire*. After the signing of this agreement, it becomes very difficult to challenge the validity of the purchase, except in case of fraud.

However, the seller's liability is easier to challenge in cases of the sale of shares of a company owning French real estate when the share purchase agreement provides representations on the seller which have not been met. The share purchase agreement can either be null and not valid according to article 1112-1 of the Civil Code in case of misrepresentation, or voidable by application of article 1187 of the Civil Code (see above).

### 7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?

The contractual warranties appearing in the "standard" private pre-purchase agreement of French real estate are, as a general rule, very limited and should be checked before the signing of the agreement in front of the *notaire*. They may concern, for example, the nature of the building (land to build), the possibility of obtaining a construction permit or purchasing a vacant building when it is still occupied. It should also allow the new purchaser to substitute the seller in order to benefit from any building guarantees previously granted. However, warranties are never a substitute for the buyer carrying out his own due diligence.

### 7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.

The seller retains three main liabilities in respect of the property post sale:

- the guarantee for hidden defects (article 1641 of the French Civil Code);
- the guarantee for non-conformity (articles 1616 to 1623 of the French Civil Code); and
- the guarantee of quiet possession free from any claims by third parties (article 1626 of the French Civil Code).

The guarantee for hidden defects applies when the defect was hidden and not visible, when it rendered the product unfit for use and when it could not have been discovered by a reasonably thorough inspection before the sale. A replacement, a partial or total refund or the cancellation of the whole contract can be obtained.

The guarantee for non-conformity in the sale of real estate property requires the delivery of a property whose area corresponds to that possibly indicated in the deed of sale. If the area does not correspond, the seller can suffer a diminution of the price received from the buyer. Moreover, in the case of the sale of a flat, the *Loi Carrez* provides that a seller must guarantee the surface area of the flat sold. If the actual surface area is less than 1/20$^{th}$ of that declared by the seller, he must if requested by the buyer, reduce the price *pro rata* by the shortfall in the area.

Finally, the seller must guarantee the buyer against any cause of eviction (i.e. a non-declared mortgage on the property sold, the extension of the lease granted to the tenant by the seller without giving notice to the buyer).

### 7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

In the case of the purchase of French real estate, the buyer is only liable for expenses mentioned in the agreement. Assuming the shares of the company owning the French real estate are sold, the purchaser is liable for known and unknown debts of the company. In order to prevent or limit the liable risk of the buyer, a liability guarantee clause along with an escrow clause should be provided in the shares purchase agreement.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

As of January 1st, 2018, a real estate wealth tax ("IFI") applies on real estate properties or rights held by resident or non-resident individuals of France. For the computations of the taxable basis of this tax, several limitations have been introduced in respect of the deductibility of loans. The main limitations are the following:

- Loans granted by family members to finance a French real estate property would only be taken into consideration for IFI purposes (see section 9 below) if the terms and conditions of the loan agreement are at arm's length.
- For taxpayers, having a real estate wealth exceeding €5 million, the deductibility of the loans for IFI purposes cannot exceed 60% of the value of the real estate. Only 50% of the amount exceeding this limit is taken into consideration for the determination of the IFI taxable basis.
- Loan agreements providing for a "bullet repayment" at maturity ("Balloon Loans") have to be amortised over the duration of the loan (or 1/20 per year elapsed in the absence of a maturity date) for IFI purposes. The principal of the loan which should have been theoretically amortised is not deductible for the purpose of determining the net value of the taxable properties.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The traditional methods by which real estate lenders seek to protect themselves are the inscription of the "*privilège du prêteur de deniers*" (lenders' pledges), registration of the mortgage within the "*registre cadastral*" and by means of a pledge on the shares of the company owning the French real estate.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Conventional mortgages as well as "*privilège du prêteur de deniers*" (lenders' pledges) should only be registered in the "*registre cadastral*" (see above) by French *notaires*. There is no need to involve court proceedings. One should also be aware that the French tax authorities are allowed to put a legal mortgage on French real estate properties if they have reason to believe that their owners would not be able to pay their taxes.

**8.4 What minimum formalities are required for real estate lending?**

As already explained, the registration of a conventional mortgage should be executed by a French *notaire*. It is the same for the registration of "*privilège du prêteur de deniers*" (lenders' pledges).

Pledges over shares should only be registered with the "*registre du commerce et des sociétés*" (Companies and Trade Registry). The cost associated with this is very limited in comparison to the fee for the registration of the mortgage.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

The real estate lender is protected against claims against the borrower or the real estate asset by other creditors by registering a "*privilège du prêteur de deniers*" (lenders' pledges) and/or a mortgage of first rank which will allow him to be paid before any other creditors, including the French tax authorities.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

The only circumstance where a security taken by a lender can be avoided or rendered unenforceable is in case of fraud when the lender helped the owner to organise his/her insolvency.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

There is no action a borrower can take except, of course, to demonstrate that the debts owed have been duly refunded to the lender.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

As a general rule, in case of insolvency or corporate rehabilitation of the borrower, the real estate lender who has registered a "*privilege du prêteur de deniers*" (lenders' pledges) or a mortgage on the real estate of first rank will be protected by the fact that he will be entitled to be paid on the sale of the real estate bought by the borrower before any other creditors.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

The most common form of security over shares is the so-called "*nantissement de parts sociales*" (share pledge).

The share pledge is granted over the shares of types of companies other than joint stock companies such as "*société à responsabilité limitée*" or "*sociétés civiles immobilières*". This pledge covers the actual share which means that new additional shares are not automatically included in the scope of the pledge.

As a general rule, a share pledge is enforced by its registration with a commercial court registry. It is also recommended to register the share pledge with a French *notaire* in order to set the rank of the pledge.

The lender has the right to appropriate shares in case of insolvency or reorganisation procedure of the borrower. However, the strength of his right will depend on the rank of inscription of the share pledge.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

As a general remark, the "*Code général des impôts*" (French tax code) provides special treatment which is applied to real estate located in France and companies owning such real estate which is very different from the tax regime applicable to other assets or companies. The concept of "*Société à prépondérance immobilière*" ("SPI") (a real estate company) has been introduced for French tax purposes only, which allows France to apply a specific regime on qualified companies. The concept of SPI has a different meaning depending on each tax involved. However, the common characteristic of the different definitions (either those of the internal law or tax treaties) is that in order to be considered as an SPI, the company (French or foreign) which owns, directly or indirectly, French real estate must have a market value which exceeds that of their movable assets.

Transfer of real estate is subject to transfer duties at the rate of 5.81%, calculated on the purchase price of the property, and at the rate of 5% on the sale price of shares of an SPI.

Traditionally, transfer duties are due by the purchaser even if it may be provided otherwise in the sale agreement. Both the seller and purchaser are liable for their payment *vis-à-vis* the FTA.

### 9.2 When is the transfer tax paid?

The *notaire* levies transfer duties at the time as the property sale agreement is signed. Transfer duties on sale of an SPI's shares should be paid within 30 days of signing the sale agreement.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Transfers of real estate are subject to income tax at a flat rate of 19% and social security contributions at the rate of 17.2% for 2019. An additional tax at progressive rates varying from 2% to 6% also applies on capital gains exceeding €50,000. Finally, the exceptional contribution on high income may also apply at a rate of 3% or 4% depending on the annual income and capital gains received by a taxpayer during a said year. The marginal rate of taxation for 2019 reaches 46.2%.

Exemptions apply depending on the duration of the ownership of the property, under which a total exemption of income tax (at the rate of 19%), an exceptional contribution on capital gains (at progressive rates from 2% to 6%) and an exceptional contribution on high income (at the rate of 3% or 4%) is granted after 22 years of ownership. A total exemption from the social contribution (at the rate of 17.2% for 2019) also applies after 30 years of ownership.

The same regime applies for residents and non-residents of France. However, tax resident individuals of the European Economic Area (European Union, Island, Norway, Liechtenstein and Switzerland) may benefit from a reduced rate of social contributions of 7.5% provided that they can demonstrate their affiliation to the social security regime of their country.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

VAT may only apply (at a rate of 20%) on transfers of land to be built upon, on buildings under completion, and on new buildings completed in the previous five years. All other sales of real estate and SPI shares are subject to transfer duties, as explained in the answer to question 9.1.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Assuming the seller of the real estate is a company subject to French corporate tax, capital gains are subject to French corporation tax at a rate of 28% (or 31% for the portion exceeding €500,000) in 2019.

A 30% flat tax applies on the distribution of dividends to French resident individuals. Except when a tax treaty provides a lower rate, a 12.8% withholding tax would apply on distribution of dividends benefitting non-French resident individuals.

Assuming the seller is a foreign company subject to corporate tax, a 31% withholding tax applies (for 2019) on capital gains realised upon the sale of French real estate. However, companies incorporated in the EU may also benefit from the corporate tax reduced rate of 28% for 2019 on the portion of the capital gain not exceeding €500,000.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Transfers of shares of an SPI (when considered tax transparent) by an individual (resident or non-resident of France) are subject to the same regime as described in the answer to question 9.3. However, the taxable capital gain is obtained by finding the difference between the sale price and the purchase price of the sold SPI shares. The same exemptions for the duration of the ownership also apply (see the answer to question 9.3). A flat rate of tax of 30% applies to the sale by French resident individuals of shares of an SPI subject to corporate tax. Non-French residents are subject to the same regime as those applicable in cases of sale of shares of an SPI considered as fiscally transparent. Finally, the special tax on real estate capital gains (ranging from 2% to 6%; see the answer to question 9.3) also applies in all cases. The transfer of shares of an SPI (regardless their fiscal statute) by a company (French or foreign) subject to corporate tax, is taxed at a standard rate of 28% (or 31% for the portion exceeding €500,000). However, foreign companies selling SPI shares are subject to a 31% withholding tax (or, for companies incorporated in the European Union, 28% for the portion of the capital not exceeding €500,000) levied upon the sale which can be imputed on the corporation tax due in France at the end of the fiscal year.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

As explained above, the transfer of real estate is secured in France. However, it is important in our opinion to execute survey diligence before purchasing even if it is, not yet, a common practice. Assuming the purchase of an SPI's shares is contemplated, it is important to conduct due diligence not only on the real estate but also on the tax and financial situation of the SPI.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

The statute of "*baux commerciaux*" (leases of business) provided

by articles L.145-1 to R.145-37 of the "*Code de Commerce*" (trade code), is deemed to protect the tenant's rights. It provides a minimum duration and allows the tenant the right to renew the agreement at its term. It also makes it possible to limit the increase in rental fees when the agreement is renewed.

The statute of "*bail professionnel*" (professional lease) provided by article 57A of the law 86-1290 on 23rd December 1987 and article 1713 of the Civil Code is applicable to professional activities other than businesses. As a consequence, professional premises cannot be used by a tenant running business activities.

### 10.2 What types of business lease exist?

As explained above, two main types of business lease exist:

- The "*bail professionnel*", which applies to professionals running a civil activity (e.g.: lawyers, doctors, etc.). The professional lease is concluded for a minimum period of six years. It can be renewed for a six-year duration. Each party can refuse the renewal of the agreement by notifying the other party six months before its termination date and the tenant can terminate the lease with six months' notice.
- The "*bail commercial*" which applies to business activities creating a "*fonds de commerce*" is described below.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

As explained in the answer to question 10.2, only the aspects relating to the "*baux commerciaux*" will be discussed in these answers. It applies to real estate where the "*fonds de commerce*" is run. The "*fonds de commerce*" is characterised by the existence of a real and independent clientele owned by the tenant. The business activity should be run by a tenant registered within the "*registre du commerce et des sociétés*" (business registry).

(a) Term

The term of the "*bail commercial*" should be concluded for at least nine years. However, the tenant can terminate the agreement at the end of each three-year period with a minimum of six months' notice.

(b) Rent increases

The rental fees are freely determined between both parties upon the signature of the original "*bail commercial*". As a general rule, rental fees can be indexed but no increases may apply before a period of at least three years following the date of first use or of the renewal of the lease agreement. In addition, the increase is limited in order to protect the tenant.

(c) Tenant's right to sell or sub-lease

When business premises are let with a lease to operate a certain type of business, the tenant has the right to sell his right to the lease ("*droit au bail*"). Depending on the provision of the "*bail commercial*" the landlord should either agree or participate in the sale of the "*droit au bail*". The sub-lease should be provided by the "*bail commercial*" and the landlord should either authorise or participate in the sub-lease agreement's signature.

(d) Insurance

Real estate is, as a general rule, insured by the landlord against damage to the building and insured by the tenant again damage to the premises and equipment.

(e) (i) Change of control of the tenant

As a general rule, the change of control of the tenant does not interfere with the "*bail commercial*", except of course if it specifically stipulates otherwise.

(ii) Transfer of lease as a result of a corporate restructuring

The "*droit au bail*" owned by a merged tenant is automatically transferred to the absorber.

(f) Repairs

Important renovation work, such as structural and internal work is the responsibility of the landlord, while other repairs are the responsibility of the tenant.

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

(a) Taxation of rental income

When the landlord is an individual, French income tax is due on rental income on a cash basis. The determination of the tax basis is different if the building is rented out as furnished or unfurnished. Residents and non-residents are subject to income tax at progressive rates with a marginal rate of 45%. Non-residents are, however, subject to a minimum taxation amounting to 20%. Social contributions are also due at a rate of 17.2% for 2019 (except for certain residents of the EEA, see question 9.3). Finally, the contribution on high income amounting to 3% or 4% may also apply.

Companies are subject to corporation tax on accrued rental income. The determination of the tax basis is the same as for operational companies. The depreciation of the building is deductible. The standard rate for 2019 of corporate tax is 28% (or 31% for the portion of the income exceeding €500,000).

(b) VAT

VAT is due when industrial and/or commercial buildings are rented out as furnished. The landlord of an industrial and/or commercial building rented out as unfurnished may elect for VAT under certain circumstances. This election allows the VAT to be deducted on construction cost, expenses relating to renting out the property and avoiding the "*taxe sur les salaires*" (tax on wages). VAT is never due on residential buildings rented out unfurnished.

(c) IFI

A wealth tax on real estate properties or rights called "*Impôt sur la Fortune Immobilière*" is due by resident taxpayers on the worldwide real estate properties owned directly or indirectly, and by non-resident taxpayers only on their real estate properties located in France, owned directly or indirectly through French or foreign companies or trusts. Among a few other exemptions, participation in a French or foreign operating company owning real estate which does not exceed 10%, is exempted from IFI provided that certain conditions are met. As already explained, some limitation of deduction of debts also applies.

(d) French gift and inheritance tax

French gift tax and inheritance tax are due on worldwide assets by resident taxpayers and only on French assets by non-resident taxpayers. Shares of French or foreign companies qualifying as a "*société à prépondérance immobilière*" (see question 9.1) and French real estate owned directly or indirectly by a French or foreign company (or a trust) more than 50% of which is owned by the same family are, among others, considered French assets.

The rate at which French gift tax and inheritance tax are due depends on the relationship between the donor (deceased)

and the donees (heirs). A full exemption of inheritance tax applies between spouses. A similar progressive rates scale applies (from 0 to 45%) to donations between spouses and to donations and successions between parents and descendants. A flat tax of 60% applies between unrelated persons. The same regime applies when assets are owned through a trust.

(e) Reporting obligations

In order to allow France to levy its taxes and duties, French or foreign companies, as well as trustees of trusts owning French assets, including real estate located in France, have a duty to report changes in ownership.

The identity of the ultimate owners of French or foreign companies, regardless of their activities, registered within the French company and commerce registry should be disclosed.

An annual 3% tax is due by French or foreign companies owning directly or indirectly real estate properties located in France. Companies disclosing the identity of their owners, as a general rule, benefit from an exemption.

An 80% penalty is due on eluded income tax, wealth tax, IFI tax, and gift and inheritance tax when the trustees of a trust indirectly owning assets subject to those taxes fail to report the identity of the settlors and beneficiaries as well as all events affecting the trust.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

As explained above, business leases are usually terminated by the tenant at the end of a three-year period (see questions 10.2 and 10.3). The landlord could also terminate a business lease at the end of a six-year period ("*bail professionnel*") or of a nine-year period ("*bail commercial*"). The parties may always decide to extend and renew the lease. The landlord should compensate the tenant if he terminates the lease before or at its expiry.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Landlords are no longer liable for their obligations once they have sold their real estate. However, the tenants remain responsible if they have sold their interest or sub-leased the real estate.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

The French Construction Code provides for numerous environmental requirements ("green obligations") relating to leases, such as the requirement to include an energy diagnosis performance with all lease agreements, with the exception of agricultural and seasonal lease agreements (article L.1343-1).

As of 1st January 2011, all rental (and sale) adverts must also contain the energy performance grade (from A to G) of the building (article R.134-5-1).

Since 14th July 2013, leases relating to offices or commercial buildings with a surface area larger than 2,000 m² must contain a "green appendix" ("*Annexe environnementale*", article L.125-9 of the French Environmental Code). This green appendix contains comprehensive information in respect of the energy equipment of the building (e.g. waste treatment, heating and lighting system, water consumption).

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

No, there are not.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Land use regulation in France is complex. As explained in question 1.1, the current frame of the regulation is set out in the Construction Code, the Urban Planning Code, and the Environmental Code.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

The laws do not differ if the premises are intended for multiple different residential occupiers. Some rules are, however, organised for multiple different residential occupiers which should be agreed to and followed by new occupiers (i.e. "*Règlement de co-propriété*"). They should be attached to all purchase and lease agreements in the form of an appendix.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Term

The term of the "*bail d'habitation*" should be at least six years. However, the tenant can terminate the agreement at the end of each three-year period with a minimum of six months' notice.

(b) Rent increases

The rental fees are freely determined between both parties upon the signature of the original "*bail d'habitation*". As a general rule, rental fees can be indexed but no increases may apply before a period of at least three years following the date of first use or of the renewal of the lease agreement. In addition, the increase is limited in order to protect the tenant.

(c) Tenant's right to sell or sub-lease

As a general rule, the tenant cannot sell its rights. The sub-lease should be provided by the "*bail d'habitation*" and

the landlord should authorise signature of the sub-lease agreement.

(d) Insurance
As a general rule, the landlord insures the property against damage to the building and the tenant insures against damage to the premises and equipment.

(e) Change of control of the landlord
As a general rule, a change of control of the landlord does not interfere in the "*bail d'habitation*".

(f) Repairs
Important renovation work, such as structural and internal work, is the responsibility of the landlord, while other repairs are the responsibility by the tenant.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The protection of the tenants is a very serious issue in France, and therefore strictly regulated. A landlord wishing to terminate a residential lease should indemnify the tenants.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

As already explained, the "*Code de l'urbanisme*" ("Planning Code") provides rules harmonising the use of the French territory. It governs the location, size and main characteristics of buildings. It also provides zoning rules.

The "*Code de la Construction et de l'habitation*" ("Construction and Housing Code") gathers together construction, development and social housing rules. It provides compulsory specifications and proper use of buildings.

The "*Code de l'environnement*" ("Commercial Code") provides, among others, rules, prohibitions, and requirements for buildings contractors and owners.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The local authorities, and under certain circumstances the State, may exercise their pre-emptive rights upon the sale of real estate properties as already mentioned above.

They can also force landowners to sell their land. The expropriation procedure is provided by an ordinance dated 4th November 2004. It should, however, only be applied for public utility purposes. Evicted landowners receive full compensation, determined either by a contractual agreement or settled by the judge.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Lands and building use are under the control of local administrative authorities. The "*Maire*" (Mayor) ensures the town planning and grants the "*permis de construire*" ("prior construction permits"). The "*Préfet de région*" ("regional prefect") may also be involved in specific circumstances. Other administrative authorities may also be included in the process, for example, for historical monuments or for environment concerns.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Various permits granted by the administrative authorities are required in France for building works as well as for the use of real estate.

Prior construction permits as well as specific authorisations should be obtained for constructions exceeding 20 $m^2$. Any modification of the use of buildings should also be authorised.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Compulsory regulations which should be complied with in order to obtain building/use permits are, as a general rule, well-known by architects. As a consequence, preparing the request for a building permit is not particularly difficult. Nevertheless, any obtained administrative permit can be challenged by third parties if they are affected by the contemplated project. As a consequence, it can take time to obtain a favourable decision, which is finally given by an administrative judge.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

As any administrative authorisations for building/use permits are free of charge, the cost of their request is, as a general rule, included in the architect's fees. When the building permit is challenged before the administrative court, its cost may become more substantial depending on the importance of the project.

As a general rule, the time necessary to obtain the building permits is relatively short. A two-month period is required for ordinary building permits, three months for construction-development permits and six months for high-rise or public access buildings. They can be challenged by third parties within two months following their display on the building site.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

As already mentioned, several regulations apply allowing for the protection of historic monuments. However, they only apply on renovation work of the building which is considered either as historic or located in an historic area. However, there is no regulation limiting the transfer of the ownership of such buildings.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Careful investors must exercise due diligence and request a pollution diagnosis from the vendor based on environmental documents.

Investors can also ask the "DREAL" (a French public body) for the relevant documentation or consult databases such as

"BASOL" and "BASIAS" which notably identify sites and soils which are polluted or may potentially be polluted.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Environmental clean-up is mandatory in case of risk to human health, security and the environment. Public authorities can automatically proceed with the clean-up if a formal demand was unsuccessful. The person responsible for such pollution must bear the cost.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

A diagnosis of energy performance (so-called "DPE") must be attached to the deed transferring the real estate ownership or to the lease agreement (either residential or commercial).

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

France transposed the European Directive 2003/87/EC of 13th October 2003 establishing a scheme for greenhouse gas emission allowance trading. The French environmental code therefore provides for a mandatory emissions trading scheme applicable to energy production activities, civil aviation activities, production of paper and carbon, the mineral industry and the production and processing of ferrous metals.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Law n° 2009-967 of 3rd August 2009 (the "*Grenelle 1*" Act) aims at reducing greenhouse gas emissions to a quarter of current levels by 2050.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The "*Grenelle 1*" Act encourages the construction of "low energy consumption" buildings (i.e. less than 50 KWh/m²/year) and requires a reduction of energy consumption by 38% by 2020 in the existing building stock. By 2020, all new buildings should produce more energy than they use.

Law n° 2010-788 of 12th July 2010 (the "*Grenelle 2*" Act) completed and implemented the "*Grenelle 1*" Act, notably by introducing specific requirements such as the completion of an energy performance diagnosis as of 1st January 2017 for buildings which have heating or cooling systems, and the requirement to carry out works to increase the energy efficiency of buildings for commercial use before 1st January 2020.

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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The Civil Code (*Bürgerliches Gesetzbuch*) contains the main regulations of real estate law. Furthermore, there are other sources of law that govern different subjects of real estate law, such as the Hereditary Building Rights Act (*Erbbaurechtsgesetz*) for the scope of heritable building rights, the Condominium Act (*Wohnungseigentumsgesetz*) which governs provisions on residential and part ownership and the related community and the Land Register Act (*Grundbuchordnung*) regarding the procedure of filing entries for the land register.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Local Common Law has no substantial impact on real estate in the German jurisdiction.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Ordinarily, international laws are not relevant to real estate in the German jurisdiction.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are no legal restrictions on ownership of real estate regarding resident and non-resident persons. Every natural person of legal capacity and every legal entity is allowed to own real estate.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

There are different sorts of ownership and similar rights in real estate in German law. The absolute and exclusive ownership of a piece of land is the strongest right (*Volleigentum*). It is also possible for two or more entities/persons to own a piece of land together (*Miteigentum*).

In German law, a form of ownership of a single apartment is called residential ownership or condominium ownership (*Wohnungseigentum*). Besides that, non-residential premises of a building are called part ownership (*Teileigentum*).

In addition, the legal institute of heritable building right (*Erbbaurecht*) also exists in the German jurisdiction.

Furthermore, there are so-called rights *in rem*, which secure rights on the property. They are listed in section two of the land register (*Abteilung II*). Those are, e.g. easements which give certain rights to a foreign property, such as a right of way on the property of the neighbour (*Grunddienstbarkeit*). Limited personal easements entitle a person to use the property in a certain way (*beschränkt persönliche Dienstbarkeit*).

Charges on the land (*Grundschulden*) and mortgages (*Hypotheken*) are used to secure claims. They are listed in section three of the land register (*Abteilung III*).

None of those rights *in rem* are purely contractual.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

As a general rule, the ownership of land and the constructed essential components on the particular land form a unit. The right to land and the right to a building constructed thereon are combined. These rights only diverge in the case of the above-mentioned heritable building right. Heritable building rights allow the development and use of a foreign property without acquiring the ownership of the property.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

There is no split between legal and beneficial title.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

The land register lists all land and rights *in rem*. Rights without effect *in rem* are not to be registered.

**4.2 Is there a state guarantee of title? What does it guarantee?**

A state guarantee of title does not exist under German law.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

The rights *in rem* have to be entered in the land register in order to have the absolute effect in relation to any person. If rights are not registered in the land register, there is no public faith as to their existence.

**4.4 What rights in land are not required to be registered?**

Contractual rights do not have to be registered when they do not have effect *in rem*, e.g. rental agreements.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period following first registration. Furthermore, no difference is made regarding classes or qualities of titles on first registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Title or ownership of land gets transferred to the buyer as soon as the new purchaser is registered in the land register as the new owner.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Rights obtain priority over other rights if they have been entered earlier. The date of entry of a certain right in the land register ranks it. Earlier registrations consequently provide a prioritised rank over other rights. However, anyone who is registered as a beneficiary in section two or three of the land register is entitled to change his rank in favour of any other beneficiary, who is registered subordinately, through a so-called postponement of priority (*Rangrücktritt*).

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

In Germany, a multiplicity of land registries operates. A centralised system of registration does not exist. The land registries are located at the lower district courts (*Amtsgerichte*). As a result, the local jurisdiction of the land registry offices is generally determined by the jurisdiction or district of the respective district court.

**5.2 How do the owners of registered real estate prove their title?**

If owners of registered real estate want to prove their title, they can request an extract from the competent land registry office (*Grundbuchauszug*). The extract contains, among other things, information on ownership, burdens and restrictions on the property, as well as registered land charges.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Real estate cannot be transferred completely electronically.

The number of documents which need to be provided to the land registry for registration of ownership right depends on various aspects. Some documents, however, are needed in basically every case: a notarial declaration of conveyance (*Auflassung*) needs to be submitted. Furthermore, verification by the competent public authorities must be issued, that no pre-emptive right exists. Additionally, a tax clearance certificate (*steuerliche Unbedenklichkeitsbescheinigung*) needs to be submitted.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Compensations can be claimed from the land registry office through an official liability claim (*Amtshaftungsklage*). A successful claim requires a mistake of the land registry office, such as incorrect registrations in the land register, and an identifiable damage on the part of the claimant.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Access to the land register is permitted to anyone who expresses a legitimate interest (*Berechtigtes Interesse*). The purpose of the scheme is to prevent abusive inspections which could infringe the legitimate interests of registered data. Legitimate interests can be approved in certain constellations. Possible scenarios are that the owner himself wants to see the land register or that a person or legal entity (e.g. the neighbour) wants to obtain information regarding a right registered in his favour (e.g. right of way).

A buyer usually has no legitimate interest to get access to land register extracts. However, he may obtain a power of attorney from the property owner to get information from the land register.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Buyers and sellers of a real estate transaction regularly have tax advisors and lawyers at their side. A notary is always involved in asset deals. In addition, asset managers and property managers often are involved in the preparation of a transaction. Finally, real estate agents usually operate by mediating and/or advising.

**6.2 How and on what basis are these persons remunerated?**

The involved parties are usually remunerated differently. It is common to remunerate advisors on the basis of hourly fees. On the other hand, notary publics are usually paid according to the statutory tariff. Real estate agents are ordinarily paid on the basis of a lump sum.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

In the German market there are different sources of capital. According to our perception, the proportion of equity has increased in recent years. In addition, however, mostly complete debt financing also occurs, for example in many project developments. Furthermore, a multitude of properties are sold to different fund models.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The German real estate market has been subject to sustained dynamism over the past years. Only a few years ago, for example, the field of micro-living was still new and undeveloped. This trend is becoming more and more of a focus, including the focus of investors. The office and logistics divisions are still popular for investors. Furthermore, properties in top locations with long-term tenants are still attractive.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

The German real estate market continues to be in strong shape. The trends of recent years remain, especially with regard to the housing market. Trends in the housing market mainly remain due to the lack of affordable housing.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

An inevitable requirement is the notarisation of a formal agreement between the seller and the purchaser of real estate. All essential contractual conditions and agreements between the parties (*essentialia negotii*) must be implied into the notarial deed.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

Under German law, there is no positively formulated obligation to disclose information. However, in order to avoid fraudulent misrepresentation, the seller is obliged to provide the buyer with all the information that a buyer would normally expect. Consequently, the seller must disclose everything that might be relevant for the purchase decision, e.g. information about (hidden) defects.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller can be liable for misrepresentation, although this may be contractually limited: a contractual regulation of the seller's liability, which includes a limitation of liability, is possible in the event of simple negligence. In case of intent and gross negligence, no exclusion of liability is possible.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

There are a variety of legal provisions that govern warranty claims and liability issues. This includes, among other things, the assumption of a guarantee. Due to the freedom of contract, the statutory warranty provisions are regularly deviated from. The parties thus regulate the question of liability and warranty on a contractual basis. This includes the question of whether a guarantee is provided by the seller. In doing so, the seller regularly tries to exclude guarantees as far as possible.

The range of possible warranties is large; reference points can be, for example, possible defects in the property, lack of permits or existing leases.

It is conceivable to replace one's own due diligence with guarantees. In view of the attempt to exclude as far as possible the guarantees, replacement will be rare.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller retains liabilities in respect of the property post-sale, if he purposely concealed certain defects that led to substantial losses on the side of the purchaser. Furthermore, the contractually declared and incurred warranties may constitute liabilities post-sale.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Normally the buyer is responsible to pay the land transfer taxes (*Grunderwerbssteuer*) and the costs of notarisation. In addition, the buyer is liable, for example, for a delay in payment for which he is responsible.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

Regulations concerning the lending of money to finance real estate can be found in the German Civil Code. There are no different rules between resident and non-resident persons. Nevertheless, the Civil Code provides for special protection for credits granted to consumers.

The provisions in the Civil Code regarding the lending of money to finance real estate are especially being completed by related regulations in the German Banking Act (*Kreditwesengesetz*).

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The best way to secure and enforce the lender's right to repayment is to provide collateral. The German jurisdiction knows basically two types of collateral: real collateral; and personal collateral. Real collateral can be provided to the real estate lender by granting mortgages or land charges. Personal collateral can be provided by establishing additional securities such as guarantees or sureties.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

If the debtor fails to meet his payment obligations, the mortgage creditor may have the property forcibly auctioned. Before auctioning the property, the mortgage creditor must normally sue the owner for foreclosure first. Since this might take a lot of time and effort, most creditors therefore immediately order a so-called enforceable mortgage. Through an enforceable mortgage, an owner already submits to foreclosure and allows the creditor immediate execution, if the debtor does not pay. This (notarised) document then replaces the court ruling and the creditor can execute more quickly if necessary.

**8.4 What minimum formalities are required for real estate lending?**

The requirements of formalities for real estate lending depend on whether the borrower is a consumer or not.

In the non-consumer sector, there are no formal requirements for the effectiveness of a real estate loan. In the consumer sector, however, written form is an obligatory requirement for the effectiveness for the loan. Beside the required formality, the real estate lender has the duty to inform the consumer about his rights.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

Basically, a real estate lender is only protected from claims against the borrower or the real estate asset, if he secured his repayment entitlement. Furthermore, the type of security is of importance. A mortgage or land charge, for example, can protect the real estate lender against other creditors through a granted right to priority satisfaction.

In order to access the debtor's assets, legal proceedings may have to be sought against its creditors, e.g. by actions for preferential satisfaction or third-party claims.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Security taken by a lender can be rendered unenforceable if the borrower invokes objections under substantive law or formal law.

It is also recognised that the lender's interest in securing its claims is limited by the case-law on overcollateralisation of the lender. In this respect, it is recognised, among other things, that there must be no "blatant disproportion" between the realisable value of the collateral and the secured risk.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

The borrower has the opportunity to invoke objections through different legal remedies in order to oppose enforcement. The borrower can assert that the debtor's claim to enforce is precluded by a substantive objection (*Vollstreckungsabwehrklage*). He could also claim procedural errors of the enforcement body, e.g. of the bailiff (*Vollstreckungserinnerung*).

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

The insolvency of the borrower has an impact on the position of the real estate lender. With the opening of insolvency proceedings, the lender has difficult access to the borrower's assets. The lender is entitled to separate satisfaction if he has had a security right created in a certain asset to secure a monetary claim against the insolvency debtor (for example, a mortgage). If such asset is realised during the insolvency proceedings, the proceeds will be used to primarily satisfy the claim of the entitled lender, and only proceeds in excess of such a claim will be distributed to the ordinary insolvency creditors. The debts incumbent on the estate will also be satisfied before the claims of the ordinary creditors. After that, the claims of the ordinary creditors without any special rights will be satisfied. The remaining assets are distributed among them, mostly on a *pro rata* basis.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

Without any agreement between the borrower, or his company, and the creditor, the latter shall not be entitled to appropriate shares as collateral. In order for a right to participate to be

realised, a shareholding must be offered for sale or pledged as collateral by the other shareholders outside insolvency proceedings. Should the pledging of the shareholding take place before the opening of insolvency proceedings, the creditor is entitled to participate even during the insolvency proceedings. In case of the borrower's insolvency, however, the shares in the insolvent company are usually worth nothing.

Shareholdings in the borrower may also be acquired by a so-called conversion of receivables into corresponding shares in the context of insolvency plan proceedings.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The transfer of real estate is subject to real estate transfer tax. The amount of the real estate transfer tax depends on the federal state (*Bundesland*) in which the real estate is located and varies currently between 3.5% and 6.5% of the assessment base. The assessment base is generally the purchase price for the property. Tax debtors are both parties involved in the sale; however, it is regularly agreed in the purchase contract that the buyer shall bear the real estate transfer tax. In addition to the direct sale of real estate, a large number of other transactions are also subject to real estate transfer tax, such as the creation or transfer of heritable building rights (*emphyteusis/Erbbaurecht*), the transfer of shares in companies holding real estate, at least if 95% of the shares are transferred or united in one hand. Overall, the details are complex and the question of whether a certain transaction triggers real estate transfer tax, can therefore only be reviewed on a case-by-case basis.

### 9.2 When is the transfer tax paid?

The real estate transfer tax is generally triggered by the conclusion of the purchase contract (or other relevant agreement) and not by the *in rem* transfer of the real estate. The competent tax authority is notified about the purchase contract by the notary public; if no notary public is involved as is, for example, the case when partnership interests are transferred, the contracting parties are obliged to notify the tax authority. As soon as the relevant transaction has been brought to the knowledge of the competent tax authority, the tax authority will then determine the tax by means of a tax assessment. Subsequently, a payment period of one month from the date of notification of the tax debtor(s) applies.

### 9.3 Are transfers of real estate by individuals subject to income tax?

If the individual holds the real estate as a business asset (*Betriebsvermögen*), any profit resulting from the sale of such real estate will be taxable with income tax (*Einkommensteuer*), plus solidarity surcharge and church tax, if applicable. If the real estate is held as private property, the capital gain may remain tax-free under certain conditions, for example if the respective real estate has continuously been owned by the individual for a period of more than 10 years or if it has continuously, or at least for a period of three years immediately prior to the sale, been used for own residential purposes.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The transfer of real estate is exempt from VAT by law. However, VAT can be opted for, which is only reasonable from an economic point of view if the property is used for any business activities which are subject to VAT or rented out and the rent is subject to VAT. With regard to the VAT option, strict formal requirements apply. The tax rate is 19%. The tax debtor is the buyer. If a leased property is sold, the transaction, for VAT purposes, is regarded as the sale of an entire business (*Geschäftsveräußerung im Ganzen*) and is not subject to VAT. Instead, the buyer, for VAT purposes, enters into the legal position of the seller.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

If an individual sells several real properties in close temporal connection, this may lead to the qualification of the transactions as commercial trade (*gewerblich*) and thus to the retroactive allocation of the relevant real properties to the business assets; income tax and trade tax (*Gewerbesteuer*) may be triggered. If the seller is a corporation, any gains resulting from the sale of real properties are subject to corporate tax (*Köperschaftsteuer*) plus solidarity surcharge, and trade tax. The amount of trade tax varies from municipality to municipality. Under certain circumstances, a company dealing with real estate may only (*reine Immobiliengesellschaft*) be exempt from trade tax.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

If shares in a real estate company are sold, real estate transfer tax is levied according to different rules, also depending on the fact if the company in question is a corporation or a partnership. In case of a partnership, real estate transfer tax may already be triggered if 95% or more of the partnership interests in the company change within a period of five years. In case of a corporation, the decisive factor is whether 95% or more of the shares are transferred or united in one hand. The percentage thresholds are currently under discussion and are expected to change in a short while. There are additional regulations to prevent abusive behaviour. The transfer of partnership interests or company shares is not subject to VAT; however, the seller may opt for VAT. In terms of income (or corporate) tax and trade tax, any profits from the sale of partnership interests are basically taxed in the same way as profits resulting from the sale of the real property itself (as for German tax purposes, a partnership is regarded as tax-transparent), whereas profits from the sale of company shares are taxed under a completely different regime.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

The transfer of a leased property may be qualified, for VAT purposes, as the sale of an entire business (*Geschäftsveräußerung im Ganzen*) with the result that the buyer, regarding VAT, enters into the legal position of the seller. This should therefore be given special attention in the course of due diligence. In such a case, the buyer may be faced with a liability obligation pursuant to Section 75 of the German Fiscal Code (*Abgabenordnung – AO*), according to which the business transferee (*Betriebsübernehmer*)

can be held liable for certain taxes relating to the business of the seller. The buyer may also be liable for outstanding property taxes (*Grundsteuer*). Furthermore, with regard to the buyer's future tax burden, it may be relevant – and should therefore be taken into account during due diligence – if the prerequisites for an extended trade tax reduction (*erweiterte gewerbesteuerliche Kürzung*), which may lessen the buyer's future trade tax burden, are fulfilled. The aforementioned reduction is jeopardised, for example, if the object of the lease is not only the lease of real estate, but also of operating equipment (*Betriebsvorrichtungen*). This is also usually taken into account during due diligence.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Basically, the regulations of the Civil Code are applicable on the leases of business premises, unless the parties have agreed otherwise in a contractual manner.

**10.2 What types of business lease exist?**

The Civil Code distinguishes between leases and (rather rarely occurring) usufructuary leases (*Pachtverträge*).

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

a) Length of term:
As a rule, the term of a business premises lease is initially limited. In addition, an extension option is often agreed. The maximum time limit of a rental contract is 30 years. A rental contract can also be concluded indefinitely. In this case, the lease may be terminated after the statutory or agreed notice periods.

b) Rent increases:
The parties can contractually agree that the rent will be automatically adjusted over time. There are two ways to do this: a so-called graduated lease (*Staffelmiete*) or an index rental (*Indexmiete*) can be arranged. The agreement on a graduated lease determines exactly the timing and amount of future rent adjustments. An index rental agreement links changes in the rental amount to the development of the consumer price index (*Verbraucherpreisindex*) and requires a lease agreement with a term of at least 10 years (including tenant's extension options).

c) Tenant's right to sell or sub-lease:
A tenant is not allowed to sell the lease. However, the tenant may change party if the landlord agrees. The tenant is not allowed to sublet the premises as a whole without the permission of the landlord unless otherwise agreed. However, the landlord cannot prohibit the tenant from subletting without reason. If the landlord wrongly refuses to sublet, this may lead to claims for damages by the tenant. In addition, the tenant is entitled to a special right of termination.

d) Insurance:
As a rule, the landlord contractually agrees to take out property and construction liability insurance, as well as all-risk insurance. The costs incurred within the scope of the insurances taken out are regularly transferred to the tenant via the ancillary costs.

e) (i) Change of control of the tenant:
If the lease does not include any regulations regarding the change of control, the lease remains with the tenant.
(ii) Transfer of lease as a result of a corporate restructuring (e.g. merger):
If a new legal entity emerges as a result of a company restructuring, the lease remains as a rule with the new legal entity.

f) Repairs:
The law stipulates that the landlord must, in principle, ensure the contractual use of the rental property. This means that he is responsible by law for all repairs and maintenance at his own expense. However, this obligation to maintain may be, and is usually, contractually waived and imposed on the tenant, with the exception of work on the essential building substance.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Income from leases will be subject to income tax at the level of the landlord, and business leases may be deducted as tax-effective expenses at the level tenant. However, generally speaking, income from leases is not subject to trade tax.

With regard to VAT, the lease is generally exempt from tax, but the landlord may, subject to certain prerequisites, opt for VAT.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

The termination of the business lease regularly depends on the contractual provisions for the duration of the lease.

A business lease can be terminated in several ways: an expiration of time can lead to a termination of a business lease, if the contractually agreed termination period has occurred. In case of tenancies for an indefinite period, the contract needs to be terminated ordinarily. The contracting parties may also agree on the termination of the lease, regardless of any agreed time limit of the lease, or may agree on special termination rights by contract. Irrespective of this, in exceptional cases, there may also be an extraordinary right of termination if a party has breached an essential obligation under the lease.

In order to allow the tenant to continue the business lease beyond the term of a contract, the parties may include a so-called extension option. An extension option is to be understood as an agreement under which the tenant should have the right to extend a fixed-term contract for a further limited period before the end of the contract period.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The liability of the former landlord after the sale of the property depends on the contractual agreements. In case of sale of the land built with rental property, the buyer becomes the new

landlord at the time of registration in the land register. However, becoming the new landlord does not automatically establish his liability towards the tenant. If the liability of the former landlord is not contractually waived, he remains liable as a guarantor for the new landlord.

An assignment of the rights and obligations of the tenant from the lease to third parties is excluded, subject to the consent of the landlord.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

A lot of national and international certificates and quality seals document the sustainable standard of buildings nowadays. However, "green leases" for commercial premises that impose obligations towards sustainability are hardly widespread in Germany. Uniform directives have so far been missing. Currently, there are no legal provisions that are geared towards imposing obligations regarding the implementation of "green leases".

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

A trend already established in Germany is the use of so-called co-working spaces. These spaces provide infrastructure and workstations for a short term and allow the build-up of a community. In the housing market, especially in urban areas, there is a trend towards obtaining so-called micro-housing. Micro-apartments are small, furnished apartments, ideally useable for specific groups of people such as students or commuters.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The regulations of the Civil Code are applicable on the leases of residential premises. Just like with the business leases, the parties can agree otherwise in a contractual manner. Due to the protection of tenants, however, certain legal regulations are stricter from the point of view of the landlord. These regulations therefore cannot be waived to the detriment of the tenant.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the laws do not differ if the premises are intended for multiple different residential occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

a) Length of term:
In principle, residential leases are concluded indefinitely. A limitation is only permissible in legally ordered cases.

b) Rent increases/controls:
There are three ways to determine a rent increase. The parties can agree to a graduated lease (*Staffelmiete*) or an index rental (*Indexmiete*). The agreement on a graduated lease determines exactly the timing and amount of future rent adjustments. An index rental agreement links changes in the rental amount to the development of the consumer price index (*Verbraucherpreisindex*).
As a third option, the landlord may require the consent to the rent increase up to the local comparative rent.

c) The tenant's rights to remain in the premises at the end of the term:
Basically, there are no provisions which provide for or permit the tenant to remain in the residential premises after the end of the rental period.

d) The tenant's contribution/obligations to the property "costs" e.g. insurance and repair:
The obligation of the tenant to contribute to the real estate costs is reflected in the payment of the ancillary costs. The so-called Ordinance on Operating Costs (*Betriebskostenverordnung*) determines which ancillary costs can be transferred to the tenant. The tenant usually pays a monthly advance payment in addition to the tenant. The landlord settles the ancillary costs once a year.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A rental contract can only be terminated by the landlord in compliance with strict conditions. In the event of an important reason for termination, the landlord has an extraordinary right of termination. The regulations in the Civil Code define what an important reason for termination is. In addition, the landlord may have the right to an ordinary termination. In addition to complying with the notice period, there must also be a reason for termination. If the tenant does not vacate and surrender the apartment despite the termination, the landlord must enforce his eviction claim in court in order to obtain an eviction title which must be enforced by a bailiff.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

There are various legal sources dealing with the development and use of land, as well as permitting procedures for a particular

construction project. A development plan (*Bebauungsplan*) regulates the way in which land can be built and the resulting use. The legal bases for drawing up the development plan are the Federal Building Code (*Baugesetzbuch*) and the Federal Land Utilisation Ordinance (*Baunutzungsverordnung*). Regulations for the prevention of danger that can occur during construction or by construction facilities are contained in the relevant state building regulations (*Landesbauordnung*). Depending on the individual case, the planning and developing process might require to include other legal sources as well, such as certain environmental laws.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The freedom of ownership is guaranteed by the Constitution in Article 14. Expropriation interferes with this fundamental right and therefore requires constitutional justification. If a landowner is expropriated, he must be compensated for the loss of his assets. Compensation must be determined in a fair manner against the interests of the general public and the parties concerned. The owner concerned shall receive appropriate compensation for the loss of his property, which shall enable him to obtain a comparable item. Compensation is usually calculated on the market value that his property had at the time when the expropriation decision was made.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The land/building use and/or occupation and environmental regulation are mainly controlled by local public authorities. The compliance control is essentially carried out by the local building authority (*Bauordnungsbehörde*). Development plans can either be accessed through the websites of the local building authorities or are made available by them on request. Information on the approval situation of individual plots can also be obtained from the local building authorities.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

The relevant local state building regulations determine whether a particular building project is subject to permits or not. Essentially, it depends on what kind of construction project is to be realised.

The building permit also determines the use of the building. If the purpose of the building is to be changed, it is usually necessary to apply for a change of use permit (*Nutzungsänderungsgenehmigung*).

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Building and use permits shall be granted only after the conclusion of formal proceedings. An authorisation procedure must be requested. Implied permissions cannot be obtained in any way.

Without a building permit, a particular construction project is formally illegal. This formal illegality entitles the local building authorities to intervene.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The amount of the costs and the duration of the authorisation procedure depend to a great extent on the particularities of the individual case. The duration mainly depends on how extensive the construction project is. The costs are based on the fee regulations of the respective federal state. Finally, the processing time always depends on the locally responsible authority.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Each federal state has its own regulations on the protection of monuments. Depending on the federal state, these regulations can have an impact on real estate transfer. Should a monument be affected by such a transaction, the responsible monument authority must be informed.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

In order to ensure from the buyer's point of view that the land to be acquired does not contain any contaminated land or harmful soil contamination, the purchaser may request information in the registers of contaminated sites. These registers are maintained by the environmental offices of the respective federal states.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

In principle, the owner, the occupier and/or the polluter are obliged to clean the land with contaminated soil.

The extent and cost of such an environmental clean-up depends largely on how dangerous the waste is to human health and the environment.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Regulatory requirements for the assessment and management of the energy performance of buildings can be found in the Energy Saving Ordinance (*Energieeinsparverordnung*). The ordinance sets standard structural requirements for the efficient operating energy requirements of the building. The ordinance affects certain commercial and office buildings, as well as residential buildings. In addition, the regulation contains information on new constructions as well as on the refurbishment of buildings.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Following the Paris Agreement and the EU's climate policy, Germany has set its climate change targets in the 2050

climate change plan. The Climate Protection Act (*Bundes-Klimaschutzgesetz*), to be adopted later this year, aims to ensure the achievement of these climate protection targets. The relevant point of the draft law is, in particular, the planned introduction of $CO_2$ pricing ($CO_2$ pricing from 2021 for the transport and heat sectors). In addition, a so-called fixed-price system is to be introduced. It is planned to sell certificates to companies with the right to put heating fuels on the market, so that citizens and the economy can adapt to a particular development. As an example, certificates are to be issued in 2021 at a fixed price of €10 per tonne of $CO_2$.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

In order to achieve the EU-wide climate change target, greenhouse gas emissions on EU territory are to be reduced by at least 40% by 2030 compared to 1990 levels. In the draft of the Climate Protection Act, however, Germany has now set itself the target of a 55% reduction by 2030 compared to 1990. In the long term, greenhouse gas neutrality is to be achieved by 2050. The Climate Protection Act stipulates how much $CO_2$ each sector may still emit.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Sustainability of newly constructed and existing buildings shall be improved through the requirement of Energy Certificates. The Energy Certificate is a document intended to provide information on the energy efficiency and energy costs of a building.

**Dr. Damian Tigges** provides comprehensive advice to insurance companies, institutional investors, banks and project developers regarding real estate transactions. His broad range of activities includes performing due diligence reviews, contract writing and negotiation, and assisting in the conclusion of real estate transactions. In addition, Dr. Tigges provides advice on commercial tenancy law and leasehold law. He also regularly represents his clients in complex litigation cases regarding property transactions and commercial tenancy law before and out of court.

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# Greece


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The right to ownership is recognised by the Hellenic Constitution (article 17 thereof) and protected by the State. The principal law that governs real estate in Greece is the Hellenic Civil Code, Title Three thereof in particular, under the title Property Law. Specific real estate matters are also dealt with in the Hellenic Code of Civil Procedure, Laws 2308/1995 and 2664/1998, which govern the procedure before the Cadaster Offices, as well as Law 3741/1929, which governs horizontal ownership. There are specific laws governing real estate owned by the Greek Orthodox Church and the orthodox monasteries in Greece.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

As mentioned above, real estate is governed by statutory law. However, established case law of the Supreme Court and Civil Courts is generally taken into account as judicial precedent, and is frequently cited by lawyers and judges.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Article 24 (1) of Law 1982/1990 stipulates certain provinces and islands as border regions, in which non-EU or a non-European Free Trade Association citizens/legal entities may not obtain property. Nonetheless, the abovementioned prohibition may be lifted by application to the regional Decentralised Administration Authority, stating the exact purpose of the real estate acquisition. Furthermore, in accordance with article 28 paragraph 1 of Law 1982/1990, real estate property on private islands can be obtained following authorisation by the Ministry of Defence.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Article 24 (1) of Law 1982/1990 stipulates certain provinces and islands as border regions, in which non-EU or a non-European Free Trade Association citizens/legal entities may not obtain property. Nonetheless, the abovementioned prohibition may be lifted by application to the regional Decentralised Administration Authority, stating the exact purpose of real estate acquisition. Furthermore, in accordance with article 28 paragraph 1 of Law 1982/1990, real estate property on private islands can be obtained following authorisation by the Ministry of Defence.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The Hellenic Civil Code recognises restricted types of rights over land (*numerus clausus* of rights *in rem*), which are stipulated in article 973 thereof. These rights are: (1) ownership (full ownership, bare ownership and usufruct); (2) servitude; and (3) mortgage and pre-notice of mortgage. None of the abovementioned rights is purely contractual between the parties.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Pursuant to article 18 paragraph 1 of Law 3986/2011, a natural person or a legal entity may construct a building over a plot of land owned by the State. This right is recognised as "right over surface", amounting to the right of ownership between private parties and is of limited duration.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

There is no split between legal title and beneficial title in the Greek legal system.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

In Greece, all land is required to be registered at the competent Land Registry or Cadaster Office.

**4.2 Is there a state guarantee of title? What does it guarantee?**

Greek law recognises no state guarantee of title.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Registration of the title deed, as provided for by the Hellenic Civil Code, is compulsory for the establishment, abolishment or transfer of rights *in rem* over land.

In particular, notarial purchase agreements, donations *inter vivos*, donations *causa mortis*, notarial parental donations, inheritance acceptance deeds, court decisions which pronounce right *in rem*, rural expropriation decisions, implementation acts of the town plan, etc. are mandatorily registered at the competent Land Registry or Cadaster Office.

**4.4 What rights in land are not required to be registered?**

Registration of contractual rights, such as lease agreements, is not required by Greek law. However, in case of a long-term lease agreement with a minimum duration of nine years, the parties may sign a notarial contract, which is subject to registration at the competent Land Registry or Cadaster Office, to ensure validity of the agreement and enhance protection in case of transfer of the land *vis-à-vis* the new owner.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

Under Greek law, the registration of all rights *in rem* is required, therefore there is neither a probationary period following first registration, nor different classes or qualities of title on first registration. In case of non-registered rights, there is no protection against *bona fide* acquisition by third parties. However, as far as mortgages are concerned, the time of registration is crucial to determine their rank towards other mortgages on the same land.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Ownership of land is obtained strictly upon the registration of the respective title deed with the competent Land Registry or Cadaster Office, depending on whichever operates in the area where a plot of land is located.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Every deed registration is given a serial number. The earlier of two registrations will always rank prior to the subsequent one. Furthermore, as indicated in question 4.5, as far as mortgages are concerned, the time of registration is crucial to determine their rank towards other mortgages on the same land. However, a different ranking order may be agreed with the consensus of all registered secured creditors.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There are several Land Registries or Cadaster Offices in every region. Upon completion of the cadastral survey of all regions in Greece, the system of "Operative Cadastre" will replace Land Registries. Despite the large number of Land Registries and Cadaster Offices in Greece, there are no differing rules and requirements among them.

**5.2 How do the owners of registered real estate prove their title?**

Certificates of ownership are issued by the competent Land Registry or Cadaster Office. Registration of real estate deeds is also proven by a certified copy of the title deed by the competent Land Registry or Cadaster Office. Besides these, a lawyer has the competency to certify the ownership in the context of after performing due diligence to the relevant registries.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Electronic completion of transactions relating to registered real estate is not possible. Consequently, no information on ownership of registered real estate can be accessed electronically either.

It must be noted that since 2018 all public auctions are conducted online.

The documents needed for the registration of ownership right are the application for the registration, a certified copy of the notarial title deed, a certified summary of the notarial title deed, both obtained by the notary, and the tax declaration. In case the registration takes place at a Cadaster Office, a cadastral diagram extract must also be provided.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

The Registrar of the Land Registry and the Director of the Cadaster Office are liable for compensation for any acts or omissions related to the fulfilment of their duties.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

All public books in the Land Registries and the Cadaster Offices are accessible for due diligence by lawyers. Moreover, the Land Registries and the Cadaster Offices are obliged to provide certified copies of the registered title deeds and certificates of registrations to all applicants.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

The parties involved in a real estate transaction are as follows:

(1) The Real Estate Agent, who introduces the interested parties.
(2) The Lawyers, who assist both the seller and the buyer in the due diligence process, the issuing of the documentation needed for the signing of the title deed and the drafting of the title deed.
(3) The Civil Engineer, who provides the seller with energy efficiency certification, as well as certification that the property is free from unauthorised constructions and/or usages.
(4) The competent Tax Office, where the buyer pays the transfer tax and is provided with the tax declaration.
(5) The Notary, who executes the notarial title deed and checks the validity of the documentation compiled.
(6) The competent Land Registry or Cadaster Office, where the registration of the notarial title deed takes place for the establishment of the transaction.

**6.2 How and on what basis are these persons remunerated?**

The real estate agent's, the lawyers' and the civil engineer's payments are subject to an agreement between the parties. In most cases, the notary's payment is calculated based on the value of the land, taking under consideration the highest value between the fair market value and the objective tax value, the number of pages or the notarial title deed and the number of certified copies requested. The tax (3.09%) and the registration fees (0.6–0.8%) are also calculated based upon the value of the land, taking under consideration the highest value between the fair market value and the objective tax value.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Since 2016 there has been a gradually increasing interest, mainly from foreign investors, in old urban residencies (mostly in Athens and Thessaloniki), urban residential buildings and tourist buildings (mostly on the Greek islands). Therefore, the availability of capital derives mainly from foreign equity. Apart from that, Greek real estate investment companies show significant interest in purchasing urban buildings to be renovated as offices, large plots of land to be remodeled as business parks and industrial buildings to be used as logistics centres. Thus, there has been a considerable increase in the availability of capital in the form of bond loans as well.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

As reported by the Bank of Greece, during the first six months of 2019 the capital spent for buying real estate from foreign equity has increased by 94.6% in relation to 2018. As indicated in question 6.3 above, foreign investors are mostly interested in purchasing urban residencies, urban residential buildings (with a view to renovating them as boutique hotels) and tourist buildings on the Greek islands. On the other hand, Greek real estate investment companies are particularly interested in industrial buildings, business parks and logistics centres.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Since the beginning of the financial crisis, the construction of new buildings has slowed down. Nonetheless, even this sector shows signs of recovery due to the increasing interest of foreign investors and investment companies in real estate.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The minimum formalities for the sale and purchase of real estate are as follows:

(1) The payment (by the buyer) of the transfer tax to the competent Tax Office just before signing of the contract.
(2) The provision (by the seller) of the certificate of the property ownership tax, which indicates that the specific real estate has been correctly filled in the property tax declaration of the seller and the ownership tax has been already paid.
(3) The provision (by the seller's engineer) of the certificate that the real estate is free of unauthorised constructions and unauthorised usages, or that the existing unauthorised constructions and unauthorised usages have been legalised in accordance with the provisions of law, along with the energy environmental certificate.
(4) The signing of the notarial transfer deed before the notary and the payment of the notarial fees (by the buyer).
(5) The payment (by the buyer) of the registration fees to the competent Land Registry or Cadaster Office.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

In the context of good faith, the seller ensures that both his property deed and the property deeds of his predecessors are valid. In addition, the seller is required to disclose any

encumbrance or legal hindrance which may impede the buyer from fully enjoying the property. The seller agrees by notarial contract to those representations and warranties.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller can be liable for misrepresentations, which can lead to the reduction of the price, the annulment of the contract, or even compensation for the buyer.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

As indicated in question 7.2, the seller, in the notarial deed of transfer, ensures the validation of his property title, that the property is free of any encumbrance, mortgage, prenotation of mortgage, claim by third party, lease, legal or real defect, contribution to land, expropriation, or that the existing matters have already been known to the buyer. These warranties do not substitute the buyer's due diligence obligation, but may support a compensation claim if purposefully concealed.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Apart from the aforementioned warranties given by the seller and the liabilities for misrepresentation, the seller does not retain any liabilities in respect of the property post-sale.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In addition to paying the sale price, the buyer pays the transfer tax, the notarial fees and the registration fees to the competent Land Registry or Cadaster Office.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

There are no specialised regulations concerning the lending of money to finance real estate, nor any different rules as between resident and non-resident persons and/or between individual persons and corporate entities. The regulatory framework only concerns lending to Real Estate Investment Companies (REIC). According to article 26 of Law 2778/1999, they are allowed to get loans and credits, provided that these loans and credits do not exceed 75% of their assets. Furthermore, REICS may get loans and credits for the acquisition of real estate assets, to be used for their operational needs, provided that the amount of loans and credits, as a whole, does not exceed 10% of the total value of a REIC's equity reduced by the total amount of its real estate investments.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Under Greek law, real estate lending obligations are secured by securities *in rem*, i.e. by mortgages or prenotation of mortgages.

More specifically, security over real property (land) and plant is created by mortgage (by virtue of a notarial mortgage deed) or by mortgage prenotation (by virtue of a county court decision) and perfected by registration in the public books of the competent Land Registry or Cadaster Office, where the land and plant are located. Prenotation of mortgage provides its beneficiary with the preemptive right to obtain a mortgage perfected as of the date of registration of the prenotation of mortgage, once its claim becomes final. Such security extends to all component parts and accessories of the real estate (i.e. machinery and equipment).

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Under applicable law, that is, pursuant to the provisions of the relevant articles of the Greek Code of Civil Procedure, the individual stages of the enforcement procedure are described in detail and specific timeframes are set, within which enforcement proceedings shall be effectuated. As a general rule, in order for the enforcement procedure to commence, the creditor-beneficiary of the collateral security (i.e. the mortgagee of mortgaged immovable assets) must obtain an enforceable title (i.e. mainly non-appealable judgments, arbitral awards, payment orders, etc.). Subsequently, as far as pecuniary claims are concerned, the enforcement procedure involves the following main stages: (a) the attachment of the debtor's assets; (b) the intervention of other creditors; (c) the liquidation of the attached assets through public electronic auction; and (d) the distribution of proceeds. In particular, regarding the liquidation process, it is noted that liquidation is effected by electronic auction, which is administered by a notary public who is certified to conduct electronic auctions. As to the distribution of proceeds from the public electronic auction of a specific asset, it is noted that, in principle, the proceeds are distributed to all the creditors who participated in the liquidation process. In the case the electronic auction proceeds, if the amount remaining after deduction of costs and expenses of the enforcement proceedings, is less than the total claims of the creditors, who participated in the respective proceedings, the amount is proportionally distributed. However, certain categories of creditors have priority over others in the proportional distribution as follows: (a) claims equipped with general privilege (i.e. claims of the State and of other public entities, claims for wages and personal maintenance, etc.) have a minimum priority of 25% of the total proceeds; (b) claims equipped with special privilege, that is, secured claims (i.e. collateral security on the specific asset on which enforcement takes place) as well as claims regarding the maintenance of the property and the production and harvest of its fruits, have a minimum priority of 65% of the total proceeds; and (c) unsecured claims have a minimum priority of 10% of the total proceeds.

The mortgagee cannot realise a mortgaged property and acquire ownership of such mortgaged property without involving court proceedings.

### 8.4 What minimum formalities are required for real estate lending?

The lender should acquire proof that the borrower is the owner of the real estate asset or that will use the proceeds of the loan to buy and/or develop a real estate asset.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Real estate lenders are protected from other creditors' claims against the borrower by establishing a first rank mortgage over the real estate asset. In more detail, certain categories of creditors have priority over others in the proportional distribution of the auction, as set out in detail under question 8.3 above.

Moreover, under Greek law the legal principle "*prior in tempore prior in jure*" applies to mortgages, so the lenders establishing mortgages prior to subsequent mortgagees have a priority in the proportional distribution from the auction.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

A court order can render a security unenforceable in the event, e.g. that it was granted to defraud third creditors and a third creditor seeks, e.g. an injunction from the competent court rendering it unenforceable.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Under the new Hellenic Civil Procedure Code, objections of the borrower against whom the enforcement action is taken, as well as any of their lenders invoking legitimate interest, which relate to the validity of the enforcement title, the enforcement procedure or the claim shall be filed only with a caveat (articles 933 & 934).

Any creditor against whom enforcement is directed shall have the right to intervene in enforcement proceedings (article 937).

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

Pursuant to the provisions of Law 3588/2007 (i.e. the Greek Insolvency Code), in case of bankruptcy, all individual enforcement actions by unsecured creditors and/or priority creditors (i.e. creditors whose claims have a general privilege for satisfaction from the whole of the debtor's estate) are suspended. Secured creditors (i.e. creditors whose claims are secured by special privilege or real security on a specific asset of the debtor's estate) may undertake enforcement action against the specific secured asset, unless such secured assets are functionally and directly linked to the debtor's business. The aforementioned moratorium may last up to 10 months starting from the issuing date of the court decision declaring the bankruptcy. As far as pre-insolvency proceedings are concerned, the relevant provisions of the Greek Insolvency Code provide for the conclusion of an agreement between the debtor and a certain percentage of its creditors (60% of the total claims including 40% of secured claims) ("the Rehabilitation Agreement"). After ratification of such agreement by the Court, all individual and collective enforcement actions are automatically suspended, starting from the filing of the Rehabilitation Agreement for ratification until the issuance of the Court decision. This moratorium may not normally exceed four months and may only be extended, following application, for as long as the decision for ratification remains pending. It is also noted that the Rehabilitation Agreement may include more specific provisions concerning such moratorium.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

The process for enforcing security over shares follows the general rules and procedure of enforcing security over assets in general, as set out in detail under question 8.3 above. The lender has a right to appropriate shares in a borrower given as collateral only if the share pledge agreement is governed by Law 3301/2004 on financial collateral agreements, which provides that the satisfaction of the pledgee-creditor is effectuated through sale, set off or application of the financial instruments and/or cash in discharge of the relevant obligations. Furthermore, the secured creditor/pledgee may satisfy the secured claims without necessarily resorting to court proceedings and subsequently to the liquidation of the debtor's assets through public electronic auction. Finally, financial collateral agreements governed by Law 3301/2004 are, in principle, not subject to the clawback provisions of the Greek Insolvency Code and generally remain unaffected by bankruptcy proceedings.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Under Greek law, the transfer of real estate is subject to a transfer tax at a rate of 3.09%, calculated based upon the value of land, taking into consideration the highest value between the fair market value and the objective tax value. However, for certain categories of natural persons, the law provides a tax exemption, under the condition that the property will be strictly used as a first residence.

### 9.2 When is the transfer tax paid?

The transfer tax is paid just before the buyer signs the notarial title deed, who is then provided with the tax declaration.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Transfer of real estate by individuals is not subject to income tax.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Transfer of real estate, taking place for the first time after its construction, is subject to VAT of 24% upon the price of the sale, if the building permit has been issued from 2006 onwards.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

No other taxes are payable by the seller on the disposal of the property.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

The taxation is identical if ownership of a company (or other entity) owning real estate is transferred.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

Before the completion of the transfer, it is advisable for the buyer to be informed of the amount of the property tax, which is paid annually for the real estate.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The main laws regulating leases of business premises in Greece are the Hellenic Civil Code and Presidential Decree 34/1995, as amended by Laws 3853/2010 and 4242/2014. Relevant legislation also includes Laws 4013/2011 (article 15), 4373/2016 (article 69) and 4335/2015 on procedural rules.

**10.2 What types of business lease exist?**

The principal types of business lease include: 1. Leases for Commercial Use (business activities); 2. Leases for Professional Use (pertaining to liberal professions such as lawyers, language schools, doctors, accountants, notaries, engineers, etc. – explicitly covered by article 2 of Presidential Decree 34/1995); and 3. State/Public Leases (intended to accommodate public authorities and organisations).

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

(a) Length of term: After the entry into force of Law 4242/2014, the minimum length of Business Leases is three years, even when the lease agreement stipulates a shorter term. The parties may, however, agree on a term exceeding the minimum.

(b) Rent increases: The lease agreement normally lays down the ratio of annual rent increase, typically inflation-index linked. In the absence of an explicit agreement, the landlord may claim adjustments by resorting to the competent Court or, under certain conditions, to the Regional Committees for the Settlement & Re-Adjustment of Rent.

(c) Tenant's right to sell or sub-lease: The tenant may not under any circumstances sell the leased property. On the contrary, sub-lease is allowed, unless explicitly prohibited by the lease agreement.

(d) Insurance: Insurance is not compulsory, however either party may choose to insure the leased premises on the basis of an entrepreneurial decision.

(e) (i) Change of control of the tenant: Change of control of a corporate entity tenant does not in any way affect the lease, nor confer any rights to the landlord.
(ii) Transfer of lease as a result of corporate restructuring (e.g. merger): Where the restructured corporate entity continues to exist and operate, corporate restructuring does not affect the lease. Typically, lease agreements reserve a tenant's right to transfer the lease to a restructured corporate entity, while a restructured corporate entity landlord is deemed a successor of the initial landlord by default. However, in the event of the landlord's bankruptcy, the new owner may evict the tenant within two months from the auction of the property.

(f) Repairs: The Law stipulates that repair of damages due to typical or agreed usage burdens the tenant. All other damages burden the landlord. The lease agreement may stipulate otherwise.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Landlords are subject to income tax from leases. Tax brackets are: 15% for lease income between €0–12,000; 35% for lease income between €12,001–35,000; and 45% for lease income over €35,000. Landlords are also subject to a solidarity levy ranging from 2.2% to 10% (depending on the total income) for annual income exceeding €12,000. Where the landlord is a legal person, lease income is treated as income from a business operation and the related expenses are tax deductible, provided they have been included in the company's commercial books. Unless otherwise agreed, tenants are burdened with stamp duty amounting to 3.6% of the monthly lease.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Business leases are usually terminated either at expiry, by a new agreement of the parties, or by either party terminating the agreement before expiry of the lease term. Termination is allowed for any of the reasons stipulated in law or in the lease agreement (e.g. continued failure to pay the lease on time). Where the lease is unduly terminated by a party, the other party may claim compensation. In the event of term expiry, if the tenant remains in the premises, continues to pay the lease and the landlord accepts such payment, the lease is deemed implicitly renewed for an indefinite length of time and can be terminated only by a mutual agreement or termination by either party, without compensation for early termination.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Typically, the lease agreement prohibits the tenant from transferring the lease to a third party. If no such prohibition is in place, the tenant may transfer (albeit not sell) an active lease, under the condition that they communicate such transfer to the landlord. The tenant will still be liable for obligations stemming

from the time they were participating in the lease, while new obligations burden the new tenant. The landlord may sell their interest, their liability against the tenant ceasing, once they have been succeeded by the new owner. The landlord may, however, be held liable to the new owner for *culpa in contrahendo*.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

All leases, whether residential or business, require a Building Energy Performance Certificate in order to be lawfully concluded under Law 4122/2013. The serial number of the Certificate must be electronically filed with the tax office, along with the other lease details, enabling the tax platform to automatically verify its authenticity and validity.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

In the last few years, along with the "sprouting" of AirBnB short-term residential leases, there has been an increase in shared short-term working spaces, mainly office buildings, equipped with standard or more advanced amenities. On the other hand, shared residential spaces with shared facilities, apart from short-term leases, are not widespread or common.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The main laws governing residential leases are the Hellenic Civil Code and Law 1703/1987, as amended by Law 2235/1984.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

There is no difference in the law applicable to cases of multiple occupiers under the same lease agreement.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Length of term: Residential Leases have a three-year minimum term, even when the lease agreement stipulates a shorter term. The parties may, however, agree on a term exceeding the minimum.
(b) Rent increases/controls: The lease agreement normally lays down the ratio of annual rent increase, typically inflation-index linked. In the absence of an explicit agreement, the landlord may claim adjustments by resorting to the competent Court or, under certain conditions, to the Regional Committees for the Settlement & Re-Adjustment of Rent.
(c) Tenant's rights to remain in the premises at the end of term: The tenant is obliged to give up the leased property at the end of the term, without further notice. If the tenant remains in the premises after expiry, continuing to pay the lease and the landlord accepts such payment, the lease is deemed implicitly renewed for an indefinite length of time and can be terminated by either party or by mutual agreement.
(d) Tenant's contributions to property costs: The tenant is burdened with utility costs (electricity, water supply, etc.). Insurance is not compulsory for either landlord or tenant. Repair of damages due to typical or agreed usage burdens the tenant. All other damages burden the landlord. The lease agreement may stipulate otherwise.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The landlord may terminate a residential lease due to non-compliance with the terms of the tenancy agreement on the part of the tenant (e.g. non-payment). There are two main options for termination: (i) by lawsuit terminating the lease and seeking eviction; and (ii) by extrajudicial notice demanding compliance – in the event of no compliance, after a 30-day lapse period, a request for an eviction order may be filed. In both cases, the execution of the decision or order requires execution by a bailiff.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main laws governing zoning/permitting and related matters are:
(1) Law 4067/2012 – New Construction Law.
(2) Law 1337/1983 – Expansion of Urban Development Plans, Residential Development and Other Provisions.
(3) Law 4495/2017 – Audit and Protection of Built Environment and Other Provisions.
(4) Law 2508/1997 – Sustainable Urban Development.
(5) Law 2742/1999 – Spatial Planning, Sustainable Development and Other Provisions.
(6) Law 2971/2001 – Shoreline and Coastline Protection and Other Provisions.
(7) Law 1650/1980 – Environmental Protection.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

According to article 17 paragraph 2 of the Constitution, the State can expropriate real estate for public service after fully compensating the owner of the land. The expropriation is officially declared by publishing the decision in the Government Gazette. The State assesses the value of the land which is subject to judicial review by the Court of First Instance that may accept the

value or assess differently. The owner may appeal objecting this assessment.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The bodies for control are: the City Planning Service of each Municipality; the Forest Registries; and several Departments of the Ministry of Environment and Energy. Buyers are advised to consult a civil engineer on matters concerning the use of real estate and environmental issues.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Law 4495/2017 provides for three types of building permits:

(1) Common building permit.
(2) Small-scale permit for construction works worth no more than €25,000.
(3) Pre-authorisation of building permit, for buildings of more than 3,000 sq. m or in case the building permit is officially issued by another authority other than the competent City Planning Service.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Building permits are mainly obtained by the competent City Planning Service. An implied permission cannot be obtained in any way.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The procedure for issuing a building permit is exclusively conducted electronically. Provided that all necessary documentation has been filled correctly and fully, the permit is issued within 45 days. The cost depends on several factors, such as the documents needed, the area, the use of the building and the engineer's fee.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Law 3028/2002 provides for the protection of antiquities and cultural heritage in general. Protection is focused on the preservation of historical memory for the sake of current and future generations, and on the improvement of the cultural environment. In such cases, several limitations regarding the change of use, renovation and development of a building may be imposed.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

There is no public register of contaminated land, therefore a potential buyer should conduct his own due diligence.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Although environmental clean-up is not mandatory under Greek law, those in violation of the environmental protection law are subject to criminal, civil and administrative sanctions.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

For any new construction, there are specifications ensuring the energy performance of the building. Furthermore, as mentioned above, in real estate transactions the seller must provide an energy performance certificate of the property.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Following a revision of the ETS Directive in 2009, EU ETS operations were in 2012 centralised in a single EU Registry operated by the European Commission. The Union Registry covers all countries participating in the EU ETS. The Union Registry is an online database that holds accounts for stationary installations (transferred from the National Registries used before 2012) and for aircraft operators (included in the EU ETS since January 2012). The Greek Greenhouse Gas Registry is part of the Union Registry and is managed by the Ministry of Environment and Energy.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Under the Effort Sharing Decision, EU Member States are required to limit their greenhouse gas emissions between 2013 and 2020 by meeting binding annual limits which are set according to a linear path. The annual targets – known as annual emission allocations (AEAs) – follow a straight line between a defined starting point in 2013 and the target for 2020. Greece shall, by 2020, limit its greenhouse gas emissions at least by 4% in relation to its emissions in 2005.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The Ministry of Environment and Energy has been running since 2018, the project *Εξοικονομώ Κατ' Οίκον* (Saving At Home), which aims to motivate individuals to renovate their homes, in order to become more sustainable. The process of the renovation is co-funded by the EU.

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# India


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Real estate in India is governed and impacted by a combination of Federal and State-specific laws. This is largely because, in accordance with Article 246 of the Constitution of India, 'Land' is the subject matter of State List or List-II of the Seventh Schedule to the Constitution of India, which covers subjects for which only States can legislate, while 'Transfer of Property other than agricultural land, registration of deeds and documents' and 'Contracts other than for agricultural lands', fall under the Concurrent List or List-III of the Seventh Schedule to the Constitution of India, which are subjects for which both Centre and States can legislate. Additionally, since India is a country with diverse sects, laws relating to aspects such as devolution, inheritance, etc., draw a large influence from various customs and practices, in addition to codified laws. Over the years, various judicial precedents and judgments have also adjudicated upon various aspects relating to real estate, which are either binding or have a strong reliance value, depending upon the forum/court which adjudicated.

The following are some of the key legislations governing real estate in India:

- **Transfer of Property Act, 1882**: This Act is a Central act and provides general principles of movable and immovable property, such as sale, exchange, mortgage, lease and gift of property, part performance and *lis pendens*. The States have to adopt the provisions of this Act.
- **Indian Easement Act, 1882**: This Act governs the law relating to easementry rights to immovable property.
- **Registration Act, 1908 and Indian Stamp Act, 1899**: The said Acts govern laws relating to payment of stamp duty and requirement for registration of various deeds, documents and instruments relating to transfer of interest in immovable property.
- **The Indian Contract Act, 1872**: This Act governs laws related to contracts in India including capacity to enter into a contract, execution and implementation thereof and breach and remedies available to the parties thereto. The chapters and sections of the Transfer of Property Act, 1882 which relate to contracts shall be taken as part of the Indian Contract Act, 1872.
- **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013**: This Act governs the acquisition of private lands by the Government for certain public purposes or for a company and the compensation and rehabilitative measures to be undertaken thereto by the Government.
- **Land Revenue Codes**: Various States in India have formulated their own land revenue codes, which govern laws relating to agricultural land-holding, land revenue, types of tenancy and matters connected thereto. The said codes encapsulate division and classes of immovable property in a State, restrictions on transfer thereto, powers and duties of revenue officers, rules, regulations and penalties for contravening such codes.
- **The Real Estate (Regulation and Development) Act, 2016 (RERA)**: This Act governs development, marketing and sale of real estate projects to protect the interests of consumers in the real estate sector. The Act established an adjudicating mechanism for speedy dispute redressal *vide* the Real Estate Regulatory Authority and the Appellate Tribunal and mandates compulsory registration of projects and key players in real estate sector. Corresponding RERA Rules and regulations have been adopted by the States to ensure effective implementation of the Central Act at local level.
- **Foreign Exchange Management Act, 1999 (FEMA) and Foreign Direct Investment Policy (FDI Policy)**: FEMA and regulations pursuant thereto govern the purchase/sale of immovable property in India by foreign entities. The consolidated FDI Policy governs permissibility of foreign investment in the real estate sector in India along with compliance parameters and exit of such investors. Such foreign investment is regulated by the Department of Industrial Policy and Promotion (DIPP), the Foreign Investment Promotion Board (FIPB) and the Reserve Bank of India (RBI).

In addition to the above, the real estate sector in India is also governed by various State/local/municipal laws, policies and customs, including nuances in respect of urban development, slum rehabilitation/improvement, rent control, apartment ownership, building codes/bye-laws, property tax, Special Economic Zones (SEZs), Benami transactions, environmental protection, land pooling policies, land ceiling, land use and zoning norms, Real Estate Investment Trusts regulations, dispute resolution legislations such as the Consumer Protection Act, 1986, The Arbitration & Conciliation Act, 1996, etc.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The Indian legal system envisages elements of both civil and

common law. Whilst most laws in India are codified, principles of common law including that of equity and natural justice are instrumental in interpretation of legislations, judicial precedents and customs including from real estate perspective, as these have emerged to have both persuasive as well as authoritative value.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

While international laws do not have a direct bearing or applicability in context of real estate in India, several concepts or principles recognised under international law have been historically adopted in some form or the other in the legislations governing real estate in India, such as land rights of tribal or Adivasi communities, rights of farmers/agriculturalists to fair and equitable compensation in case of acquisition of lands by the Government, etc.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Earlier, the right to property was guaranteed under the Constitution of India as a fundamental right. Currently, the right to property is not a fundamental right, but a constitutional right. Article 300-A of the Constitution of India mandates that no person shall be deprived of his property save by authority of law, thus embodying the doctrine of 'eminent domain' which provides for acquisition of private property by the Government in public interest.

Further, States are duly empowered to legislate and impose legal restrictions on ownership of lands by certain classes of people (land owners with transferable rights, non-transferable rights, leasehold rights, cultivation rights, mortgagees, land owners belonging to Scheduled Caste/Scheduled Tribe categories, etc.) or on ownership of land beyond the land ceiling limits. Further, in most States, ownership of real estate has been restricted such that non-agriculturalists are not permitted to purchase agricultural lands in such State,

In addition to the above, under the existing foreign exchange norms, no person residing outside India can acquire any immovable property in India, except as permitted. Non-residents may be classified into three categories for the purposes of determining their eligibility to purchase immovable property in India:

- a person residing outside India who is a citizen of India;
- a person of Indian origin residing outside India; and
- a person not being an Indian citizen or a person of Indian origin (such as foreign nationals and foreign entities).

A person resident outside India who is a citizen of India and person of Indian origin resident outside India: Such person is permitted to acquire immovable property in India, other than agricultural property, plantation property or a farm house, provided that the payment of purchase price, if any, shall be made out of:

(i) funds received in India through normal banking channels by way of inward remittance from any place outside India; and

(ii) funds held in any non-resident account maintained in India in accordance with the foreign exchange regulations.

A person not being an Indian citizen or a person of Indian origin: Such persons are not permitted to acquire immovable property in India. However, a foreign national who, takes up an employment in India or who carries on a business or vocation in India, and becomes a person resident in India, may acquire immovable property in India for his own use without any permission as on becoming a person resident in India, such persons would be treated on par with persons otherwise resident in India. However, if such a foreign national, who has become a person resident in India, is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan, then he is required to obtain prior permission of the RBI for acquiring or transferring an immovable property in India. Further, a person resident outside India who has established in India, in accordance with the applicable foreign exchange management regulations, a branch office, or other place of business (other than a company in India), for carrying on in India any activity, excluding a liaison office, may also acquire any immovable property in India, which is necessary for or incidental to carrying on such activity. Foreign citizens and foreign entities may invest in an Indian company (either as a joint venture or a wholly owned subsidiary) for developing certain real estate projects such as townships, housing, infrastructure, construction-development projects, industrial parks, and SEZs. In certain real estate projects such as construction development projects, investment is not permitted where the project is already developed or in advanced stages of development.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The types of rights over land recognised in India vary diversely in nature, which form part of a larger bundle of rights existing by operation of law, contract, inheritance, etc. including:

- **Freehold Rights**: These rights over lands refer to absolute right, title and interest in the lands, perfected against the world at large. Hence, the owner of such an estate enjoys absolute ownership for perpetuity and can use the land for any lawful purposes; however, in accordance with the local laws and regulations.
- **Leasehold Rights**: These refer to an exclusive right and interest to hold/possess and use a property by a lessee or a tenant, in terms of the lease deed executed by lessor or landlord (being vested with title to the property) and the lessee or tenant for a fixed tenure. Leasehold rights are rights *in rem*.
- **Licence Rights**: These refer to a right of a licensee to enter/occupy/use a property, on a non-exclusive basis, whereby no interest or easement is created in the property in favour of the licensee. The said rights are neither transferable nor heritable and constitute rights *in personam*.
- **Mortgage Rights/Charge on Property**: A mortgage or charge creates an interest on behalf of the lender/mortgagee on the immovable property for the purpose of securing (i) the payment of money advanced or to be advanced by way of loans, (ii) an existing or future debt, or (iii) the performance of an engagement which may give rise to a pecuniary liability. In India, the various types of mortgagee rights that can be created in respect of immovable property are (i) simple mortgage, (ii) mortgage by conditional sale, (iii) usufructuary mortgage, (iv) English mortgage, (v) mortgage by deposit of title deeds/equitable mortgage, and (vi) anomalous mortgage.

- **Easement Rights**: An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own; for, e.g. Right of Passage, Right to Light, etc.
- **Development Rights**: Development rights are unused rights that allow developers to make changes to their property within the limitations imposed by State or local law. A special type of development right is represented by the Transferable Development Rights, which can compensate owners for not being allowed to develop certain properties because of legal limitations. Another mode of acquiring land is to enter into joint development agreements with the title holders of land for joint development of real estate projects. These are contractual rights.
- **Rights of Specific Enforcement for Part Performance**: Specific performance is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to complete performance of the contract.
- **Subsurface Rights**: Subsurface rights are rights to the earth below the land, and any substances found beneath the land's surface. Mineral rights are a type of subsurface right.
- **Transferable and Non-Transferable Rights (TDRs)**: The Transfer of Property Act provides for rights which are transferrable and non-transferable.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

The general assumption is that the right of ownership of a super structure/building is merged with the ownership of land unless there is a contrary intent and transaction in which scenario, ownership of the super structure vests in a separate entity than that of the land underneath. Indian laws allow for separate ownership of land and building.

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

A beneficial owner is a legal term where specific property rights ('use and title') in equity belong to a person even though the legal title of the property belongs to another person. Therefore, beneficial title emerges out of the beneficial rights provided to mortgagees, lessees, temples and endowments, etc. Hence, there are certain situations where there may be a split between the legal title and beneficial title in India for owners. Currently, there are no proposals to change the *status quo*; however, from the perspective of registration, legal title is considered as against beneficial title.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

Indian law does not envisage a system of land/title registration. Instead the concept of registration relates to documents under which title is transferred. Instruments/documents/transactions pertaining to lands are required to be registered in accordance with the Registration Act, 1908. Section 17 of the said Registration Act provides for the documents/deeds/instruments which must be mandatorily registered, and which are optional to be registered. The system of registration of documents is well defined in India, with robust and well operational government machinery to register such documents and maintain records of such registration/documents.

### 4.2 Is there a state guarantee of title? What does it guarantee?

No, there is no State guarantee of title. Providing a guarantee of title is one of the Legislative Agenda of the State. However, to implement this is extremely complex on account of various complexities around land title in India, therefore, no State has so far legislated any provisions with respect to the same. At the same time, various States have adopted the approach of acquiring lands under eminent domain and then allotting for development in a planned manner. In such cases of allotment of lands by the State, some comforts from the State on title are provided as contractual protections.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

**Section 17** of the **Registration Act** provides for documents that need to be compulsorily registered. This is a comprehensive list of documents, covering sale/conveyance deeds of title transfer, lease deed reserving yearly rent or more, simple and English mortgage deeds, and all other documents that create an interest in the property in favour of the transferee/beneficiary.

**Section 49** of the **Registration Act** talks about the effect of non-registration of documents that require compulsory registration. Such non-registration renders the document inadmissible in evidence amongst other impacts.

### 4.4 What rights in land are not required to be registered?

**Section 18** of the **Registration Act** describes the documents, the registration of which is optional, such as instruments acknowledging the receipt or payment of any consideration on account of the creation or extinction of any such right, leases of immovable property not exceeding one year, wills, easements right agreements, etc.

### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

In India, registration is not required of the land in question, rather it is to be done by the instruments relating to land or the transaction. The main purpose of **registration** is to render the title of the property in the name of the transferee. Registration also makes the documents pertaining to the land in question available to the public at large. This is where the doctrine of *caveat emptor* and Constructive Notice comes into play. If the land is registered, it would mean that the documents are available to

the public for perusal. Further, instruments that are unregistered can also be registered with the approval of the Sub-Registrar of Assurances.

There is no probationary period in India except that all documents, other than a Will, have to be registered within four weeks of execution or during the extended period of four weeks. It is pertinent to note that such a scenario may, however, arise in case a transaction entails a series of stages and for every such stage there may be a requirement of creation of documents and instruments. Such instruments may be required to be registered under the ambit and mandate of the Indian Registration Act. Such registered instruments may result in different classes of rights, title and interest.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

As per Section 54 of the Transfer of Property Act, 1882 a 'sale' is a transfer of ownership in exchange for a price paid or promised of part-paid and part-promised. Such transfer, in the case of tangible immovable property, of the value of Rs.100 and upwards or in case of a reversion or other intangible thing, can be made only by a registered instrument, whereas tangible immovable property below Rs.100 can be transferred either by registered instrument or by delivery of possession.

Where the transfer takes place by delivery of possession, then the transfer will take effect when the transferee is put in possession of the land/property, but in cases where registration is compulsorily required, transfer will take effect only upon registration of the instrument of transfer.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

As a general rule, rights that are created earlier are also deemed to be created prior in law, and thus even though the instrument by which the rights were initially transferred was registered after the subsequent instrument in respect of the same property being registered, the right created earlier will be enforceable in priority to that created subsequently.

**Section 48** of the **Transfer of Property Act, 1882** states the law regarding **priority of rights created by transfer** – This means that where a person purports to create by transfer at different times, rights over the same immovable property, and such rights cannot be exercised to their full extent together, each later right created will be subject to the rights that were previously created. This is the general rule, except when:

1. there is a special contract; or
2. reservation binding on the parties.

This principle is based on the maxim ***qui prior est tempore potior est jure*** which means **he who is prior in time is better in law**. The one who has advantage in time should also have precedence in law, where two successive transfers of the same property have been affected.

As a general rule, rights transferred by a registered document prevail over those transferred by an unregistered document.

Sometimes, the rights provided by Statute may prevail over those that are given under an agreement.

**Section 47** of the **Registration Act, 1908** states that a registered document will prevail from the time which it would have commenced to operate if no registration is required, and not from the time of its registration.

**'Notice' under Section 3** of the **Transfer of Property Act** means knowledge or cognisance or awareness of a fact.

If the transferee is found to have either actual or constructive notice, he would not be given the benefit under Section 48. The **Doctrine of *Caveat Emptor*** will also apply, which means 'let the buyer beware' or that the purchaser buys at his own risk. However, if the purchaser is a *bona fide* purchaser, then the benefit under Section 48 will be given to him.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

Registries are within the jurisdiction of the State Government and fall in Concurrent List in Schedule VII and, thus, laws in respect of these matters can be made by both the Centre as well as by the State. They are guided and operated under the laws, rules and regulations of the parent State. The Registration Act, 1908 is a Central Legislation which provides for the registries to be adopted by the States who are empowered to cause amendment or modification in terms of Article 254. Consequently, there are several registration offices, with each district usually having one.

**5.2 How do the owners of registered real estate prove their title?**

The owners of real estate prove their title through the documents of registry. A registered instrument is admissible in evidence under the provisions of the Registration Act, 1908 and the Transfer of Property Act. Such evidence is advanced before the court of law in accordance with the Evidence Act.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

No, a transaction relating to registered real estate cannot be completed electronically. Physical presence of the parties is required.

The documents of the property that need to be registered need to be submitted to the Sub-Registrar of Assurances within whose jurisdiction the property is situated.

The authorised signatories for the seller and the purchaser have to be present along with two witnesses, for registration of the documents.

Documents that are needed at the time of registration are:

- Aadhaar Card;
- PAN Card; or
- any other proof of identity issued by a government authority.

If the signatories are representing someone else, they have to furnish the power of authority.

If a company is a party to the agreement, the person representing the company has to carry adequate documents like a letter of authority or power of attorney along with a copy of the company's board, authorising him to carry out the registration. In order to facilitate the same.

Digitisation of land records was introduced to computerise all land records including mutations, improve transparency in the land records maintenance system, digitise maps and surveys, update all settlement records and minimise the scope of land disputes.

The registered documents can be accessed electronically dating back to the date when they were first digitised in that jurisdiction. The list of cases Change of Land Use (CLU) that are pending granted or rejected are all available online on the website of Department of Town and Country Planning. Along with this, the list of licence cases is also available online. Government plans, mobility plans, e-government initiatives, policy documents, controlled/urban areas details, etc. are also available online.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

The Registration Act provides for penalty/punishment by imprisonment for incorrectly endorsing, copying, and translating a registered document with intent to misinform.

Every registering officer is deemed to be a public servant within the meaning of the Indian Penal Code.

The Registration Act further provides that no registering officer shall be liable to any suit, claim or demand by reason of anything in good faith or refused in his official capacity.

However, the principles of absolute and strict liability may be applicable on the registry in cases of tort law.

To ensure the personal liberty of individuals from abuse of public power, a remedy was created by the Apex court to grant damages through writ petitions under Article 32 and Article 226 of the Constitution.

The doctrine of Sovereign Immunity has lost its significance as time has passed.

In ***Dr. Mehmood Nayyar Azam v. State of Chhattisgarh & ors***, the Supreme Court held that "when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 seeking enforcement or protection of fundamental rights, it does so to render the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty".

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Even though the books and materials registered are available for access to the public at large, there are still some restrictions due to which some of the books might not be available for access to the public, though they are accessible to the parties to the transaction and even the beneficiaries.

1. **Section 57** of the **Registration Act, 1908** deals with registering officers to allow inspection of certain books and indexes, and to give certified copies of entries. The same can be presumed under law to be adequate evidence of any encumbrance on the property created by a registered instrument.
2. **An application can be made under the Right to Information Act, 2005 (RTI)** for a timely response for citizens that request for government information. The object of the RTI, 2005 is to empower citizens, promote transparency and accountability in the working of the Government, to contain corruption, and to make democracy work for the people in a real sense.

All information relating to Public Information Officers under the RTI is available online, on the Department of Town and Country Planning website, including the office addresses, designation, their e-mail IDs and their telephone numbers. The list of cases related to CLU which are pending, granted or rejected, are all available online as well.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

In addition to the buyer, seller and the buyer's finance provider, the people that are usually involved in a real estate transaction are:

- **Developer**: A Developer is the one who purchases land, manages finance for real estate transaction, builds or appoints builders/contractors to develop/construct the projects and controls the process of development. Typically, developers purchase a tract of land, determine the marketing of the property, develop the building programme and design, obtain the necessary public approvals and financing, engage in the activity of construction of the structure, and rent out, manage, or ultimately sell it as per the discretion of the Developer.
- **Agent/Broker**: Real estate agents/brokers are licensed professionals who arrange real estate transactions, putting buyers and sellers together and acting as their representatives in negotiations. Under RERA, a 'real estate agent' means any person, amongst others, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, in a real estate project, by way of sale.
- **Allottee**: Under RERA, an 'allottee' in relation to a real estate project means, amongst others, the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter.
- **Land Aggregator**: A land aggregator aggregates land by tracking the geographical and topological locations, which have potential for attracting investment. Generally, in the Indian real estate market, the land originates to the aggregator in State, wherein, he prepares the title reports, property boundary, zone regulations, conversions, registrations, approvals and sanctions for the land, after which, the land can be offered for sale or development.
- **Liaison**: A liaison is a person who liaises between two organisations to communicate and coordinate their activities. They are appointed/employed to achieve the best utilisation of resources or employment of services of one organisation by another.
- **Surveyor**: A surveyor is an individual who conducts surveys of properties.
- **Registered Valuer**: Where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill, or any other assets or net worth of a company or its liabilities, it shall be valued by a person having such qualifications and experience and registered as a valuer.
- **Architects**: Architects involved in a real estate transaction typically advise on zoning, development potential, reservations, planning permissions, etc. with respect to the transaction.

- **Accountants/Tax Consultants**: Accountants/Tax Consultants involved in a real estate transaction would typically advise on the structuring and tax efficient mechanism for concluding the transaction.
- **Lawyer**: Lawyers in terms of real estate transactions would typically include lawyers from both/all parties who would be entrusted with the task of conducting legal due diligence, preparation, review and negotiation of the transaction documents in respect of the property.
- **Witness**: A witness would refer to a person who sees an event take place.

### 6.2 How and on what basis are these persons remunerated?

The people typically involved in real estate transactions are remunerated on a contractual basis which varies in terms of their nature of service/contribution provided to the real estate transaction.

### 6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?

On an evaluation basis of current market trends, an inference can be drawn that, in order to finance real estate transactions, developers have various options to seek capital. With respect to the raising of debt, developers prefer approaching Non-Banking Financial Companies (NBFCs) which is a company registered under the Companies Act, 1956 or Companies Act, 2013 and is engaged in the business of providing loans and advances to the developers. NBFCs lend and make investments and hence their activities are akin to that of banks. Banks also provide a Rupee Term Loan, non-fund based limit and overdraft facility to fund the commercial and residential real estate sector. Various companies opt for the means of raising funds by way of equity as well (both domestic and foreign).

### 6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.

The appetite of investors and/or developers to invest in India has increased significantly compared with last year. Logistics and warehouses have witnessed a substantial growth over the last few years. Similarly, commercial inventory demand has also increased. Also, massive growth opportunities are being witnessed in the renewable energy sector. There seems to be an optimistic approach towards acquisition of lands to develop multiple solar power plants, wind energy farms, warehousing parks and storage facilities in various parts across the country which has a potential to attract investment globally. As far as the residential market is concerned, in our view the same is robust for the last one-and-a-half years. A lot of developers are acquiring lands and projects for real estate development, though in certain specific jurisdictions.

### 6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.

On a pan-India basis, there is no discernible and long-lasting slow-down of any sub-sector of real estate; however, there may be regional slow down.

The Union Budget 2019–2020 has paved an optimistic way ahead for the affordable housing sector by introducing additional tax benefits for first-time homebuyers which will enhance the housing supply in very rapid manner. The real estate sector in India is expected to reach a market size of US$ 1 trillion by 2030. The housing, retail, hospitality and commercial sub-sector has witnessed an upward trend in growth. The sector has witnessed high growth with a rise in demand for office as well as residential spaces. Also, the solar power generation in India has increased substantially over the past few years. As per various reports and data, solar power accounted for over 11.4 billion units of electricity produced in the first quarter of 2019 which marks a growth of almost 34% year-over-year from the 8.5 billion units as generated in the first quarter of 2018. However, these solar installations still barely make up 10% of the total energy generation in the country. After analysing various market trends and the Government's initiative to emphasise more on sustainable development by use of renewable sources of energy, we believe various solar power companies in India would capitalise on this situation by acquiring more lands in order to develop large-scale solar energy generation power plants.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

### 7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

Under **Section 54** of the **Transfer of Property Act, 1882**:

1. Transfer of tangible immovable property with a value of Rs.100 and upwards, or in case of reversion or other intangible thing, can be made only by a registered instrument.
2. In case of tangible immovable property having a value of less than Rs.100, a transfer can be made either by a registered instrument or by delivery of the property.
3. Delivery of the tangible immovable property takes place when the seller places the buyer or such other person as he directs, in the possession of the property.
4. The seller should also have the capacity to sell and the buyer should have the capacity to buy.

Eligibility criterion as prescribed for a valid contract by the Indian Contract Act will also be required to be met.

Further implications of stamp duty also arise under the Indian Stamp Act, 1899 and under different State laws which vary as per the location of the property. When a property is considered, the stamp duty is charged on the present agreement value or market value; whichever is higher.

### 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

Under **Section 55** of the **Transfer of Property Act, 1882**, the seller has a duty to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware and which the buyer could not, with reasonable care, discover.

### 7.3 Can the seller be liable to the buyer for misrepresentation?

The seller is under a duty under Section 55(1)(a) to disclose all

material defects in the property or his title in the property, which the buyer, as an ordinary prudent man, could not have known.

Misrepresentation vests the buyer with the right to claim damages for the contract of sale or seek compensation/damages or indemnity from the seller. A contract of sale cannot be cancelled; the rectifications under such contracts can only be done by virtue of a re-conveyance deed.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

The sellers of real estate usually provide representation, warranties, and covenants relating to a clear and marketable title.

Though the seller discloses all information about the property as well as his title, the buyer should exercise due diligence and check the title of the seller.

**'Notice' under Section 3** of the **Transfer of Property Act** means knowledge or cognisance or awareness of a fact. Notice may be of two types: Actual Notice; and Constructive Notice.

If the buyer has actual (direct) notice from the seller, then he cannot claim the title of *bona fide* purchaser. Similarly, with constructive notice (deemed notice) – if the document is publicly available, then the buyer is deemed to have constructive notice. He cannot claim the title of *bona fide* purchaser if he had constructive notice but failed to acknowledge the information due to his own negligence.

Due diligence is imperative to becoming a *bona fide* purchaser, even though it is not a legal obligation.

Warranties are in the domain of contracts. The sellers vest the buyer with warranties and covenants more particularly with regards to title in the form of property having a clear and marketable title. Sale on an 'as-seen' basis often dilutes such warranties and covenants and reliance is placed on notice to the buyers and due-diligence conducted by them.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller must abide by any contractual liabilities that he has undertaken at the time of sale.

Also, under Section 55 of the Transfer of Property Act, 1882, the seller has several duties such as to disclose to the buyer any material defects, to answer questions of the buyer, to execute a proper conveyance and to pay all public charges and rent accrued due in respect of the property. Some duties of the seller transcend beyond execution of sale, such as: transfer of vacant and peaceful possession of the property; safe-keeping and handing over of title documents to the new buyer; and payment of arrears of taxes, statutory dues, etc. to the buyer. In the event of misrepresentation of capacity or entitlement to transfer the land, the seller may be held accountable on discovery of such defect or absence of power to convey.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Section 55 (5) and (6) of the Transfer of Property Act, 1882 provide for the rights and liabilities of a buyer in addition to payment of the sale price.

The liabilities of the buyer include disclosure of any fact as to the nature and extent of seller's interest, to pay the purchase money to the seller and to pay all public charges and rent which may become payable in respect of the property.

The rights of the buyer include the benefit of any improvement in, or increase in the value of, the property, and to the rents and profits thereof, charge on the property, as against the seller, to the extent of the seller's interest in the property, for the amount of any purchase-money.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

There are various and elaborate rules and regulations concerning the lending of money to finance real estate. The rules applicable to residents and non-residents are distinct in nature.

A company may, by virtue of the Companies Act, 2013, raise investments:

(a) public offers; and
(b) private placements.

The kind of capital raised through the abovementioned methods are:

(a) Equity share capital.
(b) Preference share capital.
(c) Debentures or other short/long-term lending.
(d) Bonds.

A Non-Banking Finance Company may also lend money to finance real estate activities.

The rules and regulations applicable to non-resident persons for investment in real estate in India are extensive in nature.

The FDI Policy, 2017, Chapter 3 provides general conditions of FDI, in case of **Eligible Investors** wherein a non-resident entity can invest in India subject to the FDI Policy. However, there are restrictions on citizens of several countries like Bangladesh, Pakistan, etc.

NRIs residing in Nepal and Bhutan, as well as citizens of Nepal and Bhutan, are permitted to invest in the capital of Indian companies on a repatriation basis.

Further, a company, trust and partnership firm incorporated outside India and owned and controlled by NRIs can also invest in India with the special dispensation as available to NRIs under the FDI Policy.

Foreign Institutional Investors (FII) and Foreign Portfolio Investors (FPI) may, in terms of Schedule 2 and 2A of FEMA (Transfer or Issue of Security by Persons Resident outside India) Regulations, as the case may be, respectively, invest in the capital of an Indian company under the Portfolio Investment Scheme subject to specific conditions.

Only registered FIIs/FPIs and NRIs, as per Schedules 2, 2A and 3 respectively of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, can invest/trade through a registered broker in the capital of Indian companies on recognised Indian Stock Exchanges.

A SEBI registered Foreign Venture Capital Investor (FVCI) may contribute up to 100% of the capital of an Indian company engaged in any activity mentioned in Schedule 6 of Notification No. 20/2000 FEMA, including start-ups, irrespective of the sector in which they are engaged, under the automatic route. Such investments shall also be subject to the extant FEMA

regulations and extant FDI Policy including sectoral caps, etc. The investment can be made in equities or equity-linked instruments or debt instruments issued by the company (including business start-ups organised as a partnership firm or an LLP). SEBI-registered FVCIs are also allowed to invest under the FDI Scheme, as non-resident entities, in other companies, subject to FDI Policy and FEMA regulations.

**Other Entities**: FDI in resident entities, other than those mentioned above, is not permitted.

**Entry Routes for Investment**: Investments can be made by non-residents in the equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares of an Indian company, through the automatic route or the Government route. Under the automatic route, the non-resident investor or the Indian company does not require any approval from the Government of India for the investment. As per this automatic route, 100% investment is provided under the FDI Policy for construction development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, and townships). However, under the Government route, prior approval from the Government of India shall be required by such non-resident investor required.

**Entry Conditions on Investment**: Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalisation, a lock-in period, etc.

**Note**: It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farmhouses and trading in TDRs. The FDI Policy has further elaborated the scope of 'Real estate business' by meaning and including dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure and townships. Further, rental earnings/income from the lease of a property, not amounting to transfer, will not amount to real estate business. (For details, please refer to the 'Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Sixteenth Amendment) Regulations, 2014'.)

### 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

Customarily, a mortgage/charge is the most common form of security interest created over immovable property by virtue of which a real estate lender seeks to protect itself in the event of default by the borrower. However, apart from the mortgage/charges, other methods of protection are:

- **Hypothecation**: Hypothecation means offering assets/receivables as collateral security to the lender whereby the ownership lies with the vendor and the possession is enjoyed by the borrower. In the event of default by a borrower, the lender can exercise his rights of ownership and seize the asset or derive benefits from the property in terms of the contractual protections guaranteed to the lender under the respective financing documents.
- **Pledge**: There is one fundamental difference between a 'pledge' and a 'hypothecation'; the possession of the asset remains with the lender in case of a pledge, while it remains with the borrower in case of hypothecation. Pledging also includes pledging of shares wherein the shares of the borrower entity are in the possession as a measure of security.
- **Third-party Guarantee**: This refers to when a guarantor is a third party in a contract who promises to pay for certain liabilities if one of the other parties in the contract defaults on their obligations. Guarantors sometimes appear on insurance contracts and also provide a sort of insurance themselves.
- **Personal Guarantee**: A personal guarantee is an individual's legal promise to repay credit issued to a business for which they serve as an executive or partner.

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

Section 58 of the Transfer of Property Act defines mortgage.

When a mortgaged property is to be realised by the lender due to default by the borrower, he may take recourse to Order 37: Summary Procedure of the Code of Civil Procedure.

Also, as per the provisions of the Transfer of Property Act, a lender has the right to foreclosure or sale of mortgaged property to realise dues as against such property.

As per Section 67 of the Transfer of Property Act, providing the right to foreclosure or sale, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the court, a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

Apart from the aforesaid proceedings under the Transfer of Property Act, Indian laws also provide for the Insolvency and Bankruptcy Code, 2016 (IBC), wherein any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate a corporate insolvency resolution process in respect of such corporate debtor in the manner as provided.

However, there is also an option to realise a mortgaged property without involving court proceedings in order to get a speedy recovery. Under the ambit of the SARFAESI Act, 2002, the financial institution/bank can give notice to the defaulting borrowers to pay the entire amount in arrears within a stipulated timeframe. If the borrower fails to pay such outstanding amount within the prescribed time period, the lender can initiate recovery proceedings without the intervention of the court. It is also pertinent here to note that, all such charges/security/pledge/hypothecation created in favour of the lender are compulsorily to be disclosed and filed with the Ministry of Corporate Affairs, Government of India.

### 8.4 What minimum formalities are required for real estate lending?

The usual formalities are:

- **Due Diligence**: The lender must carry out a due diligence against the borrower to verify title, outstanding/pending litigations, accrued interests, etc.
- **Valuation Report**: A valuation report is an assessment of the property concerned to determine its value. It must be obtained by a certified valuer.

- **Execution of Loan Agreements**: Loan agreements are required to be executed between the borrower and the lender in respect of the loan being availed.
- **Stamping and Registration**: Proper execution, stamping and registration of documents must be carried out.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Under the IBC, any claims against the borrower are entertained on the basis of hierarchy of claims.

The most effective way of protection against the claims by creditors is to create the first charge on the concerned property in his name. Such charge created in a property may have priority over all others and may be enforced even in the absence of consent of subsequent creditors. Provisions under the SARFAESI Act elaborate the same.

The sale of the assets of the liquidation estate will be distributed in the waterfall mechanism manner and in a priority set out in Section 53, IBC, such as:

1. Insolvency Resolution Process costs and Liquidation costs.
2. Workers' dues and dues to secured creditors shall be distributed on a *pari passu* basis.
3. Wages and unpaid dues.
4. Financial debt owed to unsecured creditors.
5. Amount due to Central Government & State Government and debts due to secured creditor remaining unpaid following the enforcement of Security interest.
6. Any remaining debts or dues.
7. Preference shareholders.
8. Equity Shareholders.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

- Breach of terms of original allotment/agreement.
- Hierarchy of claims by which a creditor enjoys the position of priority over receivables and claims of creditors.
- The SARFAESI Act allows secured creditors to take possession over collateral within a prescribed timeframe. In addition to the Amendment Act, the Central Government has also notified certain Non-Banking Finance Companies (NBFCs) as secured creditors under the SARFAESI Act.
- Third-party agreements: if the property rendered as security and its title is conferred on any subsequent/third party before the interest is created in the lender's title for such property, such security may be rendered unenforceable.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Under the ambit of Section 13 and Section 14 of the SARFAESI Act, secured creditors are permitted to take possession over collateral within a prescribed timeframe. Section 17 allows any person (including borrower), aggrieved by any of the measures taken by the secured creditor or his authorised officer to make an application before the Debts Recovery Tribunal. The following rights can be enforced by the borrowers:

- The borrowers can, at any time before the sale is concluded, remit the dues and avoid losing the security.
- In case any act in contravention to the provisions of this act is carried out by the authorised officer, the lender will be liable for penal consequences and the borrower is entitled to compensation.
- The borrowers can approach the DRT and, thereafter, the DRAT in appeal.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The position of the lender gets subsumed in the insolvency process as a creditor/borrower of the corporate debtor/lender. The recoveries under the Indian regime of the Insolvency and Bankruptcy Code, 2016 will be governed by the insolvency process itself. The borrower shall not be permitted to bilaterally negotiate or recover or enter into any kind of agreements with the corporate debtor pursuant to the commencement of the insolvency process.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Upon enforcement of security over the shares pledged by a company to a lender, the lender shall have the right to receive all amounts payable in respect of such collateral or to sell such shares without the intervention of the court and without any consent of the pledgor at public or private sale or vote on any part in connection with the collateral or to receive all dividends, interest and other distributions made in respect of the collateral and otherwise act as though it were the owner thereto and apply the aforesaid proceeds towards payment of the outstanding amounts owed to the lender.

In the event of insolvency of the company, the financial creditor shall enforce its security interest in the company and such amounts which remain unpaid following such enforcement shall be paid to the creditor from the proceeds of the insolvency.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Presently, the levy of Goods and Services Tax (GST) is limited to the activity of construction of a complex, building, civil structure, including a complex or building intended for sale to a buyer and over Lands and Building in terms of the existence of any lease, tenancy, easement or licence to occupy land. Therefore, sale of land and immovable property is not subject to GST. Typically, sale of land and immovable property is subject to stamp duty and registration charges. However, stamp laws are administered under the Indian Stamp Act and various State stamp acts and rules. Stamp duty charges in India differ from State to State and, sometimes, even within the State. It varies further if the property is within the Municipal Corporation, Municipal Council, Gram Panchayat limits, etc. Stamp duty ranges from 3% to 10%, depending on the slab decided by the particular State. Stamp duty is encapsulated in the schedule attached to the Indian Stamp Act.

Please refer to the Indian Stamp Act, 1899 (Section 29) for visibility on who pays stamp duty.

### 9.2 When is the transfer tax paid?

Transfer Tax (referring to stamp duty) would only be paid prior to or during/at the time of execution of such conveyance/agreement of transfer. It cannot be paid on a date subsequent to such date of transfer.

Registration fees (as under the Indian Registration Act, 1908) are paid subsequently to the payment of stamp duty pertaining to such transfer.

### 9.3 Are transfers of real estate by individuals subject to income tax?

**Section 45** of the **Income Tax Act, 1961** provides for provisions with respect to any **profits or gains arising from the transfer of a capital asset** affected in previous years and shall be chargeable with income tax under the head – **capital gains**.

The capital asset includes property of any kind or any securities held by a FII which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992).

Capital Assets are further classified into long-term capital gains and short-term capital gains.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

No, transfers of real estate are not subject to VAT. With effect from 1 July 2017, VAT has been subsumed under GST. Real estate, excluding sale of land and building, is subject to levy of GST.

The effective GST rate (after abatement of land value) on construction of residential apartment, other than affordable housing apartments in a residential real-estate project or projects other than residential real estate project, is 5%. The GST rate on construction of commercial apartments in a residential real-estate project (after abatement of land value) is 5% and, in projects other than residential real estate project, is 12%. However, in case of construction of affordable housing, the effective GST rate (after abatement of land value) is 1%.

Generally, the liability to pay GST falls on the supplier of the goods and services. In case of supply of real estate, it is the Developer or builder who is liable to pay GST on the consideration charged from the buyer.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Capital Gains Tax would have to be paid by the seller on the disposal of the property. It is charged under Section 45 of the Income Tax Act, 1961 and it is deemed to be income. It is taxed in the assessment year immediately after the preceding year in which the immovable property was transferred.

The other taxes that would have to be paid by the seller on the disposal of a property in addition to Income Tax are: stamp duties; registration fees; and GST, etc., which have already been discussed above. Along with this, local taxes may be levied that may differ from State to State.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

The acquisition of the business/property of an Indian company can be accomplished by the purchase of shares or the purchase of all or some of the assets. From a tax perspective, long-term capital gains arising on a sale of equity shares through the recognised stock exchanges in India are exempt from tax, provided Securities Transaction Tax (STT) is paid. All other gains on sales of assets are taxable. In addition, stamp duty and registration fees with respect to the instrument of transfer is to be paid.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

Yes, the following matters need to be taken into consideration by the buyer of real estate:

- The documentation of the property should be properly done. The sale document should be stamped as required by law and original title deeds should be taken by the purchaser from the seller of the property.
- The title of the property needs to be checked properly.
- The Sanctioned Plans and Commencement Certificate by the concerned authority should be inspected of the property in question.
- The Power of Attorney needs to be properly scrutinised to ensure that it is properly executed.
- The tenure of the land in question needs to be considered. If it is a leasehold property and the remaining period is short and there is no provision regarding the renewal of old lease.
- No objection certificate from the society should be obtained, even though it is not required as of now.
- All dues should have been paid including Property Tax.
- The buyer should check whether or not any proceedings under Section 281 of the Income Tax Act, 1961 have been instituted against the seller. In case of a non-resident being the seller, TDS may be deductible from the consideration paid, unless a situation arises whereby a certificate of non-deduction or lower deduction of TDS is obtained by the concerned Income-Tax Officer. Also, Section 56 of the Income Tax Act provides for income from other sources which would have to be taken into consideration. As income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income tax under the head-income from other sources, if it is not chargeable to income tax under any of the heads specified in Section 14, items A to E.

Before purchasing a property, one should confirm as to whether the property in question is of a commercial nature or residential as per the Development Control Regulations. Other things to be considered may include set-back for road widening, heritage rules, etc.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

Various laws govern the leases in India:

(a) **Transfer of Property Act, 1882**: The Transfer of Property Act, 1882 governs individual leases in India and provides general principles regarding leases, rights of lessee and lessor and their duties. The States have to adopt the provisions of the Act.

(b) **Rent Control Acts**: Various States in India have enacted their own rent control laws which affect tenancies created thereunder.

(c) **Indian Stamp Act, 1899 and Registration Act, 1908**: Lease of property is created by way of an instrument duly stamped and registered as per the provisions of the Indian Stamp Act, 1899 and Registration Act, 1908, respectively.

(d) **Government Grants Act, 1895**: In India, the Government owns leasehold property which it grants under the Government Grants Act, 1895 for various terms, including perpetual lease.

(e) **The Indian Contract Act, 1872**: The Indian Contract Act is the principle Act governing laws related to contracts in India and the contractual obligations of parties to a contract. The contractual relationship between the Lessee and Lessor are also governed by the principles laid in the Indian Contract Act, 1872.

In addition to the above, the Central Government is in the process of setting up model laws of tenancy for States to follow in consonance of changing the paradigm of the rental environment in India. The Ministry of Housing and Urban Affairs has drafted the Model Tenancy Act, 2019 to serve as a model law which has been circulated for views/comments from the States and Union territories.

### 10.2 What types of business lease exist?

Section 105 of the Transfer of Property Act defines a lease as a transfer of right to enjoy property for a certain period expressly or impliedly or in perpetuity, in consideration of a price paid or promised to be paid to be rendered periodically or on specified occasions. In leases, residuary or reversionary powers are vested with the owner, thereby, on determination and termination of the lease, the property reverts to the owner.

A business lease is a type of lease. There is no separate codified law specific to business leases, and laws relating to leases apply.

In India, business leases are usually term-based and would have a specific time limit, on expiry of which the lease concludes. Unlike residential leases, business leases are of a longer duration. Business leases are characterised by high rentals, incubation period leases, strong representations and warranties, strong positive and negative covenants, lock-in period, default situations, termination clauses, security deposit, etc.

Business leases also take the form of a sub-lease where the incumbent sub-tenant is bound by the terms of sub-lease deeds and master lease deed.

The terms of business leases are in the realm of private contract and may be in the nature of a full-service lease, percentage lease, step-up lease, straight lease and others whereby tenants may be obligated to pay and discharge rents, property taxes, insurance, taxes, maintenance, utilities and the like.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

Typical provisions for leases of business premises are:

(a) **Length of term**: It varies from short-term to long-term. Sometimes, a tenant may make capital investments and therefore require a long-term lease.

(b) **Rent increase**: A rent increase is a matter of contract. The lease deed contains an escalation clause whereby lease rentals are increased annually or on terms as mutually agreed.

(c) **Tenant's right to sell or sub-lease**: All such rights are determined contractually. In practice, residuary rights of ownership and transfer are vested with the owner and there are restrictions on sub-leases by the tenants. In certain instances, the tenant may be entitled to assign its rights, but these rights are generally subjected to the permission of the owner.

(d) **Insurance**: Insurances are integral to high-value leases and properties. Tenants may be obligated to ensure the premises are insured and ensure that they are reasonable and can be satisfied.

(e) (i) **Change of control of the tenant**: It is in the realm of contract and such provisions must be provided in the lease deeds in comprehensive, unambiguous and clear terms.

(ii) **Transfer of lease as a result of corporate restructuring (e.g. merger)**: Transfer of lease is permitted unless prohibited by law or contract. Under the scheme of amalgamation right of tenancy and occupancy gets vested in and becomes the property of the Transferee Company.

(f) **Repairs**: Provisions of Repairs are in the realm of private contract. In practice, day-to-day repairs fall under the obligation of the tenant and structural repairs by the owner. However, under no circumstances are urgent and structural repairs conducted without the knowledge and consent of the owner.

(g) **Usage of premises**: There may be specific provisions in the lease governing the usage for which the premises may be used. These restrictions may also include exclusive items specifically, that cannot be carried on the premises.

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

The GST, which is the umbrella tax covering all indirect taxes, is levied on a business lease at a rate of 18%. In addition to the same, there may be taxes which are particularly liable to be paid for the kind of business carried out by the tenant. Further, the landlord is also required to pay the Property Tax for the premises being owned by him.

### 10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

The termination of a business lease depends on the commercial understanding between the parties to the agreement. The terms and conditions of the agreement are to be considered in this regard. However, normally, business leases can be terminated on the following grounds:

(a) by efflux of the time limited thereby;

(b) where the term of the lease is limited conditionally on the happening of some event – by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event – by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say:
  (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter;
  (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or
  (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other; and

(i) on occurrence of a *force majeure* event which renders the premises incapable of usage by the lessee.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The entitlements, liabilities and obligations of the owners of a premise under a lease are generally transferred to the owner/transferee and the tenancy runs its terms as per the lease deed; unless terminated mutually. The past obligations may continue to remain the responsibility of the erstwhile owner, but such course is determined contractually. Similarly, the termination/determination of the lease coupled with discharge of all obligations by the tenant ensures the cessation of liabilities of the tenant; unless contracted otherwise.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

All development/construction use, and operation of such buildings have to be in compliance with the environmental laws. Keeping the 'green' commitment in mind, green practices result in energy-efficiency (and includes products like energy-efficient LEDs, air-conditioners and the like), sustainability and superior air quality, thereby providing occupants a healthy working environment. All such commitments forming a part of a legal and valid contract are enforceable in entirety and in parts before the court of law.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Co-working spaces are coming up across Indian metros as well as Tier-II cities, providing flexible working options. It has been predicted that, by 2030, substantially up to 30% of all office spaces will adopt the co-working model in some form or the other. There are over 850 shared workspaces with over 1.80 *lakh* seats across the country. The area under co-working space is currently around 15 million sq. ft.

The concept of shared residential spaces is at a nascent stage in India; however, there is a growing interest and trend towards it. By way of an example, 'Hub' in Bengaluru provides shared residential space.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The laws in India that govern the leases of residential premises are as follows:

(a) **Transfer of Property Act, 1882**: The Transfer of Property Act, 1882 governs individual leases in India and provides general principles regarding leases, rights of lessee and lessor and their duties. The States have to adopt the provisions of the Act.

(b) **Rent Control Acts**: Various States in India have enacted their own rent control laws which affect tenancies created thereunder.

(c) **Indian Stamp Act, 1899 and Registration Act, 1908**: Lease of property is created by way of an instrument duly stamped and registered as per the provisions of the Indian Stamp Act, 1899 and Registration Act, 1908, respectively.

(d) **Government Grants Act, 1895**: In India, the Government owns leasehold property which it grants under the Government Grants Act, 1895 for various terms including perpetual lease.

(e) **The Indian Contract Act, 1872**: The Indian Contract Act is the principle Act governing laws related to contracts in India and the contractual obligations of parties to a contract. The contractual relationship between the lessee and lessor are also governed by the principles laid in the Indian Contract Act, 1872.

In addition to the above, the Central Government is in the process of setting up model laws of tenancy for States to follow in consonance of changing the paradigm of the rental environment in India. The Ministry of Housing and Urban Affairs has drafted the Model Tenancy Act, 2019 to serve as a model law which has been circulated for views/comments from the States and Union territories.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the laws do not differ if the premises are intended for multiple residential occupiers. They would remain the same.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Length of term – As per Section 107, it is contractually determined. They are generally of a short duration.

(b) Rent increases/controls – This is based on the general market practice and it depends on the terms and conditions as decided between the parties to the agreement. It is generally around 5% to 10% annually.

(c) The tenant's right to remain in the premises at the end of the term – There are two ways in which the tenant can remain in the premises even at the end of the term. These are:
   (i) **TENANCY AT WILL** – A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either the landlord or tenant. A tenancy at will is implied when a person is in possession by the consent of the owner and is not held in virtue of any tenancy for a certain term.
   (ii) **TENANCY AT SUFFERANCE** – A tenant at sufferance is one who comes into possession of land by lawful title, but who holds it by wrong after the termination of the term or expiry of the lease by efflux of time. A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. A tenancy at sufferance does not create the relationship of landlord and tenant.

(d) The tenant's contribution/obligation to the property 'costs' e.g. insurance and repair – As per Section 108 of the Transfer of Property Act, 1882, it is the duty of the lessor of the property to make repairs which he is bound to make to the property. In case he fails to make such repairs within reasonable time after notice, the lessee may make such repairs himself and deduct the expenses of such repairs along with interest from the rent, or otherwise recover it from the lessor. A tenant may be obligated contractually to effect insurance of the tenanted premises.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The rights of landlord to determine the lease is given in Section 111 of the Transfer of Property Act, 1882. The following are the grounds on which the lease may be terminated by the landlord:

1. by efflux of the time limited thereby;
2. where such time is limited conditionally on the happening of some event – by the happening of such event;
3. where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event – by the happening of such event;
4. in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;
5. by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;
6. by implied surrender;
7. by forfeiture; that is to say:
   a. In case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter.
   b. In case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself.
   c. The lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event.

   And in any of these three cases, the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.
8. on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other
9. on occurrence of a *force majeure* event which renders the premises incapable of usage by the lessee.

It also depends on the commercial understanding between the parties to the agreement. The terms and conditions of the agreement are to be considered in this regard. It is trite in law that no tenant can be evicted without the due process of law. This may entail serving a notice of termination on the tenant (statutory or otherwise) and institutions of a civil suit before the competent court, as may be necessary.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

In India, land can be broadly categorised into the following categories:

(a) rural/agriculture;
(b) urban lands; and
(c) other land such as protected/preserved forests, and eco-sensitive zones.

Land falling under the urbanised zones is developed within the framework of town planning legislation to meet the requirements of residential, commercial, evidential, institutional, SEZs, information and technology (IT) parks, etc.

Rural/agriculture land is governed by the Land Revenue Department under specific statutory enactments and needs conversion of land from 'agriculture' to 'non-agriculture' status for development purpose as per the Master Plans or any other development permitting and conclusive plans.

The zoning/permits and other related matters are region-specific and are primarily governed by State laws and guidelines issued in this regard. For instance, all building activity has to be in consonance with building bye-laws, the development code and the national building code. Construction names are well-prescribed. The municipal laws required all buildings to obtain various certificates and permissions such as the approval with respect to the building plans, No-Objection Certificates in terms of environment, fire hazards, water assurance, sewage waste, etc. Further, certificates such as Completion Certificates and Occupation Certificates are also required to be obtained in order to show completion of the building in a legal manner.

There are various laws governing zoning/permitting applicable to India and certain States, as the case may be, and related matters concerning the use, development and occupation of land in India such as:

- **Urban Planning and Development Laws**: These are State legislations enacted for the purpose of regulating zoning and land use/development regulations. The respective Urban Development Authorities of each State work in accordance with the provisions of the respective State/Central legislation.
- **Town and Country Planning Laws**: Most States in India have a Department of Town and Country Planning Act to provide for planning the development and use of rural and urban land in the respective State. Wherein, competent 'planning authorities' are constituted which perform functions like formulating the Master Plan, dividing the State into zones based on their developmental potential, regulating the development in and around town, granting licences to owners having clear title of land, formulating Zonal Developmental Plans, etc.

- **Master Plans**: A Master Plan can be more clearly understood as the long-term perspective plan for guiding the sustainable planned development of the city. This document lays down the planning guidelines, policies, development code and space requirements for various socio-economic activities supporting the city population during the plan period. It is also the basis for all infrastructure requirements. It is the subject matter of each State.

The **Constitution of India** has envisaged within its framework the inalienable need to conserve and protect the environment and all its components. Article 246 of the Constitution of India divides the subject areas of legislation between the Union and the States into three lists namely: the Union List (List I); the State List (List II); and the Concurrent List (List III) which are further listed under the Seventh Schedule of the Constitution of India. Matters related to environmental protection are enlisted in the Concurrent List and, hence, both the State and the Union have jurisdiction with respect to the same. However, in matters of repugnancy, the Union will prevail.

The laws and provisions that govern environmental regulations and matters connected therewith are:

- The National Green Tribunal Act, 2010.
- The Air (Prevention and Control of Pollution) Act, 1981.
- The Water (Prevention and Control of Pollution) Act, 1974.
- The Environment Protection Act, 1986.
- The Hazardous Waste Management Regulations, etc.
- The Biomedical Waste (Management and Handling) Rules, 1988.
- The Indian Forest Act, 1972.
- The Forest Conservation Act, 1980.
- The Biological Diversity Act, 2002, etc.

The real estate sector is subject to many Central, State and local regulations designed to protect the environment. Amongst other things, these laws regulate the environmental impact of construction and development. The Ministry of Environment and Forest (MoEF) is the key national regulatory agency responsible for policy formulation, planning and coordination of all issues related to environmental protection.

With respect to forest conservation, the Forest (Conservation) Act, 1980 regulates development restrictions in forest lands and preservation of forests through State Government. The MoEF mandates that an 'Environmental Impact Assessment' must be conducted for projects and requisite certificates shall be obtained from the respective State authorities operating under the MoEF.

### 12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.

The State can acquire private property under eminent domain by the virtue of Article 31(2) as it categorically states that land can be acquired by the State only for public purpose in consideration of compensation.

The Land Acquisition Act 1894 (Erstwhile LA Act) has been the paramount legislation governing acquisition of private property by the Government. Provisions for acquisition of land are also found in other legislation, including:

i. the Indian Forests Act 1927;
ii. the Metro Railway (Construction of Works) Act 1978;
iii. the National Highways Act 1956;
iv. the Petroleum and Minerals, Pipelines (Acquisition of Right of User in Land) Act 1962; and
v. state-specific laws.

The Erstwhile Land Acquisition Act was replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (LARR Act), which took effect from 1 January 2014. The collector computes the amount to be granted as compensation under Section 26 of the Act and, having determined the market value of the land to be acquired, shall calculate the total amount of compensation to be paid to the landowner (whose land has been acquired) by including all assets attached to the land.

The LARR Act provides a detailed mechanism for the calculation of the amount of compensation and the factors to be considered while arriving at such amount. The LARR Act does not provide any scope for modification of such compensation by way of contractual arrangements. In addition, under the LARR Act, acquisition follows a far more detailed process that includes conducting a social impact study of the proposed acquisition, planning and taking steps for rehabilitation and resettlement of landowners, seeking the consent of landowners, etc.

Finally, the collector, having determined the total compensation to be paid, shall arrive at the final award, impose a '*Solatium*' amount equivalent to 100% of the compensation amount which shall be in addition to the compensation payable to any person whose land has been acquired. In addition to the market value of the land provided under Section 27, the collector shall, in every case, award an amount calculated at the rate of 12% *per annum* on such market value for the period commencing on and from the date of the publication of the notification of the social impact assessment study under Sub-section (2) of Section 4, in respect of such land, till the date of the award of the collector or the date of taking possession of the land, whichever is earlier.

### 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

- **Local and Special Planning Authorities**: A local/special planning authority (LPA) is the local/special government body that is empowered by law to exercise urban planning functions for a particular area such as the Town and Planning Commission, Municipality of the respective urban areas, Urban Development Authorities, etc. These authorities are formed under State Legislatures for the purpose of land use planning wherein, competent 'planning authorities' are formed which usually go by the name of Town and Planning Department of every such State which performs functions like formulating the Master Plan, dividing the State into zones on the basis of their developmental potential, regulating the development in and around town, granting licences to owners having clear title of land, formulating Zonal Developmental Plans, etc., for example, DTCP Haryana, DTCP Uttar Pradesh, etc.
- **MoEF**: The apex administrative body for:
  (i) regulating and ensuring environmental protection;
  (ii) formulating the environmental policy framework in the country;
  (iii) undertaking conservation & survey of flora, fauna, forests and wildlife; and
  (iv) planning, promotion, co-ordination and overseeing the implementation of environmental and forestry programmes.
- The Ministry is also the nodal agency in the country for the **United Nations Environment Programme (UNEP)**.
- **Central Pollution Control Board (CPCB)**: Primarily executes the responsibility for prevention and control of industrial pollution at the Central Level, which is a statutory

authority, attached to the MoEF. The State Departments of Environment and State Pollution Control Boards are the designated agencies to perform this function at the State level.

- **Environmental Information System (ENVIS)**: Has been established as a plan programme and as a comprehensive network in environmental information collection, collation, storage, retrieval and dissemination to varying users. ENVIS has developed itself with a network of participating institutions/organisations.

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

**Land Use Change Permits/Land Clearance**: This is required if any land which is demarcated as 'agricultural land' is to be converted into 'non-agricultural land' for the purpose of construction, development and/or use of real estate.

**Zoning Permits**: Land in each State is differentiated and demarcated on the basis of certain factors (like growth potential) for different purposes through the Master Plans of every such State, respectively. Therefore, a zoning permit may be required for any construction, change of land use and the like of the concerned property/land.

The State town planner checks the city development with the planning board and forwards the proposals to various other concerned authorities in the city as required for issue of case-specific approvals/NOC before granting zoning approval.

**Building Sanctions and Approvals**: The next step requires an approval from the authority for sanction of building plans/building permits under the provisions of Building Bye-laws, Master Plans and Local Body Acts. Building approval comprises the building plan and the layout approval for the construction of the building.

1) **Layout approval**:
   The builder has to get approval of the layout plan from concerned authorities before starting construction of a residential or commercial building.
   The Approved Layout Plan is as per approved FAR (Floor Area Ratio) or FSI (Floor Space Index).
2) **Building Plan**:
   The building plan ensures that the building complies with building laws.
   Once the building plan is approved, the builder should commence construction work within two years and there should be no deviation from the sanctioned plan.
3) **Intimation of Disapproval or similar processes/stages**:
   Intimation of Disapproval (IOD) basically states conditions that need to be complied with during different phases of an under-construction project. Intimation of Disapproval in some places is also known as a Building Permit.
4) **RERA Approval**:
   The Real Estate Regulation and Development Act, 2016 has been enacted for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project. The Act also governs that residential and commercial projects sold by the Developer/builder, during the process of development/construction of the intended building/project, also have to obtain approval under the Real Estate Regulation and Development Act, 2016 and various Rules therein, which are formulated in accordance with the respective States.

**Environmental Impact Assessment (EIA)**: The purpose of an EIA is to identify and evaluate the potential impacts (beneficial and adverse) of development and projects on the environmental system. This exercise should be undertaken early enough in the planning stage of projects for selection of environmentally compatible sites, process technologies and such other environmental safeguards. There are various parameters which bring projects under their ambit.

While all industrial projects may have some environmental impact, all of them may not be significant enough to warrant elaborate assessment procedures. The need for such exercises will have to be decided after initial evaluation of the possible implications of a particular project and its location.

- **Environmental Clearances/Approvals**: The environment consultant hired by the company prepares the Environment Impact Assessment Report which is submitted to the State level expert Appraisal Committee which refers it to the State Environment Impact Assessment Authority (SEIAA).

The main clearances to be obtained are:

- **Fire Department Permit**: A permit from the local fire department is required to be obtained.
- **Air and Water Pollution Control Permit**: Permits for Air and Water Control are to be obtained before the commencement of any real estate activity by the competent local authority of the Fire and Water department. Environmental protection regulations may also require approval be obtained before doing any construction or beginning operation.

Other permits/approvals to be obtained (if necessary) are:

- Coastal Regulatory Zone (CRZ) clearance is obtained wherever required by the Coastal Zone Management Authority.
- Ancient Monument Approval by the Archaeological Survey of India.
- NOC from Airport Authority of India by Civil Aviation Department/Airport Authority of India.
- NOC from the Sewerage Department (Municipal).
- NOC from the Storm Water and Drain Department (Municipal).
- NOC from the Electric Department (Municipal), etc.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Building/use permits and licences are commonly obtained through applications and submission of required documents to the concerned competent authorities.

However, there are certain situations wherein permission may be regarded as implied/deemed. If no such approval or rejection is communicated to the interested party within the stipulated timeframe, it is considered to be a 'Deemed Approval'. This concept is also provided under Section 5(2) of the RERA, 2016 wherein if the Authority fails to grant the registration or reject the application, the project shall be deemed to have been registered.

However, if any real estate development/construction is carried out in contravention of law being in force or in the absence of such approval by the concerned competent authority, it would be deemed to be an 'Unauthorised Construction'.

Also, the concept of self-certifying construction has been introduced in certain jurisdictions wherein a registered architect will be able to submit the building plans under self-certification on the official portal of the administration, as per the Haryana Building Code, 2017.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

A nominal cost is to be incurred by the parties to obtain a building or use permit; however, the same varies from State to State.

Further, the time involved in obtaining such permits/certifications also varies on the basis of respective States, depending on the rules that have been enacted in that regard. However, in a generic sense, the time involved for such process is usually between 30 to 120 days.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

As per the Ancient Monuments and Archaeological Sites and Remains, 1958, an '**Ancient Monument**' is defined under Section 2(a) as any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than 100 years, and includes:

(i) the remains of an ancient monument;
(ii) the site of an ancient monument;
(iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and
(iv) the means of access to, and convenient inspection of, an ancient monument.

If the Central Government apprehends that the protected monument is in danger of being destroyed, injured, misused, or allowed to fall into decay, it may undertake the maintenance of the protected monument.

A **Prohibited Area** is demarcated as the area beginning at the limit of a Protected Area or the protected monument and extending to a distance of 100m in all directions. However, the Central Government may increase this area even beyond 100m and by notification in the Official Gazette; and specify such area to be a protected area. Every area, beginning at the limit of a prohibited area in respect of every ancient monument and archaeological site and remains, declared as of national importance extending to a distance of 200m in all directions shall be a **Regulated Area**.

The transfers of ownership of lands that are within the limits as prescribed under the Act and referenced here above ('regulations') are not restricted or impacted. Such land should not be a part of such monument.

The development of such lands which are in the vicinity (and not part of the ancient monument) would have to be in compliance with the regulations.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

All reliable information can be obtained by the potential buyer on the website of various government departments of the CPCB [available online at: http://cpcb.nic.in/]. Information regarding environmental data and standards can also be obtained online on the above-mentioned website.

A technical diligence is also to be conducted by the potential buyer wherein they can check whether the development norms are being complied with or not. The buyer may obtain information regarding the emission standards; as mentioned above.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

**Environmental Clean-up Laws** govern the removal of pollution or contaminants from environmental media such as soil, sediment, surface water, or ground water.

There is a certain standard prescribed for the emission of noise, water and air pollution permitted. Only if the standards are met, will the approval be granted by the appropriate government. Even if the approval is granted, it may be cancelled if the standards are not complied with. There are legislations for water discharge and air pollution and several other environmental laws are made to protect the environment.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

**As per the Energy Conservation Act, 2001**:
Energy conservation building codes means the norms and standards of energy consumption expressed in terms of per sq. m of the area wherein energy is used and includes the location of the building (Section 2(f)).

To curb energy consumption in buildings, the Indian Government issued the Energy Conservation Building Code (ECBC) in 2007. However, the impact of the ECBC depends on the effectiveness of its enforcement and compliance. Currently, the majority of buildings in India are not ECBC-compliant. Whether the projected targets can be achieved depends on how the code enforcement system is designed and implemented.

Although the development of ECBC lies in the hands of the national Government – the Bureau of Energy Efficiency under the Ministry of Power – the adoption and implementation of ECBC largely relies on State and local governments.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

India has introduced a multi-faceted policy framework that seeks to address climate change control by reducing greenhouse gas emissions.

In June 2008, the Indian Government launched India's first National Action Plan on Climate Change with eight core 'national missions' focused on the broader themes of mitigation, adaption and stakeholder engagement.

The National Action Plan is mentioned in India's Five-Year Plan (2012–2017), which guides overall economic policy. The goals pertaining to climate change are included in this plan which are:

- reduce emissions intensity in line with India's Copenhagen pledge; and
- add 300,000 MW of renewable energy capacity.

The present Government has taken steps to scale up clean energy production and has initiated a shift in India's stance in international climate negotiations. The Government's acknowledgment of the threat posed by climate change is reflected in one

of the Government's first initiatives which was to rename the environment ministry from the '*Union Ministry of Environment and Forests*' to the '*Ministry of Environment, Forests and Climate Change*'. The newly reconstituted Prime Minister's Council on Climate Change has also set up new initiatives on coastal zone management, wind energy, health and waste-to-energy.

India is also committed to the Paris Agreement.

**Paris Agreement**

This agreement aims to reduce the increase in global temperature rise and move towards achieving the common goal of sustainable development.

**Renewable Energy**

At the federal level, India has implemented two major renewable energy-related policies. First, the Strategic Plan for New and Renewable Energy, which provides a broad framework for replacing use of fossil fuels by harnessing new energy sources.

Second, the National Solar Mission, which sets capacity targets for renewable sources.

**Solar Energy**

In November 2014, the Indian Government announced that it would increase the solar ambition of its National Solar Mission to 100 GW installed capacity by 2022. It will amount to a five-time increase and over 30 times more solar than it currently has installed.

Concurrently, the Indian Government has also announced its intention to bring solar power to every home by 2019. For this purpose, the Government has invested in 25 solar parks, which have potential to increase India's total installed solar capacity almost tenfold.

**Wind Energy**

The Twelfth Five-Year Plan proposes a National Wind Energy Mission. It is similar to the National Solar Mission, and the Indian Government recently announced plans to enhance wind energy production from 50,000 to 60,000 MW by 2022. The Government is also planning to promote an offshore wind energy market.

**Transportation**

In early 2014, India announced new vehicle fuel-economy standards. Apart from this, India has done away with BS III vehicles which would help in controlling air pollution.

**Smart Cities**

The present Government has launched an initiative to create 100 'smart cities' with better transport systems, utilities, and energy networks to address the challenges of urban growth.

India's National Mission on Sustainable Habitat also includes initiatives such as the ECBC, mandated for commercial buildings in eight States, and actions to support recycling, waste management, and improved urban planning.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

India has adopted the National Electricity Plan (NEP) released in April 2018 by which it aims to achieve its '2°C-compatible' under the Paris Agreement NDC climate action targets. The Government's aims regarding electric vehicles are unclear, resulting in a sporadic uptake of EV technology across States. It could improve this by mandating action plans at a national level and working towards its earlier aim of all new vehicles being electric by 2030.

The Indian Government is optimistic that through the Perform, Achieve and Trade (PAT) scheme, the industry sector will continue to make a substantial contribution to the country's climate targets. The Ministry of Power and the Bureau of Energy Efficiency state that the first cycle of the PAT scheme resulted in savings of 5.6 GW and 31 MtCO2e between 2012 and 2015.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

There exist regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings as mentioned below:

- **Model Building Bye-Laws 2016**: The Town and Country Planning Organisation, Ministry of Urban Development has made an effort to prepare 'Model Building Bye-Laws 2016' for the guidance of the State Governments, Urban Local Bodies, Urban Development Authorities and others. The salient features of MMBL, 2016 provide for provisions for Safety and Security, Barrier Free Environment, Environmental Concerns, Adoption for Modern Construction Technology, Swachh Bharat Mission, Ease of Doing Business, Rain Water Harvesting and Effects of Communication Technology.
- **Powers of entry and inspection**: The Environment (Protection) Act, 1986, under the ambit of Section 10, allows any person empowered by the Central Government to have a right to enter, at all reasonable times with such assistance as he considers necessary, any place:
  (a) for the purpose of performing any of the functions of the Central Government entrusted to him;
  (b) for the purpose of determining whether and, if so, in what manner, any such functions are to be performed; or
  (c) for the purpose of examining and testing any equipment, industrial plant, record, etc. or for conducting a search of any building and for seizing any such equipment, industrial plant, record, register, document or other material object if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the rules made thereunder or that such seizure is necessary to prevent or mitigate environmental pollution.
- **Air (Prevention and Control) of Pollution Act, 1981**: It aims at curbing the environmental pollution by targeting sources that cause par-standard air pollution through harmful oxides, particulate matter and sulphides. It provides for provisions for State and Central Boards for the purpose of declaring areas as pollution control areas.
- **Ministry of Environment & Forests Government of India (Office Memorandum)**: The Ministry had issued guidelines for high-rise buildings.

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# Indonesia


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The basic law for land in Indonesia is Law No. 5 of 1960 on Agrarian (the "**Agrarian Law**"), which is quite a complex Law reflecting and adopting customary (*adat*) law developed over hundreds of years at rural village level, and further modified by Dutch colonial rule. Prior to the issuance of the Agrarian Law, *adat* law and western law coexisted, governing land registration for Indonesians and foreigners respectively. The Agrarian Law, as further implemented by various implementing regulations, creates a uniform regime and ends the dualism on land matters while still maintaining the communal concepts applicable to land under *adat* law.

In relation to real estate, the Agrarian Law was supplemented by Law No. 1 of 2011 on Housing and Settlement Areas and Law No. 20 of 2011 on Apartment ("**Apartment Law**"), which is the umbrella law for real estate sector, covering, among others, transfer of title, land procurement, organisation of apartments, housing, and settlement areas.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The Agrarian Law and the Apartment Law are national laws applicable in all areas in Indonesia. Regional governments may issue implementing regulations and they must follow the basic principles and rules set by the Agrarian Law and the Apartment Law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

No, they are not.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Yes, the Agrarian Law divides the land title into several types where each of them is granted for specific purpose and can be owned by particular classes of persons (as elaborated in question 3.1).

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The Agrarian Law recognises various types of land title, the most common land titles are as follows:

a. Right of ownership (*Hak Milik*). A *Hak Milik* is a right that gives the holder the fullest right a person can possess over land in Indonesia. There is no time limit on the land. Only Indonesian citizens and certain limited Indonesian legal persons or entities are allowed to hold a *Hak Milik*.

b. Right to build (*Hak Guna Bangunan or HGB*). A *HGB* is the right authorising the holder to construct buildings or facilities (as opposed to land specifically intended for agricultural purposes; see the *HGU*, explained below). A *HGB* can be granted for a maximum period of 30 years, with possible extension of 20 years and renewal. A *HGB* may be held by Indonesian individuals and Indonesian legal entities, including companies with foreign shareholders (often referred to as PMA company).

c. Right to cultivate (*Hak Guna Usaha or HGU*). A *HGU* is the right authorising the holder to utilise the land for agriculture or plantation purposes. Like the *HGB*, the *HGU* is limited in duration, and is usually for 25 years but can be for a maximum of 35 years, with the option of extension for a maximum of 25 years and renewal. A *HGU* may be held only by Indonesian individuals or Indonesian legal entities, including PMA companies.

d. Right to use (*Hak Pakai*). A *Hak Pakai* is a right to utilise land or to collect the products from such land. A *Hak Pakai* may be held by Indonesian citizens and Indonesian legal entities, foreign citizens who reside in Indonesia and foreign legal entities having representation in Indonesia, representatives of foreign countries and representatives of international institutions, departments and non-departmental government institutions, regional government, and religious and social institutions. A *Hak Pakai* is limited in duration (i.e., it is based on either (1) a decree of the Ministry of Agrarian and Spatial Plan/National Land Office (BPN), or (2) a contract between the *Hak Milik* holder (i.e., the original holder title of the land) and the *Hak Pakai* holder.

e. Right of Management (*Hak Pengelolaan*). A *Hak Pengelolaan* is the right obtained from the state to control land. A *Hak Pengelolaan* can be held only by governmental bodies and agencies such as: regional governments; and state-owned companies. Each land title above is registered with the land office where the land is located, and land ownership will be based on land certificates issued by the land office.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Yes, conceptually Indonesian law recognises horizontal ownership division principle (*horizontale scheiding*), where ownership of a land can be separated and different from ownership of objects upon the land, including building. To implement this, the building owner must have a certain contractual arrangement with the landowner.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Conceptually, Indonesian law does not recognise beneficial owners of real property and therefore there is no split on the legal title and beneficiary title in Indonesia. The registered owner in the land certificate will be considered as the legal owner of the land and, so far, there has not been any real factual discussion to change this concept.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

Yes, the Agrarian Law mandates all land in Indonesia to be registered. However, as the concept of the land registration was only introduced in 1960, there are still quite numbers of land that are yet registered.

**4.2 Is there a state guarantee of title? What does it guarantee?**

The land certificate validly issued by the relevant land office provides guarantee to the holder of peaceful use and right to utilise the land in accordance with its usage (although there is a five-year grace period after the issuance of land certificate for a claim to be brought up against the land certificate).

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Strictly speaking, ownership right over a plot of land must be registered and evidenced by a land certificate. However, the Agrarian Law also recognises unregistered land possessed by individuals based on possession or *adat law*. One consequence of unregistered land is that it cannot be subject to a security interest and its ownership may be subject to challenge.

**4.4 What rights in land are not required to be registered?**

If the individual can prove that he/she actually and physically possesses and utilises the land (including through statements from the head of the region), he/she has the right to sell the land to a third party.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probation period or different classes of titles. However, the regulation provides a grace period of five years since the issuance of land certificate where an interest party may raise a claim.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

The land title is transferred once the seller and the buyer sign a deed of transfer/deed of sale and purchase in Indonesian language made before the authorised land deed official.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

There is no priority between one land title to another, except for differentiation of rights given under a specify type of land titles as explained in question 3.1.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

Indonesia does not have multiple land registrations. The regulation mandates the BPN to conduct the registration of land. To support this, BPN delegates the registration authority to each land office in the regional area. Based on the official website of BPN, there are more than 500 land offices in Indonesia. Each land office serves the registration of land in its working area.

**5.2 How do the owners of registered real estate prove their title?**

The title land or apartment unit is evidenced by a certificate issued by the land office. There is no uniform evidence of ownership for houses but, in practice, building permission (*izin mendirikan bangunan*) issued by the relevant regional government is commonly accepted as evidence of ownership for houses.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

No. Currently transactions of the land and building or apartment unit must be done physically by signing the deed of

transfer before the authorised Land Deed Official. To register such transfer, the purchaser must physically submit the original land certificate and the deed of transfer to the land office.

To access the information on the registered land and/or apartment unit including encumbrance, the applicant must physically visit the relevant land office by presenting the original land certificate or strata title and a Power of Attorney from the land and/or apartment owner is mandatory.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Theoretically, and as a general rule, an injured party may seek compensation from a wrongdoer by commencing a legal proceeding.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Please refer to the discussion in question 5.3.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

**Land Deed Official**
Indonesian laws require the land deed of transfer to be made before an authorised Land Deed Official. The Land Deed Official is responsible for checking and ensuring the validity of the land certificates, any existing mortgage and dispute over the land, before the parties can proceed with the land transfer. The same goes for encumbering mortgage over land, whereby the mortgage deed must be made in a notarial deed prepared by the Land Deed Official.

**Lawyer**
For the buyer, a lawyer will carry out the due diligence over the land document, to give the parties advice on the structure of the transaction and to prepare the documentation, including the conditional sale and purchase agreement or the draft mortgage deed.

**Property Agent/Broker**
To conduct among others: marketing; consultation; and advertising.

**Appraisal**
To conduct an assessment on the price of the property which may be used by the buyer and seller to determine the purchase price.

**6.2 How and on what basis are these persons remunerated?**

This is mostly on contractual basis.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

The source of financing depends on types of transaction. For individual housing transactions, the most common funding source is through bank loans.

For development of property such as construction of apartment or office building, this normally requires funding from financial institutions.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The Government of Indonesia is now conducting an initial study to move the capital city from Jakarta to Kalimantan. If the government implements this, we would expect the real property market will be very active both in Jakarta and the new capital.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Yes, and according to new trends, there is a slight oversupply of apartment and office buildings in the business district in Jakarta.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The transfer of land title must be done by way of signing a deed of transfer before an authorised Land Deed Official where the real estate is located.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

There is no strict obligation for disclosure, but it is crucial for its own interest because the seller is liable for any defects that are unknown by the buyer.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, if the buyer suffers loss as a result from the misrepresentation.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Yes, it is common practice for buyers to require warranties from the seller, normally covering non-existence of security interest,

no outstanding payment, no dispute, foreclosure, no claim from any third party or any government institutions and no environmental damages/pollution. These warranties are normally included regardless whether or not the seller carries out its own due diligence.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

This is a contractual matter but, generally, the seller is liable for any defect that is unknown by the buyer, as well as for misrepresentation and mis-warranties.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In case of sale and purchase of land: the purchase price; and property tax, as elaborated in section 9.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

Housing financing or locally known as *Kredit Perumahan Rakyat* (*KPR*) could be classified into two types: (i) with government subsidy; and (ii) without government subsidy. Only Indonesian citizens categorised as "low-income" meeting certain criteria provided under the regulation are entitled to the *KPR* with government subsidy, which agreement must follow the specific requirements set by the government, including on: maximum interest; and instalment period.

As for the *KPR* without government subsidy, this is a contractual matter, subject to certain banking and financing regulations.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The most common security interest created by the borrower is mortgage (*Hak Tanggungan*) over the financed real estate.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

To create a mortgage, the mortgagor and the mortgagee must sign a deed of mortgage before an authorised land deed official and have it registered with the BPN where the real estate is located. The mortgage is created only after the registration is complete, which would be evidenced by a mortgage certificate. In an enforcement event, the mortgagee cannot possess the land but rather it must auction the land and have the proceeds. Theoretically, the mortgage certificate has a self-executionary power without the need for a court decision but, in practice, many mortgagees seek court decisions to strengthen its enforcement position.

**8.4 What minimum formalities are required for real estate lending?**

There is no formality to create a real estate lending as it is a contractual matter, subject to certain banking and financing regulations.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

By creating a mortgage over the financed real estate, which will give security interest to the lender.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Under Indonesian law, a mortgage (and all other security interest) is accessory in nature meaning it is created only in the event there is an underlying obligation. Consequently, if the underlying agreement is void by the court, the mortgage will also be considered as void.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

In principle, creditors can enforce security through a sale by public auction without recourse to the courts. In practice, however, this is often difficult as we have seen some borrowers try to frustrate the enforcement by raising claims against the lenders and the auction places.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

In a bankruptcy proceeding there is a "stay period" of 90 days as of a verdict pertaining a declaration of bankruptcy having been read out (the lenders can execute their right over the mortgage on the 91st day and must exercise the rights within no more than two months after the insolvency condition).

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

The most common security created over shares is pledge (*gadai*) which can be enforced, either through public auction or based on court decision in civil proceeding.

The lender is not allowed to appropriate the security given by the borrower.

## 9 Tax

**9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?**

The general rule for transfer of land is that the seller is subject to income tax in the amount of 2.5% of the purchase price and the buyer is subject to the land and building acquisition duty (*bea*

*peralihan hak atas tanah* – BPHTB) in the amount of maximum 5%, depending on the region where the land is located.

**9.2 When is the transfer tax paid?**

When transferring a land, the income tax and BPHTB must be paid before the seller and buyer enter into the deed of transfer to transfer the title of the land.

**9.3 Are transfers of real estate by individuals subject to income tax?**

Yes, the same rules apply for individuals. Please refer to our response to question 9.1.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

As we are not qualified as tax lawyers, we do not have capacity to comment.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

As we are not qualified as tax lawyers, we do not have capacity to comment.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

As we are not qualified as tax lawyers, we do not have capacity to comment.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

As we are not qualified as tax lawyers, we do not have capacity to comment.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Real property lease or rental is generally a contractual matter subject to Indonesian Civil Codes.

**10.2 What types of business lease exist?**

No regulatory types of business lease exist; it is a purely contractual matter.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

**Length of Term**
Depends on types of real property, for example: land lease is normally longer (at least 2.5 – five years) than lease of office units (one year – two years).

**Rent Increase**
The increase should not be significant and is usually determined when the initial lease period lapses.

**Tenant's Right to Sell or Sub-Lease**
The common practice in Indonesia usually restricts the tenants to sell or sub-lease the real property.

**Insurance**
In some cases, the lessors usually include the insurance premium as tenants' expenses.

**Change of control**
Normally, the lessor simply requires a prior notification from the lessee.

Corporate restructuring (e.g. mergers) will result in a transfer of lease.

Under Indonesian law, in the event of merger, the rights and obligations are, by law, transferred to the surviving entity and therefore the existing lease would continue to exist.

**Repairs**
The common practice is that repairs are of the lessor's responsibilities unless if the damages are caused by the tenant.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

As we are not qualified as tax lawyers, we do not have capacity to comment.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

This is a purely contractual matter under Indonesian law. Commonly, the termination event is triggered by either mutual consent or occurrence of an event of default.

Most common remedies are penalties and refunding of the paid lease fees.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

If the lease agreement is novated to a third party, the answer is yes, unless agreed otherwise by all parties.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green lease obligations are not yet a common practice in Indonesia, although in certain industrial sectors, we have seen some landlords require their tenants to minimise the pollution generating from its industrial activity.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

For working spaces, yes, especially in Jakarta as it offers a more competitive fee structure compared to traditional lease fees, particularly for start-ups. In contrast, co-living is not yet a common practice in Indonesia.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Please refer to our answer to question 10.1 above.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

There is no difference whether the premises are intended for multiple residential occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

- Length of term: normally on a yearly basis.
- Rent increase/controls: not significant, to be determined at the end of the lease period.
- The tenant's rights to remain in the premises at the end of the term: this is a contractual matter. In practice, to allow this, the parties will include the automatic extension provision in the lease agreement.
- The tenant's contribution/obligation to the property "costs", e.g. insurance and repair: this is a contractual matter. In most cases, repair costs are of the lessors' unless caused by lessee's fault.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

This is a purely contractual matter under Indonesian law.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Law No. 26 of 2007 on the Spatial Planning is the main law governing zoning in Indonesia. It mandates each of the regional governments to manage zoning and utilisation of land in its respective territories and therefore zoning rules may be different from one area to another.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The government can only force landowners to sell the land for the purpose of public use for, among others, roads, airports, terminals, oils and gas infrastructure, power plans and their transmissions, hospitals and/or government offices.

The procedure of land procurement for public purpose is:

1. the public institution (i.e. representing the government) to prepare the land procurement plan;
2. socialisation of land procurement plan to the landowner, including settlement issues;
3. announcement of land procurement;
4. collection of data relating to the land, including the area and owner of the land;
5 valuation of the land by an independent assessor;
6. negotiation; and
7. transfer of land title.

In the event that the landowner refuses the compensation, public institutions may consign the compensation to the relevant district court, and the land is deemed to be legally transferred to the public institution.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Land use, occupation and zoning is mainly supervised and managed by the BPN and the relevant regional government where the land located. The buyer can obtain the information concerning the zoning of the land by submitting its inquiries to the relevant regional governments.

The main bodies responsible for the regulation, supervision and protection of environment are the Ministry of Environment and Forestry and the regional government. There is no official public source to collect the data on the environment condition of a land. In practice, buyers usually discuss with officials of the Ministry of Environment and Forestry on the allegation of environment violation over the land, and in some case, engaging an independent surveyor to conduct environmental due diligence over the land.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

There are several licences that relevant for the construction of a building, including:

1. Location permit, which effectiveness is subject to certain condition precedent fulfilment, except in the case of, among others, the land area is: (i) less than one hectares for general non-agriculture purpose or five hectares for low-income housing projects; (ii) located in a special zoning and industrial area; and/or (iii) to be used for expansion purposes and located adjacent to the existing land, in which case the location permit will ensure that the construction plan is consistent with the zoning regulation.
2. Building construction permit or locally known as *Izin Mendirikan Bangunan – IMB*. The *IMB* is required before construction works is commenced.
3. Building worthiness certificate or commonly referred to as *Sertifikat Layak Fungsi – SLF*. Upon the completion of the construction work, the developer must obtain *SLF* to ensure fulfilment of the building technical and safety aspects.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Yes, the IMB and SLF are commonly obtained and mandatory for the construction and utilisation of a building. There is no implied permission.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

This depends on the area, because there are retributions to be paid to the regional government for the issuance of IMB and SLF. As for the timing, it also varies depending on the area and complication of the building.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Yes, through Government Regulation No. 10 of 1993, which classifies cultural heritage into two types: (i) cultural heritage obtained hereditarily; and (ii) cultural heritage owned by the country.

The transfer of the first cultural heritage may only be made in inheritance or to the country, while the transfer for the second will need to be notified and registered to the regional government.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

No, there is no public register listing the contaminated land in Indonesia. In practice, the buyer may request information from either the Ministry of Environment and Forestry and regional government on the alleged or existing violation of environmental law in that particular area. However, there is no guarantee that such information is reliable and comprehensive. The buyer may consider to engage a third-party surveyor to conduct an environmental due diligence to the land before purchasing it.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Under the Law No. 32 of 2009 on Environmental Protection and Management, a person proven to cause pollution on a real estate, may be imposed with obligation to restore the condition of the land.

In the mining sector, mining companies are also required to conduct a reclamation of the land after exploring and exploiting phases.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

For private buildings, the only relevant green building regulation is the one specified in our answer to question 13.3.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

There is yet to be a national law on real estate for emissions trading.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Indonesia is committed to reduce unconditionally 29% of its greenhouse gas emissions by the year of 2030. Subject to availability of international support, the target is 41% reduction of emissions by 2030.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The Minister of Public Works and Public Housing Regulation No. 02/PRT/M/2015 TAHUN 2015 of 2015 on the Green Buildings introduce the concept of an environmentally-friendly building. Any building fulfilling the requirement as set out by the regulation may obtain an incentive from the government, including ease of licensing matters.

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The authors would like to thank associate Mr. Rainer Faustine Jonathan for his invaluable assistance in the preparation of this chapter. Mr. Rainer Faustine Jonathan is a young, talented lawyer with more than five years' experience assisting both domestic and multinational companies in general corporate and dispute resolutions matters. He read law at Universitas Indonesia and is admitted to the Indonesian bar. Prior to joining Walalangi & Partners, Mr. Rainer Faustine Jonathan worked as an associate in other prominent law firms in Jakarta. He was involved in the working group that handled several high-valued litigation and arbitration cases related to employment, commercial dispute and bankruptcy as well as suspension of payment. In addition, he also assisted clients in corporate matters, among others in bond issuance, acquisition of shares and land acquisition.

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- *Chambers Global* 2019: Leading Individual in Corporate and M&A.
- *Chambers Asia-Pacific* 2019: Leading Individual in Corporate and M&A.
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Founded by Mr. Luky I. Walalangi, a highly regarded lawyer with nearly two decades of experience, the firm is associated with Nishimura & Asahi, the largest law firm Japan, in reflection of W&P's high-quality standards.

W&P is recognised for its remarkable capacity to grasp and advance the clients' big-picture objectives on multiple levels, as well as further their long-term growth and success.

W&P has been ranked by *Chambers Asia-Pacific* 2020 in Corporate and M&A and is the Best New Law Firm 2019–2020 and Real Estate Firm 2019–2020 by *Asia Law Business Journal*. In addition, W&P are now ranked by *Asian Legal Business* in M&A, which is a huge leap from "Notable Firm" in 2018.

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# Ireland


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Irish law was historically based on old legislation which predated the establishment of the Irish State in 1922, such as the Conveyancing Acts, 1881–1911 (the "**Conveyancing Acts**") and the Settled Land Acts, 1882–1890. The Land and Conveyancing Law Reform Act, 2009 (the "**2009 Act**") replaced much of the old law, including the pre-1922 statute law, and modernised the law and conveyancing practice. There is modern legislation governing registration of title (the Registration of Title Act, 1964 (the "**1964 Act**") which was modified by the Registration of Deeds and Title Act, 2006 (the "**2006 Act**")) to facilitate the increasing computerisation of the property registration system in this jurisdiction and succession law (the Succession Act, 1965).

There is extensive statutory protection afforded to family property in particular, which affects conveyancing practice (e.g. the Family Home Protection Act, 1976). This is partly due to the fact that Ireland has a written Constitution enshrining certain fundamental rights which override any other law, including legislation. Thus, it is not uncommon to find legislation declared by the domestic courts to be unconstitutional and, therefore, null and void.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Irish property law is essentially based on both legislation and common law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

There are no international laws of direct relevance to real estate in this jurisdiction. However, as Ireland is a common law jurisdiction, court decisions made in other common law jurisdictions (such as the UK) are often accepted as having persuasive authority by the Irish judiciary.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are no legal restrictions on the ownership of real estate by non-resident persons in this jurisdiction. However, anti-money laundering legislation requires that a number of checks be carried out on a potential buyer; the identity of the buyer, the source of funds and the ability to fund the acquisition of real estate need to be verified.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Irish property can be held under freehold title which confers absolute ownership, or a leasehold title which confers ownership for the period of years granted by the relevant lease and held from the owner of the freehold or the owner of the superior leasehold title in the relevant property. A leasehold interest is based on a contractual relationship between the lessor/landlord and the lessee/tenant.

The quality of the title to land generally falls into four categories, namely:

- Absolute title.
- Possessory title.
- Qualified title.
- Good Leasehold title.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Real estate in Ireland comprises all immovable property. This includes land and any buildings or fixtures on the land. No distinction is made between title to land and title to buildings where they are in the same ownership. Typically, the owner of land is also the owner of any buildings erected on the land. However, there is no impediment to having different owners.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

There is a split between the legal title and the beneficial title of property in Ireland. The 2009 Act provides that the entire beneficial interest in property passes to the buyer on the making of an enforceable contract for the sale or other disposition of land (unless the provisions of the 2009 Act are disapplied). The beneficial interest in property can also be held through a traditional "off-title" trust.

In respect of registered land, the Land Registry does not recognise a split between legal title and beneficial title and only the legal owner of property will be recorded in part 2 (the ownership section) of the folio. A beneficial owner may, however, protect his or her interest in the property by registering a caution or an inhibition against the folio in question. The purpose of a caution is to obtain notice of dealings by the registered owner so that the cautioner has an opportunity to assert his or her unregistered right(s). An inhibition, on the other hand, operates as a restriction on registration that prevents all registrations except those made in compliance with the terms thereof.

There are currently no proposals to change the split between legal title and beneficial title of property in Ireland.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

The Property Registration Authority (the "**PRA**") is the State body responsible for the registration of property transactions in Ireland and the system of registration of title (ownership) to land in Ireland.

The PRA is a statutory body established on 4 November 2006 under the provisions of the 2006 Act.

The main functions of the PRA are to manage and control the Land Registry and the Registry of Deeds and to promote and extend the registration of ownership of land.

The Land Registry was established in 1892. When ownership is registered in the Land Registry, the deeds are filed with the Land Registry and all relevant particulars concerning the property and its ownership are entered on folios which form the registers maintained in the Land Registry. In conjunction with folios, the Land Registry also maintains maps (referred to as filed plans). Both folios and maps are maintained in electronic form.

The Registry of Deeds was established in 1707 to provide a system of voluntary registration for deeds affecting land and to give priority to registered deeds over unregistered but registrable deeds. There is no statutory requirement to register a document in the Registry of Deeds, but failure to do so may result in a loss of priority. The effect of registration is generally to govern priorities between documents dealing with the same piece of land. The primary function of the Registry of Deeds is to provide a system of recording the existence of deeds affecting unregistered property. When a deed is lodged in the Registry of Deeds it must be accompanied by the relevant application form (in a prescribed form) which is a summary of the essential information of the relevant deed.

**4.2 Is there a state guarantee of title? What does it guarantee?**

A title registered in the Land Registry is guaranteed by the state. The Land Registry indemnifies any person who suffers loss through a mistake made by the Land Registry. A buyer, therefore, can accept the folio as evidence of title without having to read the relevant deeds. However, the State does not guarantee the conclusiveness of boundaries or the area of the relevant property as identified on the Land Registry maps.

It should be noted that the Registry of Deeds does not guarantee the effectiveness of a deed nor does it interpret a deed, but only records the existence of the deed. The registration of a deed in the Registry of Deeds governs priorities.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Any unregistered property (property registered in the Registry of Deeds) purchased in the State after 1 June 2011 is subject to compulsory first registration in the Land Registry.

Registration is also compulsory where land is bought under the Land Purchase Acts or where land is acquired after 1 January 1967 by a statutory authority.

**4.4 What rights in land are not required to be registered?**

Except as set out in question 4.3, there is no requirement that documents or titles be registered, but it is good conveyancing practice that deeds be registered in either the Registry of Deeds or the Land Registry as appropriate in order to preserve the priority of the deed.

In the case of registered land, there are certain rights which must be registered in the Land Registry to gain protection; otherwise these rights will not be protected against a *bona fide* buyer for value without notice (e.g. rights of residence, restrictive covenants, leases for a term exceeding 21 years). Section 35 of the 2009 Act provides that an easement shall be acquired at law by prescription only on registration of a court order under section 35. Section 35(4) of the 2009 Act provides that the order shall then be registered in the Registry of Deeds or Land Registry as appropriate. Section 37 Civil Law (Miscellaneous Provisions) Act 2011 amended the 2009 Act and the 1964 Act to enable the PRA to register easements without a court order where there is no disagreement between the parties concerning entitlement to an easement or profit.

There are also a number of burdens which affect registered land without registration, such as public rights and occupational tenancies for terms not exceeding 21 years.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period following first registration.

As noted at question 3.1, the quality of the title to registered land generally falls into four categories, namely:

- Absolute title: This is the best type of title to land that can be acquired in Ireland.

- Possessory title: This category of title is granted where an applicant does not have paper title to land but is in occupation of the land and/or in receipt of the rents and profits issuing from the land.
- Qualified title: This category of title is granted where an applicant can only establish title for a limited period and/or where the title is subject to reservations.
- Good Leasehold title: This category of title applies where the Land Registry has not investigated the title of the lessor to grant the lease to the applicant. Note that if the superior title is already registered, then the lessee will be registered with an absolute title.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

The legal title usually passes when the purchase price is paid to the seller and the buyer takes delivery of the transfer deed. To complete the effective transfer of ownership of registered land, it is necessary to register the transfer in the Land Registry.

Section 52 of the 2009 Act provides that the entire beneficial interest in property passes to the buyer on the making of an enforceable contract for the sale or other disposition of land; however, it is not uncommon for this statutory provision to be disapplied or contracted out of in the contract for sale (particularly if a long period of time is anticipated between signing and completion).

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Priority is accorded by virtue of the date of registration of an instrument, rather than the date of execution of the instrument. In the Registry of Deeds (which relates to unregistered land), priority is determined by the serial number allocated to the instrument pursuant to the 2006 Act. Registered instruments have legal priority over unregistered instruments or instruments registered later in time. An exception applies where the owner of a registered instrument had actual notice of a prior unregistered or unregistrable instrument.

As regards registered land, the 1964 Act makes provision for two classes of rights or burdens that affect registered property. Section 69 burdens may be registered on a folio and include charges, liens and easements created by express grant. Section 72 burdens, on the other hand, are those which affect registered land without registration, for example, leases for a term less than 21 years and customary rights. Section 69 burdens rank in priority according to their date of registration whilst section 72 burdens rank as of their date of creation. Registered section 69 burdens rank in priority to subsequently created section 72 burdens, while section 72 burdens rank in priority to subsequently registered section 69 burdens. Judgment mortgages are dealt with separately and are subject to any right or incumbrance affecting the judgment debtor's lands, whether registered or not, at the time of their registration.

It is worth noting that a priority entry may be made by an intending purchaser, lessee, or chargee of property affording them priority over other registrations in respect of the folio for a period of 44 days from the date of registration of the priority entry. If the transaction protected by the priority entry is not lodged in the PRA within the priority period, it loses the priority conferred by the priority entry. A priority entry can be renewed following the expiry of the 44-day period.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

Please refer to question 4.1 above.

**5.2 How do the owners of registered real estate prove their title?**

Owners of registered real estate generally prove their title via the Land Registry folio, which is *prima facie* evidence of title. The legal owner of the registered property is recorded in part 2 (the ownership section) of the folio. In circumstances where real estate is sold onwards whilst an application for registration of ownership is still pending in the Land Registry, the owner will typically produce the transfer instrument as evidence of their title, in addition to the folio. A Land Registry search will reveal applications or dealings pending against the folio in question.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Transactions cannot be completed between parties electronically. Once completed, the details of a transaction relating to registered real estate can be submitted to the Land Registry for registration electronically. Once the application has been submitted electronically, the Land Registry will issue a pre-lodged dealing number, which will protect priority for 21 days. However, the original documents must be physically lodged in the Land Registry in order for the dealing number to go live and ultimately to effect the completion of the registration.

The documents that typically need to be provided to the Land Registry to effect registration of an ownership right are as follows:

- the Land Registry application form;
- the transfer instrument; and
- the appropriate fees.

The Land Registry maintains an electronic database which can be accessed electronically.

The concept of electronic conveyancing, or e-conveyancing, was first proposed by the Law Reform Commission in Ireland in 2006 and, since then, both the Irish Government and the Law Society of Ireland have engaged in consultations and established a Task Force in order to ascertain how e-conveyancing can be regulated and implemented in the future.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Compensation can be claimed from the Land Registry but not from the Registry of Deeds. Please refer to question 4.2 above.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Any member of the public is entitled to search the Registry of Deeds index on payment of the prescribed fee.

In the Land Registry, members of the public can inspect the index of names, the index of lands and the folios (including maps) on payment of the prescribed fees. Applications pending registration can only be inspected by the lodging party or the registered owner of the property or by a prescribed category of persons.

A buyer, through his/her lawyer carrying out pre-contract diligence, can obtain all the information they might reasonably require regarding encumbrances and rights affecting land from the seller's lawyer.

Bonded law searchers are typically used by lawyers to carry out Registry of Deeds and Land Registry searches in Ireland.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

The relevant property is usually marketed on behalf of the seller by an agent who advertises the property and advises on the market value of the property. In commercial real estate transactions, the parties often appoint agents to act on their behalf and the commercial terms are negotiated between the parties and their respective agents. Once the commercial terms are agreed, they are reduced to a non-binding heads of terms document.

Between heads of terms being agreed and a binding contract being signed, the parties may put in place exclusivity agreements and confidentiality agreements (which is becoming more widespread in the sale of commercial real estate). A seller's lawyer is responsible for drafting contracts, dealing with pre-contract enquiries raised by the buyer's lawyers, replying to requisitions on title, redeeming mortgages/charges and distributing the balance of sale proceeds to the seller. A buyer's lawyer investigates the title, raises requisitions on the title, drafts the purchase deed, conducts closing searches, attends the closing appointment and stamps and registers the title.

Surveyors and/or architects may be engaged before the buyer signs contracts to carry out a structural survey of the relevant property. Depending on the nature of the transaction, an environmental expert may also be engaged to provide an environmental report in respect of the property.

In the sale of commercial real estate asset portfolios, the commercial and legal due diligence is usually facilitated by providing interested parties with access to information contained in an online data-room. Before access is granted, the interested parties will typically be required to execute a non-disclosure agreement.

**6.2 How and on what basis are these persons remunerated?**

Selling Agents – normally charge a percentage of the sale price. The Property Services (Regulation) Act 2011 seeks to regulate property services provided by auctioneers, estate agents and management agents. The agent must issue a letter of engagement which among other things must set out the amount or the rate of any commission or any other fee payable by the client under the agreement.

Lawyers – no standard/fixed price. Fees are normally commensurate with the value of the property/work involved. Irish lawyers are obliged to set out the basis of their charges under section 150 of the Legal Services Regulation Act 2015.

Surveyors – no standard/fixed price. Fees are normally commensurate with the value of the property/work involved.

Environmental Experts – no standard/fixed price. Fees are normally commensurate with the value of the property/work involved.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Investor appetite for Irish real estate has been very strong in 2019, with a particular focus on residential development, purpose-built student accommodation and hotel investment. Non-bank lenders continue to be very active in the Irish market.

The profile of investors looking for opportunities in the Irish market is relatively consistent, led mainly by European institutional buyers; however, Asian investors are continuing to make a mark in this jurisdiction, most notably in the office sector.

Foreign Direct Investment remains crucial for Ireland and this jurisdiction continues to be an attractive real estate investment opportunity for a number of reasons including its strong economic backdrop, levels of occupational activity and the potential for further rental growth.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The commercial real estate market has been strong in Ireland in 2019. The completion of the sale of Green REIT PLC to Henderson Park for €1.34 billion later this year will also boost investment significantly.

The retail market has also performed relatively well despite concerns about Brexit and the volume of retail sales rose by 1.9% in July 2019. Much of the activity in the retail market at present is heavily concentrated in the convenience, food & beverage, service and leisure sectors.

Investor appetite for residential development and the hotel sector is increasing as noted at question 6.3 above. Approximately €415 million of development land sales were completed in the first half of 2019, comprising 30 land sales. Co-living concepts and PRS/Build to Rent schemes continue to be popular, accounting for 43% of investment spend in the first half of 2019. Major deals in this sector were Greystar's acquisition of Blocks B and E at the Dublin Landings development in Dublin Docklands for a reported €154.6 million and the off-market sale of 166 apartments at Mount Argus, Harold's Cross, Dublin 6W for €93 million.

The hotel/licensed market has also been robust this year with the value of hotel deals approximately €206 million to the end of August 2019. Notable disposals include the Portmarnock Hotel and Golf Links, Portmarnock, Co. Dublin; the Central Hotel, Exchequer Street, Dublin; the Heritage Hotel, Killenard, Co. Laois; and the Castle Oaks Hotel, Co. Limerick.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Stamp duty for commercial property was increased from 6% to 7.5% in Budget 2020 so this may have an impact on investment in commercial property in 2020.

The stamp duty rebate scheme that was introduced in 2018 in respect of land purchased to develop residential property continues to encourage residential development, particularly in the PRS Sector.

Ireland's 12.5% corporate tax rate on residential construction profits has led to an increase in the number of international investors establishing residential development companies, particularly in the Dublin area.

The Dublin office market continues to benefit from relocations due to the uncertainty around Brexit with particular growth in the serviced office sector.

The vacant site levy, which aims to promote the development of vacant under-utilised sites in urban areas, also continues to encourage disposals of sites for development.

The introduction of tax reforms in 2016 which negatively impacted Irish regulated funds focused on Irish property (so-called Irish Real Estate Funds or "**IREFs**"), has led to a decline in the popularity of such structures. There are now fewer tax advantages to larger non-Irish investors which has, together with the recovery of the domestic investor sector, led to an increase in the number of Irish-based buyers of Irish property.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

To ensure consistency in drafting and avoiding protracted negotiations, the Law Society of Ireland produces a *pro forma* contract for sale for use in real estate transactions, which is designed to give a fair balance of rights between buyers and sellers.

The contract for sale:

- Contains a memorandum of the agreed terms of the sale (parties, price, description of property, and completion date).
- Lists the documentation and searches to be provided by the seller.
- Incorporates the Law Society of Ireland General Conditions of Sale (the "**General Conditions**"). The General Conditions make a number of assumptions about the property and place certain disclosure obligations on a seller, which the seller can only exclude by inserting special conditions. This way, the buyer is on notice of any deviations from the standard contract. The General Conditions were updated in 2019 for use in respect of transactions commencing on or after 1 January 2019.

The General Conditions deal with formalities such as:

- The seller's title.
- The identity and condition of property.
- Possession.
- The disclosure of notices.
- Planning and development.
- Completion of the sale, completion notices and interest due if completion is delayed.
- Rescission of the contract.
- Forfeiture of deposit and resale.
- Risk.
- Boilerplate issues such as apportionment, time limits, notices and arbitration.

The special conditions of sale are typically negotiated between the parties and reflect the nature of the transaction. For commercial real estate transactions, it is normal for the seller to seek to limit the warranties being provided. Where the seller's knowledge of the property is limited, for example, a sale by a receiver, liquidator or mortgagee, it is usual to exclude or limit many of the warranties contained in the General Conditions.

Another formality that will need to be adhered to is the Conveyancing Conflict of Interest Regulation which prohibits the same firm acting for both the seller and buyer in real estate transactions, with certain very limited and defined exceptions.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The underlying principle is one of *caveat emptor* (buyer beware). The buyer must be satisfied from its own due diligence that good marketable title to the relevant property is being offered by the seller.

The principle of *caveat emptor* is diluted somewhat by the General Conditions which place a number of warranties and disclosure requirements on the seller. For instance, the General Conditions include numerous warranties relating to matters such as notices, planning compliance, boundaries, easements and identity and the existence of any other interest in the relevant property. These warranties can be excluded or amended by agreement between the buyer and the seller. In addition to any specific disclosures, sellers often limit the warranty provided in respect of planning compliance by reference to documentation and opinions/certificates of compliance in the seller's possession and produced to the buyer. Where the property is being sold in an enforcement scenario (by a receiver, liquidator or mortgagee), it is usual that many of the warranties contained in the General Conditions are excluded or limited by reference to the limited knowledge of the receiver, liquidator or mortgagee regarding the property. The 2019 General Conditions require the buyer to investigate and satisfy itself as to the title to the property pre-contract.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, a seller can be liable for misrepresentation. General Condition 29 of the General Conditions provides that a buyer shall be entitled to compensation for any loss suffered by the buyer in respect of the sale as a result of an error which includes any omission, non-disclosure, misstatement or misrepresentation made in the contract. However, as outlined above, a seller may attempt to exclude/vary this condition by inserting a special condition in the contract for sale stating that the buyer shall not rely on any representations made.

Statutory protection from fraud is provided by the 2009 Act, which makes it an offence for a seller to fraudulently conceal or falsify material information relating to the title.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

As noted at question 7.2, by virtue of the General Conditions the seller gives various contractual warranties in respect of the property for sale. It is typical for a seller to limit the scope of warranties through the careful drafting of Special Conditions in the Contract for Sale, in particular for commercial property. Despite the existence of warranties, a prudent seller (or his legal advisers) will still carry out his own due diligence of the property as the principle of *caveat emptor* is at the heart of commercial property transactions.

There are typically implied covenants as to ownership contained in a purchase deed but there is no form of title warranty. However, a buyer's lawyer will investigate the seller's title to the relevant property to ensure a buyer will acquire a good marketable title. The buyer's lawyer also carries out a number of searches against both the seller and the property. The seller must explain and/or discharge any adverse matters resulting from the searches which affect the seller and/or the relevant property before the completion of the sale can occur.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

As noted at question 7.3, a seller can be liable for misrepresentation or fraud.

A seller may also retain liability for any contractual terms or undertakings which survive the acquisition of the property and the completion of the sale.

A seller may be liable for penalties to Revenue in respect of local property tax should it fail to provide information about the chargeable value of the residential property to the purchaser or make a false statement regarding same to Revenue.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer is also responsible for discharging the following costs:

- Stamp duty.
- Surveyor/Architects' fees.
- Legal fees.
- VAT (if applicable).
- Registration fees.
- Commissioner for Oaths' fees.
- Search fees.
- Local Property Tax (if applicable) (apportioned).

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

There are extensive differences between financing real estate as a corporate entity and as an individual, most notably from a practical and legal perspective.

Real estate lenders have little regard as to the residential status of an individual, as long as the real estate is situated in Ireland.

The principal Acts, Regulations and Central Bank Codes of Conduct concerning the financing of real estate are as follows (in each case reference is made to the primary provision as amended):

- Asset Covered Securities Acts, 2001 and 2007.
- Agricultural Credit Acts, 1978–1992.
- Bills of Sale (Ireland) Act, 1879.
- Central Bank Acts, 1942–2018.
- Central Bank Consumer Protection Code, 2012.
- Central Bank Reform Act, 2010.
- Central Bank (Supervision and Enforcement) Act, 2013.
- Central Bank and Credit Institutions (Resolution) Act, 2011.
- Central Bank (Supervision and Enforcement) Act 2013 (section 48) Lending to Small and Medium-Sized Enterprises Regulations 2015.
- Companies Act, 2014.
- Consumer Credit Act, 1995.
- Conveyancing Acts, 1881–1911, the Land and Conveyancing Law Reform Acts, 2009 and 2013.
- Credit Union Act, 1997.
- Credit Union and Co-operation with Overseas Regulators Act, 2012.
- Credit Institutions (Stabilisation) Act, 2010.
- Criminal Justice (Money Laundering) Act, 2010.
- Code of Conduct on Mortgage Arrears, 2013.
- European Communities (Consumer Credit Agreements) Regulations, 2010.
- European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.
- European Union (Bank Recovery and Resolution) Regulations, 2015.
- European Union (Consumer Mortgage Credit Agreements) Regulations, 2016.
- European Union (Financial Collateral Arrangements) Regulations, 2010.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

A real estate lender will typically seek to protect itself from default by the borrower by obtaining a contractual suite of covenants, undertakings and representations and warranties from the borrower, the breach of which would lead to an event of default.

A real estate lender will provide finance that is secured over the relevant property. The real estate lender will then require that the security is registered as first ranking in the appropriate property register, thereby securing priority of the security for the benefit of the real estate lender.

Where a lender is providing finance for development purposes, it would be normal for the lender to receive collateral warranties from the members of the professional team such as architects, designers and engineers. The lender will also typically appoint its own project monitor (at the cost of the borrower).

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

The powers of mortgagees under mortgages are derived from a combination of the terms of the mortgage itself and the law

(including certain relevant statutory provisions). Generally, the same principles apply in relation to enforcement against companies as apply to individuals. Various methods of enforcing security over real property are available and the ability to avail of these will depend on the circumstances of each case.

In respect of security granted prior to 1 December 2009, there is no requirement on a mortgagee to go to court to exercise the remedies available to it, provided the borrower does not challenge the enforcement of the security. However, the 2009 Act contains certain provisions in relation to security granted on or after 1 December 2009, which compel a lender to go to court to seek an order for possession and an order for sale. These provisions can be and are usually expressly contracted out of for security taken over commercial real estate but they cannot be contracted out of in respect of residential housing loans. Therefore, in the case of housing loans and security taken over residential real estate on or after 1 December 2009, a mortgagee does have to go to court to get an order for sale and possession. A court appearance can be avoided if the borrower gives written consent to the sale not more than seven days before the power of sale is exercised.

The implementation of the 2009 Act repealed certain of the old statutory provisions that had applied prior to 1 December 2009 (most notably parts of the Conveyancing Acts and the 1964 Act). The belief was that the rights and powers conferred on the existing mortgagees by these statutory provisions had already been "acquired, accrued or incurred" by mortgagees by virtue of the provisions of the Interpretation Act, 2005 and therefore the existing mortgagees could continue to rely upon those provisions. A number of high-profile decisions by the Irish courts resulted in a concern in the market that, in essence, the statutory rights which were appealed could not have been "acquired" by existing mortgagees. The Land and Conveyancing Law Reform Act, 2013 was implemented to fill this lacuna by confirming that certain provisions of the Conveyancing Acts and the 1964 Act will continue to apply to mortgages which predate the enactment of the 2009 Act and therefore remove the uncertainty in the market.

Certain provisions of the 2009 Act enable a mortgagee, where it has reasonable grounds for believing a mortgagor has abandoned a mortgaged property and urgent action is required to prevent deterioration, to apply to court for an order authorising the mortgagee to enter into possession of the mortgaged property.

### 8.4 What minimum formalities are required for real estate lending?

The usual practice is for the terms of a property loan to be recorded in a formal agreement. For big-ticket transactions, institutions will usually adapt a suitable Loan Market Association ("**LMA**") precedent for the transaction. Use of an LMA precedent makes the negotiation of terms more efficient. However, lenders, including banks, continue to use bespoke loan agreements for smaller transactions.

If a company has created a charge over real estate, to perfect the security, a relevant filing must be lodged with the Irish Companies Registration Office ("**CRO**") within 21 days of the creation of the security. This typically takes the form of a Form C1. If not registered within this time frame, the security will generally be void against any liquidator or third-party creditor.

The Companies Act, 2014 (the "**2014 Act**") introduced changes to the procedure in relation to the registration of charges: the one-stage procedure; and the two-stage procedure. The one-stage procedure is similar to the previous regime under the Companies Act, 1963 (the "**1963 Act**"), while the two-stage procedure involves filing an initial notice of a company's intention to register a charge, followed by a second filing within 21 days of receipt of the first by the CRO, confirming the creation of the charge. The purpose of the latter procedure is to remove the "blind spot" which exists for 21 days after a charge has been created, during which it may not appear on CRO searches. Under the 2014 Act, priority of registration speaks from the date of registration at the CRO and not the date of creation of the charge itself, as was previously the case under the 1963 Act.

In addition, it is generally accepted that registration is the appropriate perfection mechanism in respect of security interests over real estate in Ireland. The specific formalities in relation to real estate in Ireland depend on whether the land is registered or unregistered (refer to section 4 above). There are no specific time limits in respect of the registration of security in the Registry of Deeds or at the Land Registry, albeit a delay or failure to register may impact on priority.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

If there are other lenders, the parties will typically structure the priority of debts in the following ways:

1. **Contractual subordination**
   Contractual subordination is common in Ireland. It occurs where the senior lender and the subordinated lender enter into an agreement as a result of which the subordinated lender agrees that the senior debt will be paid out in full before the subordinated lender receives the payment of the subordinated debt. The subordinated lender is contractually subordinated to the senior lender.
2. **Structural subordination**
   Structural subordination is also possible depending on the particular terms of a transaction. Structural subordination arises where one lender (the senior lender) lends to a company in a group of companies which is lower in the group structure than another lender (the subordinated lender).
3. **Inter-creditor arrangements**
   Inter-creditor arrangements are common in Ireland, depending on the nature of the particular transaction. Typical parties include a senior lender, a junior lender, an inter-group lender and a borrower. Typical terms in an inter-creditor agreement include provisions as to priorities, standstill, representations and warranties and covenants.
   As outlined at question 8.4 above, a real estate lender must register the charge/mortgage with the Irish Companies Registration Office in order to perfect the creation of the security.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

The answer depends on whether the security is created by a company or by an individual or partnership.

A charge created by a company over its assets (save for certain types of financial asset such as bank accounts, financial instruments and claims and rights derivative thereof) must be registered with the CRO within 21 days of its creation in accordance with the procedures set out in the 2014 Act.

The 2014 Act also sets out the circumstances in which a charge created by a company which is, or is on the brink of insolvency,

may be set aside. A charge created by a company in the onset of insolvency may be set aside where it constitutes an improper transfer of its assets to the detriment of its creditors or a liquidator of its assets. A floating charge created by a company when it is insolvent may be set aside to the extent that no consideration is provided for it. In this regard certain hardening periods apply depending on whether the floating chargee is connected with the company (e.g. a director or person connected to a director, etc.).

A charge created by an individual or partnership may be set aside if it constitutes a fraud on its creditors and in this regard the test is the same as applies to corporate security – namely whether the transaction is an improper transfer of assets to the deprivation of creditors. Where an individual or partnership creates non-possessory security over chattels, this must be registered in accordance with the Bills of Sale legislation – the requirements of which are problematic.

There are numerous protections afforded to residential mortgagors under Irish law and onerous obligations are placed on lenders in terms of enforcing their security. Much of the regulation is focused on ensuring fairness and transparency to the mortgagor. The following provisions should be considered in determining the enforceability of any residential security:

1. **European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000**
   If a term of the relevant security is heavily weighted against the mortgagor, it will be considered "unfair" and in violation of the Unfair Terms in Consumer Contracts Regulations. This will affect the value of all or part of the lender's security.
2. **European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 (as amended)**
   If the security is entered into without the lender and the mortgagor being simultaneously present it may be regarded as a distance contract and come within the scope of the Distance Marketing Regulations, if the mortgagor is a consumer. Under these regulations the security may be rendered unenforceable if the lender failed to give certain information to the mortgagor before a binding contract was entered into, such as, details of certain contractual terms and conditions and the total fee to be paid by the mortgagor.
3. **Protection of the Family Home**
   As noted in question 1.1, extensive statutory protection is afforded to family property in Ireland which renders the enforcement of security over family homes or shared homes more difficult for lenders. Under Irish law, a family home is a dwelling in which a married couple ordinarily resides and a shared home is a dwelling in which civil partners reside. Under the Family Home Protection Act 1976 (as amended) and the Civil Partnership and Certain Rights of and Obligations of Cohabitants Act 2010, a spouse or civil partner who does not own the family home/shared home must give prior written consent to any disposal of an interest in the family home, including by way of mortgage. If this consent has not been given or was ineffective, any transaction disposing of the family home/shared home is at risk of being set aside at the instance of the non-owning spouse/civil partner within certain time limits.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Case law shows that borrowers have employed a large variety of arguments in seeking to frustrate enforcement action by a lender. These include:

(a) demonstrating that the instrument appointing a receiver has not been executed in accordance with the security deed;
(b) where the party enforcing the security has purchased the secured debt from an original lender, challenging the title of that person;
(c) proving that the lender has not complied with the procedural requirements of the MARP process (see below); and
(d) on appeal, establishing that the lower court did not engage with an Unfair Contract Terms analysis of the underlying loan/security documentation.

The Code of Conduct on Mortgage Arrears 2013 ("**CCMA**") is particularly relevant when it comes to the enforcement of residential security. Under this statutory code, lenders must operate a four-stage Mortgage Arrears Resolution Process ("**MARP**") when dealing with customers in arrears or pre-arrears. The four steps are: 1) communication; 2) financial information; 3) assessment; and 4) resolution. Mortgagors must be afforded considerable support from the lender as regards the repayment of their security and offered a variety of alternative repayment options. Lenders' compliance with the CCMA will be taken into consideration by the court in determining whether to grant a request to repossess. This code requires a high standard of behaviour from lenders and may frustrate attempts to enforce their security.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

In general, where a bank encounters financial difficulty, the Central Bank of Ireland ("**CBI**") may apply to court for special measures to come into effect which are designed to preserve the business carried on by the bank (if possible), protect depositors and manage in an orderly fashion the bank's liabilities to bondholders and other creditors. These measures are taken pursuant to the European Union (Bank Recovery and Resolution Regulations 2015 ("**BRRD**")). If the bank is licensed by the CBI and is incapable of rescue then it will be wound up pursuant to the Credit Institutions (Stabilisation) Act 2010 ("**CISA 2010**") and the 2014 Act. This will entail the High Court appointing a liquidator to the bank. Whether the bank is subject to reconstruction or resolution pursuant to BRRD, or is in liquidation pursuant to CISA 2010/the 2014 Act, the insolvency officer will treat the loan as an asset of the bank and will seek to enforce the bank's rights against the borrower and any persons providing security for the loan. Accordingly, insolvency or corporate rehabilitation of the lender will not, in principle, have any impact on the liabilities of the borrower and security providers.

Where the lender is not subject to BRRD and CISA 2010/the 2014 Act, it could go into corporate rehabilitation under Ireland's "examinership" regime under the 2014 Act, or be subject to the appointment of a liquidator under the 2014 Act. In either case, the result is the same as above: the loan and its related security will be treated as an asset of the company and the company or its liquidator will look to recover/enforce in the usual way.

In an event of default, a lender will usually proceed to appoint a receiver and manager over the borrower's assets. The receiver and manager is typically appointed pursuant to the terms of the charge; however, the 2009 Act also provides for the appointment of a receiver by a mortgagee. The receiver will market the property and sale proceeds will be used to discharge the borrower's indebtedness.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

The usual method of enforcing security over shares is for the lender to appoint a receiver. The power to appoint a receiver will be contained in a well-drafted security which will set out the receiver's powers – albeit where the chargor is an Irish company the receiver's powers will be implied by the 2014 Act also. It is unusual for a lender to step in and sell charged shares: appointing a receiver (who is technically deemed to be an agent of the chargor) is invariably the preferred method because this insulates the lender from liability arising from how the charged assets are dealt with in an enforcement scenario. Most receivers will be specialist insolvency practitioners from a major accountancy firm in Ireland.

The remedy of foreclosure was abolished in Ireland pursuant to the 2009 Act. Where the transaction is governed by the European Union (Financial Collateral Arrangements) Regulations 2016 ("**EUFCR**"), the collateral taker may agree with the collateral provider that the former may appropriate the collateral provided this is clearly agreed and the method for valuation of the collateral is also agreed. Real estate security would not be within the scope of the EUFCR albeit that "credit claims" comprising a loan portfolio secured on real estate could constitute collateral under the EUFCR.

## 9 Tax

**9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?**

Ireland imposes stamp duty on transfers of Irish real estate and certain other property. The stamp duty is charged on the consideration payable for the property, or the market value in certain instances. Stamp duty is generally payable by the buyer, although in certain transactions, such as voluntary transfers, both parties to a contract can be technically liable. There are provisions which apply to contracts to acquire land, as opposed to actual transfer documents, in cases where there is a "resting on contract" position.

The rate of stamp duty on transfers of residential property is 1% on consideration up to €1 million and 2% on consideration over this threshold.

The stamp duty rate on transfers of non-residential (commercial) property is 7.5%.

Where non-residential property is transferred and is subsequently utilised for construction of residential accommodation, a stamp duty refund is available which effectively reduces the rate from 7.5% to 2%. This scheme is subject to a number of conditions.

Generally, the buyer of the property is liable for stamp duty which can be directly assessed.

**9.2 When is the transfer tax paid?**

Where an instrument is liable to stamp duty, a stamp duty return must be filed online via Revenue's e-stamping system.

The full amount of the stamp duty must be paid within 30 days of the date of execution of the instrument of transfer (typically the deed of transfer). In practice, Irish Revenue allow a further period of 14 days in which to file an e-stamping return and pay the stamp duty. Failure to file and pay within this 44-day period will result in late filing and interest charges.

In order to process a stamp duty return a tax reference number is required for both the seller and the buyer.

**9.3 Are transfers of real estate by individuals subject to income tax?**

The sale of real estate by an individual should not be subject to income tax unless that individual is carrying on the business of trading in properties.

However, the gains or profits on the disposal of Irish real estate by an individual may be subject to Irish capital gains tax. The current rate is 33%. An exemption from capital gains tax is available for individuals on the sale of the individual's principal private residence, subject to certain conditions.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

The sale of Irish real estate may be subject to Value Added Tax ("**VAT**"). As there are many variations and exemptions under the current Irish VAT regime, the VAT treatment should be addressed by the appropriate professional advisor's pre-contract with the final agreed position reflected in the contract.

Broadly, the sale of land which has been developed in the previous 20 years, or buildings which have been developed or redeveloped in the previous five years ("new" property) will be subject to VAT. The sale of "old" property which falls outside these rules is exempt from VAT. In certain cases, where a sale would otherwise be exempt, the buyer and seller can agree that the sale will be subject to VAT in order to avoid a clawback of VAT previously recovered in respect of the relevant property by the seller. The first sale of residential property by the person who developed the property is always subject to VAT.

The rate of VAT on transfers of real estate is 13.5% (a VAT rate of 23% applies to VATable lettings).

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

The sale of Irish real estate, or of unquoted shares in companies deriving the greater part of their value from Irish real estate, will be subject to Irish capital gains tax. The current rate is 33%. The gain is calculated on the proceeds of sale less acquisition and enhancement costs, and less the incidental costs of acquisition and the incidental costs of disposal.

Irish capital gains tax is subject to a withholding procedure. The buyer must generally withhold 15% of the consideration and pay this amount to Revenue unless the seller provides a tax clearance certificate from Revenue. A clearance certificate is automatically available on application to Revenue if the seller is resident in Ireland for tax purposes. A non-resident seller will need to agree and discharge its capital gains tax liability in order to obtain a clearance certificate. This withholding procedure only applies to a buyer where the consideration payable to the seller exceeds the relevant threshold current at the date of the transfer agreement (currently €500,000 or €1 million if the asset disposed of is residential property).

A capital gains tax exemption applies to disposals of land acquired between 7 December 2011 and 31 December 2014 (inclusive), provided the land was held for four years. The relief applies to residential and non-residential real estate located within any EEA state acquired by an Irish resident during the period set out above.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

Yes. Currently, stamp duty on the transfer of Irish shares deriving their value from real estate is charged at 1% of their value.

Transfers of corporate entities (such as Irish and non-Irish companies) and partnerships can be subject to 7.5% duty where the entity derives over 50% of its value from Irish land which is intended for development, held as trading stock, or held with the sole or main object of realising a gain on disposal. This provision is subject to a number of conditions, including that the transfer is one which transfers control of the land. Minority holdings may not be impacted.

Disposals by non-Irish residents of shares and securities which derive their value from Irish real estate are subject to capital gains tax. Disposals of shares or securities which are quoted on a stock exchange are exempt from this charging provision.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

A buyer of Irish real estate will request completion of standard Law Society Pre-Contract VAT Enquiries by the seller. These are intended to provide the buyer with a history of the VAT treatment of the relevant property. Buyers should also satisfy themselves that any previous transfers of the property have been duly stamped.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Historically, Ireland has had special legislation governing the relationship between landlords and tenants, e.g., the Landlord and Tenant Law Amendment Act, 1860 (commonly referred to as Deasy's Act).

Since the establishment of the Irish State, a comprehensive and very wide-ranging code of landlord and tenant legislation has been enacted.

Commercial business leases are freely negotiated subject only to statutory provisions.

The introduction of the Commercial Leases Register now requires the particulars and terms of all leases and related documentation to be disclosed on a public register.

In 2011, the draft Landlord and Tenant Law Reform Bill was published. While not yet enacted, the Bill is worthy of note as the objective is to consolidate and modernise much of the general law of landlord and tenant under one act going forward, including landlord and tenant obligations and their enforcement, statutory rights and termination.

**10.2 What types of business lease exist?**

Typically, a business lease falls into two categories: a lease on a short-term basis for a term of up to five years; or a lease on a medium- to long-term basis, which would generally be considered a term from 10 years to 25 years.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

The term of a lease of business premises has traditionally ranged from short-term up to 35 years, but recent legislative changes and market forces are resulting in shorter term leases, with the maximum term now being 15–20 years (typically including break options exercisable during the term). The structure of a typical medium- to long-term (10–25 years) commercial lease usually follows the same traditional format which, in addition to securing rent payments to the landlord, also passes the cost of maintaining, insuring and occupying the relevant property from the landlord to the tenant. This allows the landlord to enjoy the rent without deduction.

In most cases, tenants will seek to negotiate an option to break or terminate the term of the lease, i.e. after five or 10 years of the term. Any business lease granted for a term in excess of five years would typically have a provision for the periodic review of rent to the current open market rents.

Most business leases in Ireland are of a full repairing and insuring nature, whereby the tenant will be subject to extensive repairing obligations. These will be imposed directly by a repairing covenant entered into by the tenant or, in the case of a multi-let development like an office block, shopping centre or business park, indirectly through a service charge regime which will include reimbursing the landlord for repair works carried out to the structure and common areas of the relevant development.

Usually the provisions of a business lease place restrictions on a tenant's contractual right to assign or sub-let without the landlord's prior written consent. Under section 66 of the Landlord and Tenant (Amendment) Act, 1980, a landlord cannot unreasonably withhold consent which will override the contractual terms of any business lease.

Sharing a business premises with companies in the same corporate group is generally a matter for negotiation between the landlord and tenant but it is commonplace for leases to have such a provision permitting such sharing of occupation, subject usually to a requirement to notify the landlord and provided that the sharing is by way of licence only.

It is less common to see provisions in a lease relating to reorganisation or change of control of the tenant. Again, these are matters for negotiation. While landlords will generally agree on request to provisions allowing sub-letting to or sharing space with a group company without consent, it is rare that a landlord will permit assignment to a group company without consent. Normally, there are no restrictions on the change of control of a tenant company included in a lease.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Typically, rent paid in respect of Irish real estate will be subject to Irish taxation on account of it having an Irish source, regardless of the identity or location of the landlord. An Irish resident company is taxable at 25% on rental profits, and a foreign company is taxable at 20%. Income tax is applied to rent received by individuals.

In the case of a commercial/business lease, a landlord can elect to apply VAT, in which case VAT applies to the rent at the relevant rate (currently 23%).

Stamp Duty is incurred by the tenant on business leases. Stamp Duty is currently levied at 1% of the average annual rent (for commercial/business leases not exceeding a term of 35 years) with an additional fixed charge of €12.50 if the commercial/business lease contains a rent review clause. There is also an additional Stamp Duty charge of €12.50 for each counterpart of the business/commercial lease.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Usually, a business lease is terminated by the expiry of the term or the exercise of a break/termination option or by agreement between the landlord and the tenant, i.e. by surrender.

It is standard practice for a business lease to contain a re-entry clause, entitling a landlord to forfeit the lease for breach of an obligation by the tenant. The procedure in the case of the non-payment of rent (and other payments for this reason usually reserved as rent, e.g. service charges and insurance premiums) is straightforward, but rather more complicated (including service of notice on the tenant) in the case of breach of the other covenants in the lease. Re-entry can, however, be effected without a court order, if done peaceably; forcible re-entry is, on the other hand, a criminal offence. If the tenant is still in occupation and resists re-entry, the landlord must seek an ejectment order from the court. The tenant, any sub-tenants and third parties like mortgagees can apply to the court for relief against forfeiture, which will only be granted on terms designed to correct the default inducing the forfeiture and to protect the landlord's interest in the future.

A commercial tenant who has been in continuous occupation for a minimum period of five years has a statutory right to a new tenancy (known as the business equity), and, in certain circumstances, to compensation for improvements made or for disturbance. Contracting-out of the business equity is permitted and landlords typically require a tenant to renounce their entitlement to claim a new tenancy prior to signing a new commercial/business lease. However, it may be the case that market conditions will, at times, enable a tenant to resist pressure to provide such a renunciation.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

On the assignment of a lease with the landlord's consent, the assignor has no further responsibility for complying with the lease and its liability ceases completely. In contrast with the UK, there is no practice in Ireland requiring an assignor to enter into an authorised guarantee agreement guaranteeing the performance of the new tenant under the lease.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

There are currently no specific "green obligations" commonly found in leases in Ireland.

The European Union (Energy Performance of Buildings) Regulations 2006–2012 and Statutory Instrument No. 243 of 2012 introduced the requirement that all buildings being sold or let must have a Building Energy Rating ("**BER**") Certificate with certain limited exceptions. The aim of the rating is to inform prospective buyers and tenants of the energy performance of the building. The Building Energy Rating Certificate is accompanied by an Advisory Report which contains recommendations for improving the energy performance of the relevant building.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Co-working spaces are on the rise in Ireland with companies such as Iconic Offices, TCube Dublin, WeWork and DoSpace CoWorking offering such facilities in Dublin city centre. Co-working spaces appear to be particularly popular with start-up companies finding their feet. It is expected that the total flexible office space will increase to almost 2 million square feet by end 2019 which would represent an 80% increase in three years.

As noted at question 6.4 above, co-living concepts including PRS/Build to Rent schemes are becoming increasingly popular in Ireland.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The Residential Tenancies Acts 2004–2019 (the "**RTA**") is the primary legislation governing leases of residential premises in Ireland (not exceeding a term of 35 years). Rented properties must also meet the standard prescribed under the Housing (Standards for Rented Houses) Regulations 2017 as regards the conditions thereof and the facilities available.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the RTA applies.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) **Length of Term**

In Ireland, a typical residential tenancy agreement would be for a contractual term of 12 months.

(b) **Rent Increases/Controls**

A fundamental provision of the original RTA 2004 is that a landlord may not set rent at an amount greater than the market rent for the tenancy in question at the time. "Market Rent" is defined as the rent which a willing tenant not already in occupation would give and a willing landlord would take for the dwelling on the basis of vacant possession and having regard to: (i) the other terms of the tenancy; and (ii) the letting values of dwellings of a similar size, type and character to the dwelling and situated in a comparable area. In late December 2016, rent predictability measures were enacted under the Planning and Development (Housing) and Residential Tenancies Act 2016 in an effort to control the rise in rents in the parts of the country including Dublin, Cork and Galway) where rents are highest and rising and where households have greatest difficulties in finding accommodation they can afford. In these areas, known as "Rent Pressure Zones", rents will only be able to rise according to a prescribed formula which equates to about 4% of the current rent, subject to certain limited exclusions. The measures regarding Rent Pressure Zones apply for a fixed period and are currently in force until December 2021 but may be extended. The restriction applies to both new and existing tenancies and are at all times subject to the aforementioned overriding principle that rents may not be set at a level higher than the prevailing market rate. The Residential Tenancies (Greater Security of Tenure and Rent Certainty) Bill 2018 is currently before the Government for consideration and if enacted, all administrative areas in the State, that are not at present designated as such, will be deemed to be Rent Pressure Zones, for a three-year period. In addition, under the proposed legislation, annual increases in rent will be limited to increases in the annual rate of inflation, as measured by the All Items Consumer Price Index published by the Central Statistics Office.

(c) **Tenant's Rights to Remain in the Premises at the End of the Term**

Part 4 of the RTA 2004 gave tenants the right to stay in rented accommodation for up to four years in total, following an initial six-month period. The term of tenure has recently been increased to a total of six years in respect of tenancies created from 24 December 2016. These security of tenure provisions are commonly known as "Part 4 tenancies". After the first Part 4 tenancy has passed, a new Part 4 tenancy begins entitling the tenant to remain in the dwelling for a further six-year term. Where a tenant is in occupation under a fixed-term contractual tenancy, the tenant can notify the landlord that it is availing of the security of tenure provisions and is claiming a Part 4 tenancy prior to the expiry of the contractual term.

(d) **Tenant's Contribution/Obligation to the Property "Costs"**

Under the RTA, it is generally the landlord's responsibility to effect and maintain insurance in respect of the structure of the dwelling. The tenant is not obliged to contribute to insurance costs under the RTA, save where the premium payable under such policy of insurance has been increased as a result of any act of the tenant or any act of another occupier or visitor to the dwelling which the tenant has permitted, in which case the tenant is obliged to pay the landlord an amount equal to the amount of the increase in premium.

The cost of repairs is also generally the landlord's responsibility under the RTA, save where the tenant has caused deterioration to the dwelling that is beyond normal wear and tear. In these instances the tenant is obliged to make good such damage at his or her own cost.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Where the tenant is in occupation under a contractual tenancy or lease, the tenancy can only be terminated where the tenant is in breach of the terms of the tenancy, where there is a break clause in the tenancy agreement or where both parties agree to terminate the tenancy. Where the tenant has exercised its security of tenure under Part 4 of the RTA and claimed a Part 4 tenancy, termination by the landlord will then only be permissible in the following circumstances:

(a) the tenant has failed to comply with any of his or her obligations in relation to the tenancy;

(b) the dwelling is no longer suitable to the accommodation needs of the tenant;

(c) the landlord intends, within nine months after the termination of the tenancy, to sell the property (a statutory declaration providing specific details must be included with a notice of termination on this ground);

(d) the landlord requires the dwelling or the property containing the dwelling for his or her own occupation or for occupation by a member of his or her family (a statutory declaration providing specific details must be included with a notice of termination on this ground);

(e) the landlord intends to carry out a significant refurbishment of the property (a certificate of a registered professional stating that the proposed refurbishment would pose a threat to the health and safety of the occupants of the property and should not proceed while the property is occupied and specify the period of time the risk shall exist for (which period should not be less than three weeks) must be included with a notice of termination on this ground); or

(f) the landlord intends to change the use of the dwelling or the property containing the dwelling to some other use (a statement setting out the intended use of the property must be included with a notice of termination on this ground).

If termination of the tenancy by the landlord is permissible under the RTA, a valid notice of termination must be served on the tenant in order for the landlord to achieve vacant possession. The minimum notice period required will depend on the duration of the tenant's occupation. In order to be valid, the notice must:

- be in writing;
- be signed by the landlord or his or her authorised agent;
- specify the date of service of the notice;
- state the reason for the termination (where the tenancy has lasted for more than six months or is a fixed-term tenancy);
- specify the termination date and also that the tenant has the whole of the 24 hours of this date to vacate possession of the dwelling; and

- state that any issue as to the validity of the notice or the right of the landlord to serve it must be referred to the residential tenancies board within 28 days from the receipt of the notice.

The landlord must provide a copy of any notice of termination to the Residential Tenancies Board not later than 28 days after the expiration of the notice period provided in the notice.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The Planning and Development Acts 2000–2019 (the "**Planning Acts**") govern planning and zoning matters. The Planning Acts regulate the zoning of areas through a variety of development, sustainability, landscape conservation and special amenity plans. Most of the functions reserved by the Planning Acts are exercised by the local authority in the area where the relevant property is situated. There are currently 31 local authorities in Ireland, each a planning authority for the purposes of the Planning Acts, responsible for monitoring and enforcing compliance with planning laws in relation to property in its area and responsible for making decisions regarding applications for planning permission. Where suitable grounds for appeal exist, the decision of the planning authority, including conditions imposed, may be appealed by the applicant to *An Bord Pleanála* (the Planning Appeals Board).

The main laws which govern zoning and related matters are as follows:

- The Planning Acts.
- The Housing Acts, 1966–2014.

The main laws which govern environmental matters are as follows:

- The Environment (Miscellaneous Provisions) Act, 2015.
- The Environmental Protection Agency Acts, 1992–2011.
- The Waste Management Acts, 1996–2011.
- European Union (Environmental Impact Assessment) Regulations.
- The Water Services Acts, 2007–2017.
- The Air Pollution Acts, 1987 and 2011.
- The Building Control Acts, 1990–2014.
- The Building Regulations, 1997–2014.
- The Building Control Regulations, 1997–2018.
- The Wildlife Acts, 1976–2018.
- Petroleum (Exploration and Extraction) Safety Act, 2010.
- The Finance (Local Property Tax) (Amendment) Act, 2015.
- The Climate Action and Low Carbon Development Act, 2015.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Local authorities can compulsorily acquire lands in limited circumstances such as (1) where a site is derelict and poses a danger in the community, (2) for the purpose of developing infrastructure, and (3) for conservation/preservation purposes. Where property is compulsorily acquired by a local authority, compensation is payable to all persons with an interest in the lands. The assessment of compensation generally falls under a number of headings of claim to include the value of the land acquired, compensation for disturbance and any diminution in value of any retained lands.

Section 158 of the National Asset Management Agency Act, 2009 (the "**NAMA Act**") outlines NAMA's powers to acquire land compulsorily in certain circumstances where the compulsory acquisition is necessary to allow NAMA to deal with the property charged to NAMA.

Section 16 of the Industrial Development Act, 1986 (the "**IDA Act**") enables the Industrial Development Agency (the "**IDA**") to acquire lands either compulsorily or by agreement for the purpose of industrial development. A large part of the IDA's role, under legislation, is acquiring land for development and, as a result, the IDA's power to compulsorily acquire land was considered broad. However, in a recent decision of the Supreme Court delivered in November 2015, this view was somewhat curtailed. The IDA sought to compulsorily acquire land for which it had no immediate use so that if and when a particular undertaking should seek to develop the land, it would be immediately available at such time. The court, considering the constitutional protection given to property rights and applying the appropriate principles of construction, held that the IDA Act does not confer any power on the IDA to acquire lands not required for immediate use, but which might be utilised at some future time.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

**Land/building use and/or occupation**: As per question 11.1 above, the relevant local authority is the entity responsible for controlling land/building use and occupation. An independent third party appeals board, *An Bord Pleanála*, is responsible for the determination of planning appeals.

**Environmental regulation**: The Environmental Protection Agency (the "**EPA**"), the Office of Environmental Enforcement and local authorities are responsible for environmental regulation.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Generally, planning permission is required for any development of land or property, unless the development is specifically exempted from this requirement. The term "development" includes the carrying out of works (building, demolition, alteration) on land or buildings and the making of a material change of use of land or buildings.

Planning permission may not be required for certain non-structural works to the interior of a building or for works which do not materially affect the external appearance of the structure. However, in accordance with Building Control Regulations, an application to the local authority for a Fire Safety Certificate may be required.

Generally, the Building Control Regulations require a commencement notice to be lodged with the local authority prior to commencing works, together with plans and specifications, a preliminary inspection plan and various certificates and notices. It is an offence not to submit a Commencement Notice and failure to submit a Commencement Notice cannot be regularised at a later date. A Certificate of Compliance on Completion must be submitted to and registered by the local authority before the building or works may be opened, occupied or used.

In addition, certain licences may be required depending on the specific type of property and the type of development proposed. These include licences issued under the

Environmental Protection Agency Acts 1992 to 2011 (the "**EPA Acts**"), the Water Services Acts 2007 to 2017 (the "**Water Services Act**"), the Air Pollution Acts 1987 and 2011, and the Waste Management Acts 1996 to 2011 (the "**WMA**").

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Planning permission is generally required for any development. However, a limited number of exemptions exist, e.g. public works, certain internal works, works to improve a private road and other specific exemptions. In addition, where a local authority fails to make a decision on a planning application within a specific time limit, default planning permission is deemed to have been granted pursuant to section 34 of the Planning and Development Act 2000 (as amended).

Where development occurs without planning permission having been obtained, a party can make an application for retention permission save for developments within the scope of the environmental impact assessment regime. If unauthorised development has taken place and the Planning Authority has not issued enforcement proceedings within seven years, it is prevented from doing so at a later date. Exceptions to this are contained in sections 157 and 160 of the Planning and Development Act 2000 (as amended) in respect of developments involving quarries and peat extraction.

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

Each local authority sets a fee for a planning application which is dependent on the class of development proposed and the type of permission being sought.

The minimum period for determination of an application for planning permission is five weeks beginning on the date of receipt of the application. However, decisions are rarely issued on the expiration of this five-week period.

Generally, a valid and complete application for planning permission is dealt with within eight weeks from the date of receipt of the application. However, this period can vary, particularly if the local authority seeks further information from the applicant. Within four weeks of a planning decision being issued, any party who made a written submission or observation in relation to the application can appeal the decision to *An Bord Pleanála*. There are certain limited circumstances in which a third party can appeal even where they did not make any submissions or observations in relation to the application. *An Bord Pleanála* has a statutory objective to determine appeals within 18 weeks of receipt of an appeal.

Public inquiries are not very common. However, public oral hearings are sometimes held, particularly in relation to large/strategic infrastructure projects. If the planning authority consents to the application for permission it will issue a decision to grant planning permission, which is not a full permission. Once the planning authority notifies the relevant parties of its decision, the applicant and any third party who made a submission or observation in relation to the application have four weeks within which to appeal this decision or any conditions attached to it. If there is no appeal, then the planning authority will issue a formal grant of planning permission at the end of the appeal period.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

Currently, local authorities maintain a Record of Protected Structures (the "**RPS**"). Inclusion of these structures in the RPS means that they are legally protected from harm and all future changes to the structure are controlled and managed through the local development control process. Structures which are listed on the RPS are subject to more restrictive development conditions; therefore, types of work, which in another building would be considered exempted development, may not be exempted where the building is a protected structure. The local authority may issue a declaration under the Planning Acts determining the proposed works would be considered exempt from the requirement to obtain planning permission. However, a declaration cannot exempt any works which would otherwise require planning permission.

A search of the RPS will reveal if a structure is protected. If the structure is protected, this will limit or restrict the development potential of the structure.

### 12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

Certain statutory bodies are required to publish periodic reports which identify specific properties which are hazardous or which do not comply with certain environmental requirements. However, Ireland has no dedicated register of contaminated land.

A potential buyer would always be advised to carry out its own due diligence where non-compliance with environmental law is a concern.

### 12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

Environmental clean-up is mandatory where a party breaches the provisions of the Environment (Miscellaneous Provisions) Act 2015 and the EPA Acts, the WMA and the Water Services Act. Sections 55 to 58 of the WMA may require that a person who is holding, recovering or disposing of waste be liable for the costs of clean-up and any costs incurred by the relevant regulatory authority in investigating an incident. A person found guilty of an offence under the WMA, the EPA Acts or the Water Services Act may face criminal prosecution.

### 12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.

Since 1 July 2008, a BER certificate and advisory report must be supplied by all sellers/landlords to a prospective buyer/tenant when a building is constructed, sold or rented. A BER certificate is an energy label for buildings which rates the building from A1 (most efficient) to G (least efficient). Since 9 January 2013, BER information must also be provided in advertisements for the sale or rental of property. The Regulations provide for exemptions for certain categories of buildings.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The EU Emissions Trading Scheme ("**ETS**") came into operation on 1 January 2005. The scheme operates on a "cap and trade" basis. EU Member State governments were required to set an emissions cap for each installation in the scheme. The number of allowances allocated to each installation must be set down in the National Allocation Plan for the period in question, which must be approved by the European Commission.

The European Communities (Greenhouse Gas Emissions Trading) Amendment Regulations 2010 provided for the revised operation of the EU-wide ETS since 2013. While the European Communities (Greenhouse Gas Emissions Trading) (Aviation) Regulations 2010 established a procedural framework for aircraft operators in Ireland to participate in the EU ETS. The EPA is the designated body for the purposes of the ETS in Ireland.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Ireland ratified the Kyoto Protocol on 31 May 2002, along with the EU and all other Member States. Ireland has adopted two National Climate Strategies in order to meet its commitments under the Kyoto Protocol to reduce its greenhouse gas emissions. These strategies seek to reduce emissions through a variety of measures. Under the Kyoto Protocol, the EU agreed to reduce greenhouse gas emissions to 8% below 1990 levels. Ireland committed to limit the growth in annual greenhouse gas emissions to 13% above 1990 levels by the period 2008 to 2012 and to at least 20% of 1990 levels by 2020 as part of its contribution to the overall EU target.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

There is a requirement under the Recast Energy Performance of Buildings Directive that all EU Member States, including Ireland, must ensure that all new buildings will be nearly zero energy buildings (that is, have high energy performance, with energy requirements to a significant extent being met from renewable sources) by 31 December 2020.

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# Italy



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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main applicable real estate legislation is:

- The Constitution of the Italian Republic, which states the right to a private property, subject to possible limitations for public interest.
- The Italian Civil Code (Royal Decree no. 262 of 16 March 1942), which regulates freehold title (*proprietà*), other rights on real estate assets, how to acquire and transfer real estate properties and related rights, co-ownership on real estate properties, registration of title in the land registry and also contains the general regulations for sale and purchase contracts, leases and mortgages.
- The Italian Navigation Code (Royal Decree no. 327 of 30 March 1942), which regulates title (in the form of public concession of use) on beaches, marinas, harbours, lagoons, basins, channels and any related assets.
- The Unified Building Act (*Testo Unico dell'Edilizia* – Presidential Decree no. 380 of 6 June 2001), which regulates development, construction and refurbishment of real estate.
- Legislative Decree no. 122 of 20 June 2005, which regulates the acquisition by individuals of properties under development.
- The Unified Banking Act (Legislative Decree no. 385 of 1 September 1993), which regulates some aspects of mortgage on real estate connected to bank financing.
- The various legislation regulating the cadastral system, which maps all Italian real estate properties (Royal Decree no. 2153 of 8 December 1938 on *Catasto Terreni*, Presidential Decree no. 1142 of 1 December 1949 on *Catasto Edilizio Urbano*, and Law Decree no. 557 of 30 December 1993 on *Catasto Fabbricati*).

Finally, the Governmental Social Housing Plan, which regulates the development of government-supported houses for low-income families and individuals is particularly relevant for the residential real estate market.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Common law has no impact on Italian real estate. Judicial precedents have to be taken into consideration for the interpretation of the law, but are not binding.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Only EU legislation may be relevant to real estate in Italy. International law is not relevant since real estate in Italy is regulated by local law.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

A legal restriction on ownership of real estate applies to foreign persons that are not resident in Italy, based on the "reciprocity" principle, i.e., the acquisition of real estate in Italy is not possible in principle for foreigners coming from countries where Italian citizens cannot own real estate and which have not signed reciprocal conventions with Italy.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Real estate assets can be held by:

- freehold, under:
  - i) full ownership ("*proprietà*"); or
  - ii) joint co-ownership ("*comunione*"); and
- various forms of title comparable to leasehold, under:
  - i) usufruct ("*usufrutto*"), which grants rights comparable to those of the freehold owner for a limited period of time (up to 30 years or the entire life of the individual who is granted the right);
  - ii) right of use ("*uso*" and "*abitazione*"), which grants limited right to an individual to use or live in a property;
  - iii) right to build ("*diritto di superficie*"), which grants the right to build on or under a given area and acquire full ownership of the constructed building;

iv) public concession, which grants rights to use and benefit from a governmental owned asset for a limited period of time (up to 99 years);
v) lease ("*locazione*"), which may have a maximum term of 30 years;
vi) lease of a business ("*affitto di azienda*") including real estate assets;
vii) bailment ("*comodato*"), which is a form of limited use normally without consideration; and
viii) rent-to-buy contracts, which allow a person to use a property while paying price instalments to buy the property.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

The general principle is that real estate is indivisible and comprises: (i) land; (ii) buildings; and (iii) everything attached to land or buildings.

Land and buildings located on it are usually registered together on the same title in the competent land registry.

The way to split the right over the land and the right over the construction erected thereon (or thereunder) is the right to build ("*diritto di superficie*").

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

In principle, there is not a split between legal title and beneficial title under Italian law. However, the Civil Code provides for the possibility to limit the freehold title on real estate assets (which is unlimited in time) by granting a usufruct ("*usufrutto*"), which allows the beneficiary to make full use of the asset and take any economic benefit of it for a limited period of time (which cannot exceed the life of the beneficiary or, for legal entities, 30 years). The usufruct is recorded in the land registry and can be validly opposed by any third party.

Furthermore, following a recent law regarding support to disabled persons, the Civil Code allows limitations on the use of a property to be recorded in the land registry to the benefit of specified individuals, public entities, associations and other legal entities involved in social support activities.

Finally, foreign trusts can be recognised in Italy. In this case, the title on the assets is recorded in the name of the trustee, indicating his role and the fact that the property shall be managed in the interest of a beneficiary; this annotation, however, can have a maximum duration of 90 years.

No changes to the existing legislation in this matter are currently expected.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

Private ownership of land must be registered. Ownership of real estate is evidenced by the corresponding public deed of sale and purchase or other contracts granting a title on real estate. All such contracts, as well as lease contracts for a term in excess of nine years, have to be registered in the land registries. When registered, title is enforceable against *bona fide* third parties with a potential interest in the real estate.

Land registries are organised on a local basis and managed by a special branch of *Agenzia delle Entrate*, an administrative body controlled by the Ministry of Finance.

### 4.2 Is there a state guarantee of title? What does it guarantee?

There is no state guarantee of title.

Title insurance is not commonly used because the legal system fully protects any person acquiring title from the registered owner.

Also, any sale of property has to be executed before a notary, who has a duty to perform a legal check on the title.

However, title insurance is becoming used to secure the acquisition of small properties in cases where the purchaser is not willing to conduct a due diligence on the title.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

Any contracts (i) transferring freehold title on a property, (ii) creating or transferring a usufruct or a right to build, (iii) creating a co-ownership on a property, (iv) creating or transferring an easement on a real estate property, (v) waiving any of the above rights, or (vi) granting a lease for a term exceeding nine years, and also rent-to-buy contracts, must be registered in the land registry. In the absence of registration the title cannot be opposed to *bona fide* third parties which may have validly acquired and registered a title on the asset.

Also mortgages are compulsorily registrable and registration is required for the validity and existence of the mortgage.

### 4.4 What rights in land are not required to be registered?

Leases (if their initial term does not exceed nine years), financial lease on real estate assets and bailment contracts are not required to be registered in the land registry. All such contracts, however, must be recorded in writing and filed with the local tax office (*Agenzia delle Entrate*) for registration tax purposes. The lack of registration of a lease may allow the tenant to claim the invalidity of the contract.

A preliminary contract by which the parties undertake to sign a sale and purchase contract can be registered in order to grant priority to the future title of the promissory purchaser; however, the effects of the registration are limited to three years.

### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

There is only one form of registration of a title and no probationary period applies. Limited to mortgages, it is possible to register more than one mortgage; in this case, the mortgages registered after the first one are granted a right which is subordinated to the first degree mortgage, unless this latter is cancelled and consequently the second registered mortgage acquires all of the benefits of a first registration.

In addition, in some cases it is possible to anticipate the effects of registration by registering a preliminary sale and purchase contract or filing of a judicial suit aimed at ascertaining the title on a property; in these cases, when the title is actually transferred or ascertained, the effects date back to the time of the first registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Transfer of title has to be formalised in a public deed before a notary public. After that, the buyer can register the title with the corresponding land registry to protect the title against third parties.

Title transfers on delivery of the real estate to the buyer, which normally occurs (unless agreed otherwise) when a notarial deed is signed. It is possible to defer transfer of a title: for a given term; by satisfaction of a condition precedent; or until the price is fully paid.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Registered rights prevail over other rights based on priority in applying for registration to the competent land registry. As indicated in question 4.5 above, in some cases it is possible to anticipate the effects of registration.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

Italian land registries are organised and maintained on a provincial basis. However, they are managed by the same governmental agency ("*Agenzia del Territorio*") and access is unified through a national virtual portal.

In some regions of North-Eastern Italy a somehow different registration system applies ("*sistema tavolare*"), which is managed by the local provincial authority.

Furthermore, the cadastral registry ("*Catasto*") contains useful information on real estate assets (including indication of the owner/s and a map describing the property), but its purpose is determining the taxable value of a property and not that of certifying the title on the property.

**5.2 How do the owners of registered real estate prove their title?**

The ownership of a registered real estate is proved by the transcription in the land registry of the relevant sale and purchase agreement or contract creating the title on the real estate.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Transactions relating to registered real estate must be completed in writing, by means of a notarial deed ("*atto pubblico*") or a notary certificated contract ("*scrittura privata autenticata*"). Upon signing, the notary is obliged to notify the land registry electronically in order to get priority of registration, but this must be confirmed by delivering the original title deed for registration.

Information on ownership can be accessed electronically through a national portal. The competent land registry issues an online excerpt with all relevant facts of the property (title-holder and any registered third-party rights).

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, it is feasible to claim compensation from a land registrar who makes mistakes during the registration process. The registrars are legally liable for all damages and costs they might have caused.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions on public access to the land registry. Any buyer or other interested person may obtain – by a search of the registry online, subject to payment of a consultation fee – any information on title and any registered encumbrances and also copies of the relevant notarial deed.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Buyers and sellers are usually advised by real estate consultants (one advisor per party) and, in most cases, one of them has acted also as broker of the deal. However, in some cases the broker can be unrelated to either the purchaser or the seller.

Technical advisors for due diligence are also commonly used.

A notary must be involved for the execution of the deed of sale and purchase or the lease agreement (if the term of the lease exceeds nine years).

Legal advisors provide legal support and draft the legal documentation in major transactions, while in minor transactions it is common for the parties to engage directly with the notary.

**6.2 How and on what basis are these persons remunerated?**

Each party bears the costs of its own transaction advisors. These remunerations are freely negotiated with the service providers and may be determined as a percentage of the purchase price or a fixed remuneration.

The notary has to be remunerated by both parties based on a specific agreement (although making reference to a national tariff is common practice); it is a general principle of law and common practice that the cost of the notary is paid by the purchaser, who also selects him.

Real estate brokers are entitled to claim a fee from both the seller and the purchaser, unless their engagement letter provides

differently. If not differently agreed, their fees are in the region of 2–3% of the price.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Foreign equity coming from Sovereign Funds, pension funds and private opportunistic funds have been a main driver of real estate transactions in Italy in the last five years. Insurance companies, added-value funds and Italian private pension institutions are also a main equity player in Italian real estate. More recently, Italian and foreign family offices, as well as Italian privately owned groups, are becoming more active in the market.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Real estate investments continue to be mainly focused on Milan. Secondary markets are highly considered for logistic, tourism and hospitality assets. High street retail also attracts interest in a few main cities. More recently, investors are focusing on student housing and senior housing developments.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Transactions on commercial centres and shopping malls have somehow slowed down, as investors are focusing more and more on those commercial centres that are modernising their business model.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

**Formalities**

Any contract transferring title on real estate must be executed and recorded in writing. In addition, execution in the presence of a notary is required to file the relevant contract in the land registries (and, for mortgages, for the validity of the title).

The contract must contain some mandatory information on the property, including: (a) the cadastral identification; (b) the confirmation of consistency between the cadastral data and the effective conditions of the property; (c) the permitted use of the property; (d) the titles on the basis of which the buildings existing on the property were built; (e) the allegation of the energy performance certification; (f) the allegation of a seismic compliance certification (not yet applicable on a general basis); (g) the means of payment used to pay the price; and (h) the identification of the broker which has intermediated the transaction (if any).

The execution of the notarial sale contract is often preceded by the signing of a binding preliminary contract, by which the parties undertake to transfer the real estate subject to specific terms and conditions.

**Preliminary contract**

A preliminary sale and purchase contract is usually executed once the parties agree the terms and conditions and satisfactory due diligence has taken place.

The preliminary contract contains the transaction's terms and conditions, including: (i) the object of the sale; (ii) the purchase price; (iii) any conditions precedent; (iv) the timing for closing; (v) the payment of a security deposit ("*caparra confirmatoria*"); and (vi) the seller representations, warranties and indemnities. The transcription of a preliminary contract in the land registries is not mandatory and, if requested, has a validity limited to three years.

Additional steps of a sale process may include:

- **Pre-contractual arrangements**
  Arrangements are usually related to: (i) confidentiality and non-disclosure; (ii) temporary exclusivity for due diligence and negotiation purposes; and (iii) making offers (initial offers and subsequent binding offers). Pre-contractual arrangements are fully binding on both parties limited to the above elements, but usually do not bind the parties to execute the sale contract.
- **Vendor due diligence**
  In some cases the seller engages consultants to conduct a pre-sale technical assessment of the property, aimed at assessing its compliance with zoning, building and environmental regulations, compliance with the cadastral data, and investigating any existing encumbrances. In many cases a notary is engaged to conduct a search in the land registries and certify the title of the seller and any existing encumbrances on the property.
- **Marketing**
  For major sale transactions, property companies and institutional investors usually engage a consultancy investment firm to make a pre-assessment of the value of the property, organise marketing materials and conduct the sale process.
- **Commercial negotiation**
  Negotiations usually occur between representatives from both of the parties, assisted by lawyers and real estate advisors. In some circumstances, negotiations are directly executed between the parties' lawyers and advisors.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller must act in good faith without concealing any information that, if known by the buyer, would prevent the buyer from completing the transaction.

The Italian Civil Code allows a buyer to challenge the validity of the contract or to claim for a reduction of the price in case the seller has willfully omitted to disclose elements which may affect materially the value of the property.

Also, the Italian Civil Code allows a buyer to bring legal actions against a seller for title defects and lack of conformity and/or quality of the property.

Buyers also have access to public registries (land registries and cadastral registries) in order to make their own assessment on the title of the seller.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes. Pursuant to the Italian Civil Code, a seller is always liable in case it has wilfully omitted to provide information to the buyer which could be relevant for the determination of the price or even for determining the decision to buy.

The liability of the seller regarding elements not known to it can be mutually agreed among the parties in the contract. The parties may also agree that the seller is released from any liabilities, other than in case of lack of title ("*evizione*").

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

The Italian Civil Code provides that the seller is liable in case of lack of title (total or partial), third parties rights on the property, lack of conformity ("*garanzia per vizi*") and lack of quality ("*mancanza di qualità*") of the property. However, the liability of the seller for lack of conformity and quality under the Civil Code is limited to one year after the sale and claims are subject to a short deadline (eight days from discovery). For this reason, it is usual that contracts for major transactions contain a negotiated set of seller's representations and warranties and indemnification obligations, which add to (or even replace) those provided in the Civil Code.

The warranties most frequently given by the seller relate to:

(i) powers of the seller to enter into the transaction; (ii) the nonexistence of charges and encumbrances other than those registered at the land registry; (iii) tenancy status and validity of the main conditions of the lease; (iv) compliance with applicable planning rules; (v) compliance with environmental legislation; (vi) regular payment of any applicable property tax; (vii) validity of property insurance policies; and (viii) the absence of legal disputes or court proceedings affecting the property.

Representations and warranties are mainly used to apportion the risk between the seller and the buyer. In transactions between professional operators, it is not common that representations and warranties replace any due diligence by the buyer. There is still a limited number of transactions where the parties agree to replace the seller warranties with Warranty & Indemnity Insurance.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

According to Article 1490 of the Civil Code, the seller is obliged to ensure that the item sold is free from defects.

In the event that the sold property is defective, the buyer may request the termination of the contract or a reduction in the purchase price. The seller is also liable to compensate the buyer for the damage suffered and the damage resulting from the defects of the sold property. The liability of the seller is limited to one year after the sale and claims are subject to a short-term deadline (eight days from discovery).

Furthermore, if the seller caused any contamination of the property, it remains liable for any remedial actions prescribed by environmental laws and regulations and any damages caused by such contamination.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer is responsible for paying the purchase price and any applicable transfer taxes and paying its portion of the broker fees (if any).

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The Italian Civil Code provides general regulation of loans, while the Unified Banking Act (Legislative Decree no. 385 of 1 September 1993) regulates bank financing and some aspects of mortgage loans.

Different rules (in particular regarding information duties and enforcement in case of payment default) apply to loans to individual persons acting as 'consumers' and corporate entities.

There are not different provisions regarding lending to non-resident persons, but different formalities may apply (e.g., a non-resident person shall obtain, in most cases, an Italian tax ID code, the notarial security documents to be filed in Italy must be executed in Italian or translated into Italian by a certified translator).

EU resident banks are also allowed to provide real estate financing at the same conditions as Italian banks, but the payment of interests on loans can be subject to taxation in Italy.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Loans for minor transactions often do not contain any provisions supplementing those provided by the law for mortgage loan, but often the lender seeks additional protection requesting a bank deposit, a personal guarantee by the borrower or any borrower related person and a life and disability insurance on the borrower.

Structured financing for major transactions usually includes:

a) Security packages. A security package for a real estate loan will usually comprise: (i) a mortgage over the asset; (ii) a charge over receivable rents; (iii) a charge over all bank accounts into which all rents must be paid; and (iv) a charge over all relevant contracts including leases, insurance policies and construction guarantees.

b) Corporate guarantees. Corporate guarantees are sometimes requested by lenders if the borrower is using SPVs.

c) Insurance coverage. Lenders will require the borrowers to take out appropriate building insurance.

d) Covenants. The loan documentation will also contain both financial covenants (loan to value, debt service cover) and non-financial covenants (obligations to maintain the asset in good state of repair or disposal limitations) to be granted by the borrower in order to ensure that the value of the asset is maintained.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

As a general rule, the lender with a secured loan needs to start a foreclosure proceeding, where the main step is the public auction of the asset.

There are two types of proceedings: (i) judicial proceedings, to be followed before the Italian courts; and (ii) extrajudicial proceedings, to be followed before a notary. The extrajudicial proceedings may only be followed if agreed upon by the parties.

A credit facilities contract may provide for the right of the lender to take possession of the mortgaged asset or any other assets in case of payment default and sell it on the market: in case the market value or the sale price exceeds the residual debt, the lender must transfer the excess to the borrower; on the contrary, in case the sale price is less than the residual debt, the borrower is released from any residual obligation.

### 8.4 What minimum formalities are required for real estate lending?

A mortgage over real estate must be granted in a notarial deed and is only valid when registered with the land registry. The draw of the money under the facilities agreement must also be recorded in a notarial deed, in order to have a direct enforcement title against the borrower, without having to conduct proceedings in court in order to obtain an enforcement title.

A charge over income arising from lease tenants is usually notarised, but notarisation is not mandatory. The tenants must be notified of the existence of the pledge in order to make it enforceable against them.

In share deals, it is common to grant a pledge over the shares of the SPV acquired by the buyer; this must be granted before a notary.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The protection of a real estate lender depends on the priority in ranking of the secured loans and this priority is subject to the registration principle, unless mutually agreed between the borrower and the lender. In some cases, tax authority claims for unpaid taxes have priority over the lender's mortgage.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

In case bankruptcy of the borrower is declared within 10 days of the creation of the mortgage, the mortgage can be challenged by the bankruptcy officers. Other securities can also be challenged in case of bankruptcy, if it appears that the lender was aware of the insolvency of the borrower.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

A borrower can file an objection against the enforcement action by the lender if it is able to demonstrate that no default occurred or that the lender omitted any of the formalities required to commence enforcement proceedings.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The impact varies considerably depending on whether or not the loan is secured by a mortgage on the property.

If this is the case, the creditor, in the insolvency process, will see his credit satisfied in a preferential manner compared to unsecured creditors. If this is not the case, the creditor must compete with the other unsecured creditors in the distribution of the proceeds originated by the sale of the assets.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

On the basis of the general rules established by Articles 2796 *et seq.* of the Italian Civil Code, the procedures by which the lender can enforce the pledge on the shares are as follows:

1) request the court to sell the pledged shares until the debt is paid; or
2) request the competent court to assign the shares for payment, until the debt is paid, based on an estimate to be carried out with an expert's report by an expert appointed by the court.

Pursuant to Article 4 of Legislative Decree no. 170/2004, pledge on shares can be enforced, and the shares can be appropriated, when a borrower is in administration or has entered another insolvency or reorganisation procedure, only where the creditor or debtor is a public authority, a central bank, a prudentially supervised financial institution, a central counterparty, a settlement agent or a clearing house and the other party to the agreement is one of the above mentioned institutions or a company (not an individual).

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Any contract transferring or granting right on real estate is subject to a nominal stamp duty ("*imposta di bollo*"), to registration tax ("*imposta di registro*"), which is regulated by the Unified Registration Act (Presidential Decree no. 131 of 26 April 1986) and to mortgage and cadastral taxes ("*imposta ipotecaria e catastale*").

Stamp duty is applied on a fixed basis and depends on the number of standardised pages composing the contract.

Registration tax is normally applied on a percentage basis, on the value or price of the transaction (depending on various circumstances). Standard rates vary from 2% to 9%. Registration tax applies on a fixed nominal basis in case the transaction is subject to VAT.

Mortgage tax has a standard rate varying from 2% to 3% and cadastral tax standard rate is 1%. Such rates are reduced by 50% in case of transactions involving real estate funds or SIIQ (Italian REITs). Mortgage and cadastral taxes can also apply on a fixed nominal basis in case the transaction is subject to VAT.

### 9.2 When is the transfer tax paid?

Transfer taxes have to be paid within 30 days of the transfer. Payment is usually made by the notary, which is jointly liable with the seller and the buyer for payment.

### 9.3 Are transfers of real estate by individuals subject to income tax?

The capital gain on disposal (i.e., the difference between the sale value and the original acquisition value, including all costs) is fully taxable, unless the asset was used as the primary house or was acquired more than five years before the disposal.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

VAT is payable subject to option by the seller for all sales or purchases of instrumental real estate when the transaction takes place in the framework of a business activity. VAT is compulsory in case the sale is executed within five years of the construction or refurbishment of a property.

In case VAT applies, the seller charges VAT to the buyer and the seller then pays the VAT to the tax authorities. In many cases a reverse charge mechanism applies, allowing the buyer not to disburse the VAT amount.

The general rate of VAT is 22%. However, a reduced rate of 10% applies to some residential and instrumental buildings; a further reduced 4% rate applies to the sale of residential properties which become the primary house of the buyer.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

The seller is responsible for income tax on the capital gain. The seller is also jointly liable with the buyer for the payment of transfer taxes.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

Taxation of share deals is completely different and, normally, significantly lower. However, tax authorities scrutinise share deals in order to ascertain whether the parties have simulated a share deal only to reduce the tax burden of the transaction, while their real purpose was transferring title on a real estate asset or portfolio.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

A buyer is always jointly and severally liable with the seller (and the notary) for the payment of the transfer taxes, regardless of any allocation agreement between the seller and the buyer.

In case the seller omitted to pay any applicable property tax or transfer tax, the tax authorities may enforce a lien on the relevant property, which, in some cases, may prevail over a mortgage.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The following laws regulate the lease of business premises:

- the Italian Civil Code; and
- Law no. 392 of 27 July 1978, which regulates leases of urban properties.

**10.2 What types of business lease exist?**

There are mainly three types of business leases:

- leases regulated by the mandatory rules contained in Law no. 392/1978;
- major leases (i.e., where the annual rent exceeds Euro 250,000), for which the parties may freely negotiate departing from the mandatory rules of Law no. 392/1978; and
- leases of business concerns, to which Law no. 392/1978 does not apply and are regulated by the Civil Code.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

In leases regulated by Law no. 392/1978 the following mandatory provisions apply:

a) the term cannot be less than six years, renewable for six-year periods (nine years for tourism, hospitality and most entertainment properties);
b) rent increases are ordinarily limited to 75% of the annual consumers' inflation index;
c) the tenant's right to assign the lease or sub-lease is subject to consent by the landlord; however, the tenant can always assign the lease or sub-lease the property jointly with the assignment or lease of its business concern;
d) change of control of the tenant and corporate restructuring do not affect the continued validity of the lease, unless specific provisions are included in the lease contract;
e) property insurance normally has to be paid by the landlord, while the tenant can be requested to buy tenant insurance; and
f) the tenant is responsible for ordinary maintenance, while the landlord is responsible for any extraordinary maintenance and repairs.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Leases are subject to registration tax with a standard 2% rate (reduced to 1% in case the landlord is subject to VAT).

In addition, the landlord may opt for the application of VAT at the standard 22% rate.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

As a general rule, upon expiry of the initial six-year (or nine-year) term only the tenant may avoid the automatic renewal of the lease. The landlord may avoid the renewal only in case it intends to use the property for its own business or to carry out a major refurbishment of the property.

Also, Law no. 392/1978 provides that only the tenant can be granted an early termination right; such a right can be granted to the landlord only in major leases.

The contract can contain provisions allowing either party to terminate the lease in case of material breach of contract by the other party.

For retail leases, in case the landlord denies the renewal of the lease, under the provisions of Law no. 392/1978 the tenant is entitled to receive compensation for loss of business continuance and has a right of first refusal on any new lease. The tenant has also a right of first refusal in case the landlord intends to sell the leased property.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

In case the tenant assigns the lease, it remains jointly liable with the assignee for any unpaid costs related to the period before the assignment.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

The main "green obligation" lies with the landlord, since he is obliged to provide an energy performance certificate to the tenant before signing the lease contract.

Recent leases of grade "A" properties often contain a best efforts provision by the tenant to maintain energy efficiency policies and to provide information to the landlord on its energy consumption levels.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

The offer of flexible office spaces and co-working spaces is increasing significantly. This is usually based on service contracts, whereby the client is authorised to make use of specific office facilities, but does not obtain any rights on the relevant property.

The offer of short-term leases having a term of between 30 days and one year is very limited because of constraints in the applicable legislation. Some operators are experimenting with new forms of short-term contracts based on hotel and tourist accommodation legislation.

Operators are also considering actively serviced apartments, while shared residential spaces are not very common. Also, in this case, constraints in the applicable legislation create some limitations in the implementation of new models.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The following laws regulate the lease of residential business premises:

- the Italian Civil Code;
- Law no. 392 of 27 July 1978, which regulates leases of urban properties;
- Law no. 431 of 9 December 1998, which regulates leases of residential properties;
- Law Decree no. 133 of 12 September 2014, which regulates rent-to-buy contracts;
- Law no. 208 of 28 December 2015, which regulates financial leasing of residential properties; and
- Legislative Decree no. 206 of 6 September 2005, which regulates contracts granting a time share right on a real estate property.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the same legislation applies to premises for single tenants and premises intended for multiple residential occupiers.

Different regulations may apply with respect to the lease of state or Municipality owned houses offered to low income families, and to temporary leases for touristic purposes.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

The following mandatory provisions apply to residential leases:

a) the initial term cannot be less than four years, renewable for four-year periods (the initial term may reduce to three years, with a renewal of at least two years, for leases that comply with local agreements aimed at containing rent increases);
b) rent increases are ordinarily limited to 100% of the annual consumers' inflation index;
c) at the end of the initial term the landlord may avoid the renewal only in limited circumstances: direct use of the premises for living purposes; refurbishment of the building; the tenant has another house available in the same Municipality; the landlord intends to sell the premises provided that he does not have other properties available; and provided that he grants the tenant a right of first refusal. At the end of the first renewal period any of the parties may commence a renewal or termination procedure; and
d) the tenant is generally responsible for ordinary maintenance, while the landlord is responsible for any extraordinary maintenance and repairs. National agreements between owners' and tenants' associations provide criteria for the allocation of operating costs to the tenant and landlord.

In some leases entered into with governmental agencies or state-owned companies, the tenant may have a preferential right to purchase the property in case of disposal.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The landlord can terminate the lease early in cases where the tenant is in default of payment of the rent (even for only a one-month instalment) by commencing special proceedings ("*sfratto per morosità*"). However, the tenant may stop proceedings (up to four times in a four-year period) by paying any amount due to the landlord before or during the proceedings. Once the eviction of the tenant is confirmed by the court, if the tenant does not release the premises, the landlord may need to commence an enforcement procedure to obtain vacant possession, which may stay for a number of months.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/ permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Regions and Municipalities in Italy are responsible for country and town planning in their designated territory. Consequently, there are multiple local planning systems in Italy. However, these systems are inspired by the same planning law system. Therefore, the systems have common institutions and regulations.

Municipalities are the most important authorities concerning town planning and are responsible for the following:

- determining the local planning system ("PRG – *Piano Regolatore Generale*" or "PGT – *Piano di Governo del Territorio*"), which provides for the permitted use of land;
- approving the local building regulation ("*Regolamento Edilizio*"), which sets the standard to be met in constructions (in compliance with national guidelines and legislation and the general provisions of the Civil Code);
- granting authorisations for special local planning, new constructions, refurbishment of existing buildings and change of the permitted use of land and buildings; and
- expropriating land for public use.

The protection of the environment and the implementation and application of the national environmental law (Legislative Decree no. 152 of 3 April 2006) is also delegated to local agencies and legislation, organised at the Regional and Municipality level.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Yes; land owners can be forced to sell land which is included in a planning sector or has to be dedicated to construction of public infrastructure or public service/utility facilities and buildings. The authority to expropriate land is attributed not only to the central Government, but also to Regions, Municipalities and other public agencies.

The compensation for the owner is determined by the authority that has promoted the expropriation process on the basis of cadastral values and other publicly available information; the owner may challenge the proposed remuneration, which in such case is finally determined by an expert appointed by the local court.

It must be taken into account that in most cases that valuation will not be consistent with the open market value of the land at that time.

**12.3 Which bodies control land/building use and/ or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

As indicated in question 12.1, land and building use and occupation is controlled by the local Municipalities and local police. Local agencies at Regional and Municipal level ("ARPA – *Agenzia Regionale Protezione Ambiente*" and "ASL – *Azienda Sanitaria Locale*") and the local Fire Brigade are in charge of supervising and controlling the correct application of environmental law and building regulations that are relevant to human health.

Buyers may obtain information on the permitted use of a land/ building, building permits and local public constraints through access at the local Municipality offices. Obtaining information on the actual status of a property and its environmental compliance is usually more complicated and collaboration by the owner is required.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Permits required for building works differentiate considerably depending on the relevance of works and their impact on the building/land.

The development of a new building is always subject to a prior permit granted by the local Municipality, or to a previous special planning agreement with the Municipality which sets the framework for subsequent construction.

Refurbishment of existing buildings can require a building permit if the permitted use of the building is affected, or its total surface or its aspect are materially changed; in most cases, however, construction works can be commenced without requesting a permit, provided that the relevant project is notified to the local authorities before the works are commenced.

Once construction is terminated, certification must be obtained attesting that the building is fit for occupancy, complies with antiseismic regulation and fire prevention regulation. As to occupancy and seismic compliance, the certification of technical consultants engaged by the developer in most cases replaces the need of a certification by the Municipality, while fire prevention compliance needs to be certified by the local Fire Brigade.

It should be noted that, in response to the tragedies that occurred as a result of the earthquakes in central Italy, several Municipalities have decided to increase controls on buildings in order to protect the national building stock. In particular, in 2014, the City of Milan introduced, with the local planning system, the obligation to obtain, for all buildings with more than 50 years, the certificate of static suitability ("CIS – *Certificato di idoneità statica*"), which is becoming mandatory in case of sale of the property. This requirement is expected to become mandatory throughout the country.

**Use of real estate**

Use of real estate may require an authorisation by the local authorities depending on the nature of such real estate (e.g., the use of public areas and other state-owned infrastructures or natural resources and areas is subject to a concession) or the activity to be conducted in the property (e.g. restaurant, retail, entertainment, hospitality, health assistance, etc.).

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

As indicated in question 12.4, in many cases permits and licences can be replaced by a certification of a technical consultants. However, in all cases where a permit or licence must be granted by the Municipality, no implied permissions are allowed.

In some cases, the procedure to obtain a permit or licence can be facilitated if the law provides that in case the Municipality fails to reply within a given deadline, the permission/licence is intended to be granted ("*silenzio-assenso*").

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The fees for obtaining the relevant permits are defined locally by municipal authorities and normally include: (a) a contribution

for urbanisation works strictly related to the project; (b) a contribution for more general urbanisation works; and (c) a fee remunerating the allowed surface of the building.

Contributions under (a) and (b) are often replaced by the undertaking of the developer to carry out the relevant infrastructure works.

The standard term for obtaining a building permit is in the region of three months from the complete filing. However, the term can be delayed considerably in case the opinion of different commissions, agencies or entities is required (e.g., opinion on the landscaping impact of the project, opinion of the local agency of the Ministry of Culture in case of historical buildings, opinion of the Fire Brigade, etc.).

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The Cultural Heritage and Landscape Act ("*Codice dei beni culturali e del paesaggio*" – Legislative Decree no. 42 of 22 January 2004) provides for limitations on the ownership, transfer and refurbishment of real estate assets having historical value and those characterising or having a significant impact on the landscape.

In particular, the Ministry of Culture and other local agencies have a right of first refusal in case of transfer of a property which was declared of historical, architectural or landscaping interest; accordingly, the deed of sale must be notified to the relevant authorities, which normally have 60 days to exercise the right of first refusal. Construction work on historically valuable buildings must be approved by the Superintendence and such buildings cannot be used for purposes which are incompatible with their historical or artistic character or which are detrimental to their conservation.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Legislative Decree no. 152 of 3 April 2006 delegates the Regional Authorities to maintain a register of sites interested by an environmental clean-up procedure.

However, only major contaminations that were ascertained by or denounced to the competent authorities are recorded in such registers. Access to information on minor contamination is normally limited to the owner.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Environmental clean-up is always mandatory as from the declaration of contamination by the environmental authorities until the remediation is complete. As a general rule, the originator of the contamination is responsible for the clean-up; however, under given circumstances the owner of a contaminated site can also be responsible for the clean-up. In addition, in case the parties that are responsible for the clean-up are in default, the public authorities may carry out the clean-up procedure and create a charge on the contaminated land to cover the relevant costs.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Legislative Decree no. 192 of 19 August 2005 provides for the assessment of the energy performance of any building containing electrical and heating systems. The relevant energy performance certificate issued by authorised consultants must be disclosed to the purchaser and to the tenant of a property.

In addition, local regulations adopted at Municipality levels may provide for the granting of benefits in terms of additional permitted surface or for discounts on construction costs for new or refurbished buildings that meet specific energy performance requirements.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

EU Directive no. 31/2019 and Italian Legislative Decree no. 63 of 2013 provide that by the end of 2020 all new buildings must meet the "zero energy consumption" standards. Various Italian Regions are implementing local schemes aimed at accelerating the implementation of the above legislation.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Please see question 13.1 above.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Local regulations adopted at Municipality levels may provide for the granting of benefits in terms of additional permitted surface or for discounts on construction costs for new buildings that meet specific energy performance requirements.

Additional requirements for "green housing" are set by private organisations (e.g. LEED, Casa Clima) and can be adopted on a voluntary basis.

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Domenico's client base highlights include international institutional investors, real estate funds, wealthy individuals, developers, financial institutions and large end-user corporate entities in all spectrum of corporate business activities, including industrial.

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Some of the transactions in which we have been involved in the last decade are milestones in the Italian real estate industry. Our integrated approach allows us to assist our clients in a full range of issues including development, financing, listing in capital markets, construction of large-sized projects, creation and management of real estate funds, corporate reorganisations and assets spin-offs.

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# Japan

Anderson Mori & Tomotsune

Kenichi Yamamoto

## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The Civil Code, which governs real estate in Japan, regulates ownership, assignment, mortgages, and other relevant matters, including contracts such as sale and purchase agreements and lease agreements. Other major laws relevant to real estate are as follows:

**Real Estate Registration**
The Law of Real Estate Registration governs the registration process for the transfer of real estate ownership and the establishment of mortgages. Registration is necessary to perfect a transfer or a mortgage.

**Brokerage**
The Real Estate Transactions Business Law governs the brokerage aspect of the real estate business. For example, under this Law, it is necessary to obtain a licence from the relevant authority in order to engage in real estate brokerage.

**Construction**
The Building Standard Law provides standards relating to the construction of buildings.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

In principle, no property rights may be established other than those prescribed by statutory laws, including the Civil Code. In terms of a contractual relationship, there may be some local customary laws that may be relevant.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

There are no international laws that are materially relevant to real estate in Japan.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Generally, the law does not restrict non-resident persons from obtaining and owning real estate in Japan. However, in certain cases, non-resident persons are required to make a report regarding real estate transactions to the relevant governmental authority in accordance with the Foreign Exchange and Foreign Trade Law.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

**Ownership**
In general, a person who has an ownership in real estate has a right to use, profit from, and dispose of that real estate in accordance with the Civil Code. Ownership is not purely contractual.

Joint ownership of real estate (*kyoyu*), which is governed by the Civil Code, is a form of ownership that can be held by multiple persons. Unit ownership (*kubunshoyu*) of a building under condominium ownership, which is subject to the Law for Condominiums as well as the Civil Code, is a form of ownership that may be held by a single person separately from other condominium owners in the same building.

**Other form of rights to use another person's real estate:**

1. *Superficies* (*Chijoken*)
   Superficies is typically a right to use land in order to enjoy ownership of structures, such as buildings, located on the land. While a superficies may be established based on an agreement between the owner of the land and a user, a registered superficies may be claimed against a third party. Thus, a superficies is not purely contractual.
2. *Servitude* (*Chiekiken*)
   Servitude is a right to use land for the enjoyment of other land (e.g. right of way). While servitude may be established based on an agreement between an owner of the land and a user, a registered servitude may be claimed against a third party. Thus, servitude is not purely contractual.
3. *Leases*
   A lease is a contractual right and obligation under the Civil Code. However, a lease can be perfected through registration, or otherwise recognised under the Act on Land and

Building Lease. A tenant who obtains such perfection can assert his right against a new owner of the leased property. In this sense, a lease is not purely contractual.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Under Japanese law, a building is recognised as independent real property. Thus, ownership of land and the building that stands on the land may be separate and may belong to different persons. When a person intends to construct a building on another person's land, he or she has the option of obtaining either: (i) the title to the land; or (ii) a right to use the land, such as a superficies or a lease as described in question 3.1 above.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

In principle, there is no split between legal title and beneficial title of real estate. However, it is possible to create a trust over an estate. If a trust over an estate is granted to a third party, the legal title of the estate is recorded in the name of the third party as "a trustee".

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

In general, all land is registered. However, there are some exceptions, such as government land, that are not registered. Buildings are required to be registered under the Law of Real Estate Registration. Although it is possible that some buildings remain unregistered, in reality, those buildings usually become registered when they are subsequently sold so that the new buyer can perfect ownership against a third party.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no state guarantee of title, as the real estate registry does not necessarily reflect the true holder of the title or right. In practice, parties who plan to enter into a real estate transaction usually rely on the registry because it is generally the best indication of the true owner of the real estate-related title or right. However, a buyer has no recourse against anyone but the seller if, relying on the registry, the buyer purchases real estate or a related right from a seller and the information contained in the registry was incorrect. Under those circumstances, the buyer may seek reimbursement from the seller pursuant to statutory warranties or contractual warranties, but, generally speaking, the buyer would not be able to acquire the ownership of, or title to, the real estate.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

No rights in land are compulsorily registrable. Even if there is a transfer of ownership in land under a sale and purchase agreement, registration is not mandatory. However, if the ownership is not registered, the purchaser will be unable to assert its ownership against third parties.

**4.4 What rights in land are not required to be registered?**

See the answer to question 4.3 above.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period or different class of title in relation to a first registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Ownership is transferred to the buyer in accordance with the agreement between the seller and the buyer. No formality is required to transfer ownership.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Without perfection through registration, no right in real estate obtains priority over other rights. The priority of a perfected right in real estate is determined by the chronological order in which perfection is obtained. Thus, an earlier registered right has priority over subsequently registered rights.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

One nationwide real estate registration system operates in Japan.

**5.2 How do the owners of registered real estate prove their title?**

In practice, the registry is generally the best indication of the true owner of the real estate-related title or right. The registry office does not issue any physical title document. However, anyone can obtain a certified copy of a registration from the land registry.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Real estate transactions may be registered electronically.

In the case of an ownership transfer resulting from a sale and purchase transaction, the following documents are required for registration: (i) information certifying the cause of registration (*touki genin shomei joho*), such as the sale and purchase agreement or a document summarising the necessary information;

(ii) information for registration identification (*touki shikibetsu joho*) or a title document of the seller; (iii) a certificate with the seal impression of the seller; and (iv) a power of attorney from both the seller and purchaser. When the application for registration is made electronically (i.e. online application), the electronic certificates may be used in place of the certificate with the seal impression.

Information on the ownership of registered real estate may be accessed electronically.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Under the State Redress Law, if the relevant public officer has, in the course of registration, intentionally or negligently inflicted damage in an unlawful way on another person, the State shall assume the responsibility to compensate for that damage.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Anyone may obtain a certified copy of a registration from the land registry. Thus, a buyer may obtain a copy of a registration with almost all of the information that he might reasonably need regarding encumbrances and other rights affecting real estate. However, there are some rights that are not necessarily registered. For example, a certain land lease right may be perfected by an ownership registration on the building registry, which means that the land lease can be perfected without registration on the land registry. It is recommended to check both the building registry and the land registry.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

In general, real estate brokers are a feature of real estate transactions in Japan. Governmental approval is required to engage in the business of real estate brokerage.

In addition, a judicial scrivener is involved in almost all real estate transactions. As the registration process is very technical, a judicial scrivener's involvement is crucial to ensure that the process is completed smoothly.

Depending on the size and complexity of a transaction, legal, tax, and technical advisors are sometimes engaged for due diligence work.

**6.2 How and on what basis are these persons remunerated?**

The basis for, and process of, remuneration in any given transaction depends on the terms of the agreement.

However, there are upper limits on the amount of compensation that a real estate broker may receive under the Real Estate Transactions Business Law: (i) 6% of the transaction amount if the broker acts as an agent; and (ii) 3% of the transaction amount if the broker acts as an intermediary. In the case of (ii), the broker may be compensated by both the seller and the buyer if both are his/her clients, so the total compensation received by the broker may amount to 6%.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Since the Bank of Japan introduced the zero-interest-rate policy, Japanese banks have been encouraged to lend and, as a result, there has been fierce competition in lending between the banks for real estate transactions in Japan. It is easier to obtain real estate financing at present than it has been since 2010.

Domestic investors are the main source of capital for the financing of real estate transactions in Japan, although foreign investors are increasing their presence in the market.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Numerous new logistics assets are being built and are steadily expanding. Hotels are also attracting investors, as Japan is experiencing a historic tourism boom, recently drawing 30 million leisure visitors a year.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

There is no specific trend indicating a slowdown in any market sub-sector.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

Ownership is transferred to the buyer in accordance with the agreement between the seller and the buyer. No formality is required to transfer ownership.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

In general, the seller is not under a duty of disclosure. However, pursuant to the Civil Code, a seller is liable for any defects or encumbrances that are unknown to the buyer unless otherwise agreed. The buyer may seek damages for the unknown defects or encumbrances, and even cancel the agreement if the purpose of the agreement cannot be achieved due to the defects or encumbrances.

While the seller is not obligated to make disclosures, a real estate broker involved in a transaction has an obligation to provide certain material information concerning the real estate in writing to the buyer pursuant to the Real Estate Transactions Business Law.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller may be held liable to the buyer for fraudulent misrepresentation. If the buyer is induced to enter into a real estate transaction through fraudulent misrepresentation by the seller, the buyer may cancel the transaction and/or seek damages under the Civil Code.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Traditionally, contractual warranties in favour of the buyer have not been popular in Japan because the seller is already liable for any latent defects under the Civil Code as stated in question 7.2, without any explicit warranties provided pursuant to contract. However, we have seen quite a few contractual warranties recently in large real estate transactions. In practice, warranties could cover any matters relating to real estate. Normally, warranties would mainly function to apportion risk, but depending on the case, could also function as substitutes for due diligence.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

As we mentioned in question 7.2, in principle, the seller is liable for defects or encumbrances that are unknown to the buyer, unless such liabilities are expressly carved out in the agreement.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In general, the buyer has no liabilities beyond paying the sale price.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

As a general rule, registration as a money lender under the Money Lending Business Law (*kashikingyoho*) is required in order to engage in the money lending business. This rule does not vary between residents and non-residents, or between individual persons and corporate entities. There are no regulations regarding the lending of money specifically for financing real estate transactions.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

A mortgage is the main method for a real estate lender to secure its loan. Another method is a revolving mortgage (*neteito*), which secures unspecified loans up to a specified amount agreed in the mortgage agreement.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

There are specific proceedings for the realisation of mortgaged properties.

Foreclosure is one such legal process involving court proceedings. This is a fair and transparent process, but it can take a considerable length of time to accomplish. Moreover, the sale price through foreclosure tends to be lower than the actual market price because potential buyers are typically not given the opportunity to conduct their own investigations of the property. Additionally, a report of a property prepared by a court execution officer is not sufficient for purposes of due diligence. As such, foreclosure is not the preferred process for realisation of mortgaged properties.

One common process for the realisation of mortgaged properties is a voluntary sale (*nin-i baikyaku*), through which the property can be sold at a price close to the market value in a timely manner. Therefore, voluntary sales are much more beneficial for the mortgagee and even the mortgagor (in certain cases) than the foreclosure route.

**8.4 What minimum formalities are required for real estate lending?**

No formalities are specifically required for real estate lending. However, if a mortgage is established as a security, the registration process will be necessary for the perfection of that security.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

A mortgagee or a revolving mortgagee can perfect its rights by registration. If the mortgage or revolving mortgage is previously registered in the registry, a mortgagee may assert its preference against other creditors who subsequently register (or have not yet registered) a mortgage or other rights.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

The following acts may be avoided if they create a security interest against an existing claim, or extinguish any existing claim:

(a) an act conducted by the debtor after the debtor becomes continuously unable to pay its debts as they become due (*shiharai funo*), if the creditor knew that the debtor was unable to pay its debts or the debtor had suspended its payment at the time of the act;

(b) an act conducted by the debtor after the filing of a petition for insolvency proceedings, if the creditor knew at the time of the act that the act was conducted after the petition was filed; and

(c) an act that the debtor is not obligated to do, either with respect to the act itself or with respect to the timing of the act, if the act was conducted within 30 days prior to the debtor becoming unable to pay its debts and the creditor knew the fact that such act would prejudice other creditors.

In addition, in accordance with the Civil Code, security taken by a lender can be rescinded as a fraudulent action if the property owner establishes the security knowing that it will prejudice

other creditors, and the lender knows at the time of that establishment that other creditors would be prejudiced.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

One who obstructs enforcement action can be punished in accordance with the Criminal Code. A borrower would not be able to lawfully and effectively obstruct enforcement action by a lender.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

In Bankruptcy proceedings, a secured creditor can generally enforce its security interest through a foreclosure outside of bankruptcy proceedings.

In Civil Rehabilitation proceedings, secured creditors are not stayed from exercising their security interests, but they may become subject to a suspension order by the court, which has the effect of a temporary stay.

In Corporate Reorganisation proceedings, secured creditors are stayed from exercising their rights (security interests) outside of the proceedings.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

A share pledge is the most common way to establish a security over shares. As a general rule, a lender may not have a right to appropriate pledged properties. However, if the lender is a corporation incorporated under the Corporate Law, the lender may have a right to appropriate the pledged properties if the right is provided in the share pledge agreement. Shares may be appropriated outside of bankruptcy proceedings. As for the cases in Civil Rehabilitation proceedings or corporate reorganisation proceedings, please see question 8.8 above.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

**Real property acquisition tax**

A person acquiring real property is subject to a real property acquisition tax. This tax is calculated based on the amount of the property value assessed by the tax authority (approximately 70% of the market value if the property is land). Until March 31, 2021, the tax rate is 3% in the case of the acquisition of land or a residential house.

**Registration tax**

A person applying for registration is subject to a registration tax. This tax is calculated based on the amount of property value assessed by the tax authority. Until March 31, 2021, the tax rate in the case of the sale and purchase of land is 1.5%.

**Stamp tax**

The contract regarding transfer of real property is subject to a stamp duty (up to 600,000 yen).

### 9.2 When is the transfer tax paid?

The real property tax is payable post-transaction. The amount of the payment and the deadline for the payment are set by the tax authority several months after the transaction.

Registration tax is payable at the time of application.

Stamp duty is payable upon the execution of the contract.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Capital gain from the sale of real estate is taxable. The tax rate is dependent on the period of time for which the real estate was held. If the real estate to be sold has been held by the seller for less than five years, the tax rate is relatively high at 39.63% (30% income tax, 0.63% special income tax for reconstruction and 9% individual inhabitant tax). However, if the holding period is more than five years, a lower tax rate is applied at 20.315% (15% income tax, 0.315% special income tax for reconstruction and 5% individual inhabitant tax).

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

A consumption tax is payable in the case of a transfer of ownership of a building. The tax rate currently stands at 8%, but this is expected to increase to 10% on October 1, 2019. The seller is liable for the payment of consumption tax, except in the case where the seller is an individual and the property is his/her residence.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

If the seller is a corporation, the net income is subject to corporation tax, with the effective rate standing at 30–35%.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

The transfer of ownership of a company that owns real estate does not trigger real estate acquisition tax, registration tax or stamp tax, which are normally imposed in transfers of real estate.

In relation to corporation tax, there would be no difference in the respective rates applied to a parent company and a subsidiary for such transfers, assuming that capital gains resulting from the transfer of ownership by a parent company are equal to the capital gains that result from the transfer of real estate by its subsidiary, and provided that the subsidiary has no other assets other than the real estate.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

Real estate acquisition tax is not imposed on either the entrustment of real estate from the seller to the trust or the transfer of the beneficial interest from the seller to the buyer. This can be a useful cost-saving method in the context of real estate investment.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The Civil Code regulates matters concerning the lease of real estate as part of the general law. The Act on Land and Building Lease (the "ALBL") is a special law that regulates land leases that facilitate the ownership of buildings as well as building leases (including office buildings and residential buildings).

**10.2 What types of business lease exist?**

There are two types of real estate leases in Japan: ordinary renewable leases; and fixed-term leases.

**Ordinary lease**
In principle, an ordinary lease is used for the lease of real estate. An ordinary land lease to facilitate the ownership of a building and an ordinary building lease can be renewed even if the agreed lease period has already expired. The lessor cannot reject the renewal of the lease agreement without justifiable reasons, which, generally speaking, are not easily found.

**Fixed-term lease**
A fixed-term lease is not renewable under the ALBL. The most commonly used fixed-term leases for land are: (i) the general fixed-term land lease available for both residential purposes and businesses; and (ii) the business purpose fixed-term land lease.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

a) **Length of term**
   1. *Ordinary land lease*
      A minimum 30-year term is statutorily required for an ordinary land lease for the purpose of owning buildings (*shakuchi ken*), but the parties may agree to a longer period in their contract. Thus, the duration of the term of an ordinary building lease is contingent on the term that is specified in the agreement.
   2. *Fixed-term land lease*
      Under the ALBL, the term of a general fixed-term land lease for owning a building must be 50 years or more. The term of a business purpose fixed-term lease must be 10 years or more but less than 50 years. The duration of the term of a fixed-term building lease is contingent on the terms of the lease agreement.

b) **Rent increases**
   Under the ALBL, when the rate of rent becomes unreasonable, as a result of an increase or decrease in tax and other burdens relating to the land or the buildings resulting from the rise or fall of land or building prices or fluctuations in the broader economy, or in comparison to the rates of rent for other similar buildings in the vicinity, the lessor and lessee may, notwithstanding the conditions set out in the contract, request future increases or decreases in the rate of rent. However, if there are special provisions set out in the contract to the effect that building rent shall not be increased for a fixed period, those special provisions shall apply.
   The right to request an increase can be modified in the lease agreement, but the right to request a decrease generally cannot be excluded from the agreement, except in a fixed-term building lease if certain requirements are met.

c) **The tenant's right to sell or sub-lease**
   It is standard practice to prohibit the lessee from assigning the lease or sub-leasing without the consent of the lessor.

d) **Insurance**
   In general, there is no provision in relation to insurance in a lease agreement.

e) (i) **Change of control of the tenant**
   In general, there is no prohibition on the change of control of the lessee in a lease agreement.
   (ii) **Transfer of lease as a result of a corporate restructuring (e.g. merger)**
   It is standard practice to prohibit the transfer of the lease resulting from a corporate restructuring, such as a business transfer.

f) **Repairs**
   It is common that the lessor is obligated, under the lease agreement, to carry out repairs to the property. It is also common that the lessee is obligated to restore the property to its original state when vacating the property at the end of the lease or upon termination.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

A consumption tax is imposed on the rent for business building leases.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

**Termination**
Under the Civil Code, a lease agreement can be terminated by one of the parties if the other party fails to perform its obligations thereunder. However, under case law, a lease agreement may not be terminated if a tenant can prove that there is still a relationship of mutual trust between the parties of the lease agreement, even after the occurrence of a breach. Non-payment of rent in one instance does not usually entitle a lessor to terminate the lease, because the non-payment would not suffice to destroy a relationship of mutual trust between the parties.

**Renewal**
As mentioned in question 10.2, an ordinary land lease for owning a building and an ordinary building lease may be renewed even if the agreed lease period has already expired. In the context of lease renewals, the lessor may not terminate the lease agreement or refuse to renew the lease without justifiable reasons. The courts will consider various factors in determining whether a justifiable reason exists, and, generally speaking, it is often difficult for a lessor to establish a justifiable reason for lease termination. The following are some of the factors that are considered by the courts: (i) necessity of use by landlord and tenant; (ii) past history relating to the lease; (iii) current use and condition of the leased premises; and (iv) offer of certain benefits to the tenant in exchange for the tenant vacating the property. An offer of compensation by the lessor, provided it is a sufficient amount

with regard to the situation, can be considered as a justifiable reason. In practice, a lessor intending to reject the renewal of a lease often makes an offer of compensation.

By contrast, a fixed-term lease terminates upon the expiration of the lease term.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

If a lessor has transferred the ownership of the subject property, its status as a lessor under the lease agreement is transferred to the new owner and the former lessor ceases to be liable for the obligations as a lessor under the lease agreement. Any obligations arising out of the lease prior to the transfer may not be assigned without execution of a specific agreement, and accordingly, the former lessor would be responsible for any liability arising during the pre-sale period of the lease.

If a lessee seeks to transfer its status as a tenant under the lease agreement, the tenant would first need to seek consent from the lessor because a lease agreement usually prohibits a lessee from assigning the lease without the consent of the lessor. If consent is obtained, the status as a lessee under the lease agreement may be transferred to a new tenant and the former tenant would cease to be liable for any obligations as a lessee under the lease agreement. Any obligations arising out of the lease period prior to the transfer may not be assigned without a specific agreement, and accordingly, the former lessee would be held responsible for those obligations.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Although it is not yet standard practice to include green lease clauses in a lease agreement, templates of green lease clauses have been publicly announced by the Ministry of Land, Infrastructure, Transport and Tourism. One example of a green lease clause stipulates that the lessor and lessee shall establish reduction targets regarding the consumption of electricity, gas and other fuels, as well as $CO_2$ emissions, the consumption of water and the generation of waste. The expressed overarching goal of this template clause is for the lessor and lessee to work together to achieve the aforementioned targets. Most green lease clauses seem to come in the form of obligations to make efforts towards realisation of aspirational objectives.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

The spread of shared short-term working spaces is in an early phase in Japan.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Please see the answer to question 10.1 above.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

There is no difference based on whether the premises are intended for multiple residential occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

a) **Length of term**
Please see the answer to question 10.3 above.

b) **Rent increases/controls**
Please see the answer to question 10.3 above.

c) **The tenant's rights to remain in the premises at the end of the term**
An ordinary land lease for ownership of a building and an ordinary building lease can be renewed even if the agreed lease period has already expired. The lessor may not decline a request to renew a lease agreement without justifiable reasons, which, generally speaking, are not easily found. A fixed-term lease is not renewable under the ALBL.

d) **The tenant's contribution/obligation to the property "costs" e.g. insurance and repair**
In general, there is no provision in relation to insurance in a lease agreement. A lease agreement commonly obligates a lessor to make repairs. A lessee is commonly obligated to restore the property to its original state upon vacating at the expiry of the lease or upon termination.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A lessor's right to terminate a lease agreement is restricted. Even if a lessee breaches the agreement, a lease agreement may not be terminated if a lessee can prove that there is still a relationship of mutual trust between the parties to the lease agreement. Moreover, the lessor cannot reject the renewal of the lease agreement without justifiable reasons. If a lessee does not vacate the building, it would be necessary for a lessor to file a lawsuit against the lessee for termination of the lease. The lessor would then have to file an application with the court for a compulsory execution.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

**Zoning**

The City Planning Law is the main law that governs zoning in Japan. This law sets restrictions on land developments depending on the classification of the area. For example, if the land is located in an urbanisation control area (*shigaikachouseikuiki*), land developments would be under strict control.

Other key laws that apply to land use are as follows:

- Agricultural Land Act.
- Act on Establishment of Agricultural Promotion Regions.
- Building Standards Act.
- Forest Act.
- Natural Parks Act.
- Cultural Assets Preservation Act.
- National Land Use Planning Act.
- Urban Renewal Act.
- Land Readjustment Act.
- Landscape Act.

**Environmental Law**

The Soil Contamination Countermeasures Law is the main environmental law relating to land. If land is categorised either as a Designated Area Requiring Action (hereinafter "DAA") or a Designated Area Requiring Notification upon Change of the Land Character (hereinafter "DAN"), the owner, manager, or occupier of the land will be subject to various regulations applicable to each category, including orders rendered by an authority. One of the most important of these regulations is the removal of contamination, which is applicable only to the DAA.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

In general, the state cannot compel landowners to sell land to the state. However, under the Land Expropriation Law, the state can exercise the right of eminent domain in specific cases where it is necessary to the public interest to exercise this right (e.g. land is located in an area designated for planned public facilities, such as roads). The price is determined in accordance with the Land Expropriation Law, with regard to the market prices of neighbouring areas, etc.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The laws listed in question 12.1 above apply nationally, but they are mainly administrated at the local level by city, town, and village authorities. Buyers may obtain information concerning these matters by making inquiries to the relevant city, town, and village authorities.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

In general, confirmation from the authorised bodies under the Building Standards Law is required before building works may commence. If land development is involved, permits under the City Planning Law and other relevant laws are required. A permit may be necessary for the use of land for agricultural purposes, depending on the case.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

A building/use confirmation is commonly obtained in Japan. The application for the confirmation will not be rejected if the building/use satisfies the requirements under the relevant law. Implied permission cannot be obtained.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The cost and time involved depends on the facts of each case. As an example, for building confirmation of a residential house, the fees to apply for the confirmation would be less than JPY 1 million, and the confirmation would take a few weeks to process.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

There are regulations on the protection of historic monuments in Japan, such as the Cultural Assets Preservation Act. If the land is located within a Well-known Place Containing a Buried Cultural Property (as defined under the Cultural Assets Preservation Act), a prior notification is required to excavate the land for civil construction work and/or other purposes. If the development of the land has the potential to change the status or influence the preservation of historic, scenic, and natural monuments, a permit would be required.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Information on areas that are already designated as contaminated areas under the Soil Contamination Countermeasures Law is publicly available at the offices of prefectural governments. That information is not absolute or exhaustive, and it is possible that land could be contaminated or polluted even if the land is not in an area designated as contaminated under the Soil Contamination Countermeasures Law. Buyers should consider conducting surveys before purchasing land suspected of being contaminated.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Under the Soil Contamination Countermeasures Law, a soil contamination investigation is required in certain instances. For example, when a prefectural governor finds soil contamination that poses a risk to human health, the prefectural governor may order an investigation. Even if the land does not satisfy the relevant criteria upon the results of the investigation, the prefectural governor can designate the area covering the land as contaminated. When that designation has been made, the prefectural governor can instruct the owner, manager, or occupier of the area to clean-up the land, but only to the extent necessary to prevent harm to human health due to contamination.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Under the Act on the Improvement of Energy Consumption Performance of Buildings, when a new construction/extension/renovation over a certain size (at least 300 square metres of floor space) is to be conducted, a certificate of conformity with energy efficiency standards must be obtained. Large-scale, non-residential buildings that are not compliant with energy efficiency standards are ineligible for certification pursuant to the Building Standards Law.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Under the Act on Promotion of Global Warming Countermeasures and the Energy Saving Law, a company that produces considerable amounts of greenhouse gas emissions (the threshold for which is provided in the relevant ministerial order) is obligated to submit reports regarding the company's greenhouse gas emission levels. There is no nationwide mandatory emissions trading scheme in Japan.

An owner of a building in Tokyo may, depending on the amount of energy the building uses, be required to submit regular reports on greenhouse gas emission amounts to the Tokyo Metropolitan Governor.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

The Government of Japan has set its level of reduction of greenhouse gas emissions at 26% and 80% by the fiscal years 2030 and 2050, respectively, from the emission levels recorded in 2013.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

No other specific nationwide regulatory measures have been taken to improve the sustainability of both newly constructed and existing buildings. However, some measures have been taken at the prefectural level.

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ANDERSON MŌRI & TOMOTSUNE

# Netherlands


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Relevant legislation governing real estate includes the Dutch Civil Code (the "DCC") and land register laws.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

As the legal system in the Netherlands is considered to be a civil law system, the impact on real estate of local common law is limited. However, judges do interpret legislation in their rulings that can serve as guidance for similar cases.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws are not directly relevant to real estate in the Netherlands.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

To our knowledge, there are no legal restrictions on ownership of real estate by particular classes of persons in the Netherlands (including non-resident persons).

However, article 1:88 DCC includes a restriction for spouses on the entering into agreements resulting in, *inter alia*, the disposal of, in brief, the matrimonial home. Prior approval of the other spouse is then required.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Apart from ownership, there are several types of property rights in respect of land in the Netherlands, such as (but not limited to) easements (*erfdienstbaarheden*), ground lease (*erfpacht*) and mortgage (*hypotheek*). All of these rights are limited rights (*beperkte rechten*), which means that future owners of the relevant land are also bound to these rights because of the so-called third party effect (*zakelijke werking*) and that the establishment of such right on land requires the execution of a notarial deed for that purpose and the registration thereof with the public registers.

An easement (articles 70 and following DCC) is an encumbrance imposed upon an immovable property, the servient land, for the benefit of another immovable property, the dominant land. An easement can, in principle, only comprise obligations of the owner of the servient land to tolerate or not do something.

A right of ground lease (articles 85 and following DCC) gives the leaseholder the right to hold and use the property on which the right is established against payment of an annual ground rent to the property owner.

A right of mortgage (articles 3:277 and following DCC) is usually used as a security over land for the benefit of a lender. Whenever the debtor (or mortgagee) fails to comply with its obligations towards the lender, the lender can recover its debts with priority on other creditors of the debtor by means of an execution sale (*executoriale verkoop*).

Besides limited rights, there are also contractual rights over land, such as the right to use the land on the basis of an agreement.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Land can be encumbered with a right of superficies (articles 5:101 and following DCC), which is also a limited right as referred to under question 3.1. This is a right to own buildings, structures or plantings in, on or above an immovable property of another person and provides for the possibility to diverge the ownership of the land from the ownership of the building.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

The DCC does not make a distinction between legal and beneficial ownership. At this moment, there are no legislative proposals pending to change this. However, it is possible to construct beneficial ownership under Dutch law. Parties can

agree upon the right of use of goods of a party, while the other party remains the legal owner. Note that their arrangements are, in principle, only valid between the contracting parties and that contracting parties cannot rely on their arrangements towards third parties.

If there is a split between legal ownership and beneficial ownership, only the legal ownership is registered with the land registry (and visible for third parties).

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

In principle, all land in the Netherlands and all property rights in respect of land are registered. However, it is possible that ownership transfers and that property rights exist or cease to exist by means of prescription (*verjaring*). The land registry does not 'automatically' register these property rights.

Furthermore, it is possible to register the ownership of networks, which are considered as immovable property.

**4.2 Is there a state guarantee of title? What does it guarantee?**

Such a title does not exist in the Netherlands.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

For the transfer of ownership and the establishment or transfer of limited rights, such as easements and rights of ground lease or superficies, the DCC requires the execution of a notarial deed for that purpose and registration thereof with the public registers. The registration is constitutive: the transfer or establishment cannot take place without such registration.

Besides the transfer of ownership and the establishment or transfer of limited rights, registration is also mandatory for multiple other legal acts, including, but not limited to, the attachment (*beslag leggen op*) of land or limited rights, the allocation of land or limited rights, and the waiver (*afstand doen van*) of a limited right.

**4.4 What rights in land are not required to be registered?**

In the Netherlands, a distinction is made between limited rights and personal rights. The entitled party to a limited right has a claim on the relevant property towards any other person. The entitled party to a personal right in principle only has a claim towards the other contracting party or parties. Personal rights, including lease and loans, are not registered with a public register in the Netherlands.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

As all land in the Netherlands has to be registered, this is not applicable.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

A legally valid transfer of property requires (i) a valid title (i.e. a sale and purchase agreement), (ii) conveyance, and (iii) the power of disposal.

In the Netherlands, the conveyance of immovable property, such as land, occurs by means of the execution of a notarial deed and the registration of this deed in the public registers. As a result thereof, the ownership of the land is transferred to the buyer. Note that, at the time of conveyance, a valid title and power of disposal are required.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

In principle, the ranking of a right depends on the moment of establishment of the relevant right: an older right has priority over a younger right.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There is one land registry in the Netherlands in which immovable property and rights thereupon are registered: the public register for registered properties, held by the Kadaster.

**5.2 How do the owners of registered real estate prove their title?**

Owners of real estate can prove their title by means of the deed of transfer, together with proof of registration with the land registry.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

A transaction in relation to real estate cannot be completed online or electronically, since the execution of one or more notarial deeds will be required.

Part of the transfer of ownership is the registration of the deed of transfer with the land registry. Based on this deed, the land registry will register the (transfer of) ownership.

Information on ownership can be accessed electronically, through the website of the Kadaster.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

By starting a legal procedure an injured party can hold the land registry accountable for a mistake in the registration. However, according to jurisprudence, a notary or the registry is not easily held accountable for mistakes in the Kadaster.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Public access to the information in the public registers is legally ensured. Taking into account that the transfer of real estate and the establishment of limited rights requires a registration with the public registers, a buyer can obtain most of the information he might reasonably need in respect of the relevant real estate by means of searching the land registry. However, personal rights on real estate, such as leases, are not registered with the land registry. This also applies to limited rights that exist by way of prescription (*verjaring*).

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

A notary is involved in the drafting and executing of the deed of transfer. In most cases, parties hire (i) real estate agents to assist with the commercial points of a transaction, and (ii) engineers to assist with the assessment of the condition of the relevant building.

**6.2 How and on what basis are these persons remunerated?**

Parties are free to set the height of their remuneration; they are not regulated. However, clients are keener for a fixed or capped fee instead of payment by the hour. Often notaries use a fixed price for the services they provide and real estate agents request a certain percentage of the purchase price.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Often, commercial real estate transactions are conducted by investment funds, which are financed through (private) equity. Private real estate transactions are often financed through a mortgage in combination with the buyers own savings.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The appetite for investors and/or developers to invest is still rather good and stable in comparison to last year. Examples are the development of new office buildings and the investment in more industry-related commercial real estate (e.g., storage, manufacturing, logistics).

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

We have not observed any particular trends with regard to sectors slowing down.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The sale and purchase of real estate takes place by means of a reciprocal agreement in which the seller sells and undertakes to transfer the property (or a property right) (article 7:47 DCC), while the buyer purchases the property and undertakes to pay the purchase price (article 7:1 DCC). Multiple additional formalities apply if the buyer is a natural person who does not act in the conduct of a profession or business and the property sold is destined as residential accommodation (article 7:2 (1) DCC). The agreement must then be entered into in writing and the written agreement must be handed to the buyer. Within three days after receipt of the written agreement, such buyer has the right to terminate the sale.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller has a duty to disclose information in respect of the property, including, but not limited to, (hidden) defects, any charges, limitations and easements. Note that the buyer has an obligation to investigate the property as well.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

A seller can be liable to the buyer for misrepresentation in the event the seller presented incorrect facts or did not present all the relevant information. Note that the liability of the seller can also be excluded or limited based on the relevant arrangements in the sale and purchase agreement.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

A title guarantee is often included, mostly because the transfer of real property requires power of disposal. The inclusion of such guarantee limits the risk for the buyer. If it turns out that the seller did not have the power to dispose of the real estate and therefore, the transfer did not take place, the buyer can hold the seller liable.

According to the freedom of contract, parties can give any form of guarantee or contractual warranties. However, guarantees cannot exclude the buyer's investigation obligation. This obligation does especially apply to professional parties. Which contractual warranties are issued to the buyer, does strongly depend on the type of transaction and the investigation.

Note that if the wording of the warranties of the agreement is not clear, the warranties must be interpreted as to, in brief, what the parties intended (Haviltex).

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Liability mostly occurs when hidden defects become apparent, in which case the seller can be held liable for this if he was aware of this defect during the sale. Whether this is the case also depends on the contents of the sale and purchase agreement. Furthermore, a seller may be held liable on the basis of breach of the warranties issued to the buyer.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The sale and purchase agreement can impose other obligations to the buyer. If the buyer does not comply with these obligations, the buyer can be held liable therefore. Furthermore, a penalty clause is often included in the agreement that applies in the event one of the parties does not comply with its obligations under the agreement.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

In general, the following laws are applicable in addition to the Civil Code:

- the General Administrative Law Act (*Algemene wet bestuursrecht*);
- the Financial Supervision Act (*Wet op het financieel toezicht*);
- the Act on the Prevention of Money Laundering and the Financing of Terrorism (*Wet ter voorkoming van witwassen en financiering van terrorisme*); and
- the Consumer Protection (Enforcement) Act (*Wet handhaving consumentenbescherming*).

Also, in general, no distinction is made between resident and non-resident persons. In certain situations, a distinction is made between individual persons (e.g. in their capacity as 'consumers') and corporate entities.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Real estate lenders seek protection by asking the borrower to grant security over its assets. Typically, security is taken over the real estate itself and, if applicable, over the shares in the capital of the company that owns the real estate. Security over real estate (and other registered assets) must be taken in the form of a right of mortgage. Security over shares (and over other non-registered assets such as movables and receivables) must be taken in the form of a right of pledge.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

A Dutch right of mortgage or right of pledge may only be enforced upon the occurrence of a default (*verzuim*) with respect to any payment obligation secured by that right. In such situation, the mortgagee and respectively the pledgee has the right of summary execution (*recht van parate executie*). This entails that enforcement is possible without first obtaining an enforcement title (*executoriale titel*) from the court.

The relevant provisions of the Dutch Civil Code and the Dutch Code of Civil Procedure must be applied if a right of mortgage or right of pledge is enforced.

In principle, a right of mortgage over real estate is enforced by way of a public sale. The sale must take place in accordance with certain procedures that may be time-consuming. Alternatively, both the mortgagee and the mortgagor may request the competent court to approve a private sale of the real estate.

**8.4 What minimum formalities are required for real estate lending?**

In general, compared with non-real estate lending, there are no specific formalities required to enter into a credit facility.

Granting security in favour of the real estate lender is often a condition for extending a loan. In case security is granted over the real estate and, if applicable, the shares in the company that owns the real estate, certain formalities are required.

A mortgage is created pursuant to a deed of mortgage executed by both the mortgagor and mortgagee before a Dutch civil law notary and registered on the Dutch land register (Kadaster).

A right of pledge over registered shares (*aandelen op naam*) in (i) a non-listed Dutch limited liability company (*naamloze vennootschap*), or (ii) a Dutch private company with limited liability (*besloten vennootschap*) is granted on the basis of a deed of pledge of shares executed by the pledgor, pledgee and, if applicable, the company whose shares are pledged before a Dutch civil law notary. In order for the pledgee to be entitled to exercise its rights, the company whose shares are pledged must be: (i) a party to the deed of pledge; or (ii) notified of the right of pledge.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

Under Dutch law, subject to exceptions on grounds of preference recognised by law, creditors have, among themselves, after payment of foreclosure costs, an equal right to be paid from the net proceeds of the assets of the debtor in proportion to their claims. This is the *paritas creditorum* principle. Generally, as mortgagee and/or pledgee, a real estate lender has preference over creditors of non-privileged or unsecured claims.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Under Dutch rules of fraudulent conveyance (*pauliana*), if a debtor performs a legal act – including the granting of security – (i) to which he is not obligated (*onverplicht*), and (ii) that is prejudicial to one or more of its creditors, the legal act may be avoided (*vernietigbaar*) by each of such creditors and, if the

debtor has been declared bankrupt, by its receiver in bankruptcy (*curator*) if at the time of performance of such legal act the debtor and, unless the legal act was for no consideration (*om niet*), the counterparty was aware or ought to have been aware that prejudice to one or more creditors would result from it.

The validity and enforceability of the obligations of a Dutch legal entity (e.g. a limited liability company or private company with limited liability) under a transaction which it entered into may be avoided by such entity or, if declared bankrupt, the receiver in bankruptcy if both (i) the entry into the transaction was outside the scope of the objects of the entity (*doeloverschrijding*), and (ii) the counterparty of the entity was aware thereof or ought to have been aware (without any enquiry) that this was the case.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

A borrower can frustrate an enforcement action by initiating court proceedings on the basis of unlawful exercising by a lender of his rights as mortgagee or pledgee. Its claim could, for example, be based on: (i) no default having occurred yet; or (ii) a circumstance leading to nullity (*nietigheid*) of the deed of mortgage or deed of pledge.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

As a secured creditor (separatist), a mortgagee or a pledgee is entitled to enforce its rights as if there were no insolvency proceedings. However, on the application of each interested party or as *ex officio* (*ambtshalve*) decision, a Dutch bankruptcy court may order a mandatory stay-period of two months during which all creditors, including mortgagees and pledgees, cannot enforce their rights. The bankruptcy court may extend this stay-period once for no more than a two-month period. The rights of a real estate lender against other parties, such as guarantors and third-party security providers that have not been declared bankrupt, remain unaffected.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

In principle, a right of pledge over registered shares in a Dutch limited liability company or a Dutch private company with limited liability can be enforced by way of a public sale but this rarely occurs in practice. A pledgee has other options: he may request the competent court to (i) approve a private sale of the shares; or (ii) allow the pledgee to appropriate the shares for an amount determined by the court. As a final alternative, the pledgee and the pledgor may agree upon an alternative form of enforcement (including a private sale to a third party) that does not require the courts to be involved. However, this option is only available after the pledgee has become entitled to enforce the right of pledge.

In all cases, the shares must be transferred to the purchaser in accordance with the articles of association of the company whose shares are pledged and, if applicable, any regulatory constraints. In practice, share transfer restriction provisions (*blokkeringsregelingen*) that would restrict the enforcement of a right of pledge over shares are removed from the articles of association before the right of pledge is granted.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The acquisition of legal or beneficial ownership of Dutch real estate (including limited rights with respect to Dutch real estate such as a ground-rent (*erfpachtrecht*) or a right of superficies (*opstalrecht*)) is subject to 6% real estate transfer tax ("RETT"). A reduced 2% rate applies for residential real estate. Please note that the Tax Plan for 2020 proposed to increase the general RETT rate from 6% to 7% as per 2021.

The acquisition of shares in a Dutch or non-Dutch company may be subject to 2%/6% RETT if, in summary (i) the company (on a consolidated basis) meets the "asset test" (assets consist for more than 50% of real estate and at least 30% of Dutch real estate) and the "purpose test" (the activities consist of 70% or more of acquiring, selling and exploitation of such real estate) and can thus be considered a "real estate company" and (ii) the acquirer (alone or together with related parties) acquires an interest in the company (or increase their interest above) 1/3 or more. Detailed attribution, look-through and look back rules apply.

RETT is levied from the acquirer on the acquisition price or fair market value of the real estate, whichever is higher.

Furthermore, the Dutch tax code provides for several RETT exemptions for example for internal reorganisations, business mergers, legal mergers, legal demergers and the transfer of (*inter alia*) "new" real property for VAT purposes (see question 9.4 under (i) below). In addition, a reduction of the taxable base may be provided in case of a subsequent acquisition of the same real estate by different parties within a six-month period.

### 9.2 When is the transfer tax paid?

RETT becomes due at the moment that the transfer deed is executed by way of a notarial deed by the notary. The notary arranges the payment of the RETT to the Dutch tax authorities. In case of a transfer of economic ownership (not by way of a notarial deed), the seller should notify the Dutch tax authorities within two weeks, whereas the acquirer should file a RETT return itself within two weeks (using a form that can be obtained from the Dutch tax authorities), and the seller is jointly and severally liable for the RETT payable.

### 9.3 Are transfers of real estate by individuals subject to income tax?

The Netherlands levies personal income tax via three boxes:

- Box I (income from entrepreneurship) has a progressive tax rate of 49.50%, profits up to EUR 68,507 will be taxed against the lower rate of 37.35% (2020 rates). We note that in case the Dutch real estate is subject to the homeownership scheme (*eigenwoningregeling*) special rules apply.
- Box II (income from substantial interests in entities) has a flat tax rate of 26.25% (2020 rate).
- Box III (income from savings and investments) has a flat tax rate of 30% levied on a fictitious income derived from the assets (which range from 1.8% up to 5.33%, depending on the value of the assets), subject to a certain threshold.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

In principle, the transfer of Dutch real estate is a VAT-exempt supply of goods. However, there are a number of important exceptions to this rule: (i) the transfer of "new" real estate (prior to and during two years after the moment of first use), (ii) the transfer of a building plot (*bouwterrein*); and (iii) the transfer of other real estate whereby parties opt for a VAT-able transfer (subject to conditions). In such case, 21% VAT is generally due. Furthermore, in case the transfer of Dutch real estate forms part of a transfer of a going concern, no VAT will be due as such transfer is not subject to VAT.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

In case the Dutch real estate is transferred by a company, corporate income tax may become due.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

We refer to question 9.1 above for the acquisition of shares in a company which holds Dutch real estate. The acquisition of an interest in an entity which does not have legal personality, such as, for example, a Dutch limited partnership (CV) or Dutch mutual fund (FGR), is subject to RETT against the normal rules, in case such interest represents beneficial ownership in Dutch real estate. Special rules apply in respect of the acquisition of interests in an investment fund.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

VAT revision periods/obligations. In case of a transfer of a going concern or a VAT-able transfer (see question 9.4 above) the purchaser may be confronted with (inherited) VAT revision periods/obligations which in short means that a purchaser should use the Dutch real estate for VAT-able purposes during the remaining VAT revision periods. Otherwise it will have to repay the VAT it (or its seller) originally reclaimed from the Dutch tax authorities in relation to the Dutch real estate.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

Dutch (lease) law distinguishes between two types of business premises: (i) 290-business premises (retail) (*bedrijfsruimte*, article 7:290 DCC); and (ii) 230a-business premises (*overige bedrijfsruimte*, article 7:230a DCC).

Examples of 290-business premises are: retail spaces; restaurants; and hotels.

Examples of 230a-business premises are: office spaces; commercial spaces; factories; and warehouses.

**10.2 What types of business lease exist?**

To qualify as a 290-business premises, the leased space must be accessible to the public for the direct delivery of moveable goods and services. All other cases will qualify as 230a-business premises. For examples, see the answer to the previous question.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

The typical provisions are:

a) If the lease concerns 290-business premises, the contract will be, in principle, for an initial period of five years. If the contract has not been terminated after 10 years, the lease will continue for an indefinite period. It is also possible to agree upon a lease period of two years, after which the lease will end by operation of law (unless otherwise agreed). For 230a-business premises, the leased term is not regulated.

b) If the lease concerns 290-business premises, both parties can request the court to adjust the rent after five years. Under most leases (230a- and 290-business premises) the general terms and conditions of the ROZ Real Estate Council of the Netherlands apply (ROZ conditions). Such conditions prescribe the annual adjustment of the rent on the basis of the change of the monthly price index of the Consumer Price Index (CPI), all households series, as published by Statistics Netherlands (*Centraal Bureau voor de Statistiek*).

c) In principle, the transfer of the lease or the sublet of the leased property is only possible with the prior written consent of the other party (unless agreed otherwise). However, for 290-business premises a transfer can be enforced in court. The court can allow such claim, in case the relevant tenant has a substantial interest and the new tenant offers sufficient guarantees for proper business operations and the proper fulfilment of the lease agreement.

d) In most cases, the insurances related to the building are for the account of the landlord (e.g., building and fire insurance) and the insurances related to the business of the tenant are for the account of the tenant (e.g., household contents insurance).

e) (i) Most leases do not contain a formal change of control provision. However, pursuant to the ROZ conditions for office space and other commercial space (version 2015), both parties should inform the other party of intended relevant changes in their organisation, including the corporate structure.

(ii) As mentioned under (c), the transfer of a lease agreement will require in most cases the prior written approval of the landlord. However, it is not uncommon to include in a lease agreement that the transfer to an affiliated company is permitted without the prior written approval.

f) According to Dutch law, the lessee is responsible for minor maintenance and day-to-day repairs. The lessor is responsible for extensive and constructive maintenance and major repairs. As this is not mandatory law, the parties may deviate contractually.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

**Taxes for tenant**

Parties can opt for a lease that is subject to VAT. That is only possible in case the tenant uses the leased property for at least 90% turnover that is subject to VAT (for some businesses the threshold is 70%).

In most cases, parties agree upon a compensation for the landlord in the event the rent is not subject to VAT (also included in the ROZ conditions).

**Taxes for landlord**
Property tax is, in principle, for the account of the landlord. However, parties can agree that all taxes are for the account of the tenant (a so-called 'triple-net lease agreement').

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

**Termination after default**
Under Dutch law, a lease agreement can be terminated in case of breach of contract. However, the breach should be of such nature and importance that is justifies the termination of the lease agreement. In case of a breach of contract by the tenant, the lease agreement can only be terminated by judicial decision (i.e. extrajudicial termination is not possible).

**Termination after contractual expiry or termination**
1) 290-business premises ((retail) *bedrijfsruimte*):
Unless the lease has been entered into for a period of less than two years, the tenant has the right to renew the lease for a total period of 10 years. Usually, leases are entered into for an initial period of five years, with an extension period of five years for the tenant. In case the lease agreement is not terminated after 10 years, the lease can be considered to run for indefinite time. Such lease can be terminated at any given time, with due observance of a notice period of at least 12 months.
2) 230a-business premises (*overige bedrijfsruimte*):
Dutch law contains no provisions concerning the term or termination of the lease of 230a-business premises. The tenant is not entitled to an automatic right to renew the lease. The lease can run for a definite period of time, after which the lease will run for an indefinite period of time (if not terminated). Such lease can be terminated with due observance of a notice period that is at least equal to the period of a rent payment. Parties can also opt for an extension with certain consecutive periods of time, therefore preventing that the lease will run for an indefinite period of time.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

They can also be held liable after the sale.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

The landlord must provide a valid energy label. However, for certain spaces (e.g. commercial space for storage or temporary buildings) such energy label is not required. Furthermore, the commonly used ROZ lease template for office space contains a 'green lease' provision. This provision stipulates, among other things, that parties recognise the importance of sustainability. However, this is not drafted as an (objectively) determinable legal obligation that is enforceable.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

We do see an increase in the lease of flexible office spaces. This offers start-ups and smaller companies the possibility to lease a specific number of spaces with a tailored set of services and supplies. Often, these contracts are concluded for an initial period of less than a year and can be terminated with due observance of a short notice period.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The main laws can be found in Title 4, Book 7 DCC. A 'residential space' is understood as a constructed immovable property as far as it has been leased out as a separate or dependent dwelling (article 7:233 DCC).

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

A leased room does also qualify as a residential accommodation, meaning that the main laws are fully applicable to such leases. However, the law does make a distinction between self-contained and non-self-contained property (i.e. a room).

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

Typical provisions for a lease of residential premises would be:
(a) Regarding the length of term parties can agree on a fixed-term or an indefinite period. The main law on residential premises does not apply to rent of a short-term nature (article 7:232(2) DCC).
(b) In case of social rent, a rent limit and maximum rent increase applies. From July 1, 2019 the maximum annual rent increase is 4.1% up to 5.6% and depends on the income of the tenant in 2017. Free sector rent does not have such restrictions.
(c) The lease of residential premises is subject to rental protection. This means that the landlord cannot just terminate the lease and vacate the premises (this protection can also be applicable to co-tenants and sub-tenants). See question 11.4 for the termination procedure.

(d) The tenant's contribution to the property costs is limited to the small and daily maintenance of the leased property and for repairs of damage that the tenant has caused himself.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The landlord must have a legal reason to terminate a residential lease, and must terminate the lease in writing at least three months in advance (up to a maximum notice period of six months in the case of a longer lease). In case the tenant does not agree with the termination, the lease will continue and the landlord must then effectuate the termination in court. Common legal reasons for termination are, if:

(i) the tenant does not behave like a good tenant;
(ii) the landlord urgently needs the space for their own use;
(iii) the tenant does not agree with a reasonable offer from the landlord to conclude a new lease;
(iv) the landlord wants to implement a valid zoning plan at the location of the property; and
(v) the lease concerns a non-self-contained property (i.e. a room) and the landlord's interest in terminating prevails above the tenant's interest in continuing to live in the property.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

- The Spatial Planning Act (*Wro*) is the basis for adopting municipal zoning plans, provincial regulations that contain rules for the content of zoning plans and for spatial planning relevant policy documents.
- General provisions environmental law (*Wabo*) forms the framework for acquiring an integrated environmental permit for activities in the physical living environment, such as building, deviating from a zoning plan and the erection of environmental relevant establishments (such as factories). An important regulation to which a request for and integrated environmental permit for building is tested is the municipal zoning plan.
- The Housing Law (*Woningwet*) forms the basis of the Building Decree 2012 (*Bouwbesluit* 2012) that contains construction and fire safety regulations. The Housing Law also is the basis for the social housing regime.
- The Environmental Management Act (*Wet milieubeheer*) forms the basis for environmental regulations, *inter alia*, relating to emissions.
- The Soil Protection Act (*Wet bodembescherming*) contains rules for the quality of the soil and makes clear in what circumstances and in what way soil remediation must be performed.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

There are two laws specifically relating to the possibility for the state, provinces and municipalities to acquire land of private entities. The first is the Municipalities Preferential Rights Act (*Wet voorkeursrecht gemeenten*) that makes it possible for the state, provinces and municipalities to adopt a preferential right on land. The result of such an adoption is that when the landowner wants to sell the land it has to offer it first to the governmental entity that adopted the preferential right. The price is determined by independent experts. If the governmental entity does not want to make use of the preferential right the land owner is free to sell the land to another party. If the governmental entity wants to buy the land it must pay the price determined by the independent experts. However, the land owner is not obliged to sell the land.

The other law is the Expropriation Act (*Onteigeningswet*) which makes a forced transfer of the property rights from private individuals to the government possible. Expropriation needs to be in favour of the common interest and is only possible if an amicable transfer is not possible. The Expropriation Act stipulates that your capital or income may not be deteriorated by the expropriation. Therefore, one receives full compensation for all damage that is the direct and necessary consequence of the expropriation. The compensation is settled with any benefits or other allowances such as planning compensation.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The municipal executive (B&W) is the competent authority for most permits required for activities in the physical living environment. Many municipalities have created executive organisations (*omgevingsdiensten*) that issue permits on behalf of several municipalities and sometimes also on behalf of the province in which those municipalities are situated. The provincial executive (*gedeputeerde staten*) is the competent authority for permits based on the Nature Conservation Act (*Wet natuurbescherming*).

Information regarding zoning plans can be found on the website www.ruimtelijkeplannen.nl.

In general, reliable information can be obtained through the municipalities.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

The most important permit is the integrated environmental permit for building activities (*omgevingsvergunning voor bouwen*). An integrated environmental permit is also required if a building is in breach with the zoning plan. The zoning plan determines the type of use that is allowed (for example 'retail' or 'office') and contains rules stipulating, *inter alia*, the maximum building height and the maximum building surface (*bouwoppervlak*).

The integrated environmental permit for building can only be issued if i) the building is in compliance with the zoning plan, or if ii) an integrated environmental permit for using the building in deviation of the zoning plan is issued as well.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Integrated environmental permits for building that are not in breach of the zoning plan are commonly obtained: if other conditions are met the municipal executive is not allowed to refuse the building permit. If there is breach of the zoning plan the municipal executive is not obliged to issue the permit. This means it is important to determine whether the project at hand

fits in the zoning plan. If not, the relevant policy documents must be studied to determine whether the municipal executive would be willing to deviate from the zoning plan.

Implied permission normally does not result in a valid permit except in exceptional circumstances.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The costs vary from 2.5–5% of the construction costs. An integrated environmental permit for a building that is not in breach of the zoning plan must be issued within eight to 14 weeks after the complete request is filed. If the building project is in breach of the zoning plan a decision on the request (which could also be a refusal) must be made within 26–32 weeks after the complete request is filed.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Historic monuments are protected under the Monument Act 1988, the General Provisions Environmental Law and the Municipal Monument Bylaw. If a building is designated as a national municipal monument there are restrictions relating to changes to the building. For such changes an integrated environmental permit for the change of a monument is required that can only be refused in the interest of the protection of monumental values. Also, regulation can be attached to such a permit. Changing monuments is normally more expensive than regular buildings.

There are no limitations on transferring monuments.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

One can gain information about soil quality via the website www.bodemloket.nl. Business activities that may have influenced the quality of the soil are registered in the register. This website, however, is not complete.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

In shore soil every new contamination of the soil must be remediated immediately and completely. Historic contaminations must only be remediated if the contamination is serious and there is urgency connected to the remediation (which can be the case if the ground water is polluted). Historic contaminations must only be remediated to the level that related to the use of the land. In shore soil the remediation requirements of residential use are stricter than for industrial use.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The Dutch legislation and regulations on the energy performance of buildings is based on the European Energy Performance of Buildings Directive (EPBD). The current regulations for buildings from the EPBD can be found in the Building Decree 2012 (*Bouwbesluit* 2012), the Energy Performance of Building Decree (*Besluit energieprestatie gebouwen*) and the Energy Performance of Building Regulations (*Regeling energieprestatie gebouwen*). For more information: https://www.rvo.nl/onderwerpen/duurzaam-ondernemen/gebouwen/wetten-en-regels-gebouwen.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The Netherlands has signed several treaties/agreements. The Climate Treaty of the United Nations 1992 is one of them. In 2016, the Conference of Parties was signed by the Netherlands in Paris. To achieve the goal of the Paris Treaty, EU Member States have agreed that the EU should emit at least 40% less greenhouse gas emissions by 2030.

Besides the international agreements, the Netherlands is aiming to also provide for national regulation to embed the way Dutch policy implements the Paris Treaty; the national Climate Act sets the percentage by which the Netherlands must reduce $CO_2$ emissions. The Climate Act must provide citizens and businesses with certainty about the climate goals.

The Climate Act will enter into force on 1 September 2019.

Pursuant to the Climate Act, a 'Climate Plan' (*klimaatplan*) should be established, containing the main aspects of the climate policy that aims to achieve the reduction of $CO_2$ emissions as mentioned in the Climate Act.

The Climate Plan is mainly based on the Climate Agreement (*klimaatakkoord*) that was established on 28 June 2019. The Climate Agreement is an agreement between organisations and companies in the Netherlands, aiming to reduce $CO_2$ emissions. The Climate Agreement contains measures for five economic sectors – being the built environment, mobility, industry, agriculture and agricultural use, and electricity – and cross-sectoral measures.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Targets for reduction of greenhouse gas emissions can be found in the national Climate Act. The Netherlands aims to emit 49% less greenhouse gas emissions in 2030 compared to 1990. By 2050 the greenhouse gas emissions should be reduced to 95% less.

According to the ruling by the Dutch court in the Urgenda-case, the Dutch state must emit at least 25% less greenhouse gases in 2020 than it did in 1990. This ruling is currently subject to appeal at the Dutch Supreme Court (*Hoge Raad*).

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The Netherlands takes several measures:

- The Activities Decree (*Activiteitenbesluit milieubeheer*) contains energy-saving requirements for establishments (*inrichtingen*). In short, the operator of an establishment should take and implement all energy-saving measures for which the payback period is five years or less.

- *The National Adaption Strategy* sets out the consequences of climate change for various sectors. The Strategy focuses on how sectors can act and make an impact. This concerns consequences for agriculture, health, infrastructure, recreation and tourism.
- *The Delta Program* intends to protect the Netherlands against flooding and the effects of extreme weather. The Delta Program aims to secure the availability of sufficient freshwater.

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# Nigeria


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main laws that govern real estate in Nigeria are:

(a) The Constitution of the Federal Republic of Nigeria 1999 Cap C23, LFN 2004 (as amended) which guarantees the right of every Nigerian to own and acquire real property/estate in any part of the country.

(b) The Land Use Act 1978 Cap L5, LFN 2004, which primarily regulates land ownership in Nigeria. It enhances the principle of leasehold by which land in each state is vested in the governor of a state, to be held in trust for the benefit of Nigerians within the state.

Real estate is, however, largely regulated by the laws in the state in which the land is situated and differs from state to state. The laws governing real estate in Lagos State (the commercial capital of Nigeria) include the following:

(a) Land Registration Law Cap L41, 2015.

(b) Land Use Charge Law 2018.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The decision of judges is a core element of the Nigerian legal system. In interpreting local legislations on real estate, the principles of law upon which a court bases its decision in relation to material facts become judicial precedents, which must be followed by lower courts in deciding future cases with similar facts.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws are not relevant to real estate in Nigeria as real estate is governed by the law of the place where the property is situated.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

By the provisions of the Land Use Act, all land in each state is vested in the governor of that state, to be held in trust and administered for the use and common benefit of all Nigerians within that state. This provision presupposes that this benefit is to the exclusion of non-Nigerians.

However, some states like Lagos State have laws that expressly regulate the ownership of land by non-Nigerians. The Acquisition of Lands by Aliens Law of Lagos State Cap A2, 2015 and the regulations made pursuant thereto for instance, requires non-Nigerians desirous of acquiring land to obtain the prior approval of the governor in writing where the interest to be acquired in the land is for a period of more than three years. Furthermore, a limit of 25 years (including any option to renew) is imposed on any approved interest in land to be acquired by a non-Nigerian.

Also, subject to limited exceptions, the Land Use Act prohibits the grant of a statutory right of occupancy or consent to the assignment or subletting of a statutory right of occupancy to a person under the age of 21 years.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Land rights in Nigeria may be proprietary, possessory or may relate to lesser interests. The recognised rights over land in Nigeria broadly include:

(a) **Right of Occupancy:** A right of occupancy refers to the right granted to a holder to occupy land for a period of up to 99 years as evidenced by a Certificate of Occupancy.

(b) **Assignment/Leasehold:** Registered owners of land are at liberty to either assign the unexpired residue of their existing interest or grant a sub-lease for a limited number of years. Assignments and leases are usually contractual.

(c) **Easements:** An easement, also known as a right of way, is a property right which confers a non-possessory interest to use real property in the possession of another person for a stated purpose.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

The statutory definition of land includes fixtures permanently attached to the land including buildings. Accordingly, as a general rule in Nigeria, whoever owns the land, owns the building thereon. Therefore, ownership of the land is typically merged with the ownership of the building constructed on it.

However, there are certain scenarios where the right to land diverges from the right to the building constructed on it, and these scenarios are purely contractual. For instance, where a building/structure is erected by a developer with the permission of the owner of the land for a specified period of time, the building/structure remains the property of the developer for the period stipulated. The developer would typically also have the right to deal with the building/structure, including dismantling the same at the expiration of the term.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Nigerian law recognises the fragmentation of ownership interest which permits a split between legal and equitable interests. Legal title is vested in a person who is registered as the legal owner at the land registry.

Furthermore, the law requires that any instrument that confers, vests, transfers, limits, charges or extinguishes any interest or right in any property be registered.

Currently, there are no proposals to change this.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

The Land Use Act vests all land in a state in the governor of that state. However, each state has adopted its own laws to administer and regulate land use.

The Land Registration Law of Lagos State, for instance, mandates the holder of any registrable instrument (a document by which land is sold) to register the same within 60 days of obtaining the governor's consent.

Easements are not required to be registered. Also, leases for a period of less than three years do not require registration.

**4.2 Is there a state guarantee of title? What does it guarantee?**

Effectively, yes, as the holder of a statutory right of occupancy is entitled to exclusive possession of land to the exclusion of all other persons (except the governor) for a maximum (renewable) period of 99 years.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Nigerian law requires any transaction or instrument that confers, vests, transfers, limits, charges or extinguishes any interest or right in any property to be registered.

Furthermore, the foremost consequence of non-registration is that the property may be subject to a fraudulent, subsequent sale. Other consequences of non-registration are as follows:

- An unregistered instrument evidencing title to land is inadmissible in evidence as proof of such title.
- A subsequent (possibly fraudulent) buyer who proceeds to register their title will, in certain circumstances, have priority over the unregistered title holder.
- In certain instances, the instrument of title may be void if not registered within the stipulated time.

**4.4 What rights in land are not required to be registered?**

Leases for a period of less than three years are not required to be registered. Also, easements are not required to be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

Upon the enactment of the Land Use Act in 1978, first registration and its effects ceased to be applicable in Nigeria.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Section 22 of the Land Use Act makes it unlawful to transfer interest in land without the consent of the governor of the state where the land is located.

In a land sale, the transfer of an equitable interest in the land is achieved upon execution and delivery of the transfer documents by the parties. However, transfer of a legal title shall only be completed upon registration, i.e. filing of the requisite documents of transfer in the applicable land registry.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

As a general rule, where an interest in land is required to be registered, a registered title will have priority over unregistered title. Where competing interests are registered, the date of creation of the interest will determine priority between both interests.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There is no central land registry in Nigeria. Land registries are situated in each state in Nigeria and Nigeria has 36 states and Abuja, the Federal Capital Territory.

**5.2 How do the owners of registered real estate prove their title?**

Proof of title is dependent on information derived from the register by inspection upon registration of title.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

In the Federal Capital Territory, Abuja and in Lagos State, land searches may be conducted electronically at the registry through the Abuja Geographic Information System and the Lagos Information Management System respectively. To register ownership rights in land, the following documents will be required:

- Originals of the instrument of transfer.
- Evidence of tax payment by the applicant.
- Survey plan of the property.
- Statutory form for application of a subsequent registration in land (Form 1c in Lagos State).
- Evidence of payment of statutory fees.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes. An action may be brought by an aggrieved person for damages and rectification. However, such person's right to compensation and the quantum of such compensation will be determined by the court, based on adduced evidence.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

The registry is accessible to the public; there are no restrictions to retrieving information. Upon payment of requisite statutory fees, a prospective buyer (or a representative of the buyer) will be able to conduct a search at the registry on the records of property, and to see all registered encumbrances, including registered mortgages and other rights affecting the property.

In some states, however, the consent of the landowner is required to access records of the property in the register.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

- Real Estate Agent: Acts as an intermediary between the buyer and the seller and negotiates the commercial terms on behalf of either party.
- Property Surveyor: Measures and maps out the boundaries of the property.
- Legal Adviser: Conducts requisite due diligence on the property and prepares and/or reviews transaction documents.

**6.2 How and on what basis are these persons remunerated?**

- Real Estate Agent: Remunerated on a commission or a fixed-fee basis.
- Property Surveyor: Remunerated on a fixed-fee basis.
- Legal Adviser: Remunerated on a fixed-fee basis.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

There have been regulations and policy shifts to promote mortgage finance, which currently accounts for a small percentage of Nigeria's Gross Domestic Product (GDP).

The main sources of real estate finance include:

- Private equity.
- Real Estate Investment Trusts (REITs).
- Loans from banks and other financial institutions.
- Mortgage funding.
- Joint venture partnerships.
- Nigerian Mortgage Refinancing Corporation.
- Mortgage Warehouse Funding Limited.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The possibility and opportunities of public and private partnerships for real estate development abounds in the Nigerian housing market, as Nigeria still records a deficit in the housing sector.

According to the World Bank Project Information Document on Nigeria Affordable Housing Project (P165296) published in July 2018, Nigeria requires about 700,000 additional units each year for the next 20 years to keep up with growing population and urban migration. It has also been reported that housing demand in major commercial centres including Lagos State is growing by about 20% per year.

There has also been an increase in the use of co-working spaces as a result of the cost of Grade A office spaces, as corporates are now geared towards putting up underutilised space for co-working use.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Commercial office spaces were saturated over the last couple of years with a lot of prime office spaces built. Now it seems this is slowing down, as investors/developers are yet to fully let out available commercial office spaces.

For example, Grade A offices remain priced around $600/m$^2$ and $700/m$^2$ in Victoria Island and Ikoyi, Lagos State respectively. Also, the shopping complex subsector is slowing down, owing to a decrease in consumer spending due to downturn in the Nigerian economy and the high rental cost of the shopping complexes.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

### 7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

Under Nigerian law, there are broadly three stages in the process of sale and purchase of real estate. These include:

i. the contract stage which involves the negotiation and documentation of conditions for the sale of the property;
ii. the carrying out of due diligence by the purchaser to determine, amongst other things, the validity of the title of the vendor;
iii. the completion stage which culminates in the execution and delivery of the title documents; and
iv. the post-completion stage, which involves the registration of the title of the buyer including obtaining the governor's/minister's consent, stamping the instrument of assignment, and registering the same.

### 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

Yes. The seller is expected to be forthright in his dealings with the purchaser and is thus under a duty to disclose to the purchaser any matter which may affect the validity of his title to the property or may influence the decision of the purchaser to purchase the property, including any known encumbrances and threatened litigation.

### 7.3 Can the seller be liable to the buyer for misrepresentation?

Yes. The seller may be liable in damages for misrepresentation where the buyer suffers loss as a result of a misrepresentation of facts by the seller.

### 7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?

Sellers typically give title guarantees and contractual warranties to the buyer, which are always included in the documents of transfer. The form of guarantee or contractual warranty depends on the capacity in which the seller is conveying his interest in the title. Where, for instance, the seller conveys as "beneficial owner", the following covenants are implied:

- The seller has a right to convey.
- The seller grants quiet possession to the buyer.
- The property is free from encumbrances except those disclosed in the contract.
- The seller agrees to indemnify the buyer in the event of a claim by another claimant on the property.

The function of the warranty is to apportion risk as well as give relevant information to the buyer.

The warranties granted by the seller should not preclude the buyer from conducting requisite due diligence on the property. However, a breach of said warranty will render the seller liable to the buyer for any losses or expenses incurred.

### 7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.

Generally, the seller's liabilities over land are extinguished upon a sale. The seller may, however, in certain instances be liable to the buyer even after completion of the sale. An example would be where there is a defect in the seller's title or where, in the case of a developed property, it has been contractually agreed that the seller would remedy any latent defects within an agreed timeframe.

### 7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

In addition to paying the sale price, the buyer will also be liable to:

- pay all charges/taxes due in respect of the property from the date of completion of the sale;
- be responsible for obtaining governor/minister's consent, stamping the instrument of transfer and registering his interest in the property; and
- indemnify the seller against any liabilities or expenses which the latter may incur as a result of a breach by the buyer of his obligations, representations or warranties under the sale agreement.

## 8 Finance and Banking

### 8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

There are no specific regulations on the lending of money to finance real estate, as the general laws regulating financial transactions would apply. These include the following:

- Central Bank of Nigeria Act Cap C4, LFN 2004 – establishes and regulates the activities of the Central Bank of Nigeria.
- Banks and other Financial Institutions Act Cap B3, LFN 2004 – regulates the activities of banks and other financial institutions in Nigeria.
- Secured Transactions in Movable Assets Act (Collateral Registry Act) 2017 – makes provisions aimed at facilitating the creation, registration and realisation of security interests in movable assets.
- Mortgage Institutions Act Cap M19, LFN 2004 – provides for the establishment and licensing of mortgage institutions to grant loans to individuals for the purchase or construction of a property.
- Federal Mortgage Bank of Nigeria Act Cap F16, LFN 2004 – establishes the Federal Mortgage Bank of Nigeria, to *inter alia*, encourage and promote the development of mortgage institutions at the rural, local, state and federal levels.
- Stamp Duties Act Cap S8, LFN 2004 – regulates stamp duty payable on instruments by which credit is granted.

### 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The method adopted will vary with the finance structure adopted by the parties. Notwithstanding, the main method by

which a lender may protect itself is by taking security over the property by way of mortgage, charge over the assets of the debtor, etc.

Furthermore, a mortgage protection insurance policy may be considered to guarantee the lender the repayment of the outstanding balance upon the death of the borrower.

In addition, a real estate lender may protect itself by including adequate financial and restrictive covenants in the finance document.

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

The methods of enforcing a mortgage security are as follows:

- Enforcement of the covenant to repay.
- Entering into possession.
- Sale of the mortgaged property.
- Appointment of a receiver.
- Foreclosure of the mortgagor's equitable right of redemption.

In realising a mortgaged property, the involvement or otherwise of the court depends on the type of mortgage created and the method of enforcement adopted. For instance, a legal mortgagee may exercise its statutory power of sale without court involvement provided that the same has arisen and is exercisable. On the other hand, an equitable mortgagee must obtain an order of court to sell a mortgaged property.

### 8.4 What minimum formalities are required for real estate lending?

The formalities required for real estate lending are similar to the formalities of a typical loan transaction, save for where a mortgage security interest is sought to be created in favour of the lender, in which case the formalities below are required:

a. creation of a legal mortgage by way of assignment/sub-demise/charge, depending on the location of the property; and
b. perfection of a legal mortgage by obtaining the consent of the governor, paying stamp duties and registration at the applicable land's registry,

or, creation of an equitable mortgage, by depositing the title deed, executing a memorandum of deposit or creating an equitable charge over the property

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

A real estate lender is protected from claims against the borrower or other creditors by ensuring that security is created in its favour and the same is registered within the stipulated timeframe from the date of creation. For example, where land/real property is taken as security, the same must be registered at the relevant land registry. Similarly, if the assets of a company are charged, such charges must be registered at the Corporate Affairs Commission.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

A security over an asset may be unenforceable where the instrument creating the security has not been registered in accordance with the applicable legislation.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

The actions a borrower can take will largely depend on the nature of security interest created in favour of the lender. If a floating charge is taken for instance, a borrower may dissipate its assets prior to the crystallisation of the floating charge.

A borrower may also withhold relevant information that could guide the lender and officers appointed to carry out the enforcement action.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The impact depends on whether or not the lending is secure. Where the lender's interest is secure and has been duly registered, the insolvency of the borrower company will not affect the ability of the lender to enforce the security created over the assets.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

The process of enforcement of security over shares generally depends on the type of security taken over the shares. The core steps to be taken include the delivery of the instrument of transfer to the company whose shares were charged for registration of the lender in the Register of Members as the holder of the shares in question.

It should, however, be noted that under Nigerian law, the board of directors has a discretion to refuse to register a transfer. Practically, this hurdle is avoided by the provision of an undated board resolution approving the transfer. Furthermore, it is important that the Articles of Association of that company are checked in advance, for any provisions that may affect the transfer of shares to the lender.

Additional steps must be taken by the lender where the shares are in dematerialised form and deposited with the Central Securities Clearing System (CSCS) in Nigeria.

A lender has a right to appropriate shares given as collateral to the extent that the Articles of Association include provisions which specifically facilitate their right to be registered as holder of the shares in the event of enforcement.

Shares may be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure where the instrument creating the charge expressly provides for these events.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

- **Capital Gains Tax**: 10% computed by deducting the gains on the disposal of assets and any sum to be excluded from the consideration or any expenditure (e.g. stamp duty, insurance, professional fees, advertising etc.) is allowable on the disposal. Capital Gains Tax is payable by the transferor.
- **Stamp Duty**: Duties are levied in the form of a percentage on the value of the property as indicated on the instrument

(flat fee) or a fixed rate (*ad valorem*). Stamp duty is payable by the transferee.

### 9.2 When is the transfer tax paid?

- Stamp Duty: 40 days from the first execution of the instrument, except instruments chargeable on an *ad valorem* basis which have a time limit of 30 days.
- Capital Gains Tax: upon assessment at the land registry.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Transfers are generally subject to income tax, as the relevant tax laws provides for all income (barring exemptions under the laws) to be taxed.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The transfer of real estate will not be subject to Value Added Tax (VAT), as the same does not constitute "goods" or "service" within the contemplation of the VAT Act, Cap V1, LFN 2004.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Capital Gains Tax is payable.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes. In addition to paying Companies Income Tax and Capital Gains Tax, corporations in Nigeria are liable to pay 2% of profit derived from transfer of the real estate as Education Tax to the Education Trust Fund. This tax is viewed as a social obligation placed on all companies in ensuring that they contribute to the development of educational facilities in Nigeria.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

- Corporate Seller – Confirmation that Company Income Tax and Land Use Charges are paid up to date and that at least two Directors' Personal Income Taxes are paid up to date.
- Individual Seller – Confirmation that the seller's Personal Income Tax and Land Use Charges are paid up to date.

Evidence of payment of these taxes will be required during the registration process for both the buyer and seller.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

Nigerian laws do not differentiate between commercial and residential leases. Leases generally are regulated by the tenancy laws of each state.

### 10.2 What types of business lease exist?

Nigerian laws do not differentiate between various types of business leases.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

Courts in Nigeria have consistently held that they will uphold the terms of parties' agreements insofar as they are not illegal. Thus, typically, the terms of a lease are contractual. Specifically, these are as follows:

- **Length of term**: Leases are typically a minimum of two years and may be renewed upon agreement by both parties.
- **Rent increases**: It is usual for parties to include a clause for rent increase, typically at an interval of two years, at the prevailing market, rate, or at a specified percentage. Some states, e.g., Lagos State, have rent control laws to prevent an arbitrary increase of rent.
- **Tenant's right to sell or sub-lease**: Generally, the lessee may only sell or sublet its interest in the lease with the lessor's prior approval.
- **Insurance**: This is typically undertaken by the lessor who may recover the costs of the insurance from the lessee.
- **Change of control of the tenant including corporate restructuring**: This would not ordinarily affect the validity of the lease, save where the change is such which makes it impossible for either party to continue with the performance of its obligations. In such case, the lease may be terminated by mutual agreement of both parties.
- **Repairs**: Although there is no legal responsibility on the lessor to insure the demised property, it is not unusual to find lessors agreeing to be responsible for structural repairs, while the lessee would be responsible for all other repairs. It should be noted that the lessee's obligation for repairs is usually mitigated by an inclusion of the phrase "fair wear and tear excepted".

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

- VAT – 5% (payable by the lessee).
- Withholding Tax – 10% (payable by the lessor).
- Stamp duty – assessed based on the consideration (payable by the lessee).

### 10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Generally, a lease will terminate upon expiry of the agreed term, called an effluxion. The lease may also be terminated where a party is in material breach of the lease agreement and fails to remedy the breach within a given grace period.

Whether a tenant may be allowed to extend or renew their lease is a purely contractual matter and will depend on pre-agreed terms as between the parties.

Compensation in the event of termination will also depend on the agreement of the parties.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

No. Their obligations under the lease agreement are extinguished upon the sale of their interest. They may, however, be responsible after the sale in respect of pre-sale non-compliance.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green leases are not usual in Nigeria, and it is not common to find a "green obligation" in a lease agreement in Nigeria.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

The trend towards shared working spaces is very noticeable, particularly in large cities like Lagos State, with start-ups taking up shared workspaces, as this significantly reduces set up costs and provides other benefits including networking opportunities. Workstation International Cowork Limited (Workstation) is an example of a shared workspace facility. Established in 2016, it currently has two facilities within Lagos state, with plans to expand to other states in Nigeria.

Furthermore, the high cost of acquiring/renting residential spaces and the consequent rise in the demand for affordable housing has facilitated the rise in co-living spaces in Nigeria. Co-living is thus thriving in Nigeria, being a solution that delivers affordable living with a flexible payment structure. Prominent co-living space providers in Nigeria include Fibre and Spleet.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Residential leases are regulated by the tenancy laws of each state. An example is the Tenancy Law of Lagos State 2011.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No. The laws do not differ.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

Generally, the terms of the lease are as agreed by the parties.

- **The length of term** – This may be either fixed (for a specific period of time) or periodic (automatically renewing on expiration) and can be for as long as agreed.
- **Rent increases** – These are typically at the prevailing market rate, or at a specified percentage. Some states have rent control laws to prevent an arbitrary increase of rent.
- **Tenant's right to remain in the premises at the end of the term** – The tenancy laws of the respective states in Nigeria protect a tenant from forceful eviction. A tenant who holds over a property and refuses to hand over possession to the landlord is deemed to be a "statutory tenant" and will remain in possession until evicted by an order of court. The tenant will, however, be liable to pay rent (mesne profit) for the time spent in the premises during the pendency of litigation.
- **Obligations of the tenant** – The tenant's contribution to the property is contractual. Typically, the tenant is responsible for maintaining the interior of the property and keeping the same in good condition, except for reasonable wear and tear. It is not typical to have a tenant in a residential lease take out insurance over the demised property; this is, however, subject to the agreement of the parties.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A landlord may terminate a residential lease for reasons documented in the lease agreement, including in the event of a material breach of the agreement by the tenant. However, repossession of the property by the landlord must be in accordance with statutory requirements and the agreed terms between the parties. The tenancy laws of the various states provide for the processes a landlord must comply with to repossess its property.

The process is broadly similar and is as follows:

- **Issuing a Notice to Quit**:
  This is only applicable to periodic (automatically renewing) tenancies. It is a formal demand for the tenant to quit the property. The length of the notice is statutorily prescribed and depends on the length of the tenancy itself. The law of some states allows parties to contractually determine the length of notice.
  If the tenancy is fixed (non-renewing), the tenancy ends upon the expiration of the term granted and, as such, no notice to quit is required to be served on the tenant.
- **Issuing a Notice of Owner's Intention to Recover Possession**:
  If upon the expiration of the term granted (in a fixed tenancy) or the time specified in a valid notice to quit, the tenant refuses to hand over possession to the landlord, the landlord is bound to issue a notice informing the tenant of his intention to proceed to court to recover possession of the property. Repossession from a tenant who has refused to deliver up possession can only be legally obtained by recourse to the court.

- **Court Action**:
  Where a tenant, having been served with the requisite notices, still refuses to deliver up possession, the landlord may approach the appropriate court within the jurisdiction where the property is situated to claim repossession, arrears of rent (where applicable) and mesne profits, among other things.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

There are several laws which govern the zoning/permitting and related matters concerning the use and development of land at both the Federal and State levels. Some of the main laws include:

i. The Constitution of the Federal Republic of Nigeria 1999 (as amended), Cap C23, LFN 2004 – The Constitution specifically affirms, as a fundamental right, the right of every citizen to acquire and own immovable property anywhere in the country.
ii. Land Use Act 1978, Cap L5, LFN 2004 – This is the main Federal enactment governing land use in Nigeria. It makes provisions for how to acquire interest in real property, the extent of such interest, and how such interest may be extinguished.
iii. National Environmental Standards and Regulations Enforcement Agency Act, Cap N164, LFN 2004 – This establishes the National Environmental Standards and Regulations Enforcement Agency (NESREA), which is charged with the protection and development of the environment.
iv. Nigerian Urban and Regional Planning Act 1992, Cap N138, LFN 2004 – This establishes the National Urban and Regional Planning Commission, which prescribes planning responsibilities and development plans for the Federal, State, and Local Governments respectively.
v. Regional Planning Laws (of the various states) – This is a state variant of the Nigerian Urban and Regional Planning Act 1992, and contains more robust and copious provisions on state planning and development.
vi. The Environmental Impact Assessment Act 1992, Cap E12, LFN 2004 – This provides for environmental impact assessment in respect of public and private projects.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The state cannot force landowners to sell land to it because it will be a violation of the Constitution which provides for the right to own land in any part of the federation. However, land may be acquired by the state from a landowner for overriding public interest. To acquire a title holder's property, the Land Use Act provides that the government must do the following:

- Issue a notice of acquisition (by way of revocation of the person's Certificate of Occupancy) duly signed by the governor or a specified authorised officer.
- Serve the notice of acquisition on the title holder.
- Gazette the notice of acquisition.
- Advertise the acquisition.
- Pay compensation for acquisition to the title holders.

Compensation is calculated based on the extant value of the property at the point of acquisition. Developments on the land and economic crops on the land are also taken into consideration.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The bodies that control land or building use operate at federal, state and local government levels: at the federal level, it is the National Urban and Regional Planning Commission; at the respective state, it is the State Urban and Regional Planning Board; and at the local government, it is the Local Planning Authority. The National Environmental Standards and Regulations Enforcement Agency is the enforcement agency for environmental standards, regulations, rules, laws, policies and guidelines.

Buyers may obtain reliable information on these matters by their independent research or by seeking professional advice.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

In Nigeria, the permits or licences required for building works and the use of real estate differ based on the nature of the proposed development. Some of the main permits required are as follows:

i. Building permit.
ii. Development permit.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

In Nigeria, building permits and licences are required to be obtained for development projects and implied permission cannot be obtained by long use.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The cost of building permits will depend on the location of the property.

The timeframe for obtaining the permits will vary with the nature of development and location of the property. In Lagos State, it takes an average of 28 days to process.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The regulation which protects historic monuments in Nigeria is the National Commission for Museums and Monuments Act Cap N19, LFN 2004. Upon declaration of a building as a national monument, the owner will be entitled to compensation and any rights, title or interest in the antiquity shall be extinguished.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

There is no register of contaminated land in Nigeria. However,

potential buyers may obtain information from the public registry provided for and maintained under the Environmental Impact Assessment Act for records relating to environmental assessments.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

In the event of any pollution, the polluter-pays principle applies. The polluter, in addition to other sanctions, must carry out a mandatory environmental clean-up, and bear full liability for the pollution. This principle is entrenched in Nigerian jurisprudence, having been embedded in several enactments including the National Policy on Environment, National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act Cap N164, LFN 2004, National Oil Spill Detection and Response (NOSDRA) (Establishment) Act Cap 157, LFN 2006, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2018, and Minerals and Mining Act Cap N162, LFN 2007.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The Building Energy Efficient Code, issued by the Federal Ministry of Power, Works and Housing regulates energy performance in Nigeria. The Code is Nigeria's first attempt regarding energy-efficient buildings and does not make extensive provisions regarding the assessment and management of energy performance of buildings. It does, however, make provisions for, *inter alia*, "window-to-wall" ratio, lighting requirements of buildings, roof insulation and air conditioning.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

In affirming its commitment to the Climate Change Agreement, Nigeria, in 2015, approved the adoption of the National Policy on Climate Change and Response Strategy (NPCC-RS), a National Document for implementing climate activities in the country. The policy document serves as a backdrop on which laws and regulations will be made to specifically regulate the reduction of carbon dioxide emissions.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

As published in the Federal Government's Intended Nationally Determined Contribution (a requirement for adopting the Climate Change Agreement in 2015), Nigeria aims to mandatorily reduce greenhouse gas emissions by 20% before 2030. It also has a 45% conditional reduction target within the same specified period.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Other than as mentioned, there are currently no other regulatory measures we are aware of which are aimed at the sustainability of buildings in Nigeria.

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Greychapel Legal is a full-service Nigerian commercial law firm engaged in the delivery of bespoke legal advisory and company secretarial services. Our lawyers have, over the years, acquired cognate expertise in providing pragmatic advice to various clients in the corporate and commercial sector, especially on regulatory, structuring and compliance-related matters. We maintain an excellent working relationship with core regulators and are versed with the practice and procedure of the courts in Nigeria.

Our practice areas include: Banking & Finance; Capital Markets; Dispute Resolution; Islamic Finance; Mergers & Acquisitions; Project Finance; Real Estate; and Tax Advisory.

We consist of a team of about 12 lawyers and have gained national and international recognition from advising on real estate transactions in Nigeria. The firm has also advised on several international acquisitions.

We are currently ranked by the *IFLR1000* as a "Recognised Firm" for the years 2019 & 2020.

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# Poland


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main act governing real estate in Poland is the Civil Code of 23 April 1964. It regulates the matter of title to the real estate (ownership, perpetual usufruct) and other contractual as well as statutory rights thereto (such as easements). The general rules of the real estate regime are modified by such as acts the Land Management Act of 21 August 1997, Act on Premises Ownership of 24 June 1994, Act on Residential Cooperatives of 15 December 2000, Act on Management of Agricultural Land owned by State Treasury of 19 October 1991 or Act on Shaping of Agricultural System of 11 April 2003, which particularly imposes requirements to acquire agricultural land.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The Polish legal system is based on civil law, not the common law. What could be seen as an element unifying the court's jurisprudence are resolutions of the Supreme Court as well as resolutions of the Supreme Administrative Court, adopted in order to eliminate the discrepancies that arose around particular laws; however, their impact is limited.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Next to EU legislation, these are international treaties and agreements (such as, e.g., bilateral investment treaties, which provide protection against unlawful actions, such as unjustified expropriation), and if ratified by the Polish Parliament, they are applied directly as a source of law.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are two main limitations. First and foremost, there are restrictions, applicable to both foreigners as well as Polish citizens, regarding acquisition of agricultural and forest land. Secondly, the natural and legal persons that: i) are qualified as foreigners; and ii) have their registered office in or reside beyond the European Economic Area or the Swiss Confederation, must (as a rule) obtain the permission of the Minister of Internal Affairs in order to legally acquire ownership or a perpetual usufruct right to real estate in Poland. However, there are some small exceptions to this rule.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Apart from the ownership right and perpetual usufruct right, there are so-called limited rights *in rem* and contractual rights. The Civil Code **enumerates** (exhaustive catalogue) limited rights *in rem*. These are: usufruct; servitudes; pledge; co-operative proprietary right to an apartment; and mortgage. Meanwhile, contractual rights include lease, tenancy, time-sharing, right to use, etc.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Polish law follows the *superficies solo cedit* principle (meaning what is developed on land, belongs to the owner of the land). There are some exceptions though, the most notable being perpetual usufruct right.

In case of real estate in relation to which a perpetual usufruct right was established, the ownership of the building and other installations existing or erected during the period of perpetual usufruct (usually established for 99 years) becomes the property of the perpetual usufructuary as separate asset; the title to such separate assets can be traded only together with the perpetual usufruct right.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

There is no such split in Poland and there are no proposals to change that.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

All real estates in Poland must be registered. From the investor's perspective, entries in the following two registers are the most important: (i) the land and mortgage register (LMR) (the contents of which, as a rule, are decisive for determination of legal status of real property); and (ii) the land register (which provides for basic data pertaining to real property, e.g. area, location, etc.).

The LMR serves for registration of ownership, perpetual usufruct rights, easements and mortgages. Certain other rights, e.g., lease agreements and claims resulting from preliminary agreements, may also be registered in the LMR, but do not have to be.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no state guarantee of title in Poland. However, there is a legal presumption stipulating that, should there be an inconsistency between the legal state of the real estate as evidenced in the LMR with its actual legal state, the content of the LMR is decisive in favour of the person who has, by performing an act in law with the person entitled under the contents of the LMR, acquired the right of ownership or another right *in rem*. The above presumption is called public warranty of the LMRs. Under Polish law, a purchaser relying "in good faith" on the entries made in the LMR is protected by the public warranty of land and mortgage registers. Purchasers acting in "bad faith" and free-of-charge acquisitions are not protected by the abovementioned presumption.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Under Polish law, rights such as perpetual usufruct rights and mortgages require, for their existence/transfer, an entry in the LMR. Although such entry is not required for existence/transfer of ownership, an owner of the real property is obliged to immediately submit an application for disclosing his/her right in the LMR. In practice, usually all rights *in rem* are nowadays disclosed in the LMR, due to the fact that respective applications are filed by the notaries directly in the notarial deeds; exceptions to this situation are rare.

**4.4 What rights in land are not required to be registered?**

Rights *in rem* (other than mortgage and perpetual usufruct), including the ownership and contractual rights such as lease, tenancy, timeshare agreement rights and claims, are not subjected to mandatory disclosure (subject to minor exceptions).

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

Under Polish law, there is no probationary period following first registration and there are no classes or qualities of title on first registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Polish law treats transfers of **ownership rights** and **perpetual usufruct rights** differently. The ownership right is transferred to the buyer simultaneously with signing of the agreement (in case of real estate, notarial deed is required), whereas the transfer of the perpetual usufruct right additionally requires an entry to the LMR (and the transfer actually occurs at the moment of making relevant entry to LMR; however, the entry has a retroactive effect from the date of submission of the application for entry to the court).

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Priority of rights concerns only limited rights *in rem*. The underlying principle assumes priority of right created earlier over a right created later, but Polish law allows for amendment of priority regime, e.g. by virtue of an agreement. Furthermore, a right disclosed in the LMR has a priority over a non-disclosed right. The priority of rights disclosed in the LMR is determined based on the date of the application for disclosure of given right (provided that it was successfully examined by court).

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There are multiple public registers, but the two most important are: LMRs, maintained by District Courts; and the land and building register. The land and buildings register is intended to be a uniform for the country; it is a systematically updated collection of information about land, buildings and premises, their owners and about other natural or legal persons possessing such land, buildings and premises, while LMRs are kept in order to determine the legal status of real estate. The data contained in the land and building register constitutes, among others, the basis for description of real property in LMRs.

**5.2 How do the owners of registered real estate prove their title?**

If an LMR is established for real property, then it is sufficient to present an up-to-date excerpt from the LMR (it may be even collected online for a small fee).

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Transactions regarding real estate in Poland cannot be completed electronically. An agreement transferring the ownership or perpetual usufruct title to the real property has to be drawn up

in the form of a notarial deed by a notary public and submitted to various authorities (but it is the notary's obligation to furnish respective authorities with the excerpts of the notarial deed and it is made without participation from the transaction's parties). Since it is obligatory to disclose the transfer of the legal title in the LMR, an instruction is included in the notarial deed transferring the legal title to the real property under which the notary who drew such notarial deed is obliged to file electronically and application with the land and mortgage register court to register the transfer. As the result, the fact that an agreement pertaining to the real property was concluded is visible online almost immediately after signing the agreement – the so-called annotation about the application is then pending, until the transfer is finally registered (there is certain time gap between filing the application and the actual registration). The electronic LMRs are generally accessible.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Polish law does not provide for any specific action designed solely to pursue compensation for mistakes in entries to the LMR and/or land register. There is a possibility to pursue such compensation based on the general rules of liability for wrongdoing of the authorities. However, we are not aware of such cases happening in practice.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

LMRs are publicly available and Polish law provides even for a presumption that the content of LMR is known to a party of a transaction. The underlying documents (documents on the basis of which entries were made e.g. agreements) are kept by the District Court and can be reviewed by representatives of certain occupations (without necessity to obtain separate authorisation) or by any other person that proves his/her legal (as opposed to "factual") interest in accessing the files (in case of real estate transactions, usually the seller grants a power of attorney authorising representatives of the purchaser to review and photocopy the files of LMR).

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Every transaction which results in the legal title to the real property being transferred, needs to be recorded by a notary public in the form of a notarial deed. The involvement of further parties results from the commercial decisions of the seller and the purchaser. If so decided, such transactions may involve: (i) an insurer that provides full insurance or a specific indemnity policy pertaining to the good title to the real estate; (ii) a provider of warranty & indemnity insurance for representations and warranties; (iii) a bank that acts as an escrow agent; or (iv) a parent company or an entity affiliated with given transaction party that usually acts as a surety or guarantor.

**6.2 How and on what basis are these persons remunerated?**

A notary's fee is calculated based on official rates resulting from ordinance of Minister of Justice, whereas the remuneration due to other entities indicated in question 6.1 (apart from a parent company or affiliates that do not receive any remuneration or receive remuneration based on a separate agreement not disclosed to the other party of the real estate transaction) is established contractually and usually disbursed as a one-off payment. The remuneration due to the insurer is established as a premium and paid after execution of the policy according to the provisions thereof. The remuneration due to the escrow agent is usually split between the parties and paid based on the terms agreed with the bank (usually around the date of execution of the escrow account agreement).

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

The volume of real estate capital in Poland is still rising. In 2018, the volume of investment transaction exceeded EUR 7.2 billion setting a new record. In the current year, the main source of capital to finance real estate transactions is invariably the international real estate private equity sector. The capital comes from the USA or Western Europe and recently from South Africa and Asia (real estate funds, pension funds, insurance companies).

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The interest regarding office properties in central locations is still high and the interest regarding storage (warehouse) properties is still rising. Notwithstanding the above, this year investments such as hotels, student housing, institutional rental, private retirement homes and co-working office spaces are becoming more desirable than in the previous years.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Forecasts for the coming year indicate a slight slowdown with respect to the residential real estate market related to, among others, increasing prices, lack of building land, and restrictions imposed by banks onto the clients seeking for credits. However, the residential market remains the dominant sector in terms of price levels and volume of transactions.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The absolute minimum is an ability to prove the identity (e.g. by virtue of presenting the ID card) and observance of an obligation to record the sale agreement in the form of a notarial deed.

Such sale agreement should embrace an application to disclose the change of the owner/perpetual usufructuary in the LMR. Nonetheless, we underline that Polish practice tends to formulate more extensive requirements.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller is obliged to provide to the buyer any information related to the actual status of the real estate (both factual and legal) that is needed to execute the sale agreement. Under Polish law, there is a rule called "statutory warranty" which provides that the seller is liable for physical and legal defects of the real estate; the principles of this regime of liability are more severe for the seller, if it intentionally concealed the defect. However, the seller is not liable if the buyer knew about the defects as of the date of the sale agreement. The statutory warranty may – as a rule – be excluded, limited or changed under the sale agreement.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller is liable to the buyer for misrepresentation on the basis of statutory warranty. In the commercial transaction, the parties very often decide to waive the liability based on the statutory rules; instead, they implement contractual liability rules for misrepresentations/false representations.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Representations and warranties of the parties are a standard element of every sale agreement. Their scope is the result of negotiations between the parties, but they usually pertain to: good and valid title to the real estate; arrears in payment of the taxes or other public duties; pending proceedings; encumbrances on the real estate; third-party claims; any agreements related to the real estate (e.g. tenancy or leases); contamination of the real estate, existing building investments on the real estate; any forms of monument or environmental protection present on the real estate; compliance of the current operation of the real property with law; and permits issued in relation to the real property. The scope of representations and warranties of the purchaser is narrower and usually limited to the issues related to valid incorporation and existence of the purchaser, its capability to enter and consummate the transaction and ability to pay the entire price. On the one hand, representations and warranties are given in order to unequivocally state certain facts regarding the real property and on the other hand they are given in order to establish the scope of parties' liability for the subject matter of the transaction (in case given representation proves to be false).

No warranties will ever replace purchaser's due diligence.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Yes. In case of commercial transactions, the seller is usually held liable for breach of the representations and warranties (for a period of time and up the monetary threshold set forth in the sale agreement). If the rules of liability are not determined contractually by the parties, the seller is liable for physical and legal defects on the basis of the statutory warranty.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer is obliged to: (i) take over the real estate; (ii) (usually) return to the seller a proportional part of perpetual usufruct fee paid by the seller upfront for an entire year (in Poland, the perpetual usufruct fee has to be paid annually by the end of March of each year) and a proportional part of real estate tax paid for the month in which the sale agreement was signed; (iii) co-sign the notifications to relevant entities informing them about sale of the real estate (e.g. tenants) as well as to banks and other issuers of the respective assignable collateral documents, etc.; and (iv) (usually) refrain from termination of the lease agreements concluded in relation to the premises in the buildings being subject matter of the agreement.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The basic legal regulation concerning lending of money to finance real estate is the Banking Law dated 29 August 1997, which regulates rules for conducting banking operations. The rules are not different between resident and non-resident persons or between individual persons and corporate entities; however, as regards individuals, there is an additional act which regulates granting consumer credits – the Consumer Loan Act dated 12 May 2011 (although it should be noted that consumer loans are not typically used to finance real estate).

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The lenders usually request a mortgage over real property (this is the most commonly used method). Alternative (less popular) methods (or as supplementary collaterals) include: pledges over assets, over receivables (e.g. from lease agreements) or over shares in the borrower's SPV (accompanied with the rights to vote at the shareholders' meeting); declaration on submission to enforcement in the form of a notarial deed; assignment of receivables arising from lease agreements; assignment of insurance policies; power of attorney over a bank account; debt service reserve account; and subordination agreement and other forms of collateral agreed with a lender (e.g. blank promissory note or suretyship agreement).

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Under the Polish law, the mortgage creditor has to obtain an enforcement title with execution clause. The enforcement title

entitles the mortgage creditor to submit an application to the enforcement authority who conducts enforcement. There are several types of enforcement titles, but the most important ones are: the final (or immediately executable) court ruling; and a notarial deed in which the debtor and/or the owner of the real property submitted itself to enforcement proceedings.

### 8.4 What minimum formalities are required for real estate lending?

The credit agreement regarding the real estate must be drawn up in a written form. In most cases the credit agreement provides for collaterals (see question 8.2 above) which sometimes have to be executed in the form of a notarial deed or form with notarised signatures; some might also require disclosure in the relevant registers (e.g. a mortgage or registered pledge).

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The most common protective measure is mortgage. A mortgage – as a right *in rem* – has priority over any other claims that are not secured with a right *in rem* on the same immovable property. As a rule, the rankings of a mortgage over the same immovable property is determined by the dates of filing the applications with the respective court. However, the priority rules may, to some extent, be managed, i.e. in case several mortgages are established at the same time, the lender may demand its mortgage has the highest priority. There are also some possibilities to agree contractually on priority of the mortgages.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Under provisions of Bankruptcy Law dated 28 February 2003, after bankruptcy of the borrower is declared, it is impossible to secure claims which arose before the bankruptcy with security in the form of mortgages and pledges, therefore such security is unenforceable. Notwithstanding the above, if the enforcement of the security is to be made by way of enforcement proceedings, a borrower may request that the enforcement title is deprived of enforceability (see question 8.7 below).

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Under Polish law a borrower (or any debtor) may demand to deprive the enforcement title of enforceability by way of legal action if: (i) the borrower questions the events which were basis of the enforcement title; (ii) after issuance of the enforcement title, such event occurred that caused that the obligation expired or cannot be enforced.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

According to the provisions of the Bankruptcy Law as of the date of bankruptcy declaration: (i) all liabilities become due; (ii) the credit agreement expires as regards part of the funds which have not been transferred to the debtor; and (iii) the period of interest charge is interrupted. The lender, as every creditor during the insolvency process, also has a number of rights such as voting right at the creditor's meeting, filing arrangement proposals or challenging bankruptcy court judgments. Moreover, if the credit was secured by property limited right (e.g. mortgage, pledge) the creditor has the right to be satisfied with the subject of the collateral beyond distribution of bankruptcy estate.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Under Polish law, shares may be encumbered by ordinary pledge or registered pledge. As regards ordinary pledges, enforcing occurs through formal enforcement proceedings. Satisfaction of the creditor (pledgee) on the basis of the enforcement proceedings requires previous seizure of the shares, evaluation of the shares and sale of the shares. As regards registered pledges, parties of the registered pledge agreement may specify in the pledge agreement the value of shares and introduce a provision that the pledgee, in the absence of repayment of the claim, may, on the basis of the relevant statement, appropriate subject of the pledge. During insolvency proceedings, the creditor retains the right to appropriate shares.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Standard real estate transactions are subject to taxation either with VAT or tax on civil law transaction (TCLT). If the VAT (usually at rate of 23%) is levied on the transaction then such transaction is exempt from the TCLT (which, in case of sale of real property, is at rate of 2%). The economic burden of the VAT is borne by the purchaser, but it is the seller who is the taxpayer of this tax and who should pay it to the tax office (VAT is usually recoverable), whereas the TCLT is paid by the purchaser but collected by the notary public and is non recoverable.

### 9.2 When is the transfer tax paid?

TCLT is collected by a notary at the time of execution of the notarial deed. Payment of VAT depends upon rules applicable to the seller and particular real estate such as e.g. the type of real estate or whether it is developed as well as the status of the entities involved in the transaction (whether they are entrepreneurs or natural persons). VAT is payable to the tax authorities by the seller within the statutory deadlines, after the execution of the notarial deed and delivery of the real estate.

### 9.3 Are transfers of real estate by individuals subject to income tax?

If the real estate is sold before a lapse of five years from the end of the calendar year in which acquisition/construction took place, then such sale will be subjected to 19% income tax. In case of inherited real estate, such a five-year period is counted from the date of acquisition/construction by the testator. In case of real estate that was initially purchased by the spouses

to their marital property, but its sale is made after abolition of joint property of spouses, the above five-year period is counted from the date of acquisition (construction) of the real property to marital property.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

It might be subject to VAT taxation. The standard VAT rate in real estate transactions is 23% (there is also an 8% rate for certain residential properties, as an exception) of the price and it is the seller who is a VAT taxpayer. The list of exemptions from VAT is vast and covers, *inter alia*, the delivery of "enterprise" or its organised part; delivery (sale) of undeveloped lands that are not designed for development. Furthermore, the delivery of developed real estate may be exempt from VAT taxation if it does not satisfy the criteria of "first occupation" or the period of time between first occupation and the delivery (sale) of the building was shorter than two years.

As a rule, VAT will apply to transactions pertaining to the delivery (sale) of real estate (as opposed to sale of enterprise or its organised part) listed in the respective act as suitable for VAT (as a rule, VAT applies to developed real estates and undeveloped real estates that are designed in master plans or planning permit for development).

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

No taxes other than income tax and/or VAT and/or TCLT are payable.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

The sale of shares in a company is subject to 1% TCLT calculated against the market value of the transferred shares (payable by the purchaser). Sale of shares is not subject to VAT.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

As long as real estate is subject to transfer only as an asset, there are no major tax issues connected therewith, except for verifying the amount of property tax due for the real estate on an annual basis and, of course, checking the taxation of the acquisition transaction itself (i.e. whether it will be subject to VAT or TCLT). However, if the real estate is sold as an organised part of the enterprise, it should be verified whether the seller has any outstanding tax liabilities connected with business operations of that (part of) enterprise, due to joint and several liability of the buyer for them. Usually (and in any case, whether the real estate is sold as asset or enterprise), the seller presents relevant certificates issued by the tax office confirming the lack of liabilities or the amount thereof. Obviously, in the share deals, where the buyer takes control over the company with all its liabilities, a detailed check of tax status of such company is absolutely necessary.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The lease of business premises is comprehensively regulated by the Civil Code. The Civil Code indicates necessary elements and requirements for lease agreements, rights and obligations of parties, and rules for termination of the lease. Certain provisions in this respect can be modified by parties of the lease agreement; however, it should be noted that the Civil Code provides for the minimum rights of the tenant and, therefore, they mostly cannot be modified to its detriment.

**10.2 What types of business lease exist?**

The Civil Code refers to the lease in general (of any item other than premises) and provides for specific rules for lease of premises.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

As regards: (a) lease term, it depends on the prevailing function of the premises. Commercial and office premises are usually leased for a fixed period of at least five years, whereas the lease term of storage premises varies from three to 10 years; (b) annual indexation is pursuant to inflation index (local index in the case of rent expressed in PLN (quite rare in institutional leases), most often HICP in case of rent expressed in EUR); (c) as a rule, any sublease agreement and/or assignment of tenant's rights and obligations requires the prior written consent of the landlord. In certain instances, (e.g. in case given tenant is considered very important) the lease agreements allow for sublease of the premises to affiliates of the tenant (but this is subject to business negotiations); (d) usually lease agreements provide for landlord's obligations to take out third-party liability and property insurance for the building and tenant's obligations to take out third-party liability and property insurance for its property (assets) brought into the premises; (e) (i) and (ii) typically there are no specific provisions for such cases as the transfer of lease as a result of corporate restructuring occurs by virtue of law. Sometimes lease agreements provide for termination rights in such cases; however, these would be rather extreme situations (for instance due to obligations to prevent money laundering, terrorism financing, due to international sanctions etc.); and (f) usually the landlord is liable for repairs of the building and general building systems, whereas the tenant is liable for necessary, minor repairs in the premises and other repairs which are necessary due to damage inflicted by the tenant or persons it is liable for (but, again, those are standard rules, which are often modified).

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Rents under the leases (being a service) are subject to 23% VAT, except for the residential premises lease, which is VAT-exempt. Rental incomes are also subject to income tax.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

The most common reason is simply expiration and – as far as defaults are concerned – defaults in rental payments. Other types of default (e.g. failure to carry activity in the premises) generally happen more often in case of retail/services/gastronomy premises. Lease agreements may provide various options for tenants to extend the lease, and conditions may differ depending on the negotiating position of both parties. The most typical (contractually agreed) compensation for early termination if termination occurs by default of the tenant, are contractual penalties and/or obligation to compensate the landlord in amount corresponding to rent and service charges for the entire time remaining until the original expiration date; however, limitation of such liability is often negotiated.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

If the landlord sells the lease subject, the buyer (by operation of law) steps into his position under the lease agreement, but the seller remains liable for its pre-sale defaults. However, the Civil Code provides, if certain conditions are met, for a possibility that the new owner (new landlord) terminates existing lease agreements. If this happens, then the tenant may pursue damages from the seller (therefore very often sale agreements provide for explicit commitment of the buyer not to exercise its right to terminate). Except for the above, the transfer of the rights and obligations (only rights are freely assignable under Polish law) requires the consent of the other party. Usually, either the assignment agreement or the consent for the assignment specify the terms under which it is concluded/granted.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

The number of "green commitments" in lease agreements is growing. Their nature varies; sometimes they are pure declarations of intent but, from time to time, also firm obligations of one or both parties. This issue is partially related to the trends on construction market. It is common expectancy that new office and/or commercial building will have one of: BREEAM or LEED certificates.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Co-working spaces have become increasingly popular in the recent years offering both workplaces in open-space plans and separate rooms serving as offices but with shared facilities and services. The concept of co-living is not widespread in Poland – currently there are very few projects of such nature.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

General rules for leasing the premises (not only residential) are contained in the Civil Code Act of 23 April 1964. Many provisions in this respect can be modified by parties; however, it should be noted that the Civil Code provides for the minimum rights of the tenant, therefore those rights cannot be modified to its detriment. More specific regulations aiming at increased protection of tenants in residential premises are contained in the Act on Protection of Tenants' Rights, Municipal Residential Base and change of Civil Code of 21 June 2001. Based on the abovementioned regulations, tenants of residential premises are better protected against eviction and there are also different rules for termination, rent increases, etc.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

There is no differentiation.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(i) Typically, the residential premises are leased for a fixed term amounting from one to three years or for an unspecified term.

(ii) Rent increases are allowed not more often than every six months; however, the termination of the amount of rent takes place upon three months' notice with effect at the end of a calendar month; in practice, rents (in part corresponding to net profit of the landlord) do not increase that often (sometimes once a year, sometimes they do not change for years, depending on the situation), the tenant separately pays the amount due for use of the premises to the housing cooperative (advances towards utilities, costs of maintenance, etc.), and those may change depending on consumption and general market prices.

(iii) The tenant must vacate premises on the last day of the term or termination period.

(iv) The tenant covers the costs of basic repairs in the premises, while repairs of installations are on the side of the landlord.

(v) The tenant is entitled to reimbursement for improvements, provided that the landlord agreed to them.

(vi) Residential premises insurance is typically not directly charged to the tenant and the tenant usually covers the costs of utilities and services connected with the premises (directly or through the landlord, as the case may be).

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

There are numerous cases in which the landlord can terminate residential leases including, but not limited to: (i) default of the tenant in payment of rent and other fees for use of the premises for three months; (ii) the tenant does not use the premises in compliance with the agreement, damage the premises or behave in a way significantly disruptive to neighbours; (iii) the tenant subleases the premises without consent (in cases mentioned in points (i) to (iii), the termination takes place upon a one-month notice period); or (iv) the tenant has not lived in the premises for more than 12 months (upon a six-month notice period).

If the tenant does not leave the premises on the date of the effective expiration of the lease, the landlord may apply for eviction to the court. However, it should be noted that these proceedings take time, and eviction is sometimes impossible (due to age or personal situation of the tenant or even time of year).

It is also possible to execute a so-called "occasional lease" which, among numerous additional conditions, facilitates vacating the premises, as the tenant must provide the landlord with a notarial deed on submission to enforcement as to the return of the premises after the lease agreement termination or expiration, accompanied with a statement of a third party that it will accept the tenant in its premises, should they need residence.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

1. Construction Law of 7 July 1994 – regulates designing, construction, maintenance and demolition of buildings, obtaining permits, construction supervision, etc.
2. Spatial Planning Act of 27 March 2003 – rules of spatial planning (adoption of local master plans and zoning studies for municipalities or parts thereof).
3. Environmental Protection Act of 27 April 2001 – conditions for use of environment and emissions into environment, costs and permits therefor.
4. Water Law of 20 July 2017 – use, retention and protection of water, sewage disposal rules.
5. Waste Management Act of 14 December 2012 – rules of waste management and disposal.
6. Act on Preventing Damage to Environment and Remedies Thereof of 13 April 2007 – indicates entities liable for preventing damage to environment and their obligations, and remedies in case of damage.
7. Act on Protection of Agricultural Land and Forests of 3 February 1995 – regulates terms of use of agricultural land and forests, rules for changing the manner of use of such land.
8. Act on Access to Environmental Information, Social Participation in Nature Protection and Environmental Impact Assessments of 3 October 2008 – among others regulates terms for the issue of environmental decisions which are necessary to develop investments which may significantly impact the environment (such investments are listed in the regulation of the Council of Ministers of 25 June 2013).
9. Monument Protection Act of 23 July 2003 – protection of monuments, archaeological sites, rules for conducting construction works and renovations in such objects/places.
10. Act on facilitation in preparation and development of residential investments and related investments of 5 July 2018 – act binding until 2028, which provides for simplified construction (particularly zoning related) procedures and more lenient rules for the development of residential investments.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Forced sale of land (i.e. expropriation) is admissible in Poland, if the land is necessary to develop a public purpose investment, and only upon compensation which is guaranteed by the Constitution of the Republic of Poland of 2 April 1997. This may take place on the basis of the decision on expropriation which must be preceded by negotiations to sell the land on the basis of an agreement (as envisioned in the Land Management Act of 21 August 1997), or by virtue of law (based on the Act on Particular Conditions of Preparing and Performance of Public Road Investments of 10 April 2003 or on the Act on Railway Transport of 28 March 2003). Basically, it is connected with the allocation of given land for public purpose investment under a local master plan or separate decision (most typically it pertains to public road or railway construction). In any case, compensation is due for the expropriated land, based on market value of the property as of the date of expropriation (also, upon consent of the expropriated owner, another property can be granted as a compensation). The amount of compensation is established based on assessment of a surveyor usually appointed by a public authority (such assessment can be challenged but this is usually time-consuming and costly).

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Use and/or occupancy of land or buildings, as well as the construction process itself, is controlled by construction supervision authorities which are competent locally. Observance of environmental regulations is controlled by environment protection inspection, also competent for specific areas. Due to the fact that information with this respect is generally considered as public, it is enough to apply for such information to competent authorities who are obliged to respond in accordance with the Act on Access to Public Information of 6 September 2001.

The refusal to provide such information by the public authority may be challenged in front of an administrative court.

If certain information is restricted only to the entities with legal interest (for instance, due to personal data protection), it is enough to either provide the given authority with justification explaining the legal interest, or to obtain power of attorney from the current owner, and apply for a given certificate issued under the Administrative Proceedings Code.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

1. Environmental permit – must be obtained if the planned investment is categorised as one which may have a

significant impact on the environment (such investments are listed in the regulation of the Council of Ministers of 25 June 2013).

2. Zoning permit – must be obtained if there is no local master plan enacted for the land and indicates spatial planning conditions for the investment.
3. Building permit – the basic decision approving the submitted design and granting permission for the works (in the case of some investments, such as single family houses, it is only required to notify the authority of the planned investment, with lack of opposition construed as permission).
4. Occupancy permit – issued after construction is completed, and inspection allows use of the building (also can be replaced by notification in some cases).

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

As described above in question 12.4, due to the fact that building and use/occupancy permits are required for most larger scale investments (notifications are admissible only in the case of smaller buildings and structures, such as garages, single family houses, etc.), they are commonly obtained. If a building is constructed without required building permit/notification (or despite opposition to the notification), depending on the case: i) it can be legalised (if the construction complies or the investor is able to make it comply with certain requirements, particularly spatial and technical/construction regulations), which is connected with a considerable administrative fee; and ii) it will have to be demolished by or at expense of the investor, with potential subsequent fines to be paid (if it is not possible to make the investment comply with the laws referred to above). It should be noted that construction of an illegal building is a crime in Poland, punishable even by up to two years of imprisonment. Commencement of use of the building without occupancy permit/notification is punishable by a heavy fine. No implied permissions can be obtained, other than permissions construed from lack of opposition to notification on construction on commencement of use of the building, as described in question 12.4 above.

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

A building permit should be issued within 65 days from submission of a full and correct motion (or 45 days in case of railway investments). Therefore, in practice, this can take longer, due to the necessity to make corrections or supplement formal defects of the application. An occupancy permit is issued after inspection of authorities which is carried out within 21 days from investor's notification.

Costs of building permits can vary depending on the investment, i.e. the stamp duty due for building permits may cost from PLN 1.00 per square metre of usable area of business activity building other than agricultural and forestation, to PLN 539.00 per square metre, or for a fixed fee of PLN 2,143.00 for utility networks, plus, in any case, PLN 47.00 for design approval, as well as other stamp duties, if applicable.

Costs of design and documentation preparation which constitute part of the motion for building permit are not included in the above, while it is actually the most significant portion of such costs, as they depend on the scale and type of investment.

Stamp duty for occupancy permit amounts to 25% of the duty for obtaining building permit. Residential buildings are exempt from stamp duty fees.

It should be noted that there can be other costs involved in the process of obtaining documents which are required in order to apply for building and/or occupancy permit.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

Historic monuments are under protection envisioned in the Monument Protection Act of 23 July 2003, by means of entry in register of monuments/list of monuments/register of archaeological sites kept by the competent local authorities, or by specific provisions of local master plans. While the transfer of rights in real estate is generally not affected, the provisions of the Land Management Act of 21 August 1997 provide for the pre-emption right of a given municipality in case of sale of the real estate entered in the register of monuments (but only if such pre-emption right is disclosed in the LMR). The Monument Protection Act does impose restrictions on development/use/remodeling of buildings/lands which are under monument protection. Depending on the case, it may be necessary to obtain consent or permission from the monument protection authority in order to develop on specific land or remodel/renovate a historical building or, in some cases, even to cover the costs of archaeological excavations and their documentation.

### 12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

The information on contamination and/or pollution of real estate can be accessed online on the website of the General Directorate of Environment Protection and at Regional Directorates of Environment Protection. A central register of direct threats of environment damage, actual damage in environment and historical soil pollution, is maintained by the above authority. The Directorates also hold information from registers of lands where excess of soil standards has been established, previously maintained by local government authorities. It should, however, be noted that, as a principle, the condition of soil is not being monitored on a regular basis, and the authorities have information only on properties as to which proceedings regarding land contamination were instituted or conducted. Therefore, only independent expert research can confirm with full certainty the actual condition of the land.

### 12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

Remediation of contaminated land is mandatory for: i) owner of the land in the case of established historical contaminations (i.e. contaminations which occurred before 30 April 2007) unless the culprit can be indicated, ii) the culprit of established contamination (damage to environment) which occurred after 30 April 2007.

Issuance of decision ordering remediation is preceded by assessment by authorities of the level of hazard to people and environment – if it is very low, remediation may not be necessary.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

In accordance with the Act on Energy Characteristics of Buildings of 29 April 2014, owners and managers of buildings (in some cases also tenants) are obliged to prepare and display an energy characteristics certificate of a given building in the case of sale and lease of such building. It is also obligatory to perform periodical inspections of heating and air conditioning systems in buildings. A central register of energy characteristics is maintained for the purpose of monitoring of the energy performance of buildings, and a national plan aimed at increasing the number of low energy consumption buildings has been established.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The emission trading system has been implemented in Polish law in the Act on the Emission Rights Trading System of 12 June 2015 that pertains to emissions from installations and aviation. The operation of installations which emit greenhouse gases requires obtaining a permit applied for at the local government authority. Such entity must also file annual reports with the National System of Balancing and Forecasting Emissions based on the Act on Greenhouse Gas Emission Management System of 17 July 2009, which also regulates the authority supervision over the entire system.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Gas emissions reduction targets are governed by EU law. In the case of industry (factories, production facilities), covered by the Emissions Trading System, the target is to reduce emissions by 43% until 2030 (in comparison to 2005), and no specific limits for particular countries have been set). In the case of other industries, among other construction, the general target for reduction is set at 30% until 2030 (in comparison to 2005), and under binding Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018, the target for Poland is set at a 7% reduction.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The matter of sustainability is reflected in numerous particular provisions of Construction Law (and regulations issued thereto regarding specific technical and occupational conditions set for residential and non-residential buildings), as well as Environmental Law (such as Environment Protection Act or Water Law) and other acts of administrative law. These measures regulate, amongst others, the materials being used, environmental impact of investments (which may require additional consents of administrative bodies), hygiene, health issues, waste disposal regulations, consumption of environmental supplies *et al.*

## Acknowledgments

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DPPA Legal Grzonek Machczyński Świdnicki adwokaci i radcowie prawni sp. p. is an independent partnership founded by three senior lawyers with extensive experience in advising Polish and international clients. The firm was established in July 2011 and since that time has successfully developed as a real estate law boutique specialising in legal services for entities active in the commercial real properties industry. The main focus of the firm is real estate and development projects in all sectors of the real estate industry covering office, commercial, logistics, hotel and infrastructural real properties. The scope of the firm's area of specialty is determined by the broad experience of the partners, which provides the firm's clients with the full scope of legal advice at each stage of the lifetime of a commercial real property. Apart from three partners, the firm is currently employing 15 highly qualified, dedicated and experienced real estate lawyers who, among others, specialise in due diligence and real property acquisition, real estate property management including leasing, construction, reconstruction, modernisation and development of real estate projects, hotel franchise and management agreements.

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# Portugal


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Considering that the Portuguese Republic is a Constitutional State, it is important to highlight that the right to own private property is a fundamental right recognised in the Portuguese Constitution, dated 1976.

The discipline of properties rights, the rules and the most relevant principles regarding *in rem* rights, are foreseen in the Portuguese Civil Code, dated 1966.

The Civil Code includes a specific chapter regarding *in rem* rights (e.g. right of use, surface right, lease, etc.) with rules about condominiums and common parts of buildings, that provides for the segregation of buildings.

The registration of real estate properties is regulated in the Land Registry Code, approved by the Decree-Law 224/84, 6th July, last amended by Decree-Law 89/2017, 21st August.

The actual Regime of Urban Planning and Building was approved by the Decree-Law 555/99, 16th December, which was amended for the last time by the Decree-Law 66/2019, 21st May.

There are also General Rules for Urban Buildings which contain technical rules for construction complementing the Urban Planning and Building Regime, dated 1951, last amended by Decree-Law 50/2008, 19th March.

Recently, the Law 83/2019, 3rd September, approved the Habitation Base Law which defines national and local policies for habitation and foresees important rules regarding, among others, the right of preference of the state, the municipalities and the tenants over certain buildings.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The Portuguese law system is a Roman law-based system and therefore there is no impact of local common law in its jurisdiction.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

According to the Portuguese Civil Code, the applicable law to real estate matters, namely the ones related to rights *in rem*, are solely governed by Portuguese law.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Notwithstanding that there are no legal restrictions on ownership of real estate by classes of persons, either natural or legal, it must be pointed out that foreign entities investing in Portuguese real estate are required to obtain a Portuguese taxpayer number (NIF).

If the potential owner is considered a non-resident from outside the European Union, then it is mandatory to appoint a Portuguese tax representative in order to obtain their NIF.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

There are several type of rights over land in the Portuguese legal framework, the main being: ownership (*direito de propriedade*); co-ownership (*compropriedade*); condominium ownership (*propriedade horizontal*); right of use (*usufruto*); use and housing right (*direito de uso e habitação*); surface right (*direito de superfície*); servitudes (*servidões*); and statutory rights of preference (*direitos legais de preferência*).

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

The Portuguese legal framework foresees that the holder of a surface right is allowed to build and maintain construction on a property owned by other person or entity.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Usually, the owner of the legal title is also the owner of the beneficial title. However, it is possible to split the two of them, since this faculty is considered one of the powers recognised by the property owner.

The Portuguese legal framework has several degrees of self-limitation of the property right such as the surface right, the use and housing right and the right of use.

The rights mentioned above shall be registered in the Land Registry and can be assessed by means of a Land Registry Certificate, otherwise they will be considered unenforceable against third parties which will be construed as in good faith (*bona fides*).

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

In general, all land must be registered in Portugal, excluding public domain land.

However, there is specific legislation regarding statutory servitudes that exempt such specific right of being registered.

### 4.2 Is there a state guarantee of title? What does it guarantee?

There is no state guarantee of title. Although the Portuguese Land Registry is managed by the state (being part of it), its purpose is to publicise information on the legal status of the property.

This system is aimed to assure that all transactions regarding real estate property take place according to the law.

Considering the above, any rights registered in the Portuguese Land Registry are presumed to exist as publicised in the Registry.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

Since the registered facts are presumed to exist, the lack of registry will significantly decrease the level of legal protection of the property owner against third parties, that will assume that the registered facts are true.

There is also a general principle of priority according to which the first registered right prevails over any other further incompatible rights (even if established before the registered right).

As a result, any facts resulting in the creation, recognition, acquisition or modification of any *in rem* rights should be registered with the Land Registry.

### 4.4 What rights in land are not required to be registered?

Statutory servitudes, statutory rights of preference and restraints on disposal do not require to be registered. However, again, if they are not registered third parties, it will be assumed that no other limitation to the *in rem* right exists.

### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

Under the Portuguese legal framework, all land has to be registered, as a result the abovementioned rights do not apply.

### 4.6 On a land sale, when is title (or ownership) transferred to the buyer?

The real estate ownership is transferred from the seller to the buyer with the execution of the deed of transfer.

Nonetheless, the ownership right will only become opposable to third parties after being duly registered with the Land Registry.

### 4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

The Portuguese Land Registry was designed based on two main principles: a general principle of priority; and a principle of public trust.

According to the first, the first registered right prevails over any further incompatible rights (even if such rights were established before the registered right).

On the other hand, the public trust principle means that third parties may assume that the registered facts are true and therefore the acts based on those facts are considered to be taken in good faith (*bona fides*), meaning that earlier rights prevail over later rights unless proven otherwise.

## 5 The Registry / Registries

### 5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.

There are two State sectors where land is registered – the Land Registry and the Tax Division. The Land Registry publicises the creation, recognition, acquisition or modification of any rights regarding a property. The Tax Division's purpose is mainly to keep an updated physical description of the property and its corresponding tax value so as to the identification of those responsible for paying the taxes imposed on the property, which would usually be the owner, but can also be the holder of a right of use (*usufruto*) or a surface right (*direito de superfície*).

### 5.2 How do the owners of registered real estate prove their title?

The Land Registry will issue a Land Registry Certificate proving ownership over the property.

### 5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?

Real estate transactions cannot be completed electronically. Therefore, any transaction resulting in the creation, recognition, acquisition or modification of any rights regarding a property must be executed by means of a deed, before a notary, or by means of a private document signed before and certified by a lawyer, solicitor, representative from the Chamber of Commerce and Industry or the Registry Office and afterwards filed at the Land Registry, and based on a certified copy of the transfer deed.

Any facts or rights registered over a property, including ownership, can be accessed online by using an access code provided by the Land Registry.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes. Compensation can be claimed from the registry based on the legislation about the liability of the State and other public bodies.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no specific restrictions on accessing information in the register, since the Land Registry information is public.

Buyers may obtain the information they might reasonably need to complete a transaction as the information provided by the Land Registry covers all registered liens and encumbrances that might prevail over their acquisition. However, legal servitudes and leases for a term of less than six years are not subject to mandatory registration and therefore do not show up in the Land Registry information.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Usually, real estate brokers and legal advisors are involved in property transactions.

The legal advisors' parties conduct, in larger operations such as institutional investment and divestment deals and with tax advisors, architects, engineers and urban planners, due diligences in their area of expertise in order to be able to provide legal support and draft and negotiate all contractual arrangements, regarding the transaction.

The transactions must be executed in a public deed executed before a notary, or by means of a private document signed before, and certified by a lawyer, solicitor, a representative from the Chamber of Commerce and Industry or Registry Office; other officials invested in similar powers are also involved.

**6.2 How and on what basis are these persons remunerated?**

Real estate brokers are be paid by a lump sum corresponding to a percentage of the transaction price (commission). Conversely, legal and tax advisors are normally paid on an hourly basis. Other consultants are usually paid according to a work ratio.

Notaries can establish their fees freely, but many notarised acts are fixed by the State.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

The Portuguese Government recently approved a Real Estate Investment Trusts (REIT) regime, approved by the Decree-Law 19/2019, 28th January, which was amended for the last time by the Decree-Law 97/2019, 4th September.

This new regime is in force since 1st February 2019. It is designed to provide investors with a new vehicle for real estate investment. Under this regime, investors may benefit from exemptions or reduced taxation at the level of the REIT and its shareholders.

The introduction of the REIT regime in the Portuguese legal framework was considered a necessary step to provide investors with alternative tax-efficient investment structures reinforcing the foreign direct investment and the potential of the Portuguese real estate market for future growth and expansion.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The appetite for residential transactions in *premium* areas (CBD) increased in the past five to six years. Considering there are not many available assets, it will continue to be interesting to invest on those areas. Co-living is becoming a trend and there is a great lack of student accommodation, meaning that investors/developers are looking for good deals in real estate areas. The demand for non-residential accommodation has increased and offers are still unable to meet demands, meaning that there is potentially a lot of good business to be done.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Residential, high-end retail and hospitality, i.e. retirement homes, student residences, and co-living and co-working spaces, with emphasis in Portugal's main city centres, are currently very busy markets and we have noticed a very high demand for the development of such projects.

It should be noted that both investors and developers tend to focus on rehabilitation investments since they have a shorter time to market and benefit from an incentive scheme that the Portuguese legal framework has in place for property rehabilitation.

These measures allow investors to requalify buildings in historical designated areas, waiving some of the technical requirements that otherwise would be mandatory and simulate the lease market, along with a tax-incentive scheme that includes reduced VAT on construction works and exemption of IMT (Property Transfer Tax) and IMI (Annual Property Tax) applicable on designated cases.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The minimum formalities for the sale and purchase of real estate are:

I. Promissory purchase and sale agreement (optional).
II. Payment of IMT and Stamp Duty.

III. Execution of the sale and purchase deed before a notary, or in a private document signed before, and certified by, a lawyer, solicitor, or representative from the Chamber of Commerce and Industry or Registry Office.
IV. Registration of the transaction at the Land Registry.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

There is no specific duty of disclosure. However, the seller must act in accordance with the principles of good faith (*bona fides*), according to the general provision of law, therefore the seller shall disclose any information of essence for a reasonable buyer to decide to purchase the property, such as any legal or material defects so as to any issues that have a material impact on the use and/or value of the property.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, in case of an infringement of the seller's representation and warranties if, as a result, the buyer suffers a loss.

Nevertheless, the seller may negotiate to limit the liability at a certain amount or to restrict the survival of its liability to a set amount of time.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

The seller is liable for defects and for the lack of qualities it has guaranteed the buyer, or that are necessary for the purpose for which the property is intended, during the five-year period following the relevant sale.

It is also not uncommon for the seller to provide contractual warranties to the buyer (apportion risks between the parties). These warranties are commonly referred to as apportion risks between the parties relating to title, encumbrances, licensing status, tax issues, hidden defects and environmental aspects, among others. These warranties should not be a substitute for the buyer's own due diligence designed to check the technical, physical, commercial, legal, urban, environmental and tax status of the target property, as warranty claims have to ultimately be decided in court, with the inherent costs and time involved.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller may be responsible for some liabilities such as condominium expenses, utilities expenses, and unpaid taxes related to the property. It may also be liable for defects and lack of qualities warranted to the buyer or that are necessary for the purpose that the property is intended to be used. This guarantee has a five-year extent period following the relevant sale.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Usually the buyer also pays the transaction-related costs, namely, IMT, the Stamp Duty and the notary and registry fees.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

Except for some very specific cases, Portuguese regulations do not differ between residents and non-residents.

Lending money is mainly ruled by the Portuguese Civil Code and the special Banking Laws that regulate the banking activity.

The Portuguese legal framework has several consumer protection laws that may apply to loans relating to the finance of real estate acquisition.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The creation of a mortgage for the benefit of the lender is one of the most common methods by which a real estate lender protects itself.

Asset assignment of rents or receivables may also apply if the property is an income.

Also, loan agreements typically contain financial covenants and non-financial covenants.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

According to the Portuguese legal framework, mortgage enforcement is only made through courts, under a specific proceeding whereby the court shall promote the sale of the relevant property and the mortgage shall be paid from the proceeds resulting therefrom, after payment of other privileged credits, if any.

**8.4 What minimum formalities are required for real estate lending?**

Loans are executed by means of a private contract between the parties.

Conversely, mortgages are formalised in a notarial deed executed before a public notary or by means of a private document signed before, and certified by, a lawyer, solicitor, or representative from the Chamber of Commerce and Industry or Registry Office. Mortgages must be registered in the Land Registry in order to be valid and effective towards third parties.

Finally, pledges over shares must comply with the formalities set forth in the Portuguese Securities Code and will vary depending on whether the shares are book-entry shares or represented by certificates.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

A creditor holding a mortgage has special privilege over the other creditors.

This means that a lender secured by a mortgage is entitled to be paid with preference over other borrowers' or other creditors without any special privilege, even in the scenario of insolvency of the borrower. The proceeds will be distributed then to the security holders in order of their rankings in the Land Registry.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

The Portuguese legal framework allows two kinds of securities: personal securities; and *in rem* securities.

It is not unusual for a lender to ask for both securities in a single contract.

If the borrower does not comply with the contract, the personal securities shall allow the lender to affect a natural person's patrimonial assets (i.e. a person's salary, incomes, car, etc.). The patrimonial assets may be the borrower's or a third-parties' that assumed that role when signing the contract.

Conversely, in general, a specific asset offered as *in rem* security shall be affected prior to any other borrower's assets if this party breaches the contract, unless there are other securities in the same contract. In this scenario the lender shall choose which one to affect first.

The *in rem* securities have to be registered with the Land Registry regarding that asset, otherwise they will be considered unenforceable. The *in rem* security will also cease to exist in the following events if: (i) the contract that they secure also ceases to exist; (ii) they terminate 20 years after a third party have bought and registered the asset offered as security and five years after the maturity of the borrower's obligations; (iii) the asset offered as security is destroyed; or (iv) the lender forfeits the security.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Enforcement actions regarding *in rem* securities may imply judicial proceedings and the borrower will be able to present a defence.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

Both insolvency and corporate rehabilitation will restrict lenders from starting their own litigation proceedings against the borrower. However, the lender will be allowed to claim credits in those proceedings.

If the asset offered as *in rem* security is sold on a judicial sale, the creditors will be paid in the following order:

(i) Specific preferential credits (i.e. workers' salary debts).
(ii) Secured credits.
(iii) General preferential credits.
(iv) Common credits.
(v) Subordinated credits.

After the issuance of the judgment on the rating of credit claims and acknowledgment of the claims, secured creditors are paid through the sale of the underlying security in accordance with the established priority.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

The lender does not have the right to appropriate shares given as collateral. Just like *in rem* securities, the shares will be subject to a judicial sale and before that proceeding, they shall be subject to an appraisal, in order to determine their value. The lender may, however, present a proposal to acquire those shares.

As for the borrower in administration, he will continue in that role. However, he may be released of that position throughout the proceedings mentioned in the company's bylaws.

When the company is under an insolvency or reorganisation procedure, the court may order that the insolvency administrator shall assume the administration role.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

IMT is applicable to real estate transfers and it shall be paid by the buyer and assessed on the purchase price or its tax value, whichever is higher.

IMT rates are currently the following: (1) Residential properties: between 0% and 6%; (2) other urban properties: 6.5%; (3) rural properties: 5%; and (4) properties purchased by an entity with residence in a tax haven (except natural persons): 10%.

Subject to the fulfilment of certain requirements there are some facts that can lead to exemption of IMT, namely:

- acquisition of properties for resale by Real Estate Trading companies;
- acquisition of properties intended for urban rehabilitation;
- restructuring operations or cooperation arrangements;
- acquisition of buildings classified as being of national/public/municipal interest; and
- exemption or reduction of the IMT rate, regarding the acquisition of property that constitutes eligible investment under the Investment Promotion Tax Regime (RFAI).

### 9.2 When is the transfer tax paid?

Transfer tax is paid immediately before the property transaction. The: right of use (*direito de usufruto*); right of use and housing (*direito de uso e habitação*); the assignment of the contractual position of the buyer on a Promissory Purchase and Sales Agreement; and the assignment of rights to the property by the owner by irrevocable power of attorney, are facts also subject to the payment of IMT.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Yes. Half of the capital gains resulting from the sale of real estate, by residents in Portuguese territory, is added to the individual's personal income (IRS) and tax accordingly. This rule does not apply if the property was acquired in 1989.

If the property is the taxpayer's primary residence and the sale proceeds are reinvested in the acquisition, improvement or construction of another primary residence in Portuguese

territory or within the EU, within 36 months of the sale or in the 24-month period prior to the relevant sale, the gain may be wholly or partially exempt from tax.

Capital gains obtained by Non-Habitual Residents (NHR) are generally taxed at a 28% flat rate. If a double taxation agreement applies, such capital gains may be exempt from taxation in Portugal.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

Usually, transfers of real estate deals are exempt from VAT.

If applicable, the VAT rate is 23% of the purchase price or its registered tax value, whichever is higher; Stamp Duty shall not be due. VAT is self-assessed by the buyer, meaning that no amount is actually paid by the seller.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

There are no other taxes applicable to an individual for the disposal of property.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

The purchase of properties by the means of share deals is not subject to IMT or Stamp Duty, except in the case that the purchase involves an interest of 75% or more in a Limited Liability Company (LDA) owning real estate.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

It is advisable to conduct a due diligence on the real estate property before its transaction, in order to prevent possible complications with the Portuguese tax authorities due to debts from the previous owners.

Also, it should be taken in consideration the possible existence of encumbrances due to debts to the Portuguese tax authorities.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The Portuguese legal framework regulates the urban lease in the Urban Lease Law and in the Portuguese Civil Code, that applies both to business and residential leases.

Business leases are qualified as non-residential leases, which apply to all leases for non-residential purposes.

**10.2 What types of business lease exist?**

The Portuguese legal framework only acknowledges the qualification of leases either as residential or non-residential, therefore all business leases are qualified as non-residential.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

(a) Length of term: Parties may agree on the duration of the lease, as to the applicable regime for the termination rights/break option and opposition to renewal. If the contract is not terminated, it will automatically be renewed for the original period, unless that period is less than five years in which case the contract will be renewed for that period. Usually, business leases are entered for an initial period of five or 10 years. In the absence of the length of term in the lease agreement, the length of term will be five years.

(b) Rent increases: Rent is updated according to the criteria agreed and established by the parties in the lease agreement or, in the absence of a specific contractual provision, on an annual basis according to the official criteria (Price Consumer Index).

(c) Tenant's right to sell of sub-lease: The tenant may transfer his/her/its contractual position and sublease considering that the landlord consents with the said transfer. However, the transfer of a commercial business which entails the automatic transfer of the relevant lease agreement, exempts the seller of obtaining the prior consent. Unless, agreed otherwise, the landlord has a pre-emption right in this transfer.

(d) Insurance: The landlord is required to contract a multi-risk insurance for the property. The tenant is usually expected to contract insurances regarding its business (liability insurances) and its contents in the property.

(e) (i) Change of control of the tenant: Change of control provisions are not common unless the ownership or control is an important element in the landlord's decision to lease the property. However, these provisions are usually part of real estate financial leasing operations.
(ii) Transfer of lease as a result of a corporate restructuring: It is not usual for leases to include provisions regarding this subject, therefore, most of the time the lease is transferred as a result of a merger or a demerger.

(f) Repairs: The tenant is usually responsible for interior repairs and the landlord is responsible for structural and major repairs. Nonetheless, the parties may agree on different rules regarding this matter.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

The landlord pays income tax or corporation tax on rental income.

Leases are subject to Stamp Duty – to be paid by the landlord – at a rate of 10% of the first rent, considering that VAT is not applicable.

In what concerns commercial leases, rent is usually exempt of VAT. However, the landlord may waive this exemption considering that certain criteria are met. The current rate of VAT in Portugal, on this subject, is 23%.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Leases, including business leases, terminate at the end of a term, but can also be terminated for other reasons; the most common are mutual consent of the parties or a contractual breach by one of the parties.

Tenants may also accept a break option/termination right at one or more points through the term of the lease considering that the landlord pays a compensation/termination fee.

It is possible to include in the lease contract that tenants have an option to extend the lease, although this is not a common market practice.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The transfer of ownership of the leased property entails the assignment of the landlord's contractual position on the lease to the buyer. Afterwards, the new landlord acquires not only the rights but also the obligations of the former owner/landlord.

Unless otherwise agreed, the tenant will remain liable only in relation to obligations prior the assignment.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Under the Portuguese law, the landlord has the obligation to obtain and deliver the property's energy and air quality certificate when signing the lease agreement.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

There is an increasing interest in shared short-term working and living spaces, such as co-working and co-living. However, it is still a grey area in the Portuguese legal framework. Investors and developers are helping to shape this rising market.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The main laws regarding residential leases are the following:

- The general principles for contracts so as the discipline of properties rights, namely most relevant rules about condominiums and leases are stated in The Portuguese Civil Code, dated of 1966.
- The New Urban Lease Regime (NRAU), approved by the Law 6/2006, 27th February, which was last amended by the Law 7/2019, 7th March, rectified by the Rectification 11/2019, 4th April.
- The Lease Services and Eviction Proceedings Regime was approved by the Decree-Law 1/2013, 7th January.
- The New Rural Lease Regime, approved by the Decree-Law 294/2009, 13th October.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

Co-living is a new trend in the Portuguese real estate market. Nowadays, there is not a specific regime applicable to this new trend.

There is, however, a special regime regarding the local lodging and tourism developments, aimed at regulating very short stays and that may imply multiple residential occupiers. The local lodging regime was approved by the Decree-Law 128/2014, 29th August, which was last amended by the Law 71/2018, 31st December. The Regime of the Establishment, Commercial Exploration and Functioning of Tourism Developments was approved by the Decree-Law 39/2008, 7th March, and was last amended by the Decree-Law 80/2017, 30th July.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) Length of term: The minimum length of the residential lease agreement is one year and the maximum length is 30 years. If the contract is not terminated, it will be automatically renewed for the original period, unless that period less than three years, in which case the contract will renew for that period of time.

(b) Rent increases: Rent is updated according to the criteria agreed by the parties in the lease agreement. If there is not a specific contractual provision regarding the rent update, the rent may be updated on an annual basis, according to official criteria.

(c) The tenant's rights to remain in the premises at the end of the term: The tenant is obligated to leave the premises with the termination of the lease agreement, unless the parties have agreed otherwise. However, there are some specific rules for long-length contracts, signed before 2006, regarding tenants with a very low revenue; tenants over 65 years of age and tenants with disabilities.

(d) Tenant contribution to the property cost: The tenant is usually responsible for interior repairs and the landlord is responsible for structural and major repairs.

Usually tenants are responsible for utilities costs, while the landlord is responsible for paying for the insurance and taxes regarding the property. Nonetheless, the parties may agree on different terms regarding this matter.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The lease agreement may cease for several reasons, following an agreement between the parties, such as cancellation, expiration of the agreement length and termination.

The landlord may cancel the lease agreement in the event of a serious contract breach, by the tenant (i.e. for a substantial delay

on paying the rent). This will imply to serve a judicial notice and an eviction proceeding if the tenant is not compliant.

The landlord can also oppose to the contract renewal considering that he/she/it is compliant with the following terms: (i) to inform the tenant that he/she/it opposes to the renewal, 240 days prior to the renewal, if the original duration of the contract, or its duration after being renewed, is six years or more; (ii) 120 days, if the original duration of the contract, or its duration after being renewed is one or more years, but less than six years; and (iii) 60 days, if the original duration of the contract, or its duration after being renewed is less than six months.

The landlord may also terminate the lease agreement if: (i) he/she/it, or any of his/her/its close family (until the 1st degree), needs the property to reside; (ii) demolishing, remodelling or deep restoration that demands the property be vacant (as long as the property after those works is not considered have the same characteristics as the leased property); and (iii) by means of a written communication to the tenant five years in advance of the desired termination date.

## 12 Public Law Permits and Obligations

### 12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.

The main laws concerning zoning and related matters are the following:

- The Planning Act, which defines the scope and proceedings for approving and modifying the different levels of zoning plans, namely, regional, municipal and national.
- The General Framework of Soils Policy, Zoning and Urbanism, that states the general rules and principles applicable for the different sub-levels of zoning and planning laws and regulations.
- Local Planning Instruments, such as municipal plans that regulate the use and occupation of soil included in the area of their jurisdiction.
- Environment Impact Assessment Act – regarding the proceedings of environmental impact assessments.

### 12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.

Yes, through the compulsory acquisition – expropriation – of private property, which is admitted considering that it is necessary and justified in public purposes. Prior to the compulsory acquisition, the public entity has to make an attempt to acquire the envisaged land by mutual agreement.

If the parties do not achieve an agreement, then the expropriation proceedings start by issuing a public interest declaration (DUP) justifying the acquisition decision.

The expropriating entity shall submit a proposal of compensation to the landowner, considering the damages suffered by the latter and reflecting the property's market value according to its regular economic use. This proposal must be submitted within 15 days after the DUP.

### 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Municipalities issue and control building use and occupation permits.

The Portuguese Agency of Environment (APA) is one example of the specialised agencies with powers to enforce environmental regulations in the country.

Most information regarding the requirements to obtain licences is available on the municipalities and governmental websites.

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

The use of buildings and construction works are controlled by municipalities. These works may be conditional upon the issue of a construction permit or the notice of the municipality of its commencement.

Municipalities also control the use permits that confirm that a certain construction project has been executed in accordance with the approved plans and drawings or that the building is fit for the exercise of determinate activities.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

It is not possible to obtain implied permissions under the Portuguese legal framework, except in very special cases.

The municipality where the real estate is located issues the relevant permits and licences regarding its construction and use which will be granted if the real estate has been built in compliance with the approved plans.

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

The municipality regulations establish formulas meant to determine the construction and use permit costs.

The timing involved in obtaining a building permit depends on the complexity of the work involved. A use permit, which is a document that confirms that the relevant works have been executed in compliance with the approved plans, should be obtained within 10 days after being requested. Along with the said request, a pre-defined set of documents, such as statements from the developer's architect and engineer confirming that the works are in accordance with the competent laws, building regulations and approved plans, are also required.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

Yes. There are laws and regulations on historic areas, monuments and historic or classified buildings that regulate development projects of their surrounding areas or of the properties classified as such. Additionally, municipalities and national heritage agencies have a pre-emption right in the transfer of any classified buildings or located within certain historical areas.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

In Portugal, there is no public register regarding contaminated land. In order to obtain this information an investor shall promote an environmental assessment.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

The legal framework regarding environmental liability, concerning the prevention and remedying of environmental damage establishes that the operator causing imminent or effective environmental damage, namely to the soil or water, is responsible for adopting the necessary measures for its prevention or remediation, including clean-up measures.

Besides, under the general rules of environmental legislation, if the environmental liability regime does not apply, there is an obligation to remediate the environment and restore it to its previous state in case of pollution events or any type of damage to the environment.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Both the transfer and lease of real estate is subject to a previous energetic certification of the property. These proceedings are carried out by certified technicians and registered with an association specifically dedicated to the energy sector (ADENE).

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Considering the United Nation Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol so as to the Paris Agreement on Climate Change, Portugal has adopted the following instruments in order to promote the reduction of greenhouse gas emissions (GHG), including carbon dioxide:

a) The Green Growth Commitment (CCV), aimed at establishing a development model for Portugal based on sustainability.
b) The Strategic Framework for the Climate Policy (QEPIC), establishing the goals for Portuguese policy on climate change up 2030.
c) The National Emissions Trading Framework in the context of the European Emission Trading Scheme (EU-ETS), determining the obligation for operators of certain sectors to hold greenhouse gas emission allowances.
d) The National Program for Climate Change (PNAC 2020/2030), establishing policies, measures and instruments mainly focused on the limitation of GHG in those sectors covered by EU-ETS.
e) The National Strategy of Adjustment to Climate Change (ENAAC 2020), establishing the goals, activities and functioning model of the Portuguese strategy on climate changes up until 2020.
f) The Environmental Fund.
g) The National Action Plan for Renewable Energies (PNAER), establishing the goals regarding the share of Portuguese energy sourced from renewable sources for energy consumption up until 2020.
h) The National Action Plan for Energy Efficiency (PNAEE), establishing the Portuguese goals regarding energy efficiency.
i) The National Road Map for Low Carbon (RNBC 2050) (Road Map), aimed at guaranteeing Portugal reaches carbon neutrality by 2050.
j) The National Climate and Energy Plan, with a strategic long-term vision for a climate-neutral Portugal, taking into account the goals of the Paris Agreement.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Portugal must limit the increase of GHG for the sectors not included in the EU Emission Trading Scheme to 1% in relation to 2005, having adopted a new goal of 31% regarding renewable energies in the raw final consumption of energy, of which 10% is allocated to transport. A general goal to reduce the consumption of primary energy by 25% and a special goal for the Public Administration of a reduction of 30%, have also been adopted.

Portugal has also approved the CCV, imposing certain goals to be achieved by 2020 and 2030. The main goals for 2030 are the following: a) to reduce GHG emissions by between 30% and 40% (52.7–61.5 MtCO2e) compared to 2005; b) increase the share of renewable energies in the final consumption of energy to 40%; and c) increase energy efficiency through a reduction of 30% over the energy baseline by 2030 translated into an energetic of 101 tep/M€ GDP.

Finally, the Strategic legal framework for the Climate Policy (QEPiC) determines that Portugal shall reduce its GHG emissions to values of: 18% to 23% by 2020; and 30% to 40% by 2030, compared to 2005 values, depending on the results of European negotiations.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The Operational Program of Sustainability and Efficiency in the Use of Resources (POSEUR), focused, among other issues, on available funding in order to achieve the goal to increase energy efficiency in the housing sector and to reduce the annual estimated GHG emission, limiting, by 2023, the value of GHG emissions to 80.640T CO2e.

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BAS law firm was founded in 2010 and has a team of 30 lawyers, with about 34 professionals. In addition to the Lisbon and Oporto offices, BAS is present through partnerships in Angola, Brazil and Mozambique.

BAS is a full-service law firm but has a special focus on legal support in the areas of Real Estate Law, Health Law, Labour Law, Public Service, Administrative Law, Public Procurement, Administrative Litigation, Intellectual Property, Corporate Law, Banking and Financial Law, Civil Litigation, Data Protection, Immigration Law, Aeronautical Law and Sports Law.

The increasing popularity of the Portuguese Golden Visa and Non-Habitual Resident schemes so as to the associated increased demand for Portuguese properties, created the perfect opportunity for Real Estate Departments to grow along with those programmes. Nowadays, BAS Real Estate Department has a team of lawyers that frequently provide legal advice to foreign investors that wish either to obtain a Residency Permit in Europe, to benefit from a more favourable tax regime, or both.

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# Russia



Alexey Konevsky


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

In Russia, real estate is governed primarily by the following laws:

- The Civil Code of the Russian Federation of 1994 N 51-FZ constitutes itself a major legal act regulating real estate relations, in particular, the procedure for acquisition of rights to real estate and various kinds of transactions with objects of real estate.
- The Land Code of the Russian Federation of 2001 N 136-FZ has a specific subject of legal regulation – land, which constitutes itself a separate kind of real estate. Therefore, the Land Code stipulates provisions on acquisition and cessation of rights to land plots and reveals the legal ties between land and various types of constructions upon it.
- The Town-Planning Code of the Russian Federation of 2004 N 190-FZ establishes the legal regulation of relations on construction and reconstruction of capital facilities (another kind of real estate) and sets certain restrictions and requirements to the contents of documents on construction.
- The Residential Code of the Russian Federation of 2004 N 188-FZ has a narrower subject of regulation – residential premises and, consequently, usage, maintenance, remodelling and reconfiguration of such premises.
- The Federal Law "On the State Registration of Real Estate" of 2015 N 218-FZ provides legal regulation of state registration of rights to real estate and several kinds of transactions with it (e.g. sale-purchase, leasing agreements, etc.).
- The Federal Law "On the Joint Funding of Construction" of 2004 N 214-FZ defines relations on the participation of physical persons in the process of real estate construction and acquisition of rights to it.

Prescriptions by competent authorities and regional laws also form an integral part of legal regulation of real estate relations in Russia.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

There is no concept of common law in Russia.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

According to the provisions set in the Constitution of the Russian Federation, generally recognised principles and rules of international law, as well as international treaties, are included into the legal system of Russia.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Pursuant to the provisions of civil law, foreign individuals and legal entities are entitled to the same rights and obligations as Russian citizens, i.e. they enjoy the national regime. Still, certain restrictions exist with respect to the non-resident's right of ownership. Thus, non-residents are not entitled to own land located near state borders and agricultural land. The latter restriction also applies to legal entities in which the share of foreigners in the share capital exceeds 50%. Non-residents are also not allowed to purchase land within territories of seaports and other specially determined territories indicated by federal laws.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

- Ownership. In Russia, several types of ownership are recognised: public (which can be state or municipal); private (by individuals and legal entities); co-ownership, which can be shared ownership (where the shares are determined); or joint ownership (where the shares are not determined).
- Lifetime inheritable possession. Such right is no longer granted. However, the Russian Civil Code contains such provision that used to be granted to physical persons in respect of public land. Nowadays, it is still applicable only to land plots that were originally granted on this title.
- Permanent (termless) use applies to publicly-owned land and is no longer granted (while historical rights are recognised).
- Free of charge use (can be only contractual).
- Easement (can be public or private, contractual or prescribed by law). It constitutes itself a right to limited use of land that is owned by another person.

- Land lease (can be only contractual).
- Mortgage (can be contractual or prescribed by law) is regulated by a specific federal law N 102-FZ dated 16.07.1998 on real estate mortgage. Only land plots that are included in civil circulation can be pledged. A mortgage can be solely set for the term of a lease agreement.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

A building owner has to have a right to the underlying land. However, this right can be different to ownership; for example, it is a common situation when the building owner leases the underlying land.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

No, there is no split between legal title and beneficial title under Russian laws, because Russian law does not have a concept of a beneficial title.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

Rights to all kinds of real estate (including land) generally require state registration in the Unified State Register of Real Estate ("EGRN"). However, as the procedure of state registration was introduced only in 1998 (by a specific law), titles acquired before are also recognised by Russian law. In order to enter into transactions with such real estate, the title-holder should register its title (subject to minor exceptions).

All land that is not in the ownership of individuals, legal entities or municipalities is state property.

**4.2 Is there a state guarantee of title? What does it guarantee?**

Under the Russian Constitution, private ownership is protected by law and can solely be taken away by a court decision. Forced disposal of property for state needs may only take place subject to prior and fair compensation to the owner.

Another state guarantee of title is state registration which is declared as the primary evidence of existence of a right. Registered title may only be challenged in court.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

The general rule is that all rights to land require state registration. However, titles to land acquired before the procedure of state registration was enacted by law (i.e. before 1998) are also recognised by the state, with a limitation that such titles cannot be the subject of a transaction until they are registered. Absence of registration means that title has not arisen (subject to some exceptions, for example, an unregistered lease is effective between the parties, but not against third parties).

**4.4 What rights in land are not required to be registered?**

The rights to land require state registration under Russian civil laws, with the exception of short-term lease of land (less than one year).

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

The notions of first registration and probationary period are unknown to Russian real estate law.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

In sale-purchase transactions a title to land is considered transferred after the state registration was carried out.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The concept of priority of rights is not known to Russian law.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

EGRN is the main registry which contains legal and technical information on real estate objects, including land plots. It is operated by the Federal Service of State Registration, Cadastre and Cartography ("Rosreestr").

While most of the data on real estate objects can be acquired from EGRN, there are specialised registries, like forest registry, water bodies registry, and the registry of objects of cultural heritage.

A good source of information is the Information System of Town-planning Activity ("ISOGD"). This database stores town-planning documentation, resolutions and decisions of authorities and other documentation related to the specific real estate and its territory.

**5.2 How do the owners of registered real estate prove their title?**

An up-to-date extract from the EGRN is a sufficient document to prove the ownership title for any object of real estate.

The extract is provided by Rosreestr within seven working days upon the applicant's request.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Electronic transactions concerning real estate are possible to perform via the website of Rosreestr (purchase, lease, mortgage, gift, easement, other titles and encumbrances). In order to register such transaction, contractual parties are required to sign and submit copies of documents with an electronic digital signature.

Documents to be submitted to Rosreestr to register ownership title to real estate:

- application(s) for registration;
- identity documents and (or) corporate documents;
- title deeds: transaction; court decision; succession; commissioning certificate of newly constructed building; and decision on reorganisation of a legal entity;
- state duty payment receipt;
- power of attorney (if parties are represented); and
- approvals and consents: mortgage holder consent for transactions (if real estate is mortgaged); spouse consent or marriage agreement (if the seller is a married citizen); corporate approvals for major transactions; and interested party transactions (for legal entities).

Information on ownership can be accessed by requesting extracts from EGRN both electronically and by visiting the registration body office.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Being a public registering body, Rosreestr bears civil liability for improper fulfilment of its obligations under the Federal Law "On the State Registration of Real Estate".

Damages suffered by individuals or companies resulting from illegal actions (omissions) of Rosreestr shall be reimbursed by the Federal Treasury in the amount not exceeding a certain limit.

Such improper fulfilment implies:

- loss or distortion of information;
- provision of incomprehensive or incomplete information; and
- unreasonable refusal to register rights.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

According to the law, the EGRN is open to the public.

Extracts from the EGRN with description of title, titleholder, encumbrances and limitations are available on a fee basis (from US$4 to US$33 for different types of extracts approximately). Some information is available only to the current owner, tax authorities, courts and law enforcement.

Any individual can request information from the Register in relation to a particular property by presenting ID and filling in an application form.

Information from the Register is not sufficient for a detailed due diligence, since it would not contain information on some limitations and encumbrances and does not show sufficient information on the history of title.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Normally lawyers and real estate brokers would be involved. Notaries are involved if the agreement requires notarisation or if the parties voluntarily agree to notarise it.

**6.2 How and on what basis are these persons remunerated?**

Remuneration of lawyers and real estate brokers is freely determined by these parties in contracts with the party asking for their services. Notaries get fees, which are subject to some state restrictions.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

The main sources of capital in Russia have not changed and include owner's equity and bank loans.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Because of economic sanctions imposed on Russia since 2014, our country has significantly lost its investment attractiveness for foreign investors.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

A general trend for the slowing down of investments appears applicable to all sub sectors of the real estate market.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

Real estate purchase agreements shall be executed in writing in the form of one document. The law stipulates specific cases when a purchase agreement shall be notarised. After the agreement is signed, transfer of title shall be registered in the EGRN.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

There is no particular duty of disclosure. However, if the seller does not disclose some negative facts (such as encumbrances on the real estate), the seller would be liable to the buyer.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller is liable for misrepresentation provided that the relevant provisions are stipulated by a purchase agreement.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

The seller usually gives warranties to a buyer that:

- the real estate is free from any rights of third parties, is not seized or pledged and is free from any encumbrances and limitations; and
- there are no disputes, demands or court claims related to the real estate.

Assuming some provisions are included in the contract, breach of warranty gives the buyer a right to claim damages and, in some cases, to terminate the contract. The warranties are not a sufficient substitute for due diligence.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

After the sale, the seller is liable for breach of contract, including for breach of requirements regarding the quality of real estate.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In addition to paying the sale price, the buyer shall also accept the real estate by the signing of a respective transfer and acceptance act.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The Russian Civil Code is the main source of regulation.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The most common security is a mortgage. Other methods of protection are an independent guarantee, suretyship and pledge of movables or shares.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

There are two types of foreclosure on mortgaged property: judicial; and extra-judicial.

It is a general rule that a mortgage is subject to judicial foreclosure by means of a court order. The mortgaged assets are then sold at a public auction held by the court authorities.

The parties may enforce a mortgage without recourse to the courts. Extra-judicial procedure is possible, in particular, through a public auction under the agreement or through a closed auction where provided for by law.

**8.4 What minimum formalities are required for real estate lending?**

The loan agreement for any material amount should be in writing.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

A real estate lender may protect itself through a third-party security (independent guarantee, surety, mortgage, etc.).

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Being an accessory to the agreement, security may be avoided or rendered unenforceable when the main agreement is null and void (with the exception of an independent guarantee, which is not auxiliary to the agreement, but an independent obligation).

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

Enforcement through an out-of-court procedure in some situations (and arguably in all cases) requires endorsement of a public notary. Public notaries are supposed to give such endorsement only if the claim is "undisputed". Therefore, the borrower may declare that the claim is disputed and, therefore, arguably frustrate the enforcement through an out-of-court procedure.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

In case of insolvency of the borrower, the lender does not have any priority over other creditors, unless the lender is also a mortgage-holder. If the lender is a mortgage-holder, it would have some limited priority among the third line of creditors (after, for example, claims for wages).

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

The main stages of enforcing the security over shares through the extra-judicial procedure are the following: (i) the pledge-holder files a court claim; and (ii) the court orders the public auction, or, if the parties previously so agreed, a sale to a third party or transfer of ownership to the pledgor. The main stages

of enforcing the security over shares through the extra-judicial procedure are the following: (i) evaluation of the market price of the shares; (ii) notification of the pledgor; (iii) arguably an endorsement of the public notary; and (iv) court bailiffs enforce the pledge (by transferring the property to the lender, selling to a third party or through an auction).

The pledgor has a right to appropriate shares in the borrower given as collateral, if the parties so agreed. The insolvency or reorganisation is not an obstacle for such appropriation. There is no separate concept of administration under Russian law other than in the context of bankruptcy proceedings.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The buyer shall pay a stamp duty for the state registration of ownership title. It does not depend on deal value and comprises 2,000 rubles for individuals (about US$30) and 22,000 rubles (about US$300) for legal entities.

### 9.2 When is the transfer tax paid?

The stamp duty is paid when the buyer addresses to a registering body (Rosreestr) with an application for state registration of ownership title.

### 9.3 Are transfers of real estate by individuals subject to income tax?

In accordance with the Tax Code, real estate sales transactions are subject to income tax paid by individuals in the amount of 13%. The Tax Code sets provisions for income tax deductions and income tax exemptions.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Transactions involving the sale of commercial real estate are generally subject to VAT in the amount of 20%. The buyer pays the purchase price to the seller together with the VAT amount, and then the seller pays VAT to the state budget.

The sale of residential premises, land plots and the purchase of real estate through a share purchase agreement is VAT exempt.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Russian legislation does not stipulate additional taxes for the seller of real estate other than VAT and income tax.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Individuals are obligated to pay a tax on income of physical persons in the amount of 13%. Companies are obligated to pay a tax on profit of organisations. The amount of the latter depends on the taxation system under which the company is operating. If ownership of a company owning real estate is transferred solely or primarily to transfer ownership of the real estate, there is a risk that a VAT may be applied.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

The buyer should take into account the cadastral value of the real estate object before buying it. Land tax and corporate property tax (in certain cases) are based on the cadastral value, which may be higher than the real market price of the real estate.

The seller may propose to execute the real estate purchase agreement with an indication of a lowered price in it for the purposes of tax reduction. By entering into such agreement, the buyer bears certain risks, including a risk of not receiving back the actual paid amount in case the transaction is declared invalid.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

Leases of business premises in Russia is primarily governed by the following laws:

- The Civil Code defines the legal nature of lease agreements, sets the main provisions for execution of lease agreements for buildings, facilities and premises, as well as contractual rights and obligations of the parties.
- The Federal Law "On State Registration of Real Estate" comprehensively governs all relations on registration of rights to objects of real estate and transactions with them.

### 10.2 What types of business lease exist?

Russian legislation does not provide legal classification of business lease. However, it can be conditionally categorised by the object of the lease: office premises; retail premises; warehouses; and industrial premises.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

a) The parties are entitled to determine the length of lease term in the agreement. Business premises are typically leased for a term of five to 10 years. If the term is not specified in the agreement, it is deemed to be concluded for an indefinite term and can be terminated with three months' notice.
Long-term lease agreements (for more than one year) are subject to state registration.
There are no restrictions on the length of lease between private parties. As for public property, the law establishes a maximum lease term of 49 years.

b) According to the law, the rent can be changed by agreement between the parties within time limits set in the agreement, but no more than once a year. A yearly increase is usually stipulated in business leases.

c) The tenant can assign its lease rights and obligations to a new tenant (assignment agreement) with the landlord's consent. Public leases with a lease term exceeding five years can be assigned without prior consent.
Upon obtaining the landlord's consent, the tenant is also entitled to sublease the leased property, to pledge lease rights and to contribute them to the charter capital of legal entities.

d) There are no mandatory requirements towards insurance of commercial real estate. As a rule, the landlord insures its property against damage or destruction. The tenant usually obtains insurance of property (equipment and furniture) in the leased premises. The landlord may request insurance from the tenant to insure its third-party civil liability that might arise in connection with use of the leased premises.

e) (i) The lease agreement survives unchanged even in case of a change of control of the tenant, unless the parties agreed otherwise.
(ii) Reorganisation of the landlord as a legal entity does not affect the tenant's rights in a negative way. All rights and obligations of the previous landlord are transferred to a new one.

f) In accordance with the law, the landlord shall carry out major repairs to the leased premises, while the tenant is obliged to keep the premises in a good condition and perform minor repairs (maintenance). This order may be changed in the agreement.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

The rent under a lease agreement is subject to VAT at a rate of 20%. In any case, the landlord shall pay property tax, land tax (if applicable) and profit tax.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

The leases are usually terminated upon expiry. Upon expiry, the Tenant has the right of first refusal with respect to further lease. The lease is deemed automatically renewed for an indefinite term on the same conditions if upon the expiry of the agreement the Tenant continues to use leased property without objections from the Landlord.

A lease can be prematurely terminated by court at the request of either party in cases specified by the law. The parties can also agree upon other conditions of early termination in the lease agreement.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

As a general rule, the Landlord and the Tenant of a business lease are responsible for pre-sale non-compliance.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Such terms are very unusual for Russian law leases.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Co-working spaces are an emerging trend, but they are already having an effect on office leasing. While being a popular living trend in other countries, so far co-living has received a poor response in Russia.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Leases of residential premises are mainly regulated by the provisions of the Civil Code and the Residential Code.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the legal basis would be the same.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

a) The maximum term for a lease of residential premises executed with an individual comprises five years. If the term for lease is less than one year (short-term lease), the contract does not require registration.

b) A rent increase is only allowed when prescribed by law or settled in an agreement. When the maximum rent fee is prescribed by law, no increase of that amount can be stipulated by the agreement.

c) Under Russian law, the tenant is entitled to the pre-emptive right to remain in the premises after the end of the term. Under lease of residential premises to an individual, the Landlord should offer the Tenant a new lease with the same or different terms no later than three months before the end of the term. The only exception from this rule is that the Landlord intends not to let its premises for at least one year.

d) Unless a lease provides otherwise, the Tenant covers public utility charges. The general rule is that the Tenant incurs current repair costs, while the Landlord incurs capital repair. However, an agreement may provide otherwise.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A Landlord in a lease with an individual can terminate a lease only though judicial proceedings, when:

- a Tenant does not make rent payments for half a year (or in case of a short-term lease, at least twice);
- a Tenant damages or destructs the premises leased; and

- a Tenant continues to use the premises for purposes other than intended or keeps on violating legally protected rights and interests of third parties.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main laws are:
- the Land Code;
- the Urban Planning Code;
- the Water Code;
- the Forest Code;
- the Federal Law "On Specially Protected Natural Territories"; and
- the Federal Law "On Environmental Protection".

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Provisions of the Land Code and the Civil Code allow owners to be forced to sell land to it, if it is required for state or municipal needs. The compensation amount is equal to the market price of the land plot. Land plots are taken together with the real estate objects on it, which are also subject to compensation.

Procedure:
- a decision on taking is made on federal, regional or municipal level by a respective authority;
- an owner is notified about upcoming taking and is entitled to dispute the decision on taking in court;
- land plot and other real estate on it undergo market price estimation;
- an agreement on withdrawal is signed between the authority and the owner; and
- when the owner does not agree, the authority has a right to take the real estate through a court.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The bodies which control land/building are:
- Local administration (municipal control for use of buildings/land plots).
- Rosreestr – land supervision.
- Federal Service for Supervision of Natural Resources (*Rosprirodnadzor*) – environmental supervision.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

The main permits/licences are:
- State (or private) expertise of engineering surveys and project documentation.
- Construction/design contractors must be members of respective self-regulatory organisation (membership in this professional union is similar to licensing).
- Construction/reconstruction permit.
- Commissioning permit.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Obtaining construction and commissioning permits is mandatory unless stipulated otherwise by law in certain cases. There is no possibility to obtain an implied permission.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The construction and commissioning permits are issued free of charge. The permits are issued within seven working days.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The historic monuments are protected by the law "On objects of cultural heritage (monuments of history and culture) of peoples of the Russian Federation" and other regulations.

The legislation heavily restricts development and change of use of historic monuments. Their demolition or reconstruction are not allowed, only some limited works are allowed that require permission from the authorities. Owners of monuments normally have to sign special undertakings on protection of the monument. Such undertakings continue to apply to the purchasers of monuments.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

There is no public register of contaminated land. The best way to obtain information is to perform respective independent surveys.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

As a general rule, environmental clean-up is mandatory in cases when any harm is done.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Energy performance in Russia is mainly governed by the Federal Law "On Energy Conservation and Energy Performance". The law stipulates requirements regarding the power efficiency of buildings and facilities (restricting usage of power-inefficient equipment, requirements to install power-metering devices, etc.).

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

An international standard of tasks in respect of control and

reporting on greenhouse effect emissions was ratified in 2016. Then, the Russian Government issued a long-term strategy on sustainable development of woods complex until 2030 that is aimed at enhancement of efficiency of woods' protection and reduction of greenhouse gas emissions. Ratification of the Paris Climate Agreement by Russia is planned for the end of 2019.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

In accordance with the decree of the President of Russia, the goal for 2020 is to achieve a level of greenhouse gas emissions of no more than 75% of the emissions that existed in 1990.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

The main regulatory basis of buildings sustainability is the Town Planning Code of Russia and a corresponding Federal Law N 384-FZ "Technical Regulations on the Safety of Buildings and Constructions".

**Alexey Konevsky** is a partner specialising in real estate, construction and land law.
He has significant experience in supporting investment projects in various industries and transactions with real estate (including due diligence, structuring deals, and drafting contracts). He advises clients across these specialist areas.
Alexey also defends clients in courts in civil law and public law disputes over real estate, construction and investment projects.
Alexey's major projects include:

- participated in drafting amendments to the Russian Land Code with a view to improving the investment environment in Russia by offering enhanced access to energy generation facilities by simplifying the procedures and, therefore, the time limits for the construction of such facilities;
- developed and assisted with the transaction of a major Russian diamond miner to purchase office premises in Moscow with a total area of 11,500 sq.m and transaction value of approximately US$90,000,000;
- provided integrated legal support in connection with amendments to be introduced into Russian legislation governing the construction of infrastructure (stadiums and other facilities) required to hold the 2018 FIFA World Cup; and
- the practice headed by Alexey has won the Records of the Real Estate Market award.

According to independent international rating of law firms, *The Legal 500,* Alexey Konevsky is a recommended lawyer in land law, real estate and construction in Russia.

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**Vladislav Ivanov** is a senior associate specialising in real estate for over 15 years. He has extensive experience of advising on M&A transactions, the sale and purchase of real estate, construction, development, financing and leases.
Among Vladislav's major projects, we would highlight advising:

- Yandex, one of the biggest Internet providers in Europe and a leading search engine in Russia.
- Capital Partners:
  - on the construction, financing and subsequent sale of Metropolis, one of the biggest shopping malls in Moscow, to the Morgan
  - Stanley Real Estate Fund for US$1.2 billion; and
  - on the acquisition and subsequent sale for US$600 million of Ritz Carlton Hotel in Moscow, one of the best 5-star hotels in Russia.
- Meridian Capital on the sale of Gallery shopping mall in the centre of St Petersburg to the American real estate fund Morgan Stanley Real Estate Fund for US$1.1 billion.

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# Scotland


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Many aspects of real estate law in Scotland are still affected by conveyancing and other legislation enacted over the last few centuries. The **Conveyancing (Scotland) Acts of 1874, 1924 and 1938** continue to be relevant. The **Conveyancing and Feudal Reform (Scotland) Act 1970** is largely credited with being the starting point for the modernisation of real estate law in Scotland. The 1970 Act created the "standard security", which is now the only way in which a fixed charge over heritable property in Scotland can be created. The **Land Tenure Reform (Scotland) Act 1974** paved the way for abolition of the feudal system by prohibiting the creation of new feuduties, the **Land Registration (Scotland) Act 1979** introduced a state guaranteed system of land registration, the **Housing (Scotland) Act 1988** introduced a modern form of residential tenancy (now superseded by the private residential tenancy – see below), and the **Requirements of Writing (Scotland) Act 1995** provided a statutory code for validity and probativity of documents relating to the creation, transfer, variation or extinction of a real right in land.

In more recent times, and since the creation of the Scottish Parliament in 1999, much modernising legislation has been enacted, and the Scottish Government's land reform agenda has also been influential in real estate law-making in Scotland. Of particular note are:

- The **Abolition of Feudal Tenure etc. (Scotland) Act 2000**, which abolished the feudal system of land holding in Scotland.
- The **Land Reform (Scotland) Act 2003**, which created: rights of public access over most land in Scotland; a pre-emptive right to buy for predominantly rural communities (now applicable to all of Scotland); and a crofting community right to buy.
- The **Title Conditions (Scotland) Act 2003**, which produced a statutory code for the way in which title burdens affecting land can be created, varied and extinguished.
- The **Tenements (Scotland) Act 2004**, which replaced the common law rules relating to tenements and provides a scheme of management for tenements.
- The **Planning etc. (Scotland) Act 2006** sets out the framework for a strategic planning policy. It is due to be replaced by the Planning (Scotland) Act 2019, which is not yet in force.
- The **Climate Change (Scotland) Act 2009** provides powers to impose requirements on owners of residential and commercial buildings to take active steps to improve the energy efficiency of their properties.
- The **Land Registration etc. (Scotland) Act 2012** completely overhauled the system of land registration in Scotland and introduced advance notices providing applicants with a protected priority period for the first time.
- The **Land and Buildings Transaction Tax (Scotland) Act 2013** introduced a new tax on land transfers, replacing stamp duty land tax in Scotland.
- The **Long Leases (Scotland) Act 2015** converted tenants' rights under ultra-long leases to outright ownership.
- The **Legal Writings (Counterparts and Delivery) (Scotland) Act 2015** introduced a statutory form of counterpart execution to Scotland, and enabled effective electronic delivery of traditional hard copy, wet signature documents.
- The **Private Housing (Tenancies) (Scotland) Act 2016** introduced a new private sector residential tenancy regime, and the potential for rent control zones.
- In the area of land reform, the **Community Empowerment (Scotland) Act 2015**:
  - enacted a number of provisions designed to empower communities to have a greater say in the decisions affecting their locality, and acquire publicly owned property, and introduced a new community right to buy abandoned, neglected or detrimental land; and
  - extended the community right to buy to the whole of Scotland,

  while the **Land Reform (Scotland) Act 2016** set up a new Scottish Land Commission, introduced proposals for registering information about persons with controlling interests in land and a community right to buy land for furthering sustainable development, and revised and modernised aspects of agricultural tenancies.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Much of Scots real estate law is based on the common law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

There are no international laws which are directly relevant.

## 2 Ownership

### 2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

No, there are no such legal restrictions.

## 3 Real Estate Rights

### 3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?

Real estate in Scotland can be held under outright ownership (similar to freehold) or a leasehold title under which a person is entitled to occupy a property under contractual terms agreed with the owner of the property.

Other rights include:

- the rights of a heritable creditor to take a standard security (fixed legal charge) over a property; and
- the rights of a person to exercise servitude rights (easements) over the land of another or to enforce title burdens such as use restrictions over another property.

Such rights are real rights in property, not contractual, and run with the land.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

Not generally. Ownership of land includes ownership of any buildings or other structures constructed on the land. An exception to this rule is the law relating to tenements. Unless otherwise specified, the owner of the ground floor flat owns the ground (or "*solum*") on which the building is erected, but does not own the whole of the building as a consequence. Each flat in the tenement can be held in separate ownership.

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

Scots law does not recognise separate estates of legal and beneficial ownership. There are no proposals to change this.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

No. Scotland currently has two Property Registers which exist side by side: the 400-year-old Register of Sasines; and the more modern Land Register of Scotland. Title held in the Register of Sasines is described as both "recorded" or "unregistered". Title held in the Land Register of Scotland is described as "registered".

A process is currently under way to ultimately transfer all titles in the Register of Sasines onto the Land Register. Any transfer of unregistered property will induce a first registration into the Land Register and other transactions such as the grant of a new registrable lease, or the grant of a standard security will trigger the requirement for the landlord's or borrower's title to be registered in the Land Register, if it is unregistered at the time. Eventually, the Register of Sasines will be closed to all deed types. Through this process, and voluntary registration in the Land Register of Sasines title, and a process known as Keeper-induced registration, by which the Registers of Scotland can transfer a Sasine title onto the Land Register without having to contact the owner, it is intended that all title in Scotland will eventually be registered. The provisional deadline for this is 2024.

Some ancient land rights are not registered in either Register. These often relate to land rights granted by Royal Charter, such as Burgh lands and some lands held by the older Scottish Universities.

### 4.2 Is there a state guarantee of title? What does it guarantee?

Yes. Land registered in the Land Register of Scotland benefits from a state guarantee of title. Titles recorded in the Register of Sasines do not. Under the Land Registration (Scotland) Act 1979, this state guarantee was known as indemnity. The state guaranteed that any title registered in the Land Register was a good title, unchallengeable if the registered proprietor was in possession. If any person suffered loss as a result of rectification against them of such a title, or in respect of any error or omission in the title, they were entitled to receive compensation in respect of that loss. Under the Land Registration etc. (Scotland) Act 2012, indemnity is replaced by warranty. Warranty is similar to indemnity in respect that any person who suffers loss is entitled to compensation, but the conditions for establishing loss are slightly different. The Keeper's warranty is that the title sheet of any property is accurate insofar as it shows the owner to be the proprietor of the property and is not inaccurate insofar as there is omitted from it any encumbrance. Registration no longer guarantees an unchallengeable title, but warranty means that compensation should be payable in the event of loss.

In certain circumstances, for example where there is a known flaw in the title, indemnity or warranty may be excluded.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

There is no compulsion, as such, to register property rights, but registration is the only way that an owner of land or a heritable creditor in a fixed security can obtain a real right of property, as opposed to merely a personal one. A heritable creditor's rights to enforce a security, for example, can only be exercised if the security is registered, and failure to register a security could also mean that the heritable creditor loses priority to a subsequent security that was registered. Failure to register a title to property would mean that the ownership of that property remained vested in the previous registered or recorded owner.

### 4.4 What rights in land are not required to be registered?

Commercial leases with a duration of 20 years or less cannot be registered. Residential leases cannot be registered as there is a statutory prohibition against such leases being longer than 20 years. Servitudes can be created, other than by express grant, through exercise of the right for a continuous period of at least 20 years, and although they can now be added to the title sheet of a registered title they do not rely on such registration for their validity. Public rights of way do not require to be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period following a first registration. For already registered titles, there is a type of probationary period in certain very rare cases: this is a protection for good faith purchasers who buy from someone who is not in reality the true owner of the land. Provided that person is registered as the proprietor, and is in possession of the land, the buyer will obtain a good unchallengeable title after a period of one year has elapsed. That one-year period can include the period of possession of the seller, so if the seller has already been in possession for one year, the title is immediately protected.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Title and ownership transfer on registration of the transfer at the Land Register.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The priority of rights is usually determined by the order in which such rights are created and, as a general rule, earlier rights would defeat later competing rights. This can be overturned if the later right was protected by an advance notice, and the earlier right was not, provided the later right is registered within the protected period of the advance notice (35 days).

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

The Registers of Scotland operate two principal Land Registers: the older Register of Sasines which is a Register of deeds and does not benefit from any state guarantee of title; and the Land Register of Scotland which is a Register of rights in land and provides a state guarantee of title. The Land Register is map-based, and property being transferred or secured or over which other rights are being created, must be capable of being mapped onto the cadastral map which forms part of the Land Register. There is no mapping requirement in the Register of Sasines.

**5.2 How do the owners of registered real estate prove their title?**

An owner's title is demonstrated by the title sheet for the property in the Land Register. Appearance in the Land Register carries a state warranty of good title (see question 4.2).

For titles to real estate that are still on the Sasine Register (i.e. are "unregistered") (see question 4.1), good title is proved by examining all title deeds going back for a period of 10 years to ensure that there are no breaks in any chain of ownership from the person who held the unregistered title more than 10 years previously, to the current owner (if that owner has not owned the property for more than 10 years themselves). Section 1 of the Prescription and Limitation (Scotland) Act 1973 provides that where a person has possessed land openly, peaceably and without judicial interruption for 10 years, on the basis of a sufficient recorded title, the title will be unchallengeable. Accordingly, no further proof is required.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Only in limited circumstances at present. For some years the Land Register has operated a system of Automated Registration of Title to Land (ARTL), although it is now only occasionally used, and is due to be discontinued.

The Registers of Scotland are currently operating a system for electronic registration of discharges of standard securities, and plan to develop that system to be able to accept transfers of title (dispositions) and standard securities in the future.

If the transaction involves a first registration into the Land Register, then in addition to the disposition in favour of the applicant, accompanied by a completed application form, all other documents relative to the title have to be submitted. This may include other deeds containing a full description of the property, deeds containing servitudes and burdens, and a plan. If any Land and Buildings Transaction Tax (LBTT) (see section 9) is payable, payment of this must be confirmed in the application.

It is possible to search the Registers through a service provided by the Registers of Scotland, known as ScotLIS. Business users of ScotLIS have to be approved or licensed to use it, and charges are made for accessing documents, but a lesser service is available to the general public.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, if the person suffers loss as a result of the mistake, and certain conditions apply.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

The Registers are open to public inspection and copies of documents registered can be obtained for a fee. A buyer's solicitor will normally conduct all the necessary searches, inspections and other due diligence required to establish all registered rights and encumbrances, although some rights and encumbrances can exist without registration; for example unregistered leases (with a duration of 20 years or less), or prescriptive servitudes (see question 4.3).

While registered encumbrances such as real burdens ought to be ascertainable from the title sheet for a property, some encumbrances occur off-register, such as rights of way or core paths plans. Separate investigations of other sources, such as

Local Authority records, are required to establish the nature and extent of such off-register encumbrances, although some may be noted on the Land Register.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

**Solicitors**
Usually both the buyer and the seller will instruct their own solicitors to act for them in the negotiation and preparation of the contract. The buyer's solicitor will conduct all necessary due diligence in relation to the title, any occupational leases, and other ancillary matters, including examining legal reports and other searches. The buyer's solicitor will attend to submission of an LBTT return and payment of any LBTT due, and submission of the application for registration and other post-completion matters.

**Agents**
Selling or letting agents are usually involved in marketing property, and are often responsible for negotiating the principal heads of terms for the sale with the buyer's agents.

**Surveyors**
A preliminary step in the purchasing process is to establish the physical condition of the property, and a buyer will instruct a surveyor to carry out an inspection of the property, either prior to bidding, or will make its offer conditional on receiving a satisfactory survey report.

**Accountants/financial advisers**
Particularly if there are complex tax or capital allowances issues, the parties may engage specialist advisers. Specialist tax lawyers may be employed for this purpose.

Other specialists (e.g. environmental consultants) may be required according to circumstances.

**6.2 How and on what basis are these persons remunerated?**

They will usually render an invoice for their services direct to the client. Agents often operate on a commission basis, agreeing to be paid a certain percentage of the price obtained. Lawyers will usually agree the basis of their fee at the stage of being instructed and will invariably have been asked to provide a quote for the work. Surveyors are usually paid a fixed fee, often on a scale of fees depending on the value of the property, but not always.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

There has been continued appetite in the past year from UK institutions willing to invest in Scotland compared to previous years.

Alternative lenders continue to invest in higher risk real estate such as secondary properties.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The nascent build to rent sector in Scotland continues to grow in popularity (if not actual completed developments). There has been renewed interest in Central Scotland offices, in Edinburgh where supply is tightening, and Glasgow where there have been several large occupier commitments to the City.

Interest in the retail sector remains muted, other than prime retail properties or sites. That said, there have been some signs of renewed interest in secondary retail, on the basis values are bottoming out, with a number of sites being targeted for repurposing.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

The general slow-down in the traditional/high street retail sector has continued, in light of the well-publicised insolvency and CVAs of a number of significant retail occupiers, with all but the very best multi-channel retailers under pressure, and only the prime locations prospering.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

A contract for the sale and purchase of the land must be in writing. In Scotland, the contract is usually adjusted between the solicitors acting for the seller and the buyer, who negotiate and then exchange contract letters (missives) on behalf of their respective clients. While it is possible to buy or sell property without entering into a prior contract to do so, in practice a contract is invariably arranged.

Title to the property is transferred by way of a disposition signed by or on behalf of the seller. The purchaser then registers the disposition in the Land Register to complete its title.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller does not have a duty of disclosure, in general terms, and the principle of *caveat emptor* (let the buyer beware) applies, so that the buyer must usually conduct its own due diligence and satisfy itself as to the title and other relevant matters in relation to the property.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, if the seller makes a false statement, on the strength of which the buyer is induced to purchase the property, and the buyer suffers loss as a result.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Limited warranties are given in the contract. Some contracts, particularly of residential properties, will contain a warranty from the seller that the title is valid and marketable. However, this does not replace the buyers' own due diligence requirements. Some warranties or confirmations are given by a seller in respect of matters which are only within the knowledge of the seller, and are not otherwise ascertainable from the titles or other searches and reports.

The seller will usually include a guarantee of good title in the disposition transferring title of the property to the buyer. This is called warrandice.

There are three types of warrandice:

- **Absolute warrandice**: A grant of absolute warrandice protects the purchaser from the past and future acts and deeds of the disponer, and from the acts of third parties, and is a guarantee from the granter that the title is good, and not subject to unusual conditions of title that are unknown to the disponee. It is expressed by the words: "And I/we grant warrandice." It is the most common form.
- **Fact and deed warrandice**: This is a guarantee against both the future acts or deeds and the past acts or deeds of the granter. In effect it is an undertaking by the disponer that he has not done anything in the past, and will do nothing in the future, to prejudice the title granted in the disposition. This type of warrandice is usually given by granters acting in some representative capacity, such as executors or trustees, in which case generally they will also bind the trust or the executry estate in absolute warrandice. It is expressed by the words: "And I/we grant warrandice from my/our own facts and deeds only."
- **Simple warrandice**: This is usual where the property is being transferred for no consideration, e.g. such as a gift, and is implied in such deeds unless other provision is made. It offers protection from the future voluntary acts or deeds of the granter but not past ones, or third-party acts. It is expressed by the words: "And I/we grant simple warrandice."

It is common for no warrandice to be given in sales by insolvency practitioners.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Usually, any liabilities in respect of the property will pass to the buyer, unless specific provision has been made in the contract to the contrary.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Usually, a buyer does not have any other liabilities to the seller. However, it is the buyer's responsibility to pay any LBTT due in respect of the transaction, and the registration dues of the disposition in its favour. If the sale price is liable to VAT, the buyer must pay that too.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

This section does not address private lending where various consumer protection provisions may apply.

The Financial Services and Markets Act 2000 (FSMA) (as amended) provides the framework for the UK regulatory regime. It provides for the establishment, objectives and ongoing functions of the Financial Conduct Authority, an independent, non-governmental body regulating the provision of financial services.

The Income Tax Act 2007 requires tax to be withheld on payments of annual interest broadly where that interest is paid by a company or is paid by any person to a non-resident person. Exemptions are available:

- In relation to interest payable on an advance from a bank, if, at the time when the interest is paid, the person beneficially entitled to the interest is liable to pay UK corporation tax on the interest or would be so liable but for the fact that it is a bank acting through a foreign branch in respect of which the foreign branch exemption applies.
- If the company paying the interest reasonably believes that the beneficial owner of the interest is a UK-resident company which carries on a trade in the UK through a permanent establishment and is liable to UK corporation tax on the interest or a partnership of which all the partners are such UK-resident or non-UK-resident companies.
- If the lender has the benefit of a double taxation treaty with the UK, reducing withholding tax on interest to zero.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

(a) **Security package**: The security package for a facility secured on real estate will usually comprise:
- a standard security (perfected by registration at the Land Register of Scotland) over the asset;
- an assignation of rental income (perfected by intimation (i.e. formal notification) to the underlying tenant(s)) by way of security in relation to rental income receivable from the asset;
- an assignation in security (perfected by intimation to the relevant counterparty) of the borrower's rights in any relevant contracts governed by Scots law such as insurance documents, collateral warranties and other construction documentation relative to the asset;
- a floating charge over all assets of the borrower;
- (occasionally) a share pledge (perfected by execution and delivery of a stock transfer form in the name of the lender (or its nominee)) of the share capital in the borrower, to the extent the borrower is a Scottish-incorporated company; and
- (occasionally) an assignation in security (perfected by intimation to the account bank) of the borrower's rights in relation to any Scots law-governed transaction bank accounts.

(b) **Guarantee**: Guarantees are sometimes given by the borrower's parent company or by other companies in the same group.

(c) **Control accounts**: The lender will ensure that any income from the asset is paid into control accounts. Funds from these accounts will only be released to the borrower after interest and amortisation on the loan has been paid.

(d) **Valuations and LTV covenants**: By regularly requiring valuations of the asset and testing the loan-to-value (LTV) covenant set out in the loan agreement, the lender will ensure that the value of the asset over which it has security remains sufficient to repay the loan.

(e) **Insurance**: The lender will require the borrower to take out appropriate buildings insurance.

(f) **Covenants**: The loan agreement will contain both financial covenants (financial targets which the borrower undertakes to meet (for example, an interest cover covenant (and, if the loan is being repaid in instalments, debt service cover covenant)) which aims to ensure that the net rental income from the asset will cover all interest and fees (and any repayments of principal) due under the loan agreement in a given period) and non-financial covenants (such as covenants to maintain the asset in good repair or covenants restricting disposal) by the borrower to ensure that the value of the asset is maintained.

(g) **Tenants and leases**: The lender will require detailed undertakings from the borrower in relation to the tenants, the leases and the rental income from the asset (for example, to collect the rent and otherwise enforce the tenants' lease obligations, not to grant new leases nor to accept surrenders of leases, and to provide regular information to the lender about the tenants, the leases and the rental income).

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

- **Power of sale**: Pursuant to the standard security granted over the asset, the heritable creditor/lender has statutory powers of sale and foreclosure in relation to the asset under the Conveyancing and Feudal Reform (Scotland) Act 1970. These powers are closely regulated and can only be exercised following the service of a "calling up" notice by the heritable creditor/lender on the borrower. Service of the "calling up" notice gives the borrower a two-month period in which to repay or satisfy the outstanding debt. If, following expiry of the two-month "calling up" notice period, the borrower has not repaid or satisfied the outstanding debt then the heritable creditor/lender can enforce its rights under the standard security, unless the asset is used for residential purposes (which can include hotels and student accommodation) in which case the heritable creditor/lender must also apply to court for a decree to sell or foreclose on the asset. Due to the time periods and procedure involved in using the powers of sale and foreclosure, it is less common now for heritable creditors/lenders to enforce their rights in this way. Heritable creditors/lenders will often (where the borrower vehicle makes it appropriate) seek to realise their security through appointment of an administrator or liquidator.
- **Appointment of a receiver**: Other than in very limited circumstances, a heritable creditor/lender cannot appoint a receiver under Scots law in relation to the asset. Where the borrower holds multiple assets and has granted a limited assets floating charge over a Scottish asset, it may be possible for the heritable creditor/lender to appoint a "Scottish" receiver (under the Insolvency Act 1986) to the Scottish asset. The location and jurisdiction of the borrower will also have an impact on this ability to appoint a Scottish receiver. Where such an appointment is possible, the receiver will have the powers to sell, manage and realise the property in accordance with Schedule 2 to the Insolvency Act, plus any additional powers outlined in the floating charge security.
- **Appointment of an administrator**: If the borrower is an appropriate corporate entity then the heritable creditor/lender could apply for the appointment of an administrator, either through the courts or, if the heritable creditor/lender has a qualifying floating charge over the borrower, through an out-of-court procedure. One of the effects of administration is that there is a moratorium on proceedings against the borrower (or its property) or security enforcement without the permission of the court or the consent of the administrator. An administrator is an officer of the court and has wide powers, including powers to dispose of assets.

### 8.4 What minimum formalities are required for real estate lending?

The lender will require:

- a report on title (lenders usually require the report to be in a prescribed format called a certificate of title, with both the City of London Law Society or Property Standardisation Group forms being generally accepted);
- a valuation of the asset;
- a first ranking standard security over the asset; and
- a floating charge over all assets of the borrower (where the borrower is a special purpose vehicle).

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

- **Registration of security package**: The security package referred to in question 8.2 will be perfected by the standard security being registered at the Land Register of Scotland. Prior to the standard security being submitted for registration, the borrower should submit an "advance notice" against the property title in respect of the standard security, which gives the heritable creditor/lender a priority period of 35 days. The heritable creditor/lender will then have priority as against other creditors in respect of the asset for that period. In addition, if the security is granted by a UK company, such security must be registered against the company at Companies House within 21 days of creation, failing which the security will be void against any liquidator or administrator of the company and any third-party creditor.
- **Assignation of rental income**: Where the heritable creditor/lender takes an assignation in security of the rental income derived from the asset, this must be perfected by intimation to the underlying tenant(s). Until intimation is given to the tenant(s), there is no perfected assignation and therefore no fixed security over the rental income. The heritable creditor/lender must also demonstrate a sufficient degree of control in respect of the rental income which will ordinarily be achieved by either (a) having the rental income paid by the underlying tenant(s) into

a blocked bank account, or (b) where the rental income is collected by a managing agent, having that managing agent enter into a duty of care agreement with the heritable creditor/lender.

- **Other assignations in security**: Where the heritable creditor/lender also takes an assignation in security of the borrower's rights in relation to other contracts or assets governed by Scots law (such as insurance contracts, bank accounts or construction documentation), such assignation in security must be perfected by intimation to the relevant counterparty. Until intimation is given to the relevant counterparty, there is no perfected assignation and therefore no fixed security over the relevant rights/contracts. Similar requirements in relation to control as outlined in relation to assignations of rental income will also apply.
- **Scottish share pledge**: In the limited circumstances where the heritable creditor/lender takes a pledge of the share capital in the borrower, this must be perfected by execution and delivery of a stock transfer form in the name of the heritable creditor/lender (or its nominee) and registration of the stock transfer form in the borrower's Register of members. An updated Register of members and share certificate (showing the heritable creditor/lender (or its nominee) as the registered shareholder) should also be obtained. Until the stock transfer forms are executed and delivered, and registered in the Register of members of the borrower, the share pledge has not been perfected and there is no fixed security over the share capital.
- **Negative pledge**: The loan agreement will contain a negative pledge whereby the borrower agrees not to create any other security interest over the relevant asset (breach of which will be an "event of default").

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Provided the security has been validly created and properly perfected, a lender is entitled to take enforcement action in the appropriate circumstances.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

In the event of a default under the security, a borrower can take steps to remedy the default before the expiry of the period in any default notice issued by the lender. If the default is remedied, the lender no longer has a right of enforcement in respect of that instance of default.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

Provided the lender has obtained validly created and properly perfected fixed and/or floating security, the lender will rank (subject to the terms of any ranking agreements or arrangements with third party security-holders) accordingly as a secured creditor in any insolvency process of a borrower.

In certain circumstances, the granting of security by a borrower prior to an insolvency process may be reviewable and/or challengeable by an insolvency official (such as an administrator or liquidator) appointed in respect of the borrower. In addition to statutory time periods for challenge under the Insolvency Act 1986, the common law of Scotland also provides for an unlimited period of challenge in certain circumstances.

Provided the borrower was able to meet the relevant tests for solvency when the security was granted, or the lender is able to show that the granting of security constituted reciprocal obligations between the borrower and the lender, at full and fair equivalence of consideration, and without collusion with the purpose of prejudicing the general body of creditors of the borrower, the likelihood of a successful challenge by an insolvency official to the granting of the security is limited.

A moratorium on the creditors taking action against a borrower or its property arises in the context of administration, voluntary arrangements proposed by "small companies" (being, broadly, companies satisfying two of the following criteria: (i) turnover of not more than £10.2 million; (ii) balance sheet total of not more than £5.1 million; and/or (iii) no more than 50 employees) and liquidation. The liquidation moratorium does not restrict the lender from enforcing security where no court action or proceeding is required.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

For a lender to take fixed security over the shares in a Scottish borrower company, the lender (or its nominee) must take title to the shares (see question 8.5, point (d) above). Any enforcement will therefore comprise the exercise of the rights of the lender (or its nominee) as shareholder of the borrower, subject to the terms of any agreement set out in the share pledge security document. This could include appropriation or sale of the shares, as well as receipt and retention of any dividends.

It is thought competent for a lender to exercise a right to appropriate shares in a borrower given as collateral, without obtaining a court declarator. Any appropriation should be on the basis of a commercially reasonable valuation and the lender must account to the security-provider for any surplus in value.

Shares in a borrower provided as collateral may be appropriated when the borrower is in administration or liquidation but, generally, any transfer of the shares by the lender (or its nominee) when the borrower is in liquidation, pursuant to a power of sale or otherwise, is void.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

LBTT is payable by the buyer of land and by a tenant of leased property. The tax is charged on a progressive basis; that is to say, it is charged only on the proportion of the price within and at the different rates set for, the relevant band or bands of tax. For leases, the net present value (NPV) of the rent must be ascertained, and the tax is then calculated at 1% of NPVs over £150,000. LBTT may also be payable on chargeable consideration other than rent, such as a premium.

The current rates of LBTT for non-residential properties (w.e.f. 25 January 2019) are:

| Purchase price | LBTT rate |
|---|---|
| Up to £150,000 | 0% |
| Above £150,000 to £250,000 | 1% |
| Above £250,000 | 5% |

The current rates for residential properties (w.e.f. 1 April 2015) are:

| Purchase price | LBTT rate |
|---|---|
| Up to £145,000 | 0% |
| Above £145,000 to £250,000 | 2% |
| Above £250,000 to £325,000 | 5% |
| Above £325,000 to £750,000 | 10% |
| Over £750,000 | 12% |

An additional dwelling supplement (ADS) of 4% applies to purchases of second or additional residential properties.

### 9.2 When is the transfer tax paid?

LBTT is payable to Revenue Scotland within 30 days of the effective date of a transaction. For purchases of property, the effective date usually means the date of completion: when the price is paid. However, it is not possible to register the disposition of the property at the Land Register of Scotland, unless the LBTT has been paid, or there are in place "arrangements satisfactory" to Revenue Scotland for payment of the tax. Arrangements satisfactory mean that payment must be received by Revenue Scotland (by BACS, CHAPs or direct debit) no later than the fifth working day after the date of submission of the LBTT return. For leases, the effective date is the last date of execution of the lease or, if earlier, when "substantial performance" takes place. This will occur if the tenant takes entry to the property or makes payment of all or a substantial proportion of any non-rental consideration, or makes the first payment of rent.

### 9.3 Are transfers of real estate by individuals subject to income tax?

No income tax is payable on transfers of real estate, although, depending on the nature of the seller's business, they may be liable to pay tax on any profit from the sale.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

As a matter of law, real estate is exempt from VAT. However, the owner of commercial property can opt to tax it, so that it can treat any supplies it makes in relation to the property as subject to VAT at the standard rate (currently 20%). If the seller has opted to tax the property, then the price on sale will attract VAT. It is quite common for owners of commercial property to have opted to tax. In addition, sales of newly constructed commercial buildings or civil engineering works which are less than three years old will be standard rated.

Sale contracts will invariably provide for the price to be exclusive of any VAT, so that if VAT is payable, this must be met by the buyer. It is the liability of the seller to account to HM Revenue and Customs for the amount of the VAT paid on the price.

Even when a property has been opted, there are circumstances in which no tax is payable. This is where the building concerned is held by the seller as a going concern (i.e. it is being operated as a business such as the letting of property). Provided the buyer intends to continue to operate the building in the same way, and also opts to tax, the transaction can qualify as a transfer of a going concern (TOGC), so that VAT is not payable.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

UK resident companies pay corporation tax at the rate of 19% (expected to be reduced to 17% in April 2020) on any capital gain which arises from the transfer of property held as an investment. Profits realised from the transfer of property held as trading stock will be subject to corporation tax on income at the same rate.

UK resident individuals may be liable to capital gains tax on disposal of property. The rates of tax range from 10% to 28% depending on factors such as the level of the taxpayer's income, the size of the taxable gain and the type of property disposed of.

The UK has also recently begun taxing non-residents on the disposal of UK property. The rules have been in place in respect of residential property since April 2015 and for non-residential property (or shares in certain property holding companies) since April 2019. In both cases an element of "rebasing" is available so that only gains accruing since these dates are taxable.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes. LBTT does not apply to the purchase of shares in a company (or other entity) owning a property asset, unlike the purchase of the asset itself. Stamp duty is payable on the transfer of shares in a UK company at the rate of 0.5%.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

A buyer of real estate should always consider the LBTT implications, and for commercial property, VAT considerations. Certain purchases, such as the acquisition of multiple dwellings, and certain buyers such as charities, registered social landlords, or group company transfers, may qualify for relief.

Special LBTT rules apply when works are carried out as part of the consideration for a land transaction. An exemption may apply when works are carried out by the buyer, if certain conditions are met. Particular care is required when works are carried out by the seller. If the works are carried out under a contract which is closely linked with the land contract, LBTT may be payable on the value of the works as well as the price paid for the land.

The annual tax on enveloped dwellings (ATED) is not a property transaction tax as such; it is an annual charge on UK

residential property owned by non-natural persons (mainly companies) that own UK residential property valued at more than £500,000. The annual charge ranges on bands from £3,650 (for values of more than £500,000 up to £1 million) to £232,350 (for values of more than £20 million), depending on the value of the property.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

There is very little by way of legislation regulating commercial leases in Scotland. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 makes provision for steps that a landlord must take before it can irritate a lease, requiring the tenant to remove due to some breach.

In very limited circumstances, a statutory right of renewal is available under the Tenancy of Shops (Scotland) Act 1949. This was designed to protect tenants of shop premises, by allowing the tenant to apply to the sheriff court for renewal of the tenancy where a notice to quit has been served on a tenant, and the tenant wants to continue the tenancy, but has been unable to get a renewal of the tenancy from the landlord on satisfactory terms. This is rarely invoked, and it is likely that it will be repealed.

For the most part, leases are governed by the terms of the contract between the landlord and the tenant, that constitutes the lease, and by common law.

### 10.2 What types of business lease exist?

The terms of business leases are usually negotiated between the parties and so the detail of the provisions can vary. However, most business leases tend to conform to a standard full repairing and insuring (FRI) format.

Some sectors of the real estate industry, representing both landlords and tenants, are attempting to standardise the terms of leases by adopting the format of the Model Commercial Lease (MCL). The MCL was launched in 2014 and consists of suites of leases for office, retail, logistics/industrial and food/drink premises. These leases have been generally well received in England and Wales, and since 2016, the Property Standardisation Group (PSG) (www.psglegal.co.uk) has been involved in producing Scottish law-compliant versions of the MCL. The leases are intended as a starting point for the drafting of a commercial lease and adopt a balanced approach for both parties.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

(a) **Length of term**: The term of the lease will vary according to what is negotiated between the parties. However, lease terms have been getting shorter over the past decade or so, and the average term is now likely to be less than 10 years.

(b) **Rent increases**: Leases will usually provide for a regular review of the rent – typically an upwards-only review every five years, based on open market rents prevailing at the time of review. Some leases will link the increases to a fixed formula or to the Retail Price Index or Consumer Price Index.

(c) **Tenant's right to sell or sub-lease**: The lease will usually set out in some detail what rights the tenant has to assign the lease to a new tenant or to sub-let all or part of the premises. Where permitted, assignation or subletting will be subject to obtaining the landlord's consent. There is usually a provision that consent is not to be unreasonably withheld, but that will usually be subject to the landlord being satisfied as to the suitability of the proposed assignee or sub-tenant.

(d) **Insurance**: Usually, the landlord will insure the whole of the premises, or the building or estate in which the premises are located (where the landlord owns the whole building or estate), for full reinstatement value, and for loss of rent for three years. The landlord will then recover the premium and any additional costs from the tenants.

(e) **Change of control/corporate restructuring**: It is not usual to see any specific provisions in a lease regarding change of control of the tenant or corporate re-structuring involving the tenant.

(f) **Repairs**: Most business leases will proceed on an FRI basis. How this applies will depend on the way in which the lease is structured. The lease will invariably impose liability for repairs to the premises on the tenant. If the premises comprise the whole of the building then the tenant will be expected to attend to repairs to both the interior and exterior of the premises.

For leases of part of a larger building, it is usual for the premises to consist of the internal parts of the area let, and the other parts of the building – the common parts and the exterior – will be repaired by the landlord, with a proportion of the cost of those repairs being recovered from the tenants through service charge.

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

- **Corporation tax**: A UK-resident company landlord will be liable to pay corporation tax on rental profits calculated on an accounts basis, but with certain modifications.
- **Income tax**: All other taxpayers will be liable to pay income tax on rental profits as they arise, also on an accounts basis but with certain modifications.
- **VAT**: If a landlord has opted to tax a commercial property, it must account to the UK tax authority for VAT on any rent and other amounts due to it under a lease of the property. The landlord will normally seek recovery of the VAT from the tenant.
- **LBTT**: Leases may be subject to LBTT. The NPV of the rent must be ascertained, and the tax is then calculated at 1% of NPVs over £150,000. LBTT may also be payable on chargeable consideration other than rent, such as a premium. The standard non-residential rates and bands apply to such payments; however, the nil rate band does not apply to lease premiums if the average annual rent is £1,000 or more.

### 10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

For a lease to be terminated on the expiry date, either the tenant

or the landlord has to give the other a notice to quit, usually at least 40 clear days prior to the expiry date. If neither party serves notice, the lease may continue on the same terms and conditions for a further year. This is known as "tacit relocation" and leases can continue this way year by year until one of the parties serves appropriate notice to quit.

Most leases will contain an irritancy clause, providing that the landlord will be entitled to terminate the lease in the event of a breach by the tenant, on giving notice. A breach may be a monetary one, such as non-payment of rent, or non-monetary such as a default by the tenant in respect of one or more of its other obligations under the lease, or on the tenant becoming insolvent. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 requires that appropriate notice must be given by the landlord to the tenant and, if the breach is a remediable one, the tenant must be given the opportunity to remedy the breach.

There is no statutory provision allowing a tenant to extend or renew the lease – it will be a matter of agreement between the parties whether the lease is extended or renewed, and some leases contain an option to extend or renew.

There are no rules relating to either party being entitled to compensation from the other on termination. At common law, a tenant is not entitled to compensation from the landlord for improvements. Unless there is specific provision in the lease, any improvements carried out by the tenant and which attach to the premises will fall to be retained by the landlord without compensation.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Once the landlord of a business lease has sold its interest in the property, it will cease to be liable for any obligations under the lease, unless these have been specifically identified in the terms of the sale. Identifying whether there are outstanding liabilities to tenants will form a part of the due diligence of the buyer, who will generally seek contractual confirmations from the seller about any outstanding matters.

Usually an outgoing tenant will cease to be liable for any obligations under the lease, and the terms of the assignation to a new tenant will cover the rights and responsibilities of the outgoing and incoming tenants between themselves. In some cases, the contractual arrangement between the parties may reserve liability for any antecedent breach that is not known at the date of transfer, but which subsequently comes to light.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

"Green obligations" are still not commonly encountered in business leases, although provisions relating generally to energy efficiency or sustainability are starting to appear more often. It would not be unusual to see provisions in a lease or in a licence for works that prohibit the tenant from carrying out any alterations to the premises that might have an adverse effect on the energy efficiency rating of the premises.

Green issues are becoming more relevant to landlords of certain larger buildings due to the introduction, in September 2016, of the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016. The Regulations affect buildings or building units of more than 1,000 square metres, which do not meet the building standards regulations which had effect on or after 4 March 2002. On the sale or letting of such buildings, the owner must obtain an Action Plan, containing recommendations for improvement measures, which must be carried out. Alternatively, operational ratings can be measured and must be reported annually. Either alternative requires the cooperation of the tenant, and the object of the exercise is to improve the energy efficiency of the building and reduce $CO_2$ emissions, based on reduction targets set by the Action Plan. Accordingly, landlords are now more inclined to seek to include "green" obligations in new leases. The MCL and PSG leases contain provisions relating to sustainability issues.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Providers of flexible working spaces are known to be seeking a large amount of space for development in this sector in Edinburgh. There is also a growing trend for spin-off technology teams linked to the University to occupy incubator space on a flexible basis. Lease lengths continue to shorten.

Residential developments with shared facilities, such as concierge services, are mainly limited to the small high-end luxury market at present, with nothing like the penetration of such developments as seen in London. This is, however, a growing appeal for managed residential facilities among high-end professionals and we can expect to see growth in this sector.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Residential leases and residential landlords are highly regulated in Scotland. The latest legislation which introduced a new form of tenancy – the "private residential tenancy" – is the Private Housing (Tenancies) (Scotland) Act 2016 and came into force on 1 December 2017. From that date, all new private residential tenancies must conform to the requirements of the 2016 Act.

Most private residential leases entered into before December 2017 were assured tenancies or short assured tenancies under the Housing (Scotland) Act 1988.

Other key legislation in this area includes:

- Housing (Scotland) Act 2006 (tolerable standard and repairing standard for rented accommodation; tenancy deposits; licensing of HMOs).
- Housing (Scotland) Act 2010 (registered social landlords).
- Private Rented Housing (Scotland) Act 2011 (registration of private landlords).
- Tenancy Deposit Schemes (Scotland) Regulations 2011 (regulating the treatment of deposits paid by tenants).

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

Residential tenancies for houses in multiple occupation (HMOs) are regulated by the provisions of the Civic Government (Scotland) Act 1982, and licensing of HMOs became mandatory in 2000 under the Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000. The regulation of HMOs was consolidated in the Housing (Scotland) Act 2006, with amendments in the Housing (Scotland) Act 2010 and the Private Rented Housing (Scotland) Act 2011.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) **Length of term**: Under the Housing (Scotland) Act 1988, the most popular form of tenancy was the short assured tenancy. The tenancy is required to be for a minimum of six months, and usually the tenancy agreement will provide for the tenancy to continue on a month-by-month basis until terminated by either party on giving (usually two months') notice. The attraction of the short assured tenancy for the landlord is that it has the right to terminate the tenancy for no reason other than that the period of the tenancy has come to an end. This type of tenancy is not available under the Private Housing (Tenancies) (Scotland) Act 2016.

The other form of tenancy under the 1988 Act was the assured tenancy. These types of tenancy tended to be for longer periods, as landlords would use the short assured version for shorter-term lets.

There is no provision under the Private Housing (Tenancies) (Scotland) Act 2016 for a lease term to be stated. In practice, landlords and tenants may negotiate a fixed term, but if the tenant refuses to leave at the end of the term the landlord will have to establish one of the statutory grounds for eviction before the tenant can be removed (see (c) below).

(b) **Rent increases/controls**: A landlord can intimate a rent increase to the tenant during the course of a private residential tenancy under the 2016 Act, but not more than once in a 12-month period. Notice of the increase must be served on the tenant and will apply from the date specified in the notice unless the tenant refers the matter to a rent officer, who will then determine the level of rent. There is a right of appeal by either the landlord or the tenant to the First Tier Tribunal (Housing and Property Chamber).

The 2016 Act introduces the potential for rent controls by local authorities. A local authority may make an application to the Scottish Ministers, asking for all or any part of the areas for which the authority is responsible to be designated as a Rent Pressure Zone. If an area is so designated, then rent increases may not be applied except in accordance with a capping formula set out in the 2016 Act.

(c) **Tenant's rights to remain in the premises at the end of the term**: Under a private residential tenancy, the tenant can continue to occupy the premises, even after any contractual expiry date. To remove a tenant who remains in the premises, the landlord will have to establish that one of the grounds for repossession applies. Some of the grounds are mandatory (M) – if established, the First Tier Tribunal (Housing and Property Chamber) must grant repossession. Others are discretionary (D). The grounds are:

- The landlord intends to sell the property (M).
- The property has been repossessed by the landlord's lender, who intends to sell (M).
- The landlord intends to carry out significantly disruptive refurbishment work (M).
- The landlord intends to live in the property (M).
- A family member of the landlord intends to live in the property (D).
- The landlord intends to use the property for a non-residential purpose (M).
- The property is required for occupation by a person working for a religious organisation (M).
- The tenant was given the accommodation as an employee and is no longer an employee (M or D).
- The tenant no longer has a need for supported accommodation (D).
- The tenant is not occupying the property (M).
- The tenant has failed to comply with a condition of the tenancy agreement (D).
- The tenant has been in arrears of rent for three or more consecutive months (M).
- The tenant has a conviction for an offence committed by using the property for an immoral or illegal purpose (a "relevant conviction") (M).
- The tenant has engaged in anti-social behaviour (D).
- The tenant associates in the property with a person who has a relevant conviction or has engaged in anti-social behaviour (D).
- The landlord is not registered (D).
- The landlord's HMO licence has been revoked (D).
- An overcrowding statutory notice has been served on the landlord (D).

(d) **Tenant's contribution/obligation to the property "costs"**: Usually, the tenant does not have to contribute towards the cost of maintenance and repair of the property or the insurance of the building and any landlord's contents. The tenant will usually have to meet the cost of utilities: gas, electricity and telephone; and council tax.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

See question 11.3, point (c). Unless the tenant agrees to leave voluntarily, the landlord would have to apply to the First Tier Tribunal (Housing and Property Chamber) for repossession of the property, citing one of the grounds. A hearing would then be held, at which relevant evidence to support the ground relied on would have to be produced.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

(a) Planning and Building Control

- Town and Country Planning (Scotland) Act 1997 – sets out the main framework for planning control in Scotland.

- Planning (Scotland) Act 2006 – sets out additional provisions to those contained in the 1997 Act.
- Planning (Scotland) Act 2019 – makes amendments to the structure of the planning regime and introduces a framework for an infrastructure levy. It is not yet in force.
- Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 – applies to most of the compulsory purchase schemes.
- Building (Scotland) Act 2003 – regulates the building standards system for construction, demolition and alteration works requiring a building warrant.

(b) Environmental

- Environmental Protection Act 1990 – provides for the identification and remediation of contaminated land.
- Control of Asbestos Regulations 2012 – imposes a duty on persons responsible for maintenance of properties to manage any asbestos in those properties.

### 12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.

The Scottish Government and local authorities have powers of compulsory purchase. Generally, the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 regulates most uses of compulsory purchase, although there are several forms of compulsory purchase procedures, which may come from private legislation or by an order under the Transport and Works (Scotland) Act 2007. The process is laid down in Scottish Planning Circular 6/2011.

Compensation is payable and is based on valuation. Assessing compensation is governed by continually evolving legislation and case law and is a very complex area. Whether a person is entitled to compensation, and how much compensation they are entitled to, will depend on the circumstances. However, in calculating the amount of compensation, the following may be taken into account:

- The open market value of the interest.
- Compensation for severance and/or injurious affection.
- Compensation for disturbance and other losses not directly based on the value of the interest. This includes certain reasonable professional fees.

Planning Circular 6/2011 provides basic principles for acquiring authorities to follow when assessing and negotiating the level of compensation due, although specialist valuers are often instructed to progress this aspect.

### 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Overall executive control and responsibility for planning in Scotland rests with the Scottish Ministers. Their role includes: introducing new planning legislation; publication of the National Planning Framework (NPF); producing Scottish planning policies and guidance (including the SPP); Planning Advice Notes (PANs); and planning circulars. Through the Directorate for Planning and Environmental Appeals (DPEA), Scottish Ministers also determine a variety of planning appeals and they may also choose to call in planning applications. Scottish Ministers also have a role in dealing with listing buildings through Historic Environment Scotland (HES).

At a local level, implementation of Scottish planning policy is the responsibility of local authorities. They deal with the development of local planning policies (local development plans) for their area and are responsible for determining planning applications and enforcing planning and building control. While the Scottish Ministers have the overall responsibility for planning in Scotland, the majority of the planning process will be conducted through local authorities, at least in the initial stages. The Scottish Ministers can choose to oversee the development of proposed local development plans and the approval of strategic development plans.

All current Scottish planning policies, guidance and local authority development plans are available online through the Scottish Government website or the relevant local authority.

A buyer will obtain initial information about the planning position for a particular property from the seller. The seller will be expected to provide a property enquiry certificate (PEC) as part of the due diligence package. A PEC provides details from local authority records about planning applications, whether the property is a listed building or lies in a conservation area or is otherwise designated, for example as a Site of Special Scientific Interest, affected by a tree preservation order, or an Article 4 direction restricting permitted development. The PEC will also provide details of any planning enforcement notices or other orders and whether the property is affected by any planning policies, etc. within the development plan. A PEC should also detail any recent building control decisions on applications for the property.

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

Planning permission is required where there is "development", which is defined as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land".

There are limited permitted development rights for works that do not fall within this definition, such as certain development within the curtilage of a dwelling house, the installation of domestic micro generation equipment, and agricultural buildings. There are a number of specific classes of permitted development rights detailed in the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. If planning permission is required for a development, an application has to be submitted to the relevant local authority.

The majority of construction, demolition and other works will also require a building warrant from the Building Control Department of the relevant local authority. This may include works that fall within a class of permitted development. Applying for a building warrant is a separate process from applying for planning permission. The Building (Scotland) Act 2003 and the Building (Procedure) (Scotland) Regulations 2004 are the primary statutory instruments under which the building standards system operates.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Yes – see question 12.4 above.

Local authorities have enforcement powers to deal with breaches of planning control. However, if they fail to take enforcement action, within specified time limits, the development becomes a lawful development under the Town and

Country Planning legislation through essentially having implied planning permission. However, these time limits for enforcement action do not apply to breaches of the particular statutory controls of listed buildings, tree preservation orders or advertisement control systems.

A four-year time limit applies in situations where there has been a breach of planning control consisting of carrying out without planning permission: building; engineering; mining; or other operations. The four years starts with the date on which the operations were substantially completed. The four-year time limit is also applicable where the breach consists of a change of use of any building to use as a single dwelling house.

For any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years, beginning with the date of the breach. This includes breaches of planning conditions and circumstances where there has been a material change of use to a property.

Certificates of lawfulness of existing (or proposed) use or development can be applied for to establish the planning status of land that may be in breach of planning control (i.e. whether or not an existing or proposed use or development is considered lawful for planning purposes because the enforcement period has expired).

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

If planning permission is required for a development, an application has to be submitted to the relevant local authority. This process is governed by the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, which also set out the time limits for determining planning applications. The time limit for determination of national or major developments is four months, with a two-month time limit for all other applications. Various types of planning application can be made: full planning permission; planning permission in principle; approval of matters specified in conditions; variation; retrospective; and planning permission renewal.

The fees for a planning application vary depending on the type of application under the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations 2004. Building warrant fees are regulated by the Building (Fees) (Scotland) Regulations 2004.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

HES carries out statutory functions to protect historic buildings and monuments. Under the Ancient Monuments and Archaeological Areas Act 1979, HES can schedule sites of national importance and take them into state care.

In general, properties that are scheduled as historic buildings and monuments under the 1979 Act are not the subject of transfers.

HES is also authorised under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 to list structures for their architectural or historic significance. The fact that a property is a listed building does not affect the owner's ability to transfer ownership of it. Listing does, however, affect what an owner may do with that building and whether they are able to carry out any alterations to it. Any alterations to a listed building, including demolition or extension, which would affect the character of the listed building will require listed building consent from the local authority under the 1997 Act, which is a similar process to that of a planning application.

### 12.8 How can, e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

A potential buyer can obtain information about the contamination or pollution of land or buildings from a variety of sources. A PEC can, although usually only to a limited extent, provide useful information on any statutory notices served under environmental protection legislation. This includes information on whether a particular site is registered in the relevant local authority's contaminated land register. Not all land that is contaminated is registered in a public Register, however; such Registers will only contain details of land that has been identified as contaminated. A PEC will, however, only provide information available within public Registers.

Where there is a possibility of contamination at a site, the prudent course of action is to engage a reputable environmental consultant to prepare an in-depth environmental report or a desktop survey, depending on the buyer's needs. It is essential to be clear what level of reporting is required for each particular transaction so that a site-specific, valuable report is provided.

### 12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

The environmental regimes relating to water, contaminated land and waste are each governed by separate statutory regimes. All have one element in common, however; they all follow the "polluter pays" principle. This principle seeks to ensure that those who pollute will pay the full costs of any requirement to clean up.

Liability for contaminated land and its remediation under the statutory contaminated land regime is contained in Part IIA of the Environmental Protection Act 1990. Under this, local authorities have the duty to inspect land and properties within their council boundaries to identify contaminated land. Following such identification, the local authority will notify the Scottish Environment Protection Agency (SEPA), the owner, any occupier and any "appropriate person". Liability is on the basis of the "appropriate person" who "caused or knowingly permitted" the contamination. Under Part IIA, the appropriate person is held liable to carry out remediation works. If, after reasonable inquiry, that person cannot be found, liability then falls on the present owner or occupier.

### 12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.

An Energy Performance Certificate (EPC) must be obtained for a building or part of a building when it is sold or let. This applies to both commercial and residential properties.

EPCs were introduced by the Energy Performance of Buildings (Scotland) Regulations 2008. An EPC is a document that states the energy efficiency rating and environmental impact of a building by measuring the amount of carbon dioxide estimated to be emitted from the building. The energy efficiency ratings are shown on a scale of A (excellent efficiency) to G (very poor efficiency). The EPC must also indicate current

carbon dioxide emissions, potential emissions, the current energy consumption of the building and suggested cost-effective improvements.

A recommendation report will also accompany an EPC. This includes a list of cost-effective measures to improve the building's energy efficiency. It is not mandatory to implement these measures.

Certain non-domestic buildings are subject to the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016. The Regulations affect buildings or building units of more than 1,000 square metres, which do not meet the building standards regulations which had effect on or after 4 March 2002. On the sale or letting of such buildings, the owner must obtain an Action Plan, containing recommendations for improvement measures, which must be carried out. Alternatively, operational ratings can be measured and must be reported annually. The Action Plan also sets energy efficiency and emissions reduction targets, and the recommended improvement measures must be designed to have the effect over time of meeting those targets.

Regulations are due to be introduced in 2020 for improving energy efficiency of private residential tenancies. Minimum energy efficiency standards will apply: any new tenancy from 1 April 2020 must have an EPC rating of at least Band E; and all let properties must achieve that minimum rating by 31 March 2022. The minimum level increases to D for new tenancies entered into from 1 April 2022, with all let properties required to achieve that rating by March 2025.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

The Energy Performance of Buildings (Scotland) Regulations 2008, the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 and the prospective Energy Efficiency (Private Rented Property) Regulations 2019 are all designed to help reduce carbon dioxide emissions.

All new buildings must comply with mandatory building standards and must be constructed in such a way that the energy performance of the building is capable of reducing carbon dioxide emissions.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

The Climate Change Act 2008 sets a UK-wide carbon emissions reduction target for at least an 80% reduction in emissions from 1990 levels by 2050. It also sets an interim target of a 26% reduction by 2020. The Climate Change (Scotland) Act 2009 sets the same 2050 target for Scotland, but also sets a more ambitious interim target of 42% reduction in emissions by 2020.

The Scottish Government introduced a Climate Change Bill in May 2018. Once enacted, the Bill will set a target of net-zero emissions by 2045.

The Scottish Government also proposes, in line with advice from the independent Committee on Climate Change, to update the interim target for 2020 to at least 70%, and to set a new interim target for at least 90% in 2040.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Building standards require newly constructed buildings to meet certain energy efficiency standards.

Scottish Ministers announced in June 2015 that they would take long-term action to reduce the energy demand of, and decarbonise the heat supply to, Scotland's residential, services and industrial sectors, and designated energy efficiency as a national infrastructure priority. The strategy for this is enshrined in Scotland's Energy Efficiency Programme (SEEP). SEEP will be a coordinated programme to improve the energy efficiency of homes and buildings in the commercial, public and industrial sectors and to decarbonise their heat supply, with an initial estimated overall investment in excess of £10 billion.

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# Slovenia


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main act of real estate law in Slovenia is the **Law of Property Code** (*Stvarnopravni zakonik*). Other than that, are the following:

- Agricultural Land Act (*Zakon o kmetijskih zemljiščih*);
- Housing Act (*Stanovanjski zakon*);
- Land Register Act (*Zakon o zemljiški knjigi*);
- Real Estate Recording Act (*Zakon o evidentiranju nepremičnin*);
- Protection of Buyers of Apartments and Single Occupancy Buildings Act (*Zakon o varstvu kupcev stanovanj in enostanovanjskih stavb*); and
- Real Estate Agencies Act (*Zakon o nepremičninskem posredovanju*).

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Slovenia does not have a common law system; therefore, it has no influence on real estate. Real estate is governed by the Law of Property Code and other acts. However, decisions of the court are used to help interpret the statutory law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Non-residents may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly. Therefore, international agreements are relevant in such cases.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Firstly, we have to take into consideration the international agreement that is concluded with the country the non-resident is from. The main principle to obtain the ownership of real estate in Slovenia is reciprocity. Reciprocity shall be taken into consideration when the person is a national of a candidate country that is subject to the EU accession or a person is a citizen of a third country.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

There are five different types of rights *in rem* divided into two groups: whether the right is on your own land; or whether the right is on foreign land. In the first group there is only ownership (*lastninska pravica*). If two or more legal entities jointly own a piece of land, it can be as co-ownership (*solastnina*) or as a common property (*skupna lastnina*). Regarding the rights on foreign land, there are the following: servitudes/easements (*služnost*); mortgage (*hipoteka/zastavna pravica*); encumbrance (*pravica stvarnega bremena*); and building rights (*stavbna pravica*). All these rights shall be entered into the Land Register in order to have *erga omnes* effect. There are two types of servitude, predial servitude (*stvarna služnost*) and personal servitude (*osebna služnost*).

However, there are additional rights that can be agreed in the contract but those are purely obligation rights.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

The general rule under Slovenian law is anything that is permanently merged by purpose or permanently on, above or below the property is an integral part of the property, meaning that the ownership of the land includes all the components on it (including buildings).

However, there are two exceptions to the so-called building right (*stavbna pravica*). A building right is the right to own a built building above or below a foreign property and it can be established for no more than 99 years. Furthermore, the second one is a condominium (*etažna lastnina*) which is the combination of ownership of one part of the building and co-ownership of shared parts of the building.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Under Slovenian law, only the legal owner can file the application into the Land Register and has full power over real estate. The legal owner is the only one who has the power to dispose of the real estate. However, there is a possibility to dispose the use of the real estate to another person with *inter partes* agreements. There is a possibility to enter into some obligation rights of real estate, such as: lease and tenancy right; the right to prohibit the disposal or encumbrance, if it arose from the legal agreement of the owner; the pre-emptive or redemption right, if it arose from a legal agreement; or special right of the use of public good.

So far there are no intentions to change this.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

All the land is required to be registered in the Land Register. There is no unregistered land.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is a principle of trust in the Land Register (*Načelo zaupanja v zemljiško knjigo*), meaning that anyone who acts fairly and relies on the information on the rights recorded in the land registry in legal transactions should not suffer adverse consequences. Therefore, all entries regarding rights on real estate in the Land Register are consequently considered true.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

All *in rem* rights in land are required to be registered in the Land Register in order to establish them and have an *erga omnes* effect. Non-registration means non-existence and is not secured by the principle of trust in the Land Register.

**4.4 What rights in land are not required to be registered?**

All the contractual rights (*inter partes* agreement) are not required to be registered in order to establish such right. However, there is a possibility to enter some of it into the Land Register in order to have an *erga omnes* effect. For this, please see question 3.3.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

Under Slovenian law, there is no probationary period following the first registration of the real estate.

If the right *in rem* is not entered into the Land Register it does not have an *erga omnes* effect and, therefore, it is not secured by the principle of trust in the Land Register.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

The ownership is transferred to the buyer upon registration in the Land Register and it has effect from the time the motion is submitted. The registration is usually carried out by the land registry office, which can take up to several months before the actual transfer of the ownership in the Land Register.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

The Land Registry Court decides on the entries and performs the entries in the order determined after the moment when the land registry court receives the proposal for registration. This means that the earlier of two will always rank prior to a later one. The rank of registered rights can be seen in the Land Register.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There is one central Land Register (*zemljiška knjiga*) in Slovenia.

**5.2 How do the owners of registered real estate prove their title?**

Owners of registered real estate prove their title with a Land Register excerpt or, if appropriate, with a historical excerpt.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

At this time, it is not possible that a transaction relating to registered real estate can be completed electronically.

The Land Register registers the ownership right if the following documents are provided:

- contract and explicit land registry permit (grant deed for transfer of title) where the signature of the seller is verified by a public notary;
- certificate on the use of land, issued by the municipality, for the transfer of ownership right on land; and
- decision of an authority (court of justice, decision in an administrative procedure, etc.) that is legally final.

The Land Register in Slovenia is in a form of an electronic database and is accessed electronically, including information on ownership of registered real estate.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

There is no special provision for claims of compensation if a mistake is made by the registry.

However, the Land Register is administrated by the "land book" court (*de facto* by the Supreme Court of the Republic of Slovenia). As this is a state authority, they could, by their unlawful actions, cause damage to third persons in connection with the performance of their function. Any person suffering damage has the right to claim, in accordance with the law, compensation directly from the person or authority that has caused such damage.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Information on rights in the Land Register are public (publicly accessible). A buyer can obtain information regarding ownership rights and encumbrances. Only registered rights exist legally and are valid. In the register the buyer can also see whether there is a new and unresolved filing regarding real estate and what is its nature (change of ownership, registration of encumbrance, etc). The buyer has only limited information on pending procedures.

Each person that proves justified cause has the right to claim access to copies of the documents in the Land Register and to ones that are connected with the pending procedures. This enables buyers to obtain information on filings and pending procedures.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

When buying real estate, public notaries are involved. The seller's signature on the deed for transfer of the title over the real estate to the buyer must be notarised. When buying or selling real estate, a real estate agent/broker is present alongside the buyer and seller. When the seller or buyer is a corporation, they often have their own legal (lawyers) and tax advisors. Real estate appraisals often occur as professional support to either the buyer or seller.

**6.2 How and on what basis are these persons remunerated?**

The remuneration of public notaries and attorneys are governed by the statutory tariffs. More precisely, for notaries it is governed by the Notary Tariff (*Notarska tarifa*) and, for attorneys, by the Attorney Tariff (*Odvetniška tarifa*). However, the client can conclude with their attorney an agreement for a different remuneration.

Real estate agents/brokers are paid on commission which is determined by the Real Estate Agencies Act (*Zakon o nepremičninskem posredovanju*), where the remuneration for the real estate agent/broker is limited at 4% (+ VAT) of the contract price. However, this limit does not apply where the contract value of the property is less than EUR 10,000.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Since last year there have been no changes in the sources or the availability of capital to finance real estate transactions in the Slovenian jurisdiction.

The most common source of capital in The Republic of Slovenia to finance real estate is debt (a bank loan). Usually, a bank requires insurance to establish a mortgage on such real estate. Own equity is not usually used to finance the acquisition of real estate.

Many properties are put on the market through auction by the Bank Assets Management Company which manages the real estate that has been transferred from debtors to Bank Assets Management Company through bankruptcy and other recovery procedures.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Slovenia is open to foreign investors and in cooperation with Spirit Invest, Slovenia offers all investment opportunities gathered. Most foreign investors are attracted by Slovenia's strategic position at the heart of Europe, its excellent transport and ITC infrastructure. One of the many attractions for investors in Slovenia is the land-sea-air transport system.

Other advantages include adaptability of companies and workforce, business legislation, investment incentives, a 19% corporate income tax rate and investment tax allowances.

In Slovenia, one of the most attractive features is the ICT manufacturing and services sector; it is one of the government commitments to boost the ICT sectors as a national development priority. Besides that, there are trends of investments in: pharmaceuticals and chemical products; the production of renewable energy and green engineering; and the IT sector.

Commercial real estate (apartments) is, in our opinion, still the most interesting area in which to invest.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

There are no trends of slowing down in the real estate market or any other sector in Slovenia.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The contract must be concluded in written form. For acquiring the title, entry into the Land Register is required. The entry in the Land Register is made upon the Land Register permission, which is usually included in the contract but can be made separately. The signature of the seller on the Land Register permission must be verified by a notary. Before the notary signature verification, transfer tax at a fixed rate of 2% of the purchase price must be paid.

### 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

In general, the seller has no comprehensive duty of disclosure.

However, in accordance with the Protection of Buyers of Apartments and Single Occupancy Buildings Act, upon the delivery and acquisition of the real estate, the seller must remind the buyer of the right to demand that the seller rectify the defects that are detected upon the acquisition and of the right to demand payment of the contractual penalty for possible delay in the delivery of the real estate, and to inform him/her that he/she will lose these rights if he/she does not acquire them upon the acquisition of the real estate.

The seller's liability will be stricter if the buyer is acquiring the real estate for a specific purpose and they guarantee to the buyer that said real estate has such specific qualities.

### 7.3 Can the seller be liable to the buyer for misrepresentation?

The seller of an old building is liable according to the Obligations Code. The buyer can demand that the purchase price be reduced or withdraw from the contract. In each of these cases the buyer has the right to demand the reimbursement of damage.

The Protection of Buyers of Apartments and Single Occupancy Buildings Act protects the final buyer of a **newly built building** from the risk of breaching the contract with the investors, with mechanisms such as: the right of the buyer to withhold 5% of the purchase price if defects are discovered at the handing over of the property; a mandatory bank guarantee to be set by the investor/seller for the repair of hidden defects in the amount of 5% of the purchase price; and the prolongation of warranty time.

### 7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?

Sellers give guarantees or contractual warranties that derive from Slovenian legislation for example:

- The condition of the real estate.
- The non-existence of other rights *in rem* or obligations.

From a purely legal perspective it would be possible to use a seller's guarantees to substitute a buyer's due diligence. In Slovenian practice this is not very common. Usually, a seller tries to exclude his/her warranties as far as possible. Such guaranties shall be accompanied with strong security arrangements. Such additional contractual warranties are common only in complex transactions.

Furthermore, under Slovenian law, selling commercial apartments forces the buyer to take over the agreed rent as it exists. Change of ownership of such apartments does not affect existing rental agreements. Therefore, the buyer has to enter the landlord's legal position. Also, liens pass over to the buyer if they are duly registered in the Land Register. In such cases, a detailed due diligence is essential.

### 7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.

When the sale purchase agreement is concluded, the seller is generally liable under the contractually agreed or statutory warranties. However, the seller is always liable for hidden defects of the real estate and for damages incurred by the purchaser as a result of any intentional conduct by the seller.

### 7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

One specific liability of a buyer, besides the payment of the purchase price, is taking over the real estate (possession) and, through that, stepping into the position of the owner from the payment of public liabilities (taxes) point of view. Additionally, a buyer's liabilities are:

1. Payment of notary fees.
2. Payment of a commission to the real estate agent/broker.

The buyer also becomes liable for obligations from lease agreements concerning the sold property.

## 8 Finance and Banking

### 8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

A credit agreement between two legal entities is generally regulated by the Obligations Act. However, Slovenian legislation contains different legislation for B2C loans, which is *lex specialis* regulated by the Consumer Credit Act (*Zakon o potrošniških kreditih*) and offers a special protection in comparison to corporate entities. Other than that, each bank in Slovenia has its own special rules regarding obtaining a loan.

For bank financings, there is no difference for residential or non-residential persons. Usually the amount of the loan depends on the credit worthiness of the buyer.

### 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The most common method for the real estate lender to protect itself from default by the borrower, is mortgage and maximum mortgage, where all existing and future claims arising from specific business relationships are secured by the same mortgage on real estate up to a specific amount. Other than that, there are personal securities available (additional claims against individual persons), the most common one being sureties.

In addition, a lender can sign with the borrower, an enforceable notarial deed, where the mortgage is directly enforceable (i.e. enforceable without the need to initiate any legal action first). A real estate lender can also protect itself by lien on all future leases (claims to pay the lease).

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

It depends on the type of mortgage that was established. The general mortgage must be realised through the court where the foreclosing lender files a lawsuit against the defaulting borrower. In case the judgment is in the lender's favour, the real estate is

usually the subject of the public auction which is conducted by a court-appointed seller.

Under Slovenian legislation, there is a possibility to avoid the litigation phase. Such mortgage shall be entered into a special form of a directly enforceable notarial deed, where mortgage is directly enforceable. With this type of mortgage, the pledger agrees that after the claim has fallen due, it can be repaid from the proceeds obtained through the sale of the immovables. The process of notarial sale of a real estate is conducted in accordance with the Financial Collateral Act.

### 8.4 What minimum formalities are required for real estate lending?

This largely depends on what kind of agreement is concluded. Based on the Obligation Act *(Zakon o obligacijskih razmerjih)*, the credit agreement shall be in a written form, while in case of entering into a loan agreement, no written forms are needed based on the Obligations Code (*Obligacijski zakonik*). In case of the latter, in practice, the contracting parties usually conclude an agreement in a written form. However, a mortgage can only be entered into the Land Register if it is made on the basis of the document containing the land registry permit.

When a loan is given to the consumer (i.e. B2C relationship), then the mandatory provisions of the Consumer Credit Act are applicable. The real estate lender shall give all the necessary information to the consumer in order to easily decide what kind of loan the consumer will take based on his/her financial status. The loan agreement shall always be concluded in a written form.

The loan agreement/credit agreement for real estate, whose claim is secured by a lien (mortgage) on the real estate, must be concluded in the form of a notarial deed.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The protection of the real estate lender depends solely on the type of the security. When the mortgage is entered into the Land Registry, then the lender is protected by the general principle *prior tempore, potior iure* or, in other words, "*he who is before in time, is preferred in right*". This principle protects a real estate lender as, in cases where: the real estate is sold because of the default of the borrower; and the loan is secured with a mortgage, the first of all securities entered into the Land Registry will be paid first from the purchase price.

In case of insolvency of the borrower, the loan protected by a mortgage offers to the lender a separation right, which is the right of a creditor to pay his/her claim from certain assets of the insolvent debtor before paying the claims of other creditors of that debtor from that property.

In the case of execution of the debt, when a creditor who proposed the execution of his/her debt and has a mortgage that is entered in the Land Register behind the real estate lender, then the real estate lender has a right to propose that the court suspends enforcement if the establishment value of the real estate does not even partially cover the claim of the creditor who has proposed the enforcement of the debt.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

In general, the real estate lender has a legitimate interest in obtaining collateral. However, the security can be avoided or rendered unenforceable when the agreement is proclaimed as null or the lender agrees that security ceases to exist. The enforcement and realisation of collateral by the real estate lender can be avoided by assertion of objections.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

In general, the enforcement procedure does not verify the correctness of the enforcement title, but it must be claimed in legal proceedings. In case of enforcement, the lender can file an objection against the court order claiming he/she has already paid the loan within the due time (*opposition objection*). In this case, the enforcement is stopped by the court. In addition to that, under Slovenian law, an individual can prevent the sale of the real estate that represents his/her home when the debt is relatively low.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

In the insolvency process, the claim of the real estate lender against the borrower becomes an insolvency claim. If the claim was secured with the mortgage, then the lender has a so-called separation right, which allows the lender to be repaid before other insolvency creditors. This means, that the real estate may be sold and the purchase proceeds obtained from the sale of the real estate shall be used to repay the real estate lender first. If the claim is not secured with the mortgage, then this claim will be only fulfilled proportionately with other insolvency creditors.

The compulsory settlement procedure does not have any effect on secured claims; neither the amount nor the maturity of these claims will be modified by the confirmation of the compulsory settlement. The debtor is obliged to fulfil his/her obligations regarding the payment of the secured claims within the time limits specified in the basic contractual relationship from which the secured claims originate, otherwise he/she is late in fulfilling his/her obligations. The delay set out in the decision confirming the compulsory settlement does not apply to these obligations.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Security over shares may be enforced outside the court procedure if this is agreed in a contract between the seller and buyer. In case of a commercial agreement, the latter is assumed.

Debt-to-equity swap is seen as a contribution in kind and therefore possible also with shares given as a collateral. During the drafting of the restructuring plan, it is possible to provide for claims of creditors to be converted into shares in the borrower. This process is called conversion. When the subject of the in kind contribution to the company is the creditor's claim that is secured by the mortgage, his/her declaration of subscription and payment of new shares must be accompanied by a notarised permission for cancellation of the mortgage. This rule is applicable also when the claim is secured by a lien entered in the central registry of dematerialised securities.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Real estate transfer tax is paid at the rate of 2%. The tax base for the real estate transfer tax is the purchase price of the real property. The seller of the real property is liable for the real estate transfer tax. However, the buyer can contractually undertake to pay the tax. If the real estate is considered as a newly built object or if it was not yet used, then it is subject to VAT and there is therefore no obligation to pay transfer tax.

### 9.2 When is the transfer tax paid?

The taxable person shall file a tax payment within 15 days of the conclusion of the contract. The taxable person shall pay the assessed tax within **30 days** of the tax assessment decision being served on him/her.

### 9.3 Are transfers of real estate by individuals subject to income tax?

If an individual transfers the real estate, then he/she is subject to income tax under the Personal Income Tax Act if the real estate was owned for no more than 20 years. The tax rate depends on the years of ownership of the real estate. Such tax is personal income tax on capital gains from the disposal of real property.

If the real estate was owned for less than five years, then the tax rate is 25% of the tax base. If it was owned for more than five years but no more than 10 years, then the tax rate is 15% of the tax base; if it was owned for more than 10 years but no more than 15, then the tax rate is 10% of the tax base; and if it was owned for more than 15 years but no more than 20 years, then the tax rate is 5% of the tax base.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The transfer of real estate is subject to VAT only in two situations:

- The real estate is considered as a new building (if the transfer is made before the building is first used or within two years of its use).
- Land suited for construction.

The tax rate solely depends on the usage of the building. The lower tax rate (9.5%) applies when the subject of the sale is residential buildings measuring up to 120m$^2$ (apartments) or 250m$^2$ (houses). Where real estate falls outside the threshold, or in the sale of land suited for construction, the tax rate is higher (22%).

The seller is liable for the payment of VAT.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

The seller has to pay the following taxes at the disposal of a property:

- Real estate transfer tax.
- Personal income tax on capital gains from property disposal.
- VAT.

For more, please see questions 9.1, 9.3 and 9.4.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

No. The transfer of business shares or stocks is an entirely independent transaction and does not affect taxation regarding real estate owned by such company. However, there is a possibility, when it includes selling the real estate, of an obligation to pay either VAT at the rate of 22% or real estate transfer tax at the rate of 2%.

There is a difference when the seller is a natural person and when they are a corporate entity. In case of a natural person, he/she is liable to pay capital gains tax – it is calculated as the difference between sales value (reduced by 1% of the standardised cost) and the cost of the real estate (plus the standardised cost of 1%). The tax rate depends on the years of the ownership of the real estate. For this, please see question 9.3. When the seller is a corporate entity, then the amount of the profit becomes part of the corporation tax.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

The buyer shall take into consideration whether the seller is subject to VAT or not. If it is, then the selling price shall include an additional 9.5% or 22% of VAT. In this case, there is no obligation to pay the real estate transfer tax.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

Leases of business are regulated by the Commercial Buildings in Commercial Premises Act. For matters which are not covered by the latter, the Obligations Code applies.

### 10.2 What types of business lease exist?

The Commercial Buildings in Commercial Premises Act does not regulate different types of business lease.

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

a) The lease of business premises can be concluded for an indefinite period or for the short term, at least for six months.

b) The rent increases are usually determined on the basis of the Consumer Price Index.

c) According to Slovenian law, a tenant cannot sell or transfer its right to lease without the landlord's permission. The same applies to the right to sub-lease the premises.

d) The landlord usually provides insurance of the business premises and the tenant bears the costs.

e) (i) The change of control of the tenant is usually not covered by provisions of the contract.
(ii) The transfer of lease as a result of a corporate restructuring is usually not covered by provisions of the contract.

f) The landlord is responsible for repairs and maintenance of business premises which are significant for their use. If the landlord fails to maintain or make certain repairs to the leased property, the failure may be considered as a material breach of the lease agreement. If the landlord does not make certain repairs on time, the tenant holds the right to do so. In that case, the tenant has the right of reimbursement for the cost or the cost may be deducted from the future rent under certain conditions.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

If the landlord is a natural person, the rent is considered as income from lending a property and is taxed under the law on income tax. According to the law, the tax rate is 27.5%.

If the landlord is a legal person, the rent is considered as a revenue and is taxed as corporate income tax. The tax rate is 19%. A revenue from the lease is not subject to VAT unless the parties agree otherwise. In that case, the landlord can deduce input VAT. The VAT rate is 22%.

There are certain rental expenses that can be deducted from the tax base, but no more than 15%. These expenses may include operating expenses, repairs and investments, which increases the value of the property.

If the landlord is a natural person and the tenant is a legal person, the calculation and payment of personal income tax is done by the latter.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

A lease contract can be terminated only by the court.

A lease contract that has been concluded for a fixed period is terminated when the period for which it was concluded ends. If, following the end of the period for which the lease contract was concluded, a tenant continues to use the business premises and a landlord does not obtain an order from the court to evict a tenant from the premises within a one-month period, it is deemed that the lease contract has been renewed for an indefinite period.

A lease contract that has been concluded for an indefinite period can be terminated at any time, observing the stipulated period of notice of termination. The period of notice of termination may not be less than one year.

A landlord can withdraw from the contract at any time regardless of the contract and law provisions on a duration of the lease under certain conditions (breach of contract by a tenant).

A tenant cannot extend or renew the lease. The liability for damages caused by the breach of the contract of both parties is governed by the Obligations Code.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

If a landlord sells its business premises which are the subject of a lease contract according to the Obligations Code, the purchaser or acquirer assumes the place of the landlord; thenceforth the rights and obligations deriving from the lease exist between the acquirer and the tenant. The landlord is jointly and severally liable as a surety for the obligations held by the acquirer deriving from the lease.

The tenant cannot transfer its rights and obligations of the lease contract without the landlord's consent.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

There have been no green obligations which have to be stated in a contract yet. Nevertheless, there is an energy regulation which imposes that the business premises which are leased for more than one year must have an energy certificate for the building.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Yes. It is common in the field of innovation. The innovation hubs for knowledge and technology transfer usually have their own innovation infrastructure, which include a co-working space. The main idea is to lend the meeting point to individuals with entrepreneurial ambitions, where they can connect with start-up teams and share their ideas and experiences.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The main legislation for the leasing of residential premises is the Housing Act (*Stanovanjski zakon*), which regulates all necessary questions regarding leases of residential premises. However, if something is not regulated by the Housing Act completely, then the Law of Property Code and Obligations Code apply subsidiarity for the issues that are not governed.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, Slovenian law does not contain such differences.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

**(a) Length of term**

There is no law that governs for how long the lease contract shall be concluded. Residential leases are generally

concluded for 11 months in order to avoid the obligation to obtain an Energy Performance Certificate. There is only one exception regarding non-profit housing where the lease contract must be concluded only for an indefinite term.

**(b) Rent increases**

It depends what kind of lease agreement is concluded. If the lease agreement is concluded for a specific term and the amount of rent that shall be paid is defined, then the landlord cannot unilaterally change the rent. This can be done only if the annex to the existing agreement is concluded. However, there is a possibility that rent is linked to a reference index, usually the Consumer Price Index, defined by the Statistical Office of the Republic of Slovenia.

**(c) The tenant's rights to remain in the premises at the end of the term**

The prolongation of the contract is left to the explicit demand of the tenant. The tenant, who wishes to prolong the duration of the tenancy, is obliged to ask for the permission of the landlord within 30 days before termination of the contract. If the landlord agrees, the annex to the contract is concluded. Otherwise, the tenant is obliged to vacate the premises within the period determined in the contract. This is only enforced in the case of market rentals, since non-profit rentals are always open-ended.

**(d) The tenant's contribution/obligation to the property "costs", e.g. insurance and repair**

The rental agreement shall include the method of payment and the scale of other costs not included in the rent price. The tenant shall pay for costs of repair made in an apartment resulting from the improper or negligent use of the apartment in accordance with the provisions of the lease agreement. Tenants are, for instance, obliged to repair the broken glass windows, entry and indoor doors, etc. On the other hand, the landlord is obliged to maintain the dwelling and building, in which the dwelling is located, in a condition to provide normal use.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

The landlord may terminate the contract due to one or more reasons for termination of contracts (due to culpable reasons). However, 11 reasons are applicable to all tenancy relations (also market, employment-based and purpose), whereas one reason is applicable only to non-profit relations. There is no specification of the content of the warning, nor does it determine the manner in which the warning must be delivered to the tenant. In practice, landlords use a number of methods to deliver the warning; however, the courts use different criteria when assessing whether the warning was duly served upon.

However, there is a possibility that landlords in market, employment-based and purposes rentals may terminate the contract for any reasons, under the conditions governed in the contract.

If the tenant does not comply with the requirements from the warning in the given deadline, the landlord may file a lawsuit for termination of the contract and tenant's moving out of the premises. If after the judgment is final and the tenant does not move out, there is a possibility that the court will impose a fine.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The Spatial Planning Act (*Zakon o urejanju prostora ZUreP-2*) defines: the objectives, principles and rules of spatial planning; participants involved in the field; types of spatial planning documents, their content and interrelationships and procedures for their preparation, adoption and implementation; and a joint planning and permitting process. It also defines spatial measures, instruments and measures of land policy, and regulates the monitoring of the state of space, the operation of the spatial information system and the issuing of certificates in the field of spatial planning.

The Building Act (*Gradbeni zakon*) regulates the conditions for the construction of facilities and other issues related to the construction of facilities.

The Environmental Protection Act (*Zakon o varstvu okolja* ZVO-1) regulates environmental protection against pollution as a prerequisite for sustainable development and sets out in this context, the basic principles of environmental protection, environmental protection measures, environmental monitoring and environmental information, economic and financial instruments for environmental protection, public environmental protection services and other environmental protection-related questions.

The Nature Conservation Act (*Zakon o ohranjanju narave*) lays down biodiversity conservation measures and a system for the protection of natural values in order to contribute to the conservation of nature.

The Waters Act (*Zakon o vodah*) governs the management of sea, inland and groundwater (hereinafter referred to as "waters") and water and coastal land.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The state can force landowners to sell the land to it against compensation or compensation in kind (*expropriation*). This is allowed only in public benefit. The owner of the expropriated property is entitled to adequate compensation or equivalent replacement property. The compensation includes the value of the expropriated property, compensation for damages and other costs associated with the expropriation. Compensation is determined using the methodology of real estate valuation.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The Construction, Surveying and Housing Inspection Service (*Gradbena, geodetska in stanovanjska inšpekcija*) and Inspectorate for the Environment and Spatial Planning (*Inšpektorat za okolje in prostor*) are the two most important bodies that exercise the control.

A buyer can obtain information on land use by the certificate of land use issued by the municipality, or by reviewing the municipality's spatial planning acts. These acts include environmental requirements up to a certain point.

Environmental regulation and requirements are determined in legislation; special regulations.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

A building permit is the most important and required administrative permit. After the construction work is concluded, the owner must obtain an operating permit (a permit to use construction/building work).

Some projects require an Environmental Impact Assessment procedure that results in an Environmental Consent. In case the construction has an impact on the environment (over the threshold foreseen in the legislation), the integrated procedure is required where an Integrated Permit is issued (this includes Building Permits and Environmental Consent).

An environmental permit is required for operating specific devices/construction works.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Building/use permits are mandatory for construction to start and after completion for the building to be used. Implied permissions are not foreseen in legislation. However, illegal housing could, under certain circumstances, be declared legal in a special procedure.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

There is an administrative fee/tax to be paid at the beginning of each procedure that is quite insignificant in comparison to other costs. Costs of preparation work with all mandatory blueprints and involvement of relevant officials with opinions differ from project to project. Communal tax depends on the regulations of each municipality and characteristics of planned buildings.

Time from filing the request for a building permit to its issuance depends on the characteristics of the building, its location and influence on environmental matters. Times may vary considerably.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The Cultural Heritage Protection Act (*Zakon o ohranjanju kulturne dediščine*) has these provisions. The state and municipalities have a pre-emptive right on land and real estate that is pronounced as cultural heritage. They have the right to expropriation as well.

Development and change of use is connected with cultural protection conditions and cultural protection consent.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

A public and centralised register of contaminated land does not exist in Slovenia. Some general information on grounds of monitoring the status of certain environment (air, water, land, etc.) are published and archived at the Environmental Agency of the Republic of Slovenia. The only efficient way to check whether the real estate is polluted is by performing a special analysis of the targeted real estate with the consent of its owner.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Environmental clean-up is mandatory if the owner of the land causes environmental damage (environmental liability with regard to the prevention and remedying of environmental damage).

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Some time ago, an Energy Performance Certificate (Energy ID of a building) was introduced through the Energy Act (EZ-1). It is a public document containing benchmarks that enable the comparison and assessment of the energy performance of the building. Recommendations for cost-effective energy efficiency improvements are an integral part of the Energy Performance Certificate, except for new buildings and leases.

It is obligatory for the sale of a building or its individual part and for renting for a period of one year or more. It is mandatory for the seller and the landlord.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Principal climate policy measures are aiming at increasing the share of renewables, e.g. through feed-in tariffs, Eco Fund loans and grant schemes, or various Ministry public calls for financing RES technologies and energy efficiency renovations of buildings.

Slovenia is a signatory party to the Paris Agreement and, therefore, it has committed itself to significantly reducing carbon dioxide emissions. In 2017, Slovenia adopted the Decree on the Implementation of the Decision (EU) on the efforts of Member States to reduce their greenhouse gas emissions to meet the community's greenhouse gas emissions reduction commitments by 2020 which provides the transfer of the excess of annual greenhouse gas emissions.

Slovenia has also adopted an operative programme for the reduction of greenhouse gases by 2020. The goal is that, by 2020, there shall be no increment of the greenhouse gas emissions by more than 4% compared to 2005, and shall not exceed 12.117 kt $CO_2$. Such programme focused on the sectors that represent the main sources of pollution outside the European Union Emissions Trading Scheme.

Under the Environmental Protection Act there is a possibility of trading in greenhouse gas emission allowances. The installation operator shall be allowed greenhouse emissions in the scope of emission coupons obtained for the installation. An emission coupon is an allowance expressed in tons of carbon dioxide equivalent. A ton of carbon dioxide equivalent shall mean one metric ton of carbon dioxide or an amount of any other greenhouse gas with an equivalent global-warming potential.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

The Government of the Republic of Slovenia has adopted the Operational Plan for Greenhouse Gas Reduction by 2020 (with a view to 2030) (OP GHG) in December 2014. The mentioned

Operational Plan defines measures needed for Slovenia to meet its greenhouse gas emissions reduction target to reduce the GHG emissions by 2020 with a view to 2030 in particular sectors (transport, energy use, agriculture, waste management and industry outside EU ETS).

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Slovenia has passed the Energy Efficiency Action Plan for the period 2017–2020, which foresees that all buildings will have to become energy self-sufficient by 2020. According to the Action Plan, the existing building stock represents the sector with the greatest potential for achieving energy savings. To meet the goal, it will require a 25% energy restoration by 2020. This will reduce the energy use in the buildings by nearly 10%.

In Slovenia, the Slovenian Environmental Public Fund (Eco Fund), whose main purpose is to promote development in the field of environmental protection, is established. It is the only specialised institution in Slovenia that provides financial support for environmental projects. The activities that it provides are loans to individuals for conversion from fossil fuels to renewable energy sources, energy-saving investments, investments in water-consumption reduction, connections to sewage systems, small wastewater treatment and replacement of asbestos roofs. It also grants to municipalities for investments in buildings where public education takes place, or which are newly constructed as low energy and passive buildings or are renovated to a passive standard.

**Domen Neffat** is the founder and Managing Partner of Law Firm Neffat. Mr. Neffat focuses his practice on corporate law, real estate (including construction), environmental law, waste management law, intellectual property law and public-private partnerships. He has extensive experience in domestic and cross-border business transactions and is one of the leading lawyers in the field of environmental and waste management law in Slovenia. Mr. Neffat has a capability for creating innovative solutions in a limited timeframe and is valued for always providing advice that benefits his clients the most. His work also covers transactions designed to support restructurings of group companies by change of ownership. He is very strong in advisory work for construction projects.
Mr. Neffat also has a very broad base of skills in capital restructuring, crisis management and in corporate governance in general. He also advises on consumer protection issues, including privacy, financial practices, private equity, and marketing practices. Mr. Neffat actively holds lectures on topics of corporate law, environmental law and real estates. Mr. Neffat is also a president of the Sport Association of Lawyers (*Športno društvo pravnik*).

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**Leonardo Rok Lampret**'s work encompasses a broad range of corporate, commercial, environmental law, real estate and tax law. Besides that, he specialises in M&A, corporate investigations and corporate governance. Mr. Lampret works with clients regarding environmental work, which includes regulatory compliance and enforcement actions related to air, water, wetlands, waste and endangered species. He also advises corporate and financial clients on the environmental aspects of M&A and other transactions, which involve due diligence and environmental insurance issues. He works under the mentorship of Mr. Neffat with whom he actively works on matters concerning business judgment rules and other matters regarding corporate, commercial and environmental law. Besides that, his work also includes construction and engineering law, where he helps clients obtaining building and operating permits.

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Law Firm Neffat has a long tradition that grows rapidly in the Republic of Slovenia. The Firm actively works in the fields of Corporate Law, M&A, Public Procurement, Waste Management and Environmental Law, Construction and Engineering law, Real Estates, Litigation, Commercial Law, GDPR, White Collar Crime, Copyright Law and many others.
In an increasingly complex economic world, we believe that our role is to assist our clients: working out the possible course of action resulting from various situations; obtaining efficient, comprehensive and tailored legal advice in various complex situations; and optimising decision-making in every term possible. In order to achieve this, our team believes that the quality of the relationship that we have with our clients is one of the key factors to the success of the legal work entrusted to us and we must understand the economic, sector-based, financial and managerial culture of our clients.

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# South Africa


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The right to property is enshrined under section 25 of the Constitution of the Republic of South Africa, 1996. The registration of rights to and over immovable property is regulated by the Deeds Registries Act, 1937, which sets out the registration requirements and processes necessary for the transfer of ownership or creation of real rights in respect of land, including the process whereby security is registered in favour of creditors. All regions' and cities' planning legislation (called provincial ordinances/laws and bylaws) are now subject to framework legislation that was enacted in terms of the Spatial and Planning Land Use Management Act, 2013 (SPLUMA). There are many other statutes regulating real estate law but the aforementioned are the main pieces of legislation to consider.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Since 1994, the ownership of land in South Africa has been the subject of a number of legal and administrative changes. Most notably, in 2014, government promulgated the restitution of Land Rights Amendment Act, which reopened the time period within which to submit land claims until 30 June 2019, as part of the redress following the dispossession of rights, and/or land, pursuant to racially discriminatory legislation in effect since 1913. However, in 2016, the Amendment Act was found to be unconstitutional on technical grounds and new legislation is still is envisaged to ensure new land claims after the initial cut-off date of 31 December 1998 can be lodged. This process impacts mostly rural and agricultural land, but land claims have in some instances also affected urban areas, but the Act is clear on how an existing owner may deal with land that is subject to a claim. Under the land claims process, successful claimants can either be compensated for the land, or rights in land, that were dispossessed, alternatively the land can be restored in ownership, noting that the majority of claimants preferred compensation instead of restitution of land. In both instances though, it is important to note that the current owner's rights are enshrined in terms of the Constitution but in 2018, Parliament was tasked to investigate whether section 25 needs to be amended so as to permit land expropriation without compensation. The parliamentary process involved extensive public hearings and submissions and President Ramaphosa appointed an Expert Advisory Panel on Land Reform and Agriculture on 18 September 2018 ("Advisory Panel") to consider the issue and provide a report on its findings. The Advisory Panel released its final report on 4 May 2019 which was a detailed report dealing with land reform in general, not only the question of expropriation without compensation.

The Advisory Panel did not clearly state whether it recommended an amendment to section 25 of the Constitution to facilitate expropriation without compensation; however, it did put forward that it "**may** be necessary … (to insert) a new section 25(2)(c) which may read as follows:

"Parliament must enact legislation determining instances that warrant expropriation without compensation for purposes of land reform envisaged in section 25(8)."".

The Advisory Panel recommended that the finalisation of the Expropriation Bill of 2019 be expedited and that expropriation without compensation should be permitted in circumstances such as (but not limited to):

- "where the land is occupied or used by a labour tenant (as defined in the Land Reform (Labour Tenants) Act 3 of 1996);
- where the land is held purely for speculative purposes;
- where the land is owned by a state-owned corporation or other state-owned entity;
- where the owner of the land has abandoned the land; and
- where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land",

(see section 12 of the Expropriation Bill of 2019).

The Advisory Panel acknowledged that expropriation of land without compensation alone will not result in broad reaching land reform. Other recommendations of the Advisory Panel include:

- The establishment of a Land Reform Fund to finance land reform, including instances of expropriation where it is just and equitable for compensation to be paid. Private institutions, entities and individuals could donate/contribute to this Fund in exchange for tax benefits, or transformation "credits".
- Developing a donations policy whereby voluntary donations of land from churches, mining houses, commercial farmers, etc. is encouraged (possibly with tax or other benefits for the donor).
- Understanding the demand for land – the nature of the demand: who wants what land; for where; and for what purpose.

- Establishing clear criteria for beneficiary selection.
- The establishment of an expropriation body.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

As land and the process of acquiring land involves an attorney's trust account, it has been noted that certain criminals use the acquisition of land as a means to engage in money laundering activities. Accordingly, the US and UK legislation (i.e. FCPA and Bribery Act) are enforced in terms of the Financial Intelligence Centre Act (FICA) (as amended in 2017) in South Africa so as to prevent the same. Furthermore, FATCA (US-based tax legislation) and Common Reporting Standards (CRS) also impact South African property law and especially the finances related thereto.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

At present, there are no restrictions on foreign ownership or occupation but, as stated above, a Constitutional review process is underway and the Advisory Panel recommended that our government should determine the extent of land held by foreign ownership, and the use of such land, before implementing any policy which is aimed at a "'blanket ban' on foreign land ownership". The Advisory Panel suggests that different ownership structures should be considered by the government, such as medium- and long-term leases of public land for future acquisition of land use by foreigners, as well as the establishment of a policy to prevent foreigners purchasing land in areas of historical and cultural significance, areas of national security and interest, coastal areas, conservation areas or property required for land reform. No draft bills have been tabled for comment or consideration by the public.

There are formal requirements for a foreign company to register under the Companies Act, 2008 if it wishes to acquire immovable property in South Africa. Ownership of shares by a foreign person in a local entity that owns real property is also permitted, subject to certain tax implications relating to withholding tax, capital gains tax (CGT) and exchange control.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Freehold, sectional title, leasehold and long-term lease are the manner in which an owner can enjoy tenure. Freehold means out-and-out ownership, subject to the conditions of title and real rights (e.g. a mortgage bond registered in favour of a bank) applicable to the property. Sectional title ownership is a manner in which one owns a defined area in a complex or building, together with proportionate rights to the common property and some exclusive rights to defined areas as designated on a sectional plan. Leasehold is a remnant of our history in terms whereof government restricted who could own land and is gradually being phased out in urban areas. Long-term lease is a form in terms whereof two parties agree that a specific piece of land or entire land area are let to the lessee for a defined period of time against payment of a consideration. This lease must be notarially executed and is tantamount to "land" in terms of the provisions of the Deeds Registries Act (i.e. can be mortgaged). The long-term lease is the only purely contractual tenure model, which could influence the lessee's continued tenure. For example, if the lessee is in breach, the lessor may terminate the lease if the breach is not remedied. The rest mentioned above convey rights in land pursuant to an agreement but, once registered in the deeds registry, the contract has been implemented and, hence, is fulfilled.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Based on common law principles, the registered owner of the land is also the owner of the buildings and other fixed improvements situated on the land. However, there may be exceptions in terms of certain long-term lease structures (whereby certain rights in the domain are retained by one party and another owns the land). The Sectional Titles Act 1986 also provides great application in certain residential commercial real estate developments. This can result in multiple owners owning defined sections and exclusive use areas within a building or in a property, together with an undivided share of the common property and specifically denoted exclusive areas assigned to that particular section. The common property in a sectional title setup is controlled by the body corporate. Ownership of the land, or the sectional title section and exclusive use area is recorded in all instances in the 11 deeds registries located throughout South Africa.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

With reference to long-term lease structures, there is usually a notarial lease registered in the deeds registry in terms whereof the lessee is entitled to exercise a real right both against the owner of the property and the world at large. The same principle may apply in respect of praedial servitude holders (e.g. right of way). The owner, in dealing with the property (e.g. granting further servitude rights to another third party), may, depending on the wording of the lease or servitude, have to engage the lessee/servitude holder to seek its permission. In another scenario where the owner sells the property, it may do so without the lessee's/servitude holder's permission, but the successor in title to the land will still be bound to the terms of the lease or servitude and thereby the right afforded to the lessee or servitude holder.

There are currently no proposals to change this. However, as a means of addressing the challenge of land restitution the notion of leasehold tenure has been put on the table for discussion, whereby the State will retain title of the land and enter into long-term lease agreements with lessees who will obtain the rights to use, occupy and develop the land for their purposes, subject to zoning restrictions and conditions in the lease agreement.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

Yes, save for short-term leases (less than nine years and 11

months) which need not be registered, unless contractually agreed otherwise between lessor and lessee. Other real rights in land, e.g. mortgages, servitudes and restrictive conditions of title, must also be registered. The Advisory Panel referred to above has suggested Parliament consider whether and how informal rights in land (such as the right to occupy portions of communal or tribal land) could be secured or recognised.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no formal state guarantee of title. The Constitution enshrines the rights to property and states that no one can be deprived of property except in terms of general law and no law can permit arbitrary deprivation of property. There is, however, an ongoing Constitutional review process to determine whether changes are required to section 25 of the Constitution. It appears that the Advisory Panel referred to herein above, as part of their report, suggests the possible inclusion of a subsection to section 25 compelling Parliament to enact legislation to detail instances where expropriation without compensation should be permitted. Section 25(1), which enshrines rights to property, would remain, subject to the remainder of section 25 and the Constitution in general.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Ownership and real rights such as mortgages and servitudes. Consequently, non-registration means that the rights in land, including the risk and benefit of profit and loss, do not effectively transfer.

**4.4 What rights in land are not required to be registered?**

Short-term leases (less than nine years and 11 months in duration) are not required to be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

No probationary period is applicable. In terms of ownership in land, the rights take effect on registration of the deeds in the deeds registry. In terms of leases though, the rights take effect on the date agreed between lessor and lessee in the lease and is not necessarily dependent on the date of registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

The title is transferred to the Buyer upon registration in the deeds registry.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

In general, South African law recognises a system of first in time is stronger in law. However, our deeds registry and legal system recognises that even the most complete right of all, ownership, can be limited by the real rights of others, such as mortgagee/bond holders and servitude holders and registered lessees, which real rights are registered at the same time as the owner acquires ownership, or later. On agreement between different real right holders, preference of an earlier registered right can be waived in favour of a later registered right. For example, the holder of a long-term lease can waive preference in favour of a mortgage bond to be registered. The waiver can be encompassed in the bond itself or a separate notarial deed of waiver.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There are 11 deeds registries, including the head office in Pretoria. Each deeds office has a specified area of practice, meaning a piece of land may only be recorded in one deeds office. The main services provided by the Deeds Office Registry are the registration of land and real rights in land and the provision of land registration information. For more information on South Africa's land registration system visit http://www.rural-development.gov.za/.

**5.2 How do the owners of registered real estate prove their title?**

On registration, the relevant owner is issued with a title deed which proves ownership. Real right holders' rights are evidenced either in terms of a notarial deed or a mortgage bond deed. In addition to the physical deeds issued, each Deeds Office has a database of information on properties – who owns the property, if mortgage bonds or other encumbrances are registered against the property, etc. South Africa has a negative land registration system, thus information contained in the Deeds Office Registry is considered to be sufficient proof of ownership, unless proven otherwise. The Deeds Office data records can be used to substantiate a claim of ownership if a physical title deed is lost.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

No. We still work on a manual system of submission of deeds but South Africa boasts one of the world's most efficient and sophisticated systems of land registration. Every piece of land is shown on a diagram and ownership recorded in one of the regional Deeds Registries, where documents are available for public viewing, both at the deeds registries and online. The system does provide owners with security of title. Electronic deeds registration pilot projects are, however, being planned and the Electronic Deeds Registration Bill (when effective) will allow conveyancers to submit transfer and bond deeds and

documents to the Deeds Office electronically, and to communicate with the Deeds Office on an electronic platform.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

No. If a mistake is made in relation to the registration in a deeds registry, the deeds registry and its officials cannot be held liable to pay compensation, based on a specific inclusion in the Deeds Registries Act which exempts it from liability for acts or omissions. The responsibility that the documents are correct lies with the conveyancing attorney signing/executing the deeds.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions on public access to the register. A Buyer may obtain any and all information he/she might reasonably require regarding encumbrances and other rights affecting real estate. Members of the public may request all necessary information, in person, from the deeds registries. Alternatively, this can be achieved via searches on an electronic database; however, these require subscription to the necessary platforms. Conveyancing practices subscribe to these platforms, resulting in Buyers having access to this information through the conveyancer appointed to act on his/her/their behalf.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Estate agents and specialist attorneys known as conveyancers and notaries public in relation to notarial deeds that have to be registered (e.g. notarial leases and notarial deeds of cession of exclusive use areas in sectional title matters or notarial deeds of servitude). Naturally, if the Buyer requires mortgage financing to purchase a property then the Buyer's bank will be involved and, similarly, if the Seller's property is mortgaged, the Seller's bank will issue bond cancellation figures/settlement figures to the transferring attorney who must then ensure that the finances work out with the Seller's bank being settled in full upon registration of transfer in the deeds office and at the same time, the Buyer's bank's mortgage bond is registered as security for repayment of the loan.

As recently as October 2019, the Property Practitioner's Act came into force which regulates the real estate industry even more with basically everyone in the value chain having to adopt a slightly different approach to ensure consumers are not prejudiced.

**6.2 How and on what basis are these persons remunerated?**

The estate agent industry is governed by the Estate Agency Affairs Board and all estate agents are to be registered members. The commission charged by estate agents varies, depending on the agreement reached with the party paying the commission. If no agreement is reached, the default rate prescribed in terms of the Act and in terms of the regulations is 7.5% plus Value Added Tax (VAT) thereof at 15%. The parties are, however, free to negotiate the agent's commission (whether a fixed fee or a percentage). Conveyancers and notaries public are governed in terms of the Attorneys Act and the Law Society issues guidelines in respect of conveyancing fees payable, which is based on a sliding scale depending on the value of the property or mortgage bond, or deed to be registered.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

There has not been any change in the source or availability of capital to finance real estate transactions. The introduction of REIT legislation in 2014 has remained a source of funding for the listed property sector. Overall, property prices, particularly residential properties, have remained flat or even decreased. Property investment, depending on the asset class, varies in relation to the equity and debt.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

To the extent relevant, several of South Africa's biggest REITs have already expanded into other markets in Sub-Saharan Africa, Europe and Australia. Overall investment across all sectors has declined in South Africa, primarily as a result of the current political landscape and global hesitance to invest in developing economies. In February 2018, a significant development took place in that Parliament voted in favour of reviewing the property clause of the Constitution to investigate whether the section required amendment in order to permit land expropriation without compensation. The rationale behind embarking on this parliamentary process is to see how land, and access thereto, may assist in addressing the inequalities of wealth amongst racial groups in South Africa. The ruling party, in driving this process, has been very clear in stressing that the adoption of any legislative change to the Constitution or additional legislation which allows expropriation without compensation cannot be at the expense of food security and foreign direct investment. The Advisory Panel has only recently issued its report and recommendations to President Ramaphosa (in May 2019) but, as expected, the impact of this political decision of review has seen investors adopt a cautionary approach to real estate investment, particularly in respect of agricultural land. It must be noted though, that, broadly speaking, almost all political parties agree that resolving the inequalities associated with land ownership is crucial in fighting poverty and boosting the economy. It is just the manner in which to achieve that goal that parties differ about – some believing new or amending legislation is needed, others advocating that existing legislation is sufficient, it just needs to be implemented properly. Please refer to questions 1.2, 2.1 and 4.2 for further details on the Advisory Panel's recommendations.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

No definite trends have been observed, save to reiterate what

has been stated already in respect of the current parliamentary process (to review whether the Constitution's property clause needs to be amended) having an impact on local and foreign investment in underlying real estate assets associated with mining and agriculture. There is currently a very large over-supply of office space in the prime business centres, but the warehousing and logistics sectors' real estate needs are showing solid growth and extensive new development being undertaken.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The Alienation of Land Act, 1981 prescribes the *essentialia*. An agreement, in writing, signed by the Buyer and the Seller, in terms whereof the property, price payable and payment terms are clearly set out.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

Yes. The Seller has the "duty to disclose" any defects the Seller is aware of which are prevalent, especially those which are not obvious. If the Seller hides defects in the property on purpose, the Seller will not be protected. Therefore the *voetstoots* clause will not protect a Seller who knows of a defect in the property but does not tell the Buyer about the defect.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes. Proper recourse is to institute an action for damages against the Seller.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

The most common warranties are:

- warranty of ownership or right to dispose of the property. A person or entity is entitled to sell something that does not vest in ownership in that person in terms of common law but the requirement for transfer of ownership is delivery, which is evidenced only by registration in the deeds registry;
- that there is no prior agreement, which may be stronger in law, to grant any rights to other persons relating to disposal of the property;
- that the buildings on the property are built in accordance with municipal approved plans; and
- that on registration of the property in the deeds registry, that vacant and undisturbed occupation and possession, free from encumbrances, will be granted and given to the Buyer.

We generally do not see warranties in the sale of residential properties between "once-off" Buyers and Sellers (i.e. when a primary residence is sold or purchased). Warranties are often negotiated or agreed in commercial transactions (regardless of the nature of the property [residential, agricultural, commercial]).

In terms of our common law, Sellers often include a *voetstoots* clause in the sale agreement. This means that the property is sold as it stands, i.e. with its patent or apparent defects and at the Buyer's risk. The Seller will not be held liable for patents defects but it is advisable to disclose the same upfront. The Seller, however, has a duty to disclose any latent defects (of which the Seller is aware) to the Buyer. The test on whether to disclose a defect to the Buyer or not is to determine whether disclosure of the defect will affect the Buyer's decision to purchase the property or not. If it is likely to affect the Buyer's decision, the Seller should disclose the defect. Sellers can be held liable for failure to disclose a latent defect which he/she was aware of at the time of the sale.

The principle of *caveat emptor*, which translates to "let the buyer beware", places a responsibility on the Buyer to conduct a due diligence of the quality of the goods (property) which he/she seeks to purchase. The Buyer must carry out the necessary inspections to ascertain whether the property will be suited to the purpose for which it is required. The Buyer may not rely on information provided by the Seller to be absolute or to be sufficient to warrant the Buyer's use of the property.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Generally the Seller does not retain any liabilities, unless specifically agreed to in the sale agreement.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Some of the Buyer's legal responsibilities include:

- Obtaining a mortgage bond grant, where third-party financing is required to pay the purchase consideration.
- Paying transfer fees including VAT or transfer duty to the South African Revenue Service.
- Paying any other charges (e.g. due diligence and inspection costs and conveyancer's fees) that may have been agreed upon in the sale agreement.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

Financing of the acquisition of large real estate portfolios or companies holding real estate varies, depending on the value of the transaction and the parties involved. Non-residents may only borrow up to the value of the equity they inject into the property (i.e. half of the value can be financed and half must be equity). The National Credit Act (NCA) protects primarily individual persons who are borrowers against unscrupulous lending practices.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Lenders providing finance usually require security packages consisting of one or more of the following forms of security:

- mortgage bonds over the immovable property;
- suretyship and/or guarantee by a parent company or directors, or even shareholders or trustees;
- notarial bonds (both general and special in nature over movable property such as plant and equipment);
- cession of rental income and any other proceeds derived from the property;
- cession of property insurance; and
- pledge of shares in the property-owning entity.

In addition to security packages, lenders usually require a portion of the acquisition to be equity funded, the percentage varying depending on the nature of the property or the project.

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

A lender cannot enforce a system of summary execution in respect of the repossession of immovable property over which it holds a registered mortgage. The lender will have to obtain a court judgment against the borrower to proceed to a sale in execution of the immovable property. As a result of a mortgage bond in its favour, the lender will, however, not have to first execute against the movables of the borrower, but can apply for an order of special executability against the property and proceed with a sale in execution. Where the NCA applies, the lender will have to comply with any requirements in terms of this legislation in order to execute under the mortgage bond.

### 8.4 What minimum formalities are required for real estate lending?

A mortgage bond is to be registered. It is perfected by registering it in the same deeds registry where the immovable property (over which the bond is granted) is registered. A number of preconditions must be fulfilled before a mortgage bond or real security right can come into existence:

- the parties must have capacity to enter into a legal transaction; and
- the owner of the property must consent to the creation of the real right in property by signing a power of attorney and instructing a conveyancer to register the mortgage bond.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

To reduce risk to the lender, the law has devised a process which offers some protection to the lender, so that he may recover the money he is owed in the event that the borrower does not meet his obligations. Registration of mortgage bonds are done in terms of a ranking system whereby the first bond registered provides the strongest right to that bondholder.

Real security rights give the lender the power to prevent the borrower from disposing of it, as well as a right of preference. Where the borrower is unwilling to repay the principal debt, or is insolvent, the lender may, after the immovable property has been attached and sold in execution, claim the proceeds from that sale on a preferent basis before any other creditor. They confer limited and specific entitlements on their holders and are enforceable against third parties as they are registered in the public deeds registry.

Unless otherwise agreed by the parties, a real security right is indivisible, securing the entire debt and binding the borrower until it is paid. Also, unless otherwise agreed, a real security right secures not only the principal debt but all its "incidents" as well. These may include:

- costs incurred by the lender in preserving the security;
- interest charged by the lender; and
- costs incurred by the lender in enforcing his rights.

Real security rights do not entitle the lender to the use and enjoyment of the property, unless otherwise agreed by the parties.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

The most important legislative provisions are found in the Insolvency Act, 1936. In terms of section 88 (commonly referred to as hardening periods), in general a mortgage bond passed for the purpose of securing the payment of a debt not previously secured, in which debt was incurred more than two months prior to the lodging of the bond with the registrar of deeds, or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt, shall not confer any preference if the estate of the mortgage debtor is sequestrated/liquidated within a period of six months after such lodging. Also, a registered mortgagee (i.e. lender) may run a risk of its bond not being enforceable and even set aside, if the borrower obtained financing for purposes of acquiring a business and the sale of the business was not properly advertised in terms of section 34 of the Insolvency Act. Another instance relates to a mortgagor granting security as a surety/guarantor for the debts of a related company and the necessary *Financial Assistance* provisions of the Companies Act, 2008 (sections 44 and 45) having not been complied with. If a trust does not have capacity to mortgage its property in terms of its trust deed, any mortgage bond registered would be invalid.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

A borrower enjoys the rights afforded to it in terms of the common law and if enforcement is done through the Courts or through Arbitration, the borrower will be a defendant and may then use the rules of Court or Arbitration Rules to defend the action taken against it to the fullest extent.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

In the event that a borrower is declared insolvent, the estate is placed under control of a trustee/liquidator, who is elected on approval of the Master of the High Court. The trustee/liquidator must manage the insolvent estate's affairs as best as possible for the benefit of creditors, in accordance with the provisions of the Insolvency Act. Creditors, who are classified as secured creditors, will have their debts settled prior to any concurrent creditors, save to state that the hierarchy of payment in terms of the Insolvency Act dictates in general terms that, where property is liquidated for the benefit of creditors (i.e. sold and the proceeds are received), the tax authorities and the relevant local municipality are paid even prior to any secured creditors' claims.

Different rules apply in relation to acquiring and disposing transactions, where the agreement was concluded prior to insolvency but registration has not yet occurred. Where an insolvent

entered into a contract to acquire immoveable property prior to insolvency, the trustee/liquidator may elect to uphold or repudiate the transaction by way of written notice within six weeks of being asked to do so by the Seller. If a trustee fails to make an election, the Seller may apply to a court to cancel the contract and to have the property returned. The Seller will be able to prove a concurrent claim for loss or damage suffered, against the estate, as a result of the cancellation of the contract.

An insolvent may not dispose of property which forms part of the insolvent estate, regardless if such sale transaction was signed prior to or after the date of insolvency as the insolvent's affairs are managed by the trustee/liquidator. If the transfer is registered prior to the date of insolvency, then the trustee/liquidator will investigate whether the disposition was for a fair value and may, if directed by creditors, apply to the Court to have the sale and transfer set aside if deemed not for fair value. Shortly after an order of insolvency is granted, a caveat is noted against the insolvent's property at the Deeds Registry. The effect of a caveat is to prevent the insolvent from transferring the property or registering any right over the property.

"Corporate rehabilitation" is more commonly known as *business rescue* in South Africa. In the event that a juristic person is in a position of financial distress, the entity can be placed into business rescue on a voluntary or compulsory basis, the effect of which will be the same. A business rescue practitioner is appointed to run the operations of the entity and to develop a business rescue plan which will alleviate and eventually combat the financial distress of an entity. An entity under business rescue may dispose of property if it is in the ordinary course of the entity's business, if it is a *bona fide* arm's length transaction which the business rescue practitioner has approved or if the transaction forms part of the approved business rescue plan. An entity under business rescue may obtain financing if the loan can be secured by means of an asset of the entity which is not encumbered.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

A shareholder may cede its shares and shareholder claims as security for the due performance of a borrower's secured obligations. This is referred to as a pledge of shares (i.e. *cession in securitatem debiti*). On insolvency or business rescue, the right which has been ceded (i.e. shares and claims) remains part of the borrower's estate. In practice, it is prudent for lenders to include insolvency events as events of default, allowing lenders to exercise their rights prior to such rights falling into the insolvent estate. Such insolvency events include any proceedings to commence business rescue or liquidation proceedings. On the occurrence of such an event, a lender can enforce its security and take over the pledged shares and use the proceeds of realisation of the pledged shares to settle the borrower's outstanding obligations.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Yes. If a Seller is not registered for VAT purposes the Buyer will have to pay transfer duty in addition to the purchase price. The rates for individuals, corporates and trusts are the same, and, with effect from 1 March 2017, changed to apply as follows for the following property values:

| | |
|---|---|
| R0 – R900,000 | 0% |
| R900,001 – R1,250,000 | 3% of the value above R900,000 |
| R1,250,001 – R1,750,000 | R10,500 + 6% of the value above R1,250,000 |
| R1,750,001 – R2,250,000 | R40,500 + 8% of the value above R1,750,000 |
| R2,250,001 – R10,000,000 | R80,500 + 11% of the value above R2,250,000 |
| R10,000,001 and above | R933,000 + 13% of the value above R10,000,000 |

VAT is payable either at the rate of 15% (as of 1 April 2018 the VAT rate increased from 14% to 15%) or, in some instances, 0% (e.g. property is sold as a going concern). In some instances exemptions may apply for example to charitable institutions.

### 9.2 When is the transfer tax paid?

Duty is payable within six months from the date of acquisition (i.e. the signing of the sale agreement). If the transfer duty is not paid within this period, transfer duty penalties will be levied.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Yes. Upon disposing a property, each property owner is liable for CGT unless an exemption applies.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The sale of property attracts either VAT or transfer duty, depending on the VAT status of the Seller. If the Seller is a registered VAT vendor and the sale of the property is a supply subject to VAT, the Seller must pay VAT to SARS on the purchase price; however the liability is usually passed on to the Buyer in terms of the sale agreement. If the consideration is set out in the agreement as "Rx plus VAT" or "excluding VAT", then VAT is added to and calculated on the purchase price. If not, then VAT is deemed to be included in the purchase consideration. The applicable rate of VAT is 15%.

Exemptions may apply in the following scenarios:

- Certain statutory exemptions apply in relation to intra-group transfers between companies/entities, or if the Buyer has the requisite public benefit organisation/institution of learning/charity/religious status.
- The sale of the property may be part of a business being sold as a going concern, which may lead to VAT being levied on the transaction at a zero rate.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

CGT or if the Seller is a non-resident and the value of the sale is more than R2 million, then a compulsory section 35A

Withholding tax applies as provision for the CGT liability. The rates of withholding tax being applied differ for individuals, companies and trusts.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

The Transfer Duty Act was amended to change this and, strictly speaking, the same taxes as aforementioned apply (VAT or transfer duty) unless there are statutory exemptions. CGT rates are different for individuals and entities/trusts.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

If the Buyer of real estate elects to buy shares in a property-owning company as opposed to buying the property, then it is extremely important to do a comprehensive check of ALL the property-owning company's different taxes and tax liabilities. A tax clearance certificate relating to the company's affairs can be obtained from SARS but it is also important to investigate whether a potential CGT liability arises in case the property is disposed of in the future.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

There are various laws which govern the way one does business, particularly when it comes to renting out premises. With the promulgation of the Consumer Protection Act (CPA) there are various rules and requirements which apply to leasing. In a lease agreement, the parties are bound by obligations which include invariable obligations, provisions that the parties have contracted into and residual obligations. The CPA does not necessarily apply to all business premises leases though, as there are thresholds based on the tenant's annual turnover or asset value (currently R2 million).

**10.2 What types of business lease exist?**

Commercial, agricultural (e.g. grazing), industrial and retail leases (short and long term).

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

Leases for a term shorter than nine years and 11 months are usually referred to as short-term leases. Most commercial leases have renewal options included which may extend the lease period to longer than 10 years. Long-term leases that are to be endorsed against the title deeds must be in writing and need to be executed in front of a notary public so that they can be registered in the deeds registry.

Tenants have to contractually negotiate the right to assign the lease or even sub-let the leased premises. Usual provisions state that the tenant can only assign or sub-let with the landlord's prior written consent and on such terms as the parties may agree. Some commercial leases have more strict change of control provisions included.

The Competition Commission authorities generally frown upon exclusivity clauses included in commercial retail leases.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Should the landlord be registered as a vendor in terms of the Value Added Tax Act, 1991, as amended, the tenant shall pay VAT on the monthly rental and on all applicable recoveries payable in terms of the lease.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

If the CPA applies, a tenant does have the right to cancel the lease even though he may have signed an agreement to occupy the premises for a specified fixed period. The tenant can do this without giving any legitimate reason; however, tenants are obliged to give the landlord and/or his agent at least 20 business days' notice and the landlord is empowered to charge a reasonable cancellation penalty. The landlord is fully entitled to recover all reasonable costs and losses incurred through the tenant exercising his right, as per the CPA, to terminate the fixed-term agreement (or lease in this case). In general though, leases terminate based upon the effluxion of time or in case of unremedied default, usually on the part of the tenant.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Yes. The landlord will be absolved as the rights and obligations transfer to the new owner of the property on which the leased premises are located. The tenant's liability may transfer, subject to the consent of the landlord granting permission for the tenant's rights and obligations being transferred to a third party.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Please refer to question 13.1.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

The notion of flexible workspaces is relatively new in South Africa but has gained popularity. There has been an increase in the development of shared or flexible working spaces within central business districts and along nodes between the central business districts. This trend has been on the rise with an increasingly difficult economic climate and the increase in small businesses which require professional workspaces and facilities. Specialist developers in the flexible workspace field have reported rapid growth over relatively short periods of time.

In respect of residential developments, the general trend has been for high-rise and high-density mixed use developments as a measure to alleviate the pressure of urban sprawl. Local municipalities have increasingly been in favour of developments which are of a high-density and mixed-use design which is in line with Urban Development and Spatial Development Frameworks published from time to time in terms of the SPLUMA.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The Rental Housing Act prescribes mandatory provisions relating to leasing of residential properties. The rights of property owners and tenants are also governed by the Prevention of Illegal Eviction and Unlawful Occupation Act (commonly referred to as the PIE Act) which prevents arbitrary and unlawful actions. The common law as adjudicated by the Courts also offers invaluable guidance on what rights and obligations exist between landlord and tenant. It is generally accepted that the CPA also applies to residential leases.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the same principles would apply.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

a) Residential leases are mostly for a year but can be for longer periods; b) if a lease is for multiple years, an annual escalation depending on market conditions is applied upon the anniversary of the lease term; c) tenants who do not vacate at the end of the lease term may be evicted by the landlord using the PIE Act, but most leases have a provision which automatically converts the lease into a month-to-month lease at a higher rental, or a penalty may be applied in addition to the rental payable; and d) it depends on the agreement between the parties what obligations regarding contribution to costs and maintenance and repair exist. Commonly, a tenant pays a fixed monthly amount plus usage and consumption charges in relation to water, gas and electricity and if damage is caused to the leased premises, such amounts may also be recovered from the tenant.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Yes. Breach provisions usually require a landlord to place the recalcitrant tenant on terms to rectify the breach, failing which the landlord may cancel the lease and claim for damages and eviction of the tenant. The steps to be taken are detailed in the PIE Act read with the rules of Court in case the tenant fails to vacate as requested. The landlord also enjoys a statutory hypothec in terms whereof it may attach the tenant's movable property in case of failure to pay rental. The hypothec is usually enforced together with the cancellation, recovering of damages and eviction processes.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Planning in each jurisdiction is currently governed by the local authorities in terms of the local government planning ordinances. In 2013, the SPLUMA was promulgated. This will serve as a guideline legislation that will provide for the enactment and, where necessary, amendment of provincial and local planning legislation to ensure uniformity. From an environmental perspective the National Environmental Management Act, 1998 (NEMA) is extremely important in relation to use of land and liability for rehabilitation. See also question 12.8 below.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Property can only be expropriated in terms of law of general application for a public purpose or in the public interest, subject to compensation being paid on a basis agreed by those affected, or decided or approved by a court (section 25, Constitution 1996). The amount of compensation payable must be just and equitable by reflecting an equitable balance between the public interest and those affected by the expropriation. However, Parliament is undergoing a review of section 25 of the Constitution to determine if, and how, expropriation without compensation should be permitted. Please refer to questions 1.2, 2.1 and 4.2 for further details on the Advisory Panel's recommendations on this subject.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

In almost all instances the local municipal authorities have the relevant jurisdiction but in cases of heritage properties and environmentally sensitive properties, mining properties and/or agricultural properties, various other statutes may apply which will require additional permissions.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Change of land use (or rezoning) approval will require:

- Traffic impact assessments.
- Environmental impact review.
- Consent from adjacent property owners.
- Review of title conditions and other conditions of establishment relating to the broader township.
- Consideration of what servitudes (or example, access and egress) may be required over adjacent properties.
- Filing of a proposed site development plan.
- Building plan approval in accordance with the relevant local authority process and national building guidelines.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

In almost all instances of commercial development, rezoning applications will have to be made to ensure that the desired density and bulk is allocated to the property from a services and infrastructure perspective.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The price can vary depending on the development. The timeframe also varies depending on the various departments involved.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The South African Heritage Resources Agency (SAHRA) is the national administrative body responsible for the protection of South Africa's cultural heritage. According to South African legislation, historical and cultural resources fall within the scope of the natural environment for the purposes of environmental law. The National Heritage Resources Act, No 25 of 1999 makes provision for the protection of heritage objects. SAHRA is the custodian of the country's heritage resources which form part of the national estate. Some heritage objects are located in public institutions and others are privately owned. Declaration of a specifically declared heritage object does not change its ownership status.

Development and change of land use are restricted on properties declared as heritage resources. Heritage resources may undergo necessary internal and/or structural changes; however, the façade of the building has to be retained. Land use is restricted by the requirement to maintain the building regarded as a heritage resource.

Legislation, in this regard, has been promulgated at a national level. Each municipality may, at its discretion and with the approval of the provincial heritage resource authority, make by laws relating to the protection of heritage resources. This can include: public admission into heritage buildings/areas; regulation of the use of a heritage resource; protection of a heritage resource; and the provision for incentives to protect heritage resources. Municipalities may impose fines on any person who contravenes the laws relating to the protection of heritage resources.

**12.8 How can, e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

The National Environmental Management: Waste Act, 59 of 2008 (NEMWA) came into operation in July 2009. NEMWA (section 40(1)) provides that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or the MEC and complying with any conditions that are specified by them. These provisions have direct consequences for alienation of land that may be contaminated, including potentially impacting on the right of freedom to contract for the purchase and sale of the land. In the event of non-compliance with the obligation to provide information on contaminated land in the event of transfer of such land, the same penalty provisions as are applicable to non-compliance with section 36(5), discussed above, will apply.

Owners of potentially contaminated land or persons undertaking activities that have the potential to contaminate land are advised to take note of the operation of the Contaminated Land Provisions, particularly the issues discussed above.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

The general principle applicable is "polluter pays" and any transgression of the environmental legislation and local municipal bylaws require the owner of the property to attend to the environmental remediation. If the current owner was not the polluter, the legislation nonetheless holds the owner liable, who in turn may have a claim against prior owners who were liable for the pollution.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The Department of Energy is currently embarking on or developing an EE Target Monitoring System through the Energy Efficiency Monitoring and Implementation Project, which is done jointly with the South African Local Government Association (SALGA). This project is supported through a collaboration between the Department of Energy and the Swiss Agency for Development and Cooperation (SDC). The purpose is to introduce and institutionalise an Energy Efficiency Target Monitoring System for measuring and reporting of the achievement of the sectoral targets set out in the National Energy Efficiency Strategy. In addition, the Minister of Public Works launched the National Green Building Framework in December 2011, which also has elements of energy efficiency in buildings. The National Building regulations are also being amended to include mandatory energy efficiency standards for new buildings to support the improvement of energy efficiency buildings.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Various initiatives, in accordance with international treaties and

cooperation agreements, have been initiated and, post-COP21, we expect these objectives to be translated into firmer legislative measures over the next few years, with real sanctions for transgressors.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

There are no formal targets yet to reduce greenhouse gas emissions from buildings in South Africa. The Green Building Council of South Africa is a full member of the World Green Building Council and issues GreenStar ratings in respect of building projects. There are limited legislative requirements at this stage contained in local authorities' by laws.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Increasing awareness is prevalent in the development of commercial properties. Tenants, especially global entities, seek to commit developers to more environmentally sustainable building practices and, in some instances, even insist on including penalty clauses in development lease agreements if the developer does not meet a required standard. Johannesburg recently hosted the C40 Cities Summit, which targets climate change and plans to mitigate the impact on communities.

**Pieter Niehaus** is a real estate lawyer and head of the South African real estate practice. He specialises in all property-related matters including, amongst others, providing town planning advice, attending to the full spectrum of conveyancing services, property financing (commercial and residential) and general notarial work, with specific reference to notarial bonds, all types of leases, and servitudes.
Pieter presently advises and assists all the major commercial and private banks and some foreign financial institutions in relation to financing and security arrangements, and also provides property advice to a wide range of clients including renewable energy, mining, professional services firms, student accommodation developers, property developers and, from time to time, also acts on behalf of the local authority in a variety of property-related matters.
In 2015 and 2016 *The Legal 500 Europe, Middle East & Africa* edition recommended Pieter as a lawyer in the field of real estate law.

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**Chloë Merrington** is a real estate lawyer based in Cape Town. She focuses on property developments, property finance, renewable energy, conveyancing and various property-related matters and transactions.
Chloë has extensive experience in residential, commercial and mixed-use developments (sectional title and conventional properties) including drafting of the underlying property acquisition agreements, drafting the development sale agreements to end-purchasers, project management of the conveyancing processes and registration in the relevant Deeds Office. Chloë works closely with financial institutions in respect of development and end-user finance, undertaking pre-sale audits, miscellaneous small- and large-scale loans, and the registration of the underlying mortgage bonds as security for these loans.
Chloë has worked on numerous renewable energy projects in the South African REIPPP programme. Her skills include due diligence and land risk assessment, drafting and registering notarial deeds securing real rights in land such as long-term leases, electrical and access servitudes (Eskom and private), waivers of preference and restrictions on free alienation of the land.
Chloë has experience with servitudes, notarial ties, consolidations and subdivisions of properties. Her practice involves property due diligences, which include research into current and historical title deed conditions, providing opinions on permitted uses of land and reviewing real and personal rights in immovable property.

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# Spain

Hogan Lovells

Emilio Gómez Delgado

## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main applicable real estate legislation is:

- The Constitution 1978, which states the right to a private property and the right of any individual to access a respectable dwelling.
- The Civil Code 1889, which states general principles for contracts, and regulates leases and other general real estate issues.
- The Mortgages Act 1946 (*Ley Hipotecaria*), which regulates the registration of real estate with the Land Registry.
- The Cadastral Act 1/2004 (*Ley del Catastro*), which regulates the registration of real estate with the Cadastre.
- The Consolidated Text of the Land Act 8/2007 (*Ley del Suelo*), which states the economic and environmental principles for the relationship between individuals and the administration relating to:
  - land titles;
  - the economic valuation of land; and
  - building rights or obligations for land owners.
- This Consolidated Text of the Land Act incorporates and adapts Act 8/2013, of 26 June, of building refurbishment, regeneration and urban renovation.
- The Condominium Act 1960 (*Ley de Propiedad Horizontal*), which regulates properties divided into condominiums for separate and independent use and profitability.
- Planning laws of each autonomous community. The 17 different Spanish regions each have authority to regulate planning in their jurisdictions.
- The Construction Act 38/1999 (*Ley de Ordenación de la Edificación*), which regulates construction and the protection of the environment.
- Technical Construction Code (*Código Técnico de la Edificación*), which complements the Construction Act and deals with improving energy efficiency in buildings.
- Act on Urban Leases 29/1994 (*Ley de Arrendamientos Urbanos*) (LAU), which regulates leases in urban properties for dwelling and commercial uses.
- Act on Rural Leases 49/2003 (*Ley de Arrendamientos Rústicos*), which regulates leases in non-urban properties.
- Government Housing Plan, which regulates government-supported houses for low-income families and individuals.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Common law has no impact whatsoever on Spanish real estate.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Only EU legislation is relevant to real estate in Spain. International law is not relevant since real estate in Spain is regulated by local law.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are no restrictions on foreign investors' ownership or occupation of real estate.

Foreign investment and exit from Spanish real estate (when it exceeds EUR 3,005,060.52) or in Spanish companies must be declared to the Bank of Spain (*Banco de España*) for statistical purposes. Investments from tax havens must be declared in advance, unless the investment is less than 50% of the share capital of the Spanish company.

In Spain, all entities and individuals appearing before a notary public in order to formalise title transfer must have a foreign identification number (*Número de Identificación de Extranjero*) (NIE):

- Foreign individuals and entities investing in real estate in Spain.
- Foreign individuals acting as representatives of the transaction parties.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

Generally, real estate can be held by:

- Freehold, under:
  i. full ownership;
  ii. joint co-ownership; or
  iii. a timeshare.
- Leasehold, under:
  i. a lease;
  ii. usufruct;
  iii. a public concession contract; or
  iv. a building lease.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

The general principle is that real estate is indivisible (section 334, Civil Code) and comprises:
- land;
- buildings; and
- everything attached to land or buildings.

Land and buildings located on such land are registered together on the same title in the competent land registry (*registro de la propiedad*) (Mortgage Act).

A description of land and relevant buildings is also registered with the Cadastre, a different registry under the control of the Ministry of Treasury, which aims to provide a base for property tax assessment.

The way to split both the right over the land and the right over the construction erected thereon is the building lease (*derecho de superficie*).

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

There is no split between legal title and beneficial title but the purchaser may declare that the acquisition of the property is for the benefit of a third party (as a fiduciary). In any case the registered owner, *vis-à-vis* third parties, is the entity acquiring legal title.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

Title to real estate is evidenced by the corresponding public deed of sale and purchase. Registration at the land registry is not compulsory. However, when registered, title is enforceable against *bona fide* third parties with a potential interest in the real estate.

Land registries are managed by the Registrars Bar, an administrative body controlled by the Ministry of Justice (*Ministerio de Justicia*).

### 4.2 Is there a state guarantee of title? What does it guarantee?

There is no state guarantee of title. Title insurance is not commonly used because the legal system fully protects a third party acquiring title from the registered owner.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

Under Spanish law, a mortgage and a building lease are compulsorily registrable and registration is required for the validity and existence of these rights.

### 4.4 What rights in land are not required to be registered?

As mentioned in question 4.1 above, land registration is not compulsory; however, if not registered, any right or obligation over land will only remain valid and with full effects among the parties.

### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

First registration is the same for all types of unregistered land. The applicant must provide a detailed description of the property, including:
- A description of the property and its nature.
- The property's boundaries.
- The ownership title and a chain of registration of title.
- Any charges and encumbrances.
- The date of the registration of title, charges and encumbrances.

Owners of adjoining properties and third parties with a potential interest have a trial period to challenge registration or details of such registration within two years (*section 207, Mortgages Act*).

### 4.6 On a land sale, when is title (or ownership) transferred to the buyer?

**Registration**

Transfer of title is formalised in a public deed of sale and purchase before a notary public. After that, the buyer can register the title with the corresponding land registry to protect the title against third parties.

However, if there is a right of first refusal through an option to purchase, the beneficiary of the option can register his option with the land registry before executing the transaction, to protect his right to acquire the property against other potential buyers.

**When title transfers**

Title transfers on delivery of the real estate to the buyer; this normally occurs (unless agreed otherwise) when a notarial deed is signed (see above, Registration).

### 4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Registered rights will prevail over other rights based on priority in applying for registration to the competent land registry.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

The Spanish territory is divided into land districts which are each assigned to a Land Registry. All land districts are governed by the same rules and are subject to the same requirements.

**5.2 How do the owners of registered real estate prove their title?**

Owners can prove title showing original title deeds together with updated online excerpts from the competent Land Registry.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

No. All transactions relating to real estate will have to be completed in writing, by means of a public deed. Immediately afterwards, the notary is obliged to notify the land registry electronically in order to get priority of registration, but this must be confirmed by delivering the original title deed for registration.

Information on ownership can be easily accessed electronically. The competent land registry issues an online excerpt with all relevant facts of the property (titleholder, third party rights and description of the property).

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, it is feasible to claim compensation from a land registrar who makes mistakes during the registration process. The registrars will be legally liable for all damages and costs they have caused.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Registered information can be accessed by parties with a lawful interest in finding out the status of a property and its registered rights. If requested, the information may be translated into English and presented in a double column format, with all information in Spanish listed alongside its translated counterpart.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

This really depends on the complexity of the transaction. Buyers and sellers are usually advised by real estate consultants (one advisor per party) and the seller's advisor acts as broker of the deal. Technical advisors for the due diligence of the property are also commonly used. Legal advisors provide legal support at all stages of the process and take care of drafting the legal documentation (preliminary contracts, SPA, deed of sale and purchase). Parties appoint a Notary Public for the execution of the deed of sale and purchase. Common practice is that the party assuming notarial costs decides on the appointed Notary Public.

**6.2 How and on what basis are these persons remunerated?**

Each party bears the costs of its own transaction advisors. These remunerations are freely negotiated with the service providers and may be determined as a percentage of the purchase price or a fixed remuneration. The Spanish Civil Code establishes the general rule that the notary fees are borne by the seller and registry fees are borne by the purchaser, but this rule may be changed by the parties.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Foreign equity has driven the recovery of the Spanish property market; initially the opportunistic international funds put their shoes in the country in 2013, but now the bulk of the investment is driven by Spanish REITs (SOCIMIs) and added-value funds.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Tourism is a key sector in Spain and, as a consequence, the activity in the hotel and leisure industry in secondary areas is really high. Investment in the Canary Islands and Mallorca remains quite active, similar to the South Coast (Malaga area).

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Nowadays in Spain, all sub sectors are increasing the levels of activity exponentially. A slowing-down trend has only been seen in some regions like Cataluña due to the political instability of the region in the second half of 2017.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

**Marketing**

Major property companies and institutional investors usually engage a major consultancy investment firm to:

- Conduct the sales process.
- Organise the marketing materials.
- Lead marketing actions.

Medium-sized companies prefer to conduct the marketing process themselves.

**Commercial negotiation**

Negotiations usually occur between representatives from both of the parties, supervised by lawyers and real estate advisers. In some circumstances, negotiations are directly executed between the parties' lawyers and advisers.

**Pre-contractual arrangements**

Arrangements are usually related to:

- Confidentiality.
- Non-disclosure.
- Temporary exclusivity for:
  - due diligence; and
  - making offers (initial offers and subsequent binding offers).

Pre-contractual arrangements are fully binding on both parties.

**Sale contract**

A private sale and purchase contract, exchanged between the parties, contains the transactions terms and conditions, including:

- Any conditions precedent.
- The timing for closing.
- The conditions for closing.
- The object of the sale (that is the real estate) and the purchase price.

The contract is usually executed once the parties agree the terms and conditions and satisfactory due diligence has taken place.

**When legally binding**

Parties are legally bound as soon as they agree (section 1450, Civil Code):

- The object of the sale.
- The price.

This applies even if other ancillary elements are not yet fully agreed.

In addition, parties can be legally bound by other pre-contractual arrangements, which are usually agreed through a letter of intent. Such arrangements can include:

- Confidentiality.
- A prohibition on disclosing know-how information.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller must act in good faith without concealing any information that, if known by the buyer, would prevent the buyer from completing the transaction. The Civil Code allows legal actions against a seller for title defects and buyers also have access to public registries (land registry and cadastral office).

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes; the terms of this liability are mutually agreed among the parties.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Real estate warranties vary depending on the transaction. However, the warranties most frequently given by the seller relate to:

- Tenancy status and validity of the main conditions of the lease.
- The non-existence of charges and encumbrances other than those registered at the land registry.
- Compliance with applicable planning rules.
- Having lawful power of attorney to enter into the sale and purchase agreement.
- The validity of insurance policies.
- The absence of legal disputes or court proceedings affecting the real estate.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

This depends on the undertakings assumed in the transfer deed. The Civil Code provides for title eviction and liability for hidden defects during a short period of time after closing, but this purchaser's right can be waived in the transfer deed. A seller also has statutory liability for structural defects for 10 years if he was the developer of the property.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer is only responsible for paying the purchase price and applicable taxes.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The Spanish Mortgages Act is the relevant Act setting out the requirements to secure a loan via real estate properties.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

(a) **Security package**. A security package for a real estate loan will usually comprise:

- a mortgage over the asset;
- a charge over receivable rents;
- a charge over all bank accounts into which all rents must be paid; and
- a charge over all relevant contracts including leases, insurance policies and construction guarantees.

(b) **Corporate guarantees**. Corporate guarantees are sometimes demanded by lenders if the borrower is using SPVs.
(c) **Insurance coverage**. Lenders will require the borrowers to take out appropriate buildings insurance.
(d) **Covenants**. The loan documentation will also contain both financial covenants (loan to value, debt service cover) and non-financial covenants (obligations to maintain the asset in good state of repair or disposal limitations) to be granted by the borrower in order to ensure that the value of the asset is maintained.

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

In Spain, the lender with a secured loan needs to start a foreclosure proceeding, where the main step is the public auction of the asset. There are two types of proceedings: (i) judicial proceeding, to be followed before Spanish courts; and (ii) extrajudicial proceedings, to be followed before a Notary Public. This extrajudicial proceeding may only be followed if agreed upon by the parties.

The ECJ judgment of 14 March 2013 (C-415/11) ruled that certain provisions of Spanish law do not comply with the Unfair Terms in Consumer Contracts Directive 93/13/EC. As a result of the judgment, enforcement of mortgages against consumer borrowers will be more difficult.

### 8.4 What minimum formalities are required for real estate lending?

A mortgage over real estate is granted in a public deed and is only valid when registered with the Land Registry.

A pledge over income arising from lease tenants is usually notarised, but notarisation is not mandatory. However, it is advisable to notify the tenants of the pledge.

In share deals, it is common to grant a pledge over the shares of the SPV acquired by the buyer; this must be granted before a notary public.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The protection of a real estate lender depends on the priority of the ranking of the secured loans, and this priority is subject to the registration principle, unless mutually agreed between the borrower and the lender.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Spanish courts are ruling that the enforcement of a guarantee is not valid unless a material condition of the loan agreement is breached by the borrower.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Remediation of the breach during the enforcement proceeding.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The debtor is protected against potential enforcement of guarantees by real estate lenders. On the other hand, lenders with mortgages granted over real estate properties have a privileged status compared with other non-guaranteed lenders in insolvency proceedings.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Assuming the debtor is solvent, an event of default must take place for the lender to enforce a security over shares. In general, the lender is entitled to initiate three courses of action for the enforcement of the security: (i) declaratory proceedings; (ii) executive proceedings; and (iii) notarial proceedings. In declaratory and executive proceedings, the sale is supervised by a court. In notarial proceedings, the sale is supervised by a Spanish notary public and, if after two auctions no one is willing to purchase the relevant asset, the lender can acquire control of the pledged asset, provided it accepts the debtor's full discharge.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Stamp duty and transfer tax (*Impuesto sobre Transmisiones Patrimoniales*) are different forms of the same tax.

Stamp duty is paid when the transaction is formalised in a notarial, corporate or administrative document. The rates are defined by each regional government (commonly 1% of the real estate value).

Transfer tax is payable when the sale or purchase of real estate is exempt from VAT. Rates for transfer tax are also set by each regional government, with a general rate of 7%, except for Canarias which has a general rate of 6.5%.

The buyer pays stamp duty and transfer tax.

### 9.2 When is the transfer tax paid?

Transfer tax is payable when the sale or purchase of real estate is exempt from VAT. Rates for transfer tax are also set by each regional government, with a general rate of 7%, except for Canarias which has a general rate of 6.5%.

The buyer pays transfer tax.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Yes, for the difference between the sale value and the original acquisition value (including all costs).

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Generally, VAT is payable for all sales or purchases of real estate

when the transaction takes place in the framework of a business activity.

The seller charges VAT to the buyer and the seller then pays the VAT to the tax authorities.

The general rate of VAT is 21%. However, a reduced rate of:

- 10% applies to residential buildings.
- 4% applies to government-subsidised dwellings (*viviendas de protección oficial*).

There are exemptions when the transaction relates to the:

- sale or purchase of rural land;
- delivery of plots of land to a compensation committee (*Junta de Compensación*) to develop the land; or
- second or subsequent sales or purchases of real estate.

The abovementioned transactions are subject to transfer tax. However, the seller can waive the exemption, provided both of the following apply:

- the buyer acquires the real estate as part of its business activity, for example, if it is a VAT taxable person; and
- the buyer is entitled to a total reduction of the charged VAT.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

The seller is responsible for paying a municipal duty (the municipal increase of the cadastral value of the property).

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

This has to be analysed on a case-by-case basis. In principle, due to reform, in cases where the object of the transfer is the shares of the company owning the property, the transfer is free of VAT and transfer tax if the underlying real property asset is connected to a business activity (e.g. lease activity), unless the tax authorities can prove that the sale has been implemented as a share deal, the only purpose of which was to avoid transfer tax.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

In case of share deal, latent capital gains of the SPV to be acquired and latent tax liabilities are the key area of concern for a buyer. In the event of asset deal, the relevant areas of concern are related to potential application of real estate transfer tax (RETT) instead of VAT and tax liens and the assessment of potential contingencies arising thereto.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The LAU regulates leases in urban properties for dwelling and commercial uses.

**10.2 What types of business lease exist?**

The LAU does not distinguish the legal regime applicable to different types of business leases if the object of the lease is only the real estate property. If the lease includes an industrial or a business activity, then the LAU does not apply, but a different regime governed by the Spanish Civil Code does.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

The term of a non-residential lease can be freely agreed by the parties. An initial term of between two and five years is commonly used, with extensions depending on the nature of the lease.

In non-residential leases, unless agreed otherwise, the tenant can sublet the premises or assign the lease without the landlord's approval. It is sufficient to give notice to the landlord of the subletting or the assignment. However, the landlord is then entitled to increase the rent by 10% to 20%.

Unless agreed otherwise, business premises can be shared by the tenant with companies belonging to its group by a subletting agreement.

In most non-residential leases, the parties agree that the landlord is responsible for structural and major repairs, and the tenant carries out internal repairs and maintenance as well as interior decoration. The LAU for residential leases otherwise applies to non-residential leases.

The landlord insures the premises but usually recovers premiums from the tenant as part of the ancillary costs under the lease.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

There are two taxes relevant to the occupation of business premises:

- **Property Tax (*Impuesto sobre Bienes Inmuebles*)**. This taxes the ownership of Spanish real estate. This tax is calculated in accordance with the cadastral value. It is common to charge the tax to the tenant if the property is leased.
- **Tax on Economic Activities (*Impuesto sobre Actividades Económicas*)**. This taxes the economic activity of companies with a gross business income of more than EUR 1 million. Non-resident companies operating in Spain through a permanent establishment and with a gross business income of up to EUR 1 million are exempt.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

**Landlord**

Landlords can terminate leases early (both non-residential and residential) on the following grounds (unless agreed otherwise):

- Breach of contract by the tenant.
- Lack of payment of the rent or service charge.
- Carrying out activities which are:
  - aggravating;
  - unhealthy;

- harmful;
- dangerous; or
- illegal.

The landlord has the following additional grounds for terminating the lease early in residential leases:

- Lack of payment of statutory deposit.
- Subletting or assignment without the landlord's prior consent.
- Voluntarily causing damage to the premises.
- Carrying out non-authorised works.
- The dwelling no longer being allocated for residential use.

**Tenant**

Under the LAU, the grounds for early termination by the tenant are:

- The landlord's execution of improvement works in the leased premises (subject to certain conditions).
- Execution of conservation works or works imposed by the competent authority, provided these works prevent the tenant from using the leased premises.
- Breach of contract by the landlord.

In addition, in non-residential leases, any grounds for early termination agreed in the lease are enforceable by the tenant.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Yes, unless mutually agreed by the parties in a different way.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

The main "green obligation" lies with the landlord, since he is obliged to provide an energy efficiency certificate to the tenant before signing the lease contract.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Co-working spaces are becoming more visible in CBD areas in the cities of Madrid and Barcelona. In the residential sector, co-living is not having a significant presence but touristic apartments are a clear product for development, despite the efforts implemented by regional government to restrict or even prohibit these activities in city centres.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The LAU provides for the main regulation for residential premises. Touristic activities are governed by Regional governments and some regions have enacted their own rules for this activity.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

Not for rental activities, but in some regions the touristic regulations impose different requirements in case the residential property is totally or partially devoted to touristic apartments.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

The length of term is freely agreed by the parties but if this is less than three years the tenant has the statutory right to extend the lease on an annual basis up to three years. Rent increases are linked to the CPI variation (upwards/downwards). There is no right for the tenant to remain in the premises at the end of the term, but the Spanish Civil Code states that if the landlord consents the tenant to retain possession of the property for more than 15 days after expiration, then the lease is extended for an additional term of one year. Landlord's insurance is not normally charged to the tenant under the lease of a residential property.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

In Spain, the legal system is protective of the tenant in case of dispute so the eviction proceedings take a long time. In addition, tenants have faculties to stop the eviction during the proceedings if the breach of contract is remedied. In turn, the Spanish law allows the landlord to immediately recover possession of the residential property in case the landlord or relatives must use the property as their own residence.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

Regional governments in Spain are responsible for town and country planning in its designated territory. Consequently, there are 17 different planning law systems in Spain. However, these systems are inspired by the same planning law system which was in force before the Constitution. Therefore, the systems have common institutions and regulations.

Regional government legislation is generally confirmed by the corresponding regional Planning Act (*Ley Urbanística*) and regional Planning Decree (*Decreto Urbanístico*), which complements the

Planning Act. They are passed by the corresponding regional parliament and regional government, respectively.

Parliament and the government have legislative and executive powers for other planning matters, such as:

- Land valuation.
- Compulsory purchase.
- Protection of coasts and rivers.
- Road legislation.

The city councils are the most important authorities concerning town planning and are responsible for the following:

- Initiation and processing of the basic planning regulations (*planeamiento urbanístico general*), which are subsequently approved by the competent regional governments.
- City design and development.
- Classification of the land (*clasificación urbanística*) into:
  - urban land (*suelo urbano*);
  - land fit for urban development (*suelo urbanizable*); and
  - land protected from urban development (*suelo no urbanizable*).
- Defining the permitted uses and construction parameters in each of the types of land.
- Granting authorisations of constructions and uses.
- Inspections.
- Sanctioning and expropriation.
- Approving supplementary planning regulation (*planeamiento urbanístico de desarrollo*).

## 12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.

Yes; landowners can be forced to sell land which is included in a planning sector and is due to be developed with the backing of the majority of the landowners of such sector.

Such landowner is compensated with the corresponding indemnity. The land is valued in accordance with the valuation methods established by law. It must be taken into account that in most cases, valuation will not be coincident with the fair market value of the land at that time; such valuation, however, can be challenged by the landowner in court.

## 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

**Initial consents**

In most cases, the city council grants initial and final planning licences.

**Third party rights**

Third parties do not always have the right to object. This depends on the corresponding regional government. Regional planning legislation generally sets out public information about administrative procedures to grant licences if third parties are affected by the city council's final decision (for example, an activity licence application to carry out industrial activities in a residential area).

In these circumstances, before the city council's final approval, the application form is published in official gazettes, and the procedure enters a public information stage for about one month, during which any party can:

- study the relevant documentation in the municipal offices; and
- address written pleadings to the city council to enforce their own rights and interests concerning the licence.

**Public inquiries**

The approval of basic planning regulation is always subject to public information, and, in some cases, the granting of licences is subject to public consultation.

**Initial decision**

Depending on the regional planning legislation and the works or activities to be authorised, it takes between one and six months to obtain approval. The city councils must decide and notify the parties within this time.

If the maximum term expires and the city council has not notified its decision, the licence is generally deemed to have been granted by positive administrative silence (*silencio administrativo positivo*).

**Appeals**

There is a right of appeal against a planning decision. Any party can make a judicial appeal in court (*recurso contencioso-administrativo*) against a public authority decision concerning planning or environmental issues provided the following conditions are met:

- The decision to be appealed must be final, that is, the administrative procedure for adopting the decision must be concluded, including any appeals to public authorities.
- The judicial appeal must be lodged at the competent court within two months from the date of notification or the date of publication of the decision in the Official Gazette.

## 12.4 What main permits or licences are required for building works and/or the use of real estate?

The following are subject to authorisations, or licences (*licencias*), from the city council:

- Works.
- Constructions.
- Divisions of plots.
- Carrying out any activities.

**Environmental licences for carrying out activities**

- **Activity licence (*licencia de actividad*)**. The developer applies to the city council for this licence. The licence authorises the activity for which the developed property will be used (for example, activities carried out by a hotel, factory or a car park). The city council grants an activity licence provided the activity requested by the developer complies with environmental regulations.
- **Opening licence (*licencia de apertura*)**. Once the installation of fit-out works has been duly completed to allow the authorised activities to be performed, municipal technicians inspect the property to assess that the fit-out works comply with the activity licence. If they do, the opening licence is granted.

**Planning licences for carrying out works**

- **Works licence (*licencia de obras*)**. The developer must apply to the city council for the works licence before the works begin, after the activity licence has been granted. The city council grants the works licence if the construction complies with the urban parameters in the planning regulations.
- **Occupancy licence (*licencia de primera ocupación/funcionamiento*)**. Once the construction works have been duly completed, city council technicians inspect the

property to assess that the works comply with the works licence. If they are satisfied, the occupancy licence is granted.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

See the answer to question 12.4.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The fees for obtaining the relevant permits are defined locally by municipal authorities.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The Spanish government enacted Law 16/1985 of 25 June to protect Spanish Historical Heritage. Regional governments have also implemented their own regulations for local historical heritage not protected by Spanish national regulations.

In addition, town master plans may establish different levels of protection in case demolition, change of uses, refurbishment or fitting-out works of an existing building.

**12.8 How can, e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

The land registry provides for relevant information if a piece of land has been declared as contaminated land by environmental authorities, or in the event there is an ongoing investigation. In addition, the Ministry of Environment has created a public registry of contaminated land.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Environmental clean-up is always mandatory as from the declaration of contamination by the environmental authorities until the remediation is complete.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

In Spain, the following regulations have been enacted to transpose Directive 2002/91/EU of the European Parliament and Council of 16 December 2002:

- The new Building Technical Code, approved by virtue of Royal Decree 314/2006, which envisages specific measures on energy efficiency and integration of renewable energies.
- The Regulation on Thermic Systems in Buildings, approved by virtue of Royal Decree 1027/2009.
- The Regulation of the Energy Efficiency in External Lightning, approved by virtue of Royal Decree 1890/2008.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Spain, as part of the EU, is on track to meet its targets for cutting greenhouse gas emissions both under its own internal target in the Europe 2020 Strategy and under the Kyoto Protocol's second commitment period (2013–2020). For 2020, the EU has made a unilateral commitment to reduce overall greenhouse gas emissions from its 28 Member States (including Spain) by 20% compared to 1990 levels which is one of the headline targets of the EU 2020 strategy.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Spain's goal, in relation to the reduction of gas emissions, consists of compliance with the Kyoto Protocol and the objectives established by the EU.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The most relevant measure is Royal Decree 235/2013, which transposed Directive 2010/31/EU, regarding energy efficiency in buildings, which has an impact on real estate transactions and leases.

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- Real Estate.
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- Master in Planning Law, IE Business School (Madrid) 2002.
- Business Degree, University Pontificia Comillas (Madrid) 1999.
- Law Degree, University Pontificia Comillas (Madrid) 1998.

**Memberships:**

- Madrid Bar Association.
- LAI, honorary society on land economics (www.lai.org).
- ULI (www.uli.org).

**Publications:**

- *The rebellion of the Spanish real estate market facing challeging court decisions" – Inmobiliario Mes a Mes*, March 2017.
- *"Omni-channel retailers and lease contracts: A New Era" – Inmobiliario Mes a Mes*, November 2016.
- *"The SOCIMIs in the new wave. A practical approach to foreign investors" – Inmobiliario Mes a Mes*, March 2016.
- *"Europe's lawmakers grapple with a fragile recovery" – EuroProperty*, March 2010.
- *"Aspectos prácticos clave de la Ley de SOCIMI" – Observatorio Inmobiliario*, December 2009.
- *"REITs: Spain's late arrival" – Property Week*, October 2009.
- *"Spain relief" – Property Week*, July 2008.
- Co-author, *Manual de promoción inmobiliaria* (Real Estate development) – *Editorial Wolters Kluvert*, March 2008.

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The global real estate group is renowned for first-class legal skills and market knowledge. An integrated, cross-border group, we bring client-focused innovation to bear in pioneering new deal structures and in delivering legal services.

The Madrid real estate team, led by partner Emilio Gómez, has broad experience in real estate transactions related to the acquisition, management and leasing of business parks and offices, shopping centres and industrial premises. The team advises property developers, investment funds and property companies in real estate transactions, construction contracts and planning developments. It also advises real estate companies in their investments in Continental Europe, UK, Arab Emirates and Asia.

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# Switzerland


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Switzerland is a civil law country. Real estate is mainly governed by written laws on a federal level, such as the Swiss Civil Code, the Swiss Code of Obligations, the Act on the Acquisition of Real Estate by Persons Abroad (the so-called Lex Koller), the Debt Enforcement and Bankruptcy Act and the Ordinance on the Land Register.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

As mentioned above, Switzerland is a civil law country. Hence, there is, in principle, no common law in Switzerland. Nevertheless, there is case law which offers guidance on the interpretation of written laws. In particular, such case law has an impact in the field of landlord-tenant law, where a lot of cases are produced, in particular in the Western (French-speaking) part of Switzerland.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws do not play an important role with respect to real estate in Switzerland. The Agreement on the Free Movement of Persons, however, has an impact on the Lex Koller mentioned above.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

The Lex Koller (see the answers to questions 1.1 and 1.3 above) restricts the acquisition of Swiss residential and other non-commercial real estate by foreign (i.e. non-Swiss) persons while the acquisition of business premises is, as a rule, unrestricted under the Lex Koller. In recent years, it has been debated whether the Lex Koller should be abolished altogether on the one hand, or made even stricter on the other. Swiss Parliament decided to maintain the Lex Koller since it is widely recognised that the Lex Koller is the only effective measure to reduce the demand for Swiss residential properties and thus to reduce the risk of "over-heating" residential real estate markets.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The most important types of rights over land are ownership, co-ownership (in particular, in the form of the condominium-principled co-ownership), building rights and usufructuary rights on the one hand. On the other hand, lease contracts play a major role, with both residential and commercial properties. The latter are purely contractual between the parties unless they are annotated in the land register.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Yes, in the case of a building right, the right to real estate diverges from the right to a building constructed thereon. In such a scenario, there are two owners: one that owns the soil; and the other that owns the building built thereon.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Beneficial ownership cannot be based on property law provisions, because Swiss law does not know a legal principle comparable to the common law concept of trust (even if trusts under foreign law are, under certain conditions, recognised under Swiss law – in the case of assets under a trust established abroad that are entered in the name of the trustees in the land register in Switzerland, reference shall be made to the trust relationship by means of an annotation; a trust relationship that is not annotated in the land register in such a way may be considered invalid against *bona fide* third parties). Any beneficial ownership is therefore of a purely contractual nature under Swiss law, which means, in particular, that the right of the beneficiary

is not based on an *in rem* title to the property, but only on a contractual claim against the holder of the property rights. If that holder disposes of the property in violation of the contractual provisions, the beneficiary is limited to a claim for damages. Although a purchase of property on a fiduciary basis is considered to be valid, such fiduciary purchase is void where the parties intended to circumvent legal provisions; this may especially be the case if a non-resident foreigner or a company with a registered office abroad, respectively, intends to acquire a Swiss property in breach of the Lex Koller without disposing of the necessary permit (see question 2.1 above). A common method of acquiring a beneficial interest in land is by purchasing shares or the majority of shares in a real estate company; the ownership of the property in an economical sense is transferred simply by conveying the shares of the company owning the property. However, also in such a case the restrictions of the Lex Koller apply. See question 2.1 above regarding the failed attempt to amend Lex Koller.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

In principle, all privately-owned land is registered in the land register. However, no rights of private ownership apply to public waters or to land not suitable for cultivation, such as rocks and scree, fern and glaciers, or springs rising therefrom, unless proof to the contrary is produced. Immovable property which is not privately owned and is in public use will be recorded in the land register only if rights *in rem* attaching to such property are to be registered or if cantonal law provides for its registration.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no explicit state guarantee of title. However, the land register is assumed to be complete and correct and everyone may, in good faith, rely on it. Therefore, the state (i.e. the respective canton) is liable for any losses arising from the undue maintenance of the land register.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

All acquisition of land ownership must be recorded in the land register. The consequence of non-registration is that the title remains with the seller – hence, the respective transaction is not yet closed. In addition, all rights relating to the property and relevant to everyone (not just to a contractual party) must be registered in the land register.

**4.4 What rights in land are not required to be registered?**

Emption rights, pre-emption rights, repurchase rights and lease agreements, for example, are rights in land that are not required to be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

No, there is no such probationary period following first registration under Swiss law.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Transfer of title occurs upon the respective entry into the "journal" of the land register, provided, however, that the application is later registered in the "main register" of the land register.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Except for mortgages, which have an assigned rank among each other, irrespective of the time of registration, registered rights obtain priority over other rights in accordance with the "rule of seniority", which means, in principle, "first in time, first in right". Such rule, however, can be contracted away.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

For land register purposes, the cantons are divided into districts. Hence, the 26 cantons are responsible for setting up the land registries, the demarcation of the districts, the appointment and remuneration of officials and supervision arrangements.

**5.2 How do the owners of registered real estate prove their title?**

The owner is shown in the land register, which is deemed to be correct and complete ("public faith", see question 4.2 above). No further proof is necessary.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

The cantons can allow their land registries to communicate and conduct transactions electronically. The transferor of real estate (e.g. the seller) has to file to the land register an application for the registration of the new owner (e.g. the buyer) and furnish supporting documents (e.g. the purchase and sale deed).

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Yes, the state (i.e. the respective canton) is liable for any losses arising from the undue maintenance of the land register.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Any person is entitled to obtain the following information from the register without showing a legitimate interest:

1. the name and description of the immovable property;
2. the name and identity of the owner;
3. the form of ownership and the date of acquisition;
4. the charges and mortgages; and
5. the notifications (subject to exceptions).

A person showing a legitimate interest is entitled to consult the full land register or to be provided with an extract. Hence, a buyer could also directly obtain from the land register all the information it might reasonably need regarding encumbrances and other rights affecting real estate. Furnishing evidence to establish a legitimate interest, however, takes time. In practice, it is thus more convenient for the buyer to get an extract from the land register via the seller or, in certain cantons, via the notary public. Accordingly, the land register cannot simply be searched without reason; a legitimate interest needs to be proven for a particular property in order to get a full land register extract.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Lawyers who assist the seller and/or the buyer in: conducting a due diligence; and drafting and/or reviewing the contract documents, are often involved. In addition, notaries public draft and notarise the purchase and sale deed. Other parties involved are, for example, banks, realtors, technical/environmental consultants and appraisers.

**6.2 How and on what basis are these persons remunerated?**

The fees of the notaries public are subject to the respective laws of the cantons. Realtors normally receive a certain percentage of the purchase price for their brokerage services. Lawyers, consultants and appraisers are normally remunerated on an hourly basis.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

In Switzerland, it has always been possible to access reasonable finance for real estate transactions, even following the 2008 financial crisis. While real estate as an asset class is still attractive to insurance companies and pension funds, new standards put in place by the Swiss National Bank and the Swiss Bankers Association have meant that banks have been forced to be more prudent when lending money to private individuals (see the answer to question 8.1 below).

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

As long as interest rates remain low, real estate remains an attractive asset class and there is a lack of alternatives with a comparable risk/return ratio. This applies also to the current year, in which no turn away from negative interest rates is to be expected. Since vacancies in residential properties are slowly rising and market participants expect stable but slowly decreasing prices for condominium, single-family homes and rented apartments, for example in Zurich, demand for office space, especially in business hubs such as Zurich City, is increasing. Investors are also looking at special real estate such as city hotels and logistics properties.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

With respect to the slight cooling-down in the residential property market, see question 6.4 above. Although construction activity has slowed down slightly in Q2/2019, applications for new construction projects remain at a high level and the general economic prospects for Switzerland and the construction industry remain promising. Therefore, developers continue to profit from high demand from investors.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The purchase and sale deed needs to be notarised by a notary public, and the seller (or the notary public, respectively) has to file to the land register an application for the registration of the new owner (i.e. the buyer).

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

There is no formal duty of disclosure. However, the seller is under a duty to act in good faith which implies, for example, that it has to answer questions of the buyer relating to the transaction truly and accurately.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes; if the seller does not disclose important information or gives false information, it may be liable for misrepresentation.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

According to the Swiss Code of Obligations, the seller is liable to the buyer for any breach of warranty and for any defects that would materially or legally negate or substantially reduce the value of the purchase object or its fitness for the designated purpose. Such warranty is, however, in practice, often contracted away (at least to some extent) in real estate asset transactions. However, any agreement to exclude or limit the warranty obligation is void if the seller has fraudulently concealed the failure to comply with the warranty. Other than that, any additional warranty is a result of the negotiations and depends on the type of property that is sold (e.g. rent, soil contamination, etc.).

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller retains no connection with the property after sale. However, if the property gains tax has not been secured in the contract, the seller must make sure to pay the relevant taxes. Otherwise, a liability may only arise from the warranties given as described in question 7.4 above or from post-closing obligations agreed upon in the sale contract.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In addition to paying the purchase price, the buyer has to pay the fees and taxes, as provided for by law and/or contract.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The measures against the continued increase of residential property prices and the amount of mortgage loans introduced by the Swiss National Bank (SNB) and the Swiss Bankers Association (SBA) in 2014 are, in principle, still in place today. These measures have shown effects and – despite the persisting low interest rate environment, including negative interest rates – a certain slow down (fewer transactions, decreasing prices) resulted in some areas and some segments of the residential and commercial real estate market (see also the answers to questions 6.3 and 6.5 above). Recently, more and more players in the market, including pension funds, have raised the question as to whether the time has come to mitigate such measures. As a result, the SNB did not further increase negative interest rates despite a respective move by the European Central Bank in September 2019. The pressure of the Swiss economy prompted the SNB to announce that the costs for the market participants relating to the negative interest rates will be substantially reduced. However, negative interest rates (currently at -0.75%) continue to make investments in real estate attractive and imbalances in the mortgage and real estate markets persist.

The countercyclical capital buffer remains at 2% of the risk-weighted positions secured by residential property situated in Switzerland. The SNB rules apply to both resident and non-resident persons.

In August 2019, the Swiss Financial Market Supervisory Authority (FINMA) recognised the adjusted self-regulation by the SBA in the area of mortgage lending for investment properties as a binding minimum standard. This self-regulation now requires borrowers to provide a minimum down payment of at least a quarter of the loan-to-value ratio, instead of the current 10%. The lower of cost of market principle continues to apply, whereby any difference between a higher acquisition price and lower loan-to-value ratio is to be financed entirely with the borrower's own funds. In addition, the mortgage is now to be amortised to two-thirds of the loan-to-value ratio of the property within a maximum of 10 years (currently 15 years). The tightened rules only apply to new borrowers, but not to existing loans or to the existing standards relating to owner-occupied residential property. The rules will come into force on 1 January 2020.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

In Switzerland, the main method by which a real estate lender seeks to protect itself from default by the borrower is the mortgage.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

If the creditor's debt is secured by a mortgage, the pledged property is seized and sold at auction by the debt enforcement office (the respective foreclosure proceedings are governed by the Debt Enforcement and Bankruptcy Act and its respective ordinances). In a security agreement, the lender and borrower may, however, also agree on the private realisation of the collateral. In the latter case, there are no court proceedings to be initiated to realise the mortgaged property.

**8.4 What minimum formalities are required for real estate lending?**

The establishment of a new mortgage certificate is to be notarised, and a respective application is to be filed with the land register. At the same time, there are no formalities in place regarding entering into a credit facility.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

Mortgages have a certain assigned rank among each other. In general, the claims based on mortgage certificates prevail over unsecured or unprivileged claims.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Under the Swiss Debt Enforcement and Bankruptcy Act, the following acts that disadvantage certain creditors, carried out by

the debtor or security provider before the opening of bankruptcy proceedings, can be voidable (*anfechtbar*):

- The debtor or security provider disposes of assets against no consideration or against inadequate consideration in the year before the adjudication of bankruptcy or an equivalent event.
- The debtor or security provider carries out certain acts within one year from the opening of bankruptcy proceedings, while it is over-indebted, including, *inter alia*, the granting of collateral for previously unsecured debt.

The debtor or security provider carries out any act during the five years before the opening of bankruptcy proceedings that has the purpose of disadvantaging creditors or preferring certain creditors to the detriment of others (that is, avoidance is the intent).

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

According to Art. 17 of the Swiss Debt Enforcement and Bankruptcy Act, an appeal on the grounds of incorrect application of the law or inappropriate exercise of discretion is, in principle, possible against any order made by a debt enforcement or a bankruptcy office. No charge is made for the respective appeal proceedings (Art. 20a of the Debt Enforcement Act). A party which, however, appeals in temerity or in bad faith, or its legal representative, can be fined up to 1,500 Swiss francs. Against this backdrop, some borrowers seek every opportunity to appeal (without taking a big financial risk) in order to hold up the enforcement action by the lender. We have seen cases in which it took the lender up to five years to enforce a mortgage.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

If insolvency proceedings are initiated, all debts are due with the exception of those secured by the borrower's real estate by collateral. In addition to the principal debt, the creditor can claim the interest up to the opening date and the collection costs. A real estate lender generally secures its credit with a mortgage; those debts are paid in advance (hence prior to all other creditors) and thus treated preferably.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Lending money is a risky business as the only obligation of the borrower by law is the repayment of the money in the same amount. In commercial relations, the borrower has to pay interest as well. It is not common in Switzerland to give shares as collateral; in connection with real estate, the credit is generally secured by mortgage.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The acquisition of real estate or the majority (in certain cantons even a minority stake) of the shares in a Swiss real estate company may be subject to real estate transfer tax of between 1% and 3%, depending on the canton where the property is located. Certain cantons do not apply a real estate transfer tax, such as Zurich, which abolished real estate transfer tax a few years ago. The tax is normally payable by the buyer. Often, the buyer and seller are jointly and severally liable for the real estate transfer tax. Contractual agreements are possible with respect to the internal allocation of the tax burden between buyer and seller. In certain cantons, tax laws may foresee a lien on the property to secure the transfer taxes. Also, registration fees of the land register may depend on the value of the property.

### 9.2 When is the transfer tax paid?

It depends on the regulations of the respective canton. In an asset deal, the transfer tax is sometimes paid through the notary public. In some cantons, the notary is personally liable for the payment of the transfer tax.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Yes, the gain realised through the real estate transfer is subject to tax either as a special real estate income tax or – in exceptional cases – as normal income tax.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Transfers of real estate are, as a rule, exempt from VAT. However, a waiver of exemption and option for VAT on the purchase price of the building(s) is possible, provided that the real estate is not used for private purposes. As a result, the investor will be able to reclaim Swiss input VAT on the purchase price (the current VAT rate is 7.7%). A careful analysis regarding VAT in connection with Swiss real estate transactions is required as VAT consequences can be very relevant in economic terms.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

There are no other taxes. It should be noted, however, that the buyer and seller are jointly liable for Swiss income tax on brokerage fees paid to a foreign (non-Swiss) broker involved in the transaction. The tax liability is limited to 3% of the purchase price of the property.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

The real estate transfer tax, if any, is owed in case of an asset or share deal (see the answer to question 9.1 above). It may, however, be possible to reduce or eliminate taxes on capital gains if a company holding a property instead of the property itself is sold.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

Real estate transactions regularly require an in-depth analysis with regard to income tax, VAT and tax-optimised financing and structuring. The relevant issues depend on the specific case.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The laws that regulate leases of business premises are, on one hand, the Swiss Code of Obligations (Arts 253 to 301) and, on the other hand, the Ordinance regarding the Lease of Residential and Business Premises. There is no separate Swiss act that deals with the leases of business premises only.

**10.2 What types of business lease exist?**

In practice, various types of business leases exist, such as fixed-term leases or leases that last for an indefinite period of time, ordinary leases or leases which come close to double or triple net lease agreements.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

(a) Length of term: business leases typically last for five or 10 years, possibly with an option of one additional five-year period.
(b) Rent increases: the parties often agree on indexed rents based on the Swiss consumer price index.
(c) Tenant's right to sell or sub-lease: subject to the landlord's approval, the tenant is entitled to sublet the premises.
(d) Insurance: we often see clauses according to which the tenant has to provide liability insurance.
(e) (i) Change of control of the tenant: in principle, change of control does not affect the commercial lease agreement. (ii) Transfer of lease as a result of corporate restructuring: in a merger, a lease agreement is transferred to the new (restructured) entity. The acquiring legal entity shall, however, secure claims of the creditors involved in the merger, if creditors so demand, within three months after the merger becomes legally effective.
(f) Repairs: generally speaking, and as a basic rule, the landlord is responsible for major repairs; however, exceptions may apply with leases which come close to double and triple net lease agreements.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Under certain circumstances, and if opted for VAT, the rent to be paid for business leases may be subject to VAT (which is currently at 7.7%).

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Depending on the circumstances of the case at hand, business leases can indeed be terminated at expiry, on default or by either party giving notice. The tenant may request the extension of a fixed-term or open-ended lease where termination of the lease would cause a degree of hardship for it that cannot be justified by the interests of the landlord. A commercial lease may be extended by up to six years.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

As a basic rule, the lease passes to the acquirer together with ownership of the property sold. The new owner may, however, serve notice to terminate a lease on commercial premises as of the next legally admissible termination date if it claims an urgent need to use the premises itself. If the new owner terminates sooner than is permitted under the contract with the existing landlord, the latter is liable for all resulting losses.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

In Switzerland, there are commonly no such provisions in lease agreements.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

The trend towards co-working space has also arrived in Switzerland. There are increasingly more such places, especially in the business cities like Zurich and Geneva.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The laws that regulate leases of business premises are, on one hand, the Swiss Code of Obligations (Arts 253 to 301) and, on the other hand, the Ordinance regarding the Lease of Residential and Business Premises. There is no separate Swiss act that deals with the leases of residential premises only.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, they do not.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

The typical provisions are as follows: a) an indefinite term with a notice period of three months; b) official benchmark interest rate applies (specific laws can apply in the canton of Geneva); c) it is possible to extend the term for a maximum of four years; and d) insurance and repairs are to be paid by the tenant via net rent or ancillary costs, if agreed upon accordingly.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

For valid reasons rendering the performance of the contract intolerable, the landlord may terminate any lease observing a notice period of three months. The landlord has to take court action (eviction proceedings) in order to achieve vacant possession if the circumstances exist for the right to be exercised.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The Swiss system of zoning and planning is performed on four levels (federal, cantonal, regional and local). On each level, respective laws exist. Environmental protection is mainly addressed on a federal level.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

If the rules of expropriation are followed, the state can force landowners to sell land to it in order to achieve certain goals which are in the public's interest. The basic rules of expropriation are as follows: the state needs to establish that (i) there is a sufficient legal basis for the expropriation, (ii) the expropriation is in the public's interest, (iii) the expropriation is in accordance with the principle of proportionality, (iv) the goal of the state cannot be achieved by other reasonable measures, and (v) the landowner is fully compensated.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Land/building use and/or occupation and environmental regulation are, in most cases, controlled by authorities determined by the cantons and the communities. In order to get reliable information on these matters, the respective authorities have to be contacted. More and more information is available online.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

In most cases, a permit is necessary to build, modify, demolish or change the use of a building.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

It depends on the circumstances of the case at hand. Implied permission is hardly ever seen.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

Time and costs vary from canton to canton and community to community. They range (depending on the project) from several hundred to several hundred thousand Swiss francs.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

There are regulations on the protection of historic monuments on a federal, cantonal and community level. They do not directly affect the transfer of rights in real estate. The buyer should, however, be aware that certain modifications to a building may be impossible and/or subject to negotiations with the authorities. Hence a change of use – provided that the change has been permitted – is only possible without any affection as long as the buyer does not make any modifications to the protected property, which is not common in practice.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Yes, each canton has a public register of contaminated real estate. More and more of such registers are available online. However, the fact that a property is not entered into such register does not necessarily mean that the property is not contaminated or polluted.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

A property must be cleaned up if it is listed in the public register of contaminated real estate as being polluted. When it comes to the sale or division of immovable property located on a site that is entered in the register of polluted sites, an authorisation of the competent authorities is to be obtained.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

The assessment and management of the energy performance is regulated on a cantonal level. In general, it is not mandatory for the owners to perform respective tests.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Under the heading "energy strategy 2050", a comprehensive set of documents has been produced in recent years. As part of the energy strategy 2050, the $CO_2$ Act has been revised and came into force on 1 January 2013 (under the revised $CO_2$ Act, subsidies in the amount of 450 billion Swiss francs per year for the reduction of $CO_2$ from buildings will also be made available). The $CO_2$ Act sets out targets for emission reductions until 2020 and contains measures for buildings, transport and industry. Among others, a building programme has been established in order to promote energy efficient technologies for the renovation of buildings and the investment in renewable energies, waste heat recovery and the optimisation of building utilities. There is a plan to replace the existing concept of subsidies with a steering charge. The $CO_2$ Act shall be further revised in order to comply with the obligations of the Paris climate agreement for the period after 2020.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Based on the Kyoto protocol, the $CO_2$ Act aims at reducing greenhouse gas emissions by 2030 by 50% compared to 1990 levels. Over this period, the Federal Council intends to achieve a minimum of 30% in Switzerland and a maximum of 20% abroad with various actions.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

The Energy Strategy 2050 is being implemented gradually. By approving the revision of the Energy Act in May 2017, Swiss voters gave the go-ahead to the first series of measures to restructure the country's energy system. These are intended to reduce energy consumption, improve energy efficiency and promote the use of renewable energies. Furthermore, the construction of new nuclear power stations has been prohibited. The totally revised Energy Act came into force on 1 January 2018. By applying this strategy, Switzerland can reduce its dependency on imported fossil fuels and strengthen domestic renewable energies. It can also create jobs and boost investment in the country.

Moreover, the Environmental Protection Law also contains provisions relating to construction work and buildings and the Environmental Compatibility Assessment Law provides that any construction or building measures which materially influence the environment need to undergo an environmental compatibility assessment.

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# Ukraine


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The main laws that govern real estate in Ukraine include the following:

- Civil Code of Ukraine;
- Commercial Code of Ukraine;
- Land Code of Ukraine;
- Law of Ukraine "On the Lease of Land"; and
- Law of Ukraine "On State Registration of Property Rights to Real Estate and their Encumbrances".

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Ukraine is a civil law country and the impact of local common law is therefore relevant only for the interpretation and application of the statutory law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

In Ukraine, real estate is mostly governed by local law. However, Ukraine is a party to a number of international treaties and bilateral agreements that may have an impact on real estate transactions involving foreign nationals, in particular, bilateral investment treaties that provide protection for real estate ownership rights against unlawful actions by governmental agencies such as unjustified expropriation, as well as treaties on avoidance of double taxation that may prescribe more a favourable taxation regime in contrast to local law.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Foreign ownership of agricultural land is prohibited in Ukraine.

Foreign ownership of non-agricultural land is limited. The below table demonstrates the conditions when non-resident persons may own non-agricultural land in Ukraine. Such conditions depend on whether land is located within or beyond the boundaries of a settlement *(i.e. city or village)*.

| | Within the boundaries of a city/village | Beyond the boundaries of a city/village |
|---|---|---|
| **Foreign individuals** | Yes, may own (no restrictions apply). | Only if they own real estate objects (*i.e. buildings or structures*) located on such land. |
| **Foreign legal entities** | Only for construction purposes, or if they purchase real estate objects (i.e. buildings or structures) located on such land. | Only if they purchase real estate objects (*i.e. buildings or structures*) located on such land. |

State or municipal land may be sold to a foreign legal entity only if its permanent establishment (with a right to carry out commercial activity on the territory of Ukraine) has been registered. Such condition does not apply to purchase of private land.

It is worth mentioning that the Land Code of Ukraine does not specifically allow Ukrainian legal entities with 100% foreign ownership to own any land in Ukraine. In practice, due to this limitation, two-tier corporate structures are often used by foreign investors to hold property in Ukraine (*i.e. foreign parent – Ukrainian subsidiary – Ukrainian property holding company*); alternatively, a Ukrainian partner (with a minimum participation share/interest) can be involved in order to convert a fully owned subsidiary into a joint venture (to which the abovementioned limitation does not apply).

Finally, even with respect to Ukrainian residents, the turnover of agricultural land is subject to a moratorium until a specialised law regulating such turnover becomes effective (*no bill has been adopted; various drafts have been discussed for years*).

The said moratorium means that, save for a few exceptions (*inheritance, land swap or production-sharing purposes*), there is a ban on:

(i) sale of all state- and municipally-owned agricultural land plots; and

(ii) sale or other alienation, contribution to charter capital of legal entities and/or changes to permitted use for certain parts of privately-owned agricultural land, namely: (a) agricultural commodity land; (b) individual household land allocated in kind to the owners of land shares; and (c) land shares.

The newly elected Ukrainian president, new government and recently elected parliament (in its majority) are all keen on lifting of the moratorium on land sales. Opening of the land market will most likely happen on October 1, 2020.

## 3 Real Estate Rights

### 3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?

The following types of rights over land are recognised in Ukraine:

(i) ownership (private, municipal, state);
(ii) use (term or perpetual);
(iii) mortgage; and
(iv) trust ownership.

Save for a few exceptions (*law*, *court order*, *will/inheritance*), rights of term use are purely contractual between the parties. Such rights include:

- *Lease (sub-lease)*, i.e. a temporary contractual use a right on chargeable basis.
- *Servitude*, i.e. a right to use a land plot belonging to another person for a specific purpose (for instance, passing by foot or by vehicle, installing utilities and communications, collecting water, locating building equipment, etc.).
- *Emphyteusis*, i.e. a right to use a land plot belonging to another person for farming.
- *Superficies*, i.e. a right to use a land plot belonging to another person for construction.

Right of mortgage and trust ownership can also be classified as purely contractual.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

One of the principles of Ukrainian property law is that rights to land should follow the right to a building constructed thereon. As illustrated under the Land Code, in case of acquiring the ownership right to real estate (*i.e. buildings or structures*), ownership right with respect to the land plot under such real estate terminates and the new owner of the real estate acquires the ownership right to such land plot.

However, in practice, there is a great number of privately owned buildings and other real estate objects located on state or municipal land (*where rights to land are documented as lease, permanent use, or not yet documented at all – so-called "actual use"*). Since there is no mandatory buy-out (privatisation) of state or municipal land plots under privately owned buildings, split in ownership for buildings and underlying land between different persons is likely to continue. The same refers to buildings and other real estate objects that have been lawfully constructed on private land plots leased for the purpose of construction (or used on terms of superficies).

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

There is no split between legal title and beneficial title to real estate in the Ukrainian legal system. The legal and beneficial owner is one person who is registered in the State Register of Property Rights to Real Estate (hereinafter – the "Rights Register").

We are not aware of any proposals to change this.

However, in 2019, the Civil Code and the Land Code were amended and a new concept of trust ownership was introduced to the Ukrainian legal system as an alternative to collateral. Under agreements of trust ownership, collateral property legally belongs to the creditor until loan repayment.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

All land in Ukraine is required to be registered. Land plots should be registered with the State Land Cadastre. Rights to land plots should be registered with the Rights Register.

In reality, however, a great number of land plots in Ukraine remain unregistered. Mostly, these are land plots acquired prior to launching mandatory registration procedures (i.e. prior to January 1, 2013). Rights to such land plots are recognised despite the absence of registration. However, any further legal transaction with such unregistered land plot requires prior registration of both land plot and rights thereto.

### 4.2 Is there a state guarantee of title? What does it guarantee?

One of the principles of the state registration of rights in Ukraine, as illustrated by the Law of Ukraine "On State Registration of Property Rights to Real Estate and their Encumbrances", is guaranteeing by the state of objectivity, authenticity and completeness of data on registered rights with respect to real estate and encumbrances thereof. It is not clear if expression of such principle in the law on its own is sufficient to conclude that there is a state guarantee of title in Ukraine. No relevant court practice exists yet.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

All rights to land are subject to mandatory state registration. The consequence of non-registration is that the rights do not become effective.

### 4.4 What rights in land are not required to be registered?

Only rights that validly arose prior to January 1, 2013 are not required to be registered in the Rights Register.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is neither a probationary period following the first registration, nor different classes or qualities of title on the first registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

The title (ownership) transfers from the seller to the buyer at the moment of state registration of such transfer (right) in the Rights Register.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Earlier registered rights defeat later rights (in practice, this is mostly relevant to the rights of a mortgagee).

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

Currently, there are two relevant registers operating in Ukraine, namely: (i) the State Land Cadastre; and (ii) the Rights Register.

The State Land Cadastre contains information on formed land plots. A land plot is deemed to be formed once a cadastral number has been assigned to it. Forming a land plot involves determining its area and boundaries and entering certain other details about the land plot in the State Land Cadastre. A land plot can be the subject of civil law transactions only when it is formed.

The Rights Register contains information about ownership and other rights over real estate, including land plots. Encumbrances and other property rights to a land plot may be registered only after the registration of the ownership rights to such land plot.

**5.2 How do the owners of registered real estate prove their title?**

Typically, the owners of registered real estate prove their title by two documents: (i) an information certificate from the Rights Register; and (ii) a relevant title document (i.e. sale-purchase contract, gift granting agreement, property swap agreement, inheritance certificate, privatisation/registration certificate, ownership certificate, etc. as the case may be).

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Theoretically, transactions that do not require notarisation (such as, for instance, land lease or sub-lease, servitude, emphyteusis, superficies, or real estate lease for a term up to three years), can be completed electronically (provided that the parties have electronic digital signatures). However, we have never seen this in practice yet, and all real estate transactions are in paper form.

Transactions that require notarisation (sale, mortgage, long-term (three-plus years) lease of real estate) cannot be completed electronically at present.

The following documents must be provided for purposes of registration of the ownership right with the Rights Register:

(i) application;
(ii) applicant's ID (i.e. passport);
(iii) applicant's tax identification number;
(iv) document serving as a ground for origination, transfer or termination of title (i.e. sale-purchase agreement, property swap agreement, gift granting agreement, court order, etc.);
(v) extract from the State Land Cadastre (in case other documents do not contain reference to the cadastre number of the land plot); and
(vi) payment confirmations (administrative fee).

Information on ownership of registered real estate can be accessed electronically (see question 5.5).

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Compensation from the registries if they make a mistake can be claimed on general civil law grounds governing liability in case of infliction of damages/harm. No specific liability provision exists at present.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Any person having an electronic digital signature may request and receive information from the Rights Register online (https://kap.minjust.gov.ua/login/index/) by the following search criteria:

- address;
- registration number of a real estate object;
- cadastre number of a land plot;
- identification data of a physical person; and
- identification data of a legal entity.

In order to obtain online access, it is necessary to be registered as an online user of the search service (i.e. to obtain a login and password) and to possess an electronic digital signature; in practice, this might not be possible for non-residents of Ukraine until they receive a Ukrainian tax identification number. Alternatively, searches can be carried out through the registrars (including private or state notaries).

Typically, real estate transactions involve not only a search of the Rights Register, but also a review of the original title documents and other underlying documents that served as grounds for registration of encumbrances and other rights affecting real estate.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

The following parties are normally involved in real estate transactions in Ukraine:

- *Notary* – verifies the compliance of the transaction document with the requirements of the law, checks the validity of the seller's title and encumbrances, verifies capacity of the parties to enter into transaction, certifies the contract, registers ownership change in the Rights Register and issues an information certificate from the register naming the buyer as a new owner of the real estate.
- *Real estate appraiser (not always mandatory)* – issues a valuation report that serves as a ground for application of state duty and other mandatory payments related to the transaction.
- *Real estate agent (optional)* – helps the parties to find a good deal.
- *Parties' lawyers (optional)* – structures transactions, conducts legal due diligence and other relevant checks, assists parties with signing and closing of the transaction.
- *Interpreter* – is involved in transactions with non-resident parties, provides written and/or oral translation of transaction documents and other materials to the parties that do not speak Ukrainian.

**6.2 How and on what basis are these persons remunerated?**

- *Notary* – public notaries charge a state duty in the amount of 1% of the contract price; fees of private notaries are negotiable, but, in practice, are very close to what public notaries charge, i.e. 1%.
- *Real estate appraiser* – fixed fee depending on the size of the object (typically in the range of EUR 50–5,000 per object).
- *Real estate agent* – success fee (typically in the range of 2–5% depending on the type and size of the object).
- *Parties' lawyers (optional)* – hourly rate (typically EUR 50–500 per hour, depending on the type, size and complexity of the deal; quite often the fees are capped).
- *Interpreter* – hourly rate (typically EUR 10–50 per hour, depending on the language of the parties/documents).

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

We do not observe any significant change in the sources or the availability of capital to finance real estate transactions in Ukraine. The availability of bank financing is still very limited.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

There is an appetite for high quality residential objects with good location, as well as good quality office premises. Investment in the construction of new hotels also attracts investors' interests.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

It seems that an appetite for low quality (budget) housing and residential objects in unattractive locations is declining.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The minimum formalities for the sale and purchase of real estate in Ukraine are as follows:

- validity of seller's ownership should be confirmed (relevant checks are done at the Rights Register);
- sale-purchase agreement must be notarised and registered; and
- title change (i.e. ownership of the buyer) must be duly registered in the Rights Register.

Non-resident buyers may also need to complete some preliminary steps such as translating foreign documents into Ukrainian (this may also involve legalisation or apostilisation, depending on the country of the documents' origin), obtaining a Ukrainian tax identification number (in case of individuals), opening an investment or other type of account at local banks, etc.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller's duty of disclosure is rather limited in Ukraine. The seller must disclose all existing third party rights to the property.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Ukrainian law does not prescribe/recognise the concept of contractual representations. However, under the general principles of the Civil Code, a transaction can be invalidated by a court in case one party purposely deceives the other party with regard to circumstances that are of significant importance.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Title "guarantee" is usually not given in Ukraine. Nevertheless, it is a common practice to include in the texts of sale-purchase contracts certain statements of the seller given to the buyer that are similar to contractual warranties. Typically, they cover the following:

- seller's capacity to enter into the contract;
- due title to the property;
- absence of encumbrances and other third-party rights (or disclosure thereof); and
- absence of technical defects (or disclosure thereof).

The main function of such statements is to give information. Such statements do not act as a substitute for the buyer carrying out his own due diligence.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller does not retain any liabilities in respect of the property post-sale, except for situations when transfer of title and transfer of property does not happen simultaneously (i.e. the seller is given a right to use the property for some time after the sale and to physically transfer it to the buyer at a later date). In such a case, the seller is under an obligation to continue paying for utilities and can also be held liable for accidental loss of the property.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

In addition to paying the sale price, the buyer pays a 1% contribution to the State Pension Fund of Ukraine (if applicable). Unless otherwise agreed by the parties, the buyer will also pay the fees of the notary (including 1% state duty), and remuneration of the realtor.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

Formally, lending of money to finance real estate falls within the definition of a financial service and, therefore, can be carried out by banks and financial institutions. At the same time, the Civil Code of Ukraine also allows for loans to be granted by individuals and legal entities, and despite a few attempts by the regulator to limit application of this rule (by obtaining a special permit or other authorisation), the application of the Civil Code prevails.

The rules with respect to residents and non-residents differ. Loans from non-residents are subject to notification to the National Bank of Ukraine (hereinafter – the "NBU") prior to any amount of the loan being disbursed; also, payment of interest and other payments under cross-border loans are subject to monitoring, analysis and control by servicing banks of the Ukrainian borrowers to make sure that the amounts of such payments correspond with the market conditions.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The most commonly used collateral is mortgage, as well as, to a lesser extent, sureties and bank guarantees. Pledge of shares/participatory interest in the project company, pledge of rights to funds at bank accounts, pledge of rights under leases, etc. are used as supplementary security instruments for more complex/sophisticated deals.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

The common proceedings for realisation of mortgaged property include the following steps:

- sending a 30-day notice (optional for court proceedings);
- obtaining an enforcement document (notarial writ or court judgment);
- engaging a bailiff (public or private);
- seizure of mortgaged property;
- evaluation (if applicable) and sale of collateral on public auction; and
- transfer of money to a creditor.

The Law of Ukraine "On Mortgage" provides for out-of-court (extrajudicial) proceedings, namely:

- sale of mortgaged property by the mortgagee; or
- conveyance/transfer of ownership over the mortgaged property to the mortgagee.

Such proceedings can be applied in case they are envisaged in the respective mortgage agreement or in a separate agreement on satisfaction of the mortgagee's claims.

**8.4 What minimum formalities are required for real estate lending?**

The minimum formalities required for real estate lending include:

- signing a loan agreement (in a simple written form, unless one of the parties requests notarisation);
- notifying the NBU about the loan agreement (in case of cross-border loans, no notification is needed for domestic loans);
- signing and notarising a mortgage agreement; and
- registering the mortgage as an encumbrance of the real estate with the Rights Register.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

A real estate lender as mortgagee has priority in satisfying its claims from the mortgaged property. If, in addition to the mortgage, the real estate lender keeps pledges over movable property (including property rights), the lender has priority in satisfying its claims from the pledge property, provided that the relevant pledges have been registered with the Register of Encumbrances over Movable Property (hereinafter – the "Encumbrance Register") with a ranking higher than the encumbrances of other creditors.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Clawback in bankruptcy may be relevant: there are a number of grounds on which transactions entered into by a Ukrainian debtor up to three years before commencement of the bankruptcy may be challenged; *inter alia*, such challenges can be made where the debtor pledged its property to secure the fulfilment of pecuniary claims.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

In practice, in order to frustrate enforcement actions by a lender, quite often borrowers bring a court claim for invalidation of the loan agreement and/or the mortgage agreement. Generally speaking, in case of properly executed contracts, this is more like delay tactics, not a winning path. However, we have seen situations where debtors managed to delay enforcement for five years.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

Simultaneously with the opening of proceedings in a bankruptcy case, a moratorium on satisfaction of creditor's claims is imposed, freezing all enforcement activities. A real estate lender will not be allowed to enforce the mortgage (granted by the insolvent debtor) other than as part of the insolvency case. However, if relationships between a real estate lender and an insolvent debtor were structured as a trust ownership (instead of mortgage or pledge), the moratorium shall not extend to the actions of the real estate lender who is a beneficial owner with respect to the object of a trust ownership established by the debtor.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

The process of enforcing security (pledge) over movable assets, including shares, typically involves the following steps:

- registering information on enforcement in the Encumbrance Register;
- sending a 30-day notice (optional for court proceedings);
- obtaining an enforcement document (notarial writ (if pledge was notarised) or court judgment);
- engaging a bailiff (public or private);
- seizure of pledged property (shares);
- evaluation and sale of collateral (shares) on public auction; and
- transfer of money to a creditor.

The Law of Ukraine on Securing Creditors Claims and Registration of Encumbrances allows for out-of-court enforcement of pledges of movable assets, including by way of transfer of ownership of the collateral (shares) to the pledgee.

Herewith, the shares can be appropriated when the borrower has entered into insolvency proceedings, since the moratorium on satisfaction of creditors' claims (mentioned in question 8.8) does not extend to shares in the debtor.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Transfers of real estate in Ukraine are not subject to a transfer tax. However, according to the Tax Code of Ukraine, other taxes apply, depending on the identity of the seller and/or buyer, and depending on the type of the property (residential or non-residential).

### 9.2 When is the transfer tax paid?

As mentioned above, transfer tax is not envisaged by Ukrainian law.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Yes, transfers of real estate by individuals are subject to personal income tax at the following rates:

- 5% of the property value – in case of sale by residents of Ukraine; or
- 18% – in case of sale by non-resident persons.

For residential property, the law provides exemption from the abovementioned tax: *0% – if the property has been owned for more than three years and this is the first sale in the calendar year.*

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Transfers of real estate are subject to VAT if the seller is a VAT-payer.

VAT is charged at the rate of 20% on the transfer value.

VAT is collected from the buyer and is payable to the state budget by the seller.

Sale/transfer of land plots and land shares (except for land plots located under VAT-able real estate and included into the sale value of such real estate) are exempted from VAT.

In real life, not all sellers are VAT-payers, which also makes transactions VAT-exempt. For instance, the following categories of persons may not be or may not necessarily opt to be VAT-payers:

- individuals – never;
- users of a simplified tax system (private entrepreneurs or resident legal entities) if they opt so; and
- users of the general tax system (private entrepreneurs or legal entities) – until the threshold for mandatory VAT registration is met.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

For corporate sellers, proceeds from the sale of a property are subject to corporate income tax at the rate of 18% (or, if they opted to be users of a simplified tax system – 3% or 5%, as the case may be, of the sale revenues).

Individual sellers pay so-called "military contribution" at the amount of 1.5% of the transfer value (however, it is waived if an exemption for payment of personal income tax applies – see question 9.3 above).

Individual buyers of real property (other than land) pay a 1% contribution to the State Pension Fund of Ukraine.

Finally, although it is not a plain tax, 1% of the transfer value is payable as state duty (or its equivalent). This payment is negotiable in the sense that it can be split between the buyer and seller.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes, taxation is different if ownership of a company (or other entity) owning real estate is transferred (in particular – VAT,

pension fund contribution and state duty may not apply, tax rates (exemptions) and/or rules for calculating tax base for purposes of personal income tax and corporate tax also differ).

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

It is always worth checking if there are no indebtedness for payment of land and/or property tax by the seller. Also, with respect to residential property, it is advisable to verify at the early stage of price negotiations if the property has been owned for more than three years and if this is the first property sale by the seller during the calendar year – this will give an indication if the relevant tax exemption would be applicable to the seller as this may affect the final sale price.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The laws that regulate leases of business premises include:

- Civil Code of Ukraine;
- Commercial Code of Ukraine;
- Law of Ukraine "On Lease of State and Municipal Property"; and
- Law of Ukraine "On State Registration of Property Rights to Real Estate and their Encumbrances".

**10.2 What types of business lease exist?**

In practice, various types of business leases exist, such as fixed-term leases or leases that last for an indefinite period of time. It is worth mentioning that long-term leases (i.e. for three years and more) require notarisation and state registration in the Rights Register.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

(a) Length of term: either one year with automatic extension or five to seven years;

(b) rent increases: typically, rent is expressed with reference to the equivalent in hard currencies such as USD or EUR; however, if expressed in local currency (UAH), parties often agree on monthly indexation by the official inflation rate;

(c) tenant's right to sell or sub-lease: typically subject to prior written consent of the landlord;

(d) insurance: practice is not uniform, quite often tenants are not under an obligation to insure property or provide liability insurance;

(e) (i) change of control of the tenant: in principle, change of control does not affect the commercial lease agreement; and

(ii) transfer of lease as a result of a corporate restructuring (e.g. merger): typically, corporate restructuring (merger) also does not affect the commercial lease agreement; and

(f) repairs: generally speaking, and as a basic rule, the landlord is responsible for major (capital) repairs; however, this approach is sometimes modified by the parties if the lease term is more than five years.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

If opted for VAT (i.e. if the landlord is a VAT-payer), the rent to be paid for business leases is subject to VAT (20%).

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Depending on the circumstances of the case at hand, business leases may indeed be terminated at expiry, on default, or by either party giving notice. If a tenant uses the premises after the lease expiration and the landlord has no objection, the lease agreement is deemed renewed for the same term and on the same conditions.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The general principles of the Civil Code and Commercial Code allow for the conclusion that the landlord and/or the tenant remain liable to each other in respect of pre-sale non-compliance, even after the sale of their interest (i.e. sale of property in case of landlord, and assignment of lease right in case of tenant).

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

In Ukraine, there are normally no such provisions in lease agreements yet.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Shared short-term working spaces (co-working) are gaining popularity in Ukraine in recent years, especially in the IT and consulting industries.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The laws that regulate leases of residential premises include:
- Civil Code of Ukraine;
- Housing Code of Ukraine; and
- Law of Ukraine "On State Registration of Property Rights to Real Estate and their Encumbrances".

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, they do not.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

(a) length of term: one year or for an indefinite period (which basically means that the agreement is entered into for five years);
(b) rent increases/controls: typically, rent is expressed with reference to the equivalent in hard currencies such as USD or EUR;
(c) the tenant's right to remain in the premises at the end of the term: the tenant has a pre-emptive right for entry into the lease agreement for another term; if, not later than three months prior to expiry of the lease agreement, the landlord did not notify the tenant about his/her rejection to enter into the new lease agreement, and the tenant uses the premises after the lease's expiration, the lease agreement is deemed renewed for the same term and on the same conditions; if the landlord has rejected to enter into a new lease agreement with the tenant, but, within one year enters into a lease agreement with another person, the tenant has a right to demand the rights under such new agreement be assigned/transferred to him, or demand compensation of damages; and
(d) the tenant's contribution/obligation to the property "costs": in most of the cases, the tenant's contribution is limited by payment/compensation of costs of utilities only.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A landlord has a right to terminate a residential lease under the following circumstances:
(i) non-payment of rent for six months (or, in case of a shorter term lease, twice); and
(ii) damage of premises by the tenant (or by other persons for whom the tenant is responsible).

The lease agreement can also be terminated, subject to a two-month notice, in case the owner needs the premises (part of a house, flat or room (part thereof)) for his own living and living of his family members.

The required steps to achieve vacant possession may include: giving notice; obtaining court judgment on termination of a residential lease agreement and eviction of the tenant; and enforcement through the bailiffs.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main laws governing zoning/permitting and related matters concerning the use, development and occupation of land in Ukraine are:
- Civil Code of Ukraine;
- Land Code of Ukraine;
- Law of Ukraine "On Regulation of Town-Planning Activity";
- Law of Ukraine "On Lease of Land";
- Law of Ukraine "On Land Management";
- Law of Ukraine "On State Control over Use and Protection of Lands"; and
- Law of Ukraine "On Environmental Protection".

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Yes, the state can force landowners to sell land to it for social needs (such as construction of transport and energy infrastructure, extraction of minerals, creation of city parks, to name a few). Landowners who disagree with the alienation of their land plots for public needs can be forced to sell the land by court order. The land plot price is determined based on the monetary valuation of the land plot calculated in accordance with methodology approved by the government. In practice, the price so determined quite often is lower than the market price. If the landowner disagrees with the proposed land plot price, the matter should be decided by the court.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The following bodies can be listed as such that have certain authority to control or influence land/building use and/or occupation and environmental compliance:
- Ministry for Development of Communities and Territories;
- State Architectural-Construction Inspection of Ukraine;
- State Service of Geodesy, Cartography and Cadastre of Ukraine;
- local self-government authorities; and
- public prosecution authorities.

In order to get reliable information on these matters, the respective authorities have to be contacted. More and more information is available online.

Useful online resources:
- http://map.land.gov.ua/kadastrova-karta – public cadastre map of Ukraine that contains information on formed land plots;
- https://dabi.gov.ua/declarate/list.php – register of authorisation documents for construction; and

- websites of local self-governmental authorities (cities, villages) that may contain information on zoning, for instance in the city of Lviv – https://map.city-adm.lviv.ua/ua/map/detal-plan.

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

In most cases, an authorisation is needed to build, modify, demolish or change the use of the building. Depending on the complexity of the construction, such authorisation can take the form of (i) a permit for commencement of construction works issued by a competent authority (for more complex buildings), or (ii) a notification on commencement of construction works filed by the developer with a relevant authority and registered by the latter (for less complex buildings). Likewise, once the building is finished by construction, its commissioning can be evidenced by a certificate on readiness for operation (for more complex buildings), or by a registered declaration of readiness for operation (for less complex buildings).

Construction activity is subject to licensing in Ukraine. A contractor/sub-contractor hired to perform construction works must possess the relevant licence.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Authorisations for construction and use of more complex objects (industrial, commercial, residential) are usually obtained. Private developers of smaller objects (individual houses and small buildings) quite often proceed to construction without proper authorisation, expecting to have their building legalised under so-called "construction amnesty" which have been announced by the government on several occasions over the past years. However, in our opinion, such practice is on decline as the procedure for obtaining the relevant authorisations became more transparent, less complex and expensive in recent years.

### 12.6 What is the typical cost of building/use permits and the time involved in obtaining them?

Time and costs vary depending on the complexity of the building. For complex objects, the entire authorisation circle (including various consents for design documentation, verifications, etc.) may take up to six months (provided that the developer's rights to land have been properly obtained and documented). The entire costs related to obtaining relevant authorisations (including official fees as well as documents production and filing expenses) may vary from several hundred to several hundred-thousand Euros.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?

There are regulations on the protection of historical monuments in Ukraine (the Law of Ukraine "On Protection of Cultural Heritage" is the core piece of legislation in this area).

In case of sale of an object that is listed as a historical monument, prior written consent shall be obtained from the relevant cultural heritage protection authority, depending on whether the monument is classified as one of national or local importance. Such consents are issued to the sellers; herewith, the identity of the prospective buyer must be disclosed.

Within one month upon completion of the purchase, the buyer (new owner) shall enter into a contract on the protection of the respective cultural heritage with the relevant cultural heritage protection authority, and should protect the monument in compliance with the law and the contract (for instance, to preserve the façade, wooden windows and doors, historic stoves, parquet, and to obtain all the necessary permits prior to any renovation works, etc.).

It is worth mentioning that transactions involving land plots designated for historical-cultural use (or having historical monuments located there) have a number of limitations and nuances (for instance, more strict and complex authorisation procedures).

Finally, Ukraine is a member of United Nations Educational, Scientific and Cultural Organization (UNESCO) and there are a number of Ukrainian properties inscribed on the UNESCO World Heritage List – https://whc.unesco.org/en/statesparties/ua. Ukraine follows Guidelines for the Implementation of the World Heritage Convention, and it shall inform the World Heritage Committee of its intention to undertake or to authorise, in an area protected under the Convention, major restorations or new constructions which may affect the outstanding universal value of the property.

### 12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

There is no specific public database or other register of contaminated lands or polluted properties in Ukraine. Relevant information requests may be filed with the State Ecology Inspection of Ukraine, as well as departments/units responsible for ecology and natural resources at the regional state administrations and/or local self-governmental authorities. Also, independent research (environmental due diligence) is strongly advisable before transactions of land or other real estate.

### 12.9 In what circumstances (if any) is environmental clean-up ever mandatory?

Environmental clean-up is mandatory in case the soil is damaged as a result of constructions or other works.

### 12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.

In 2017, the Law of Ukraine "On Energy Efficiency of Buildings" introduced so-called energy certificates, which contain information on the energy performance of the building and recommendations for improvement. The law also sets certain minimum requirements for the energy performance of the buildings, both newly built as well as existing.

As of July 1, 2019, energy certificates became mandatory. Save for a few exceptions, an energy certificate must be obtained, *inter alia*, for any complex object of construction (so-called CC2 and CC3), be it new construction, reconstruction or capital repairs.

In case of sale or lease of property (residential or non-residential) that is subject to rules governing mandatory energy

certification, the seller/landlord must provide information on the energy certificate of the building upon the request of the buyer/tenant.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Since 2004, Ukraine has been a party to the international Kyoto Protocol, which extends the 1992 United Nations Framework Convention on Climate Change. Since 2016, Ukraine has also been a party to the 2015 Paris Agreement. Accordingly, in 2016, the government of Ukraine adopted the Concept for State Policy in the Area of Climate Change for the Period till Year 2030 (hereinafter – the "Climate Change Policy Concept"), which is the first document on the state level aimed at the reduction of gas emissions. Detailed regulatory measures are yet expected to be introduced in the course of 2019–2020. One of them shall be the creation and implementation of an internal emissions trading scheme, in compliance with the European Union Directive 2003/87/EU establishing a scheme for greenhouse gas emission allowance trading within the Community.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

Yes, according to the Climate Change Policy Concept, the current target is to achieve, by 2030, emissions that shall not exceed 60% of the base level as of 1990 (note: the total volume of Ukraine's emissions in 1990 was 618 million tons). In 2020, the abovementioned target shall be reviewed to take into account the level of social-economic development of the country.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Yes, the new legal framework recently adopted in Ukraine provides for certain incentives for the operation and development of renewable energy sources (hereinafter – the "RES"), including a so-called "green" tariff (introduced in 2009). Ukraine's green tariff has a guaranteed "minimum floor" set in EUR and is probably one of the highest in Europe. The types of eligible RES vary; however, solar installations (roof/housetop) seem to be the most appropriate in the context of newly constructed and existing buildings. The following minimum green tariff rates (EUR cent per 1kWh) apply to roof/housetop solar installations (power plants):

- EUR 16.36 – if commissioned in 2017–2019;
- EUR 12.27 – if commissioned in 2020;
- EUR 11.84 – if commissioned in 2021;
- EUR 11.46 – if commissioned in 2022;
- EUR 11.03 – if commissioned in 2023–2024; and
- EUR 10.65 – if commissioned in 2025–2029.

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Taras graduated *cum laude* from the Lviv National University Law Faculty in 1997. He then expanded his education abroad. Taras holds a Master of Laws degree from the University of Cambridge and a Master of Laws degree from the Columbia University School of Law.
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Zvenyslava graduated from the Lviv National University Law Faculty with Master of Laws degree in 2013. The same year, she joined Taras Burhan Law Office LLC as a trainee, and was promoted to the position of associate in 2014.
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Taras Burhan Law Office LLC is a boutique law firm based in Lviv, servicing clients in Western and Central Ukraine. The firm concentrates its practice in the areas of banking, corporate and real estate law.
The firm represents:

- banks and financial institutions in lending transactions with corporate clients;
- foreign and local investors in acquisitions or disposals of existing businesses; and
- investment funds, developers, and wealthy individuals in real estate transactions.

The firm offers the following services related to real estate:

- structuring sale or leasing transactions, including off-shore structures;
- drafting and negotiating term sheets;
- conducting legal due diligence of real estate objects and their owners;
- advising clients regarding Ukrainian law requirements with respect to acquisition, maintenance, use and transfer of real estate;
- drafting and negotiating Ukrainian law governed sale-purchase/transfer/leasing agreements;
- organising signings, including notarisation;
- assisting clients with closing of transactions, including collection of conditions precedent; and
- assisting parties with recordation of real estate transactions and dealing with authorities (including local administrations, land cadastre, bureaus of technical inventory, etc.).

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BURHAN
LAW OFFICE

# USA

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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

Each state within the United States (and the District of Columbia) follows a mix of statutory and common law (Louisiana, however, employs a civil law system, derived from the Napoleonic Code). There are three levels of laws in the U.S.: federal; state; and local. Under common law, changes in law come by way of case law and new legislation, each of which is given equal weight. Rules on parol evidence, and requirements that agreements be in writing to be enforced, vary from state to state. Courts will generally rely on the express terms of the document unless the intent of the parties is unclear. Courts in the U.S. may consider the conduct of the parties if the terms of the document in question are ambiguous.

In general, contracts for the sale or transfer of real estate should be in writing.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

Each case that is decided has an impact on the way transactions are structured or documents are drafted for future transactions. For example, in New York in 2010, there was a state Supreme Court decision which ruled on the language of intercreditor agreements. The large majority of intercreditor agreements between mortgage lenders and mezzanine lenders typically contain language that requires a mezzanine lender to cure "all defaults" under the mortgage loan in certain situations. The issue in the New York case hinged on whether that requirement was a precondition to foreclosure on Uniform Commercial Code ("UCC") collateral by a mezzanine lender or whether the failure to cure would simply trigger the mortgage lender's right to accelerate the payment obligations under the mortgage loan. In this instance, the court ruled that the mezzanine lender could not foreclose without first curing an existing default, which meant paying off the already-accelerated mortgage loan in full. While there is disagreement within the legal community regarding that decision, it should be noted that, in 2011, a federal District Court in Arizona came to a similar conclusion. As a result, the relevant provisions in the common forms of intercreditor agreements are likely to be more heavily negotiated.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

While international laws do not govern real estate assets in the USA, foreign laws are relevant in several circumstances. Those include foreign exchange controls and the ability to sue foreign investors to collect on judgments under guaranties, where the assets are in overseas jurisdictions. The other international law element that contributes to the structure of every transaction involving foreign investors is home tax law or tax treaties. The debt and equity investment authority of foreign financial institutions are governed by their respective charters and home-country laws.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are few, if any, controls prohibiting a foreigner from owning real estate property in the USA. The one limitation that still exists in certain states pertains to ownership of U.S. agricultural and natural resources.

Reporting is required from foreign persons who:

- purchase (directly or indirectly) at least 10% of a U.S. business (including real estate ownership), who must file a private report within 45 days (in addition to possible quarterly and annual reports) with the bureau of Economic Analysis of the U.S. Department of Commerce (under the International Investment Survey Act (the International Investment and Trade in Services Survey Act) of 1976), though exemptions are available in certain cases;
- purchase or transfer U.S. agricultural land, who must file a public report within 90 days with the Secretary of Agriculture (under the Agricultural Foreign Investment Disclosure Act of 1978);
- hold any direct U.S. real estate investments valued over $50,000 during the previous calendar year, who must file an information return (under the Foreign Investment in Real Estate Property Tax Act of 1980, which also subjects any income of the foreign investor from U.S. real estate transactions to federal taxation); and
- control a domestic or foreign corporation – the corporation must file an information return annually with the Internal Revenue Service (under the Tax Equity and Fiscal Responsibility Act of 1982).

Additional reporting may be required under: the Hart-Scott Rodino Antitrust Improvements Act of 1976; the Internal Revenue Code and Executive Order No. 13224 on Terrorist Financing, effective from September 24, 2001, and relating to Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism; and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "Patriot Act"). In addition, certain "covered transactions" involving foreign investment in the U.S. are subject to review by the Committee on Foreign Investments in the United States ("CFIUS") to determine the effect of such transactions on the national security of the U.S. The Foreign Investments Risk Review Modernization Act of 2018 and accompanying regulations issued by the U.S. Department of the Treasury materially expand the scope of CFIUS reviews and the range of "covered transactions" to include certain real estate transactions and non-controlling investments in U.S. businesses.

## 3 Real Estate Rights

### 3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?

Land is usually owned by fee title. Record notice of title is established by recording an instrument of conveyance in the local recording office. Title can be owned in whole by an individual or an entity. Title can be owned by individuals as tenants in common or tenants by the entirety (marital). Legal title can be held by trusts for the benefit of the equitable owners. Parties can hold an interest in land by contract. A lender secures repayment of its loan by obtaining a mortgage (or in some states a deed of trust, or in Georgia a deed to secure debt) (a "mortgage") granting the lender a security interest in the property or ground lease being financed. A trustee holds title for the benefit of trustors pursuant to a trust agreement. A tenant under a lease holds a contractual interest in the demised premises, which may or may not constitute an interest in real property, depending on the length of the lease term and applicable state law. Parties may also hold the right to use or occupy property under a licence agreement. A licence may give a party an access right over the property of another, but it is easily terminated. The more common form of granting an appurtenant right across the property of another is by a recorded easement. Because most states require a recorded notice to enforce use rights against third parties, even agreements that do not "run with the land" are often recorded to give third parties notice of the rights accorded thereby.

### 3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

Title to land may diverge from the ownership of a building constructed thereon in the case of a ground lease. In a ground lease, the tenant will typically lease the underlying land for a long term, but, by the terms of the ground lease, the tenant will often own, rather than lease, the temporary or permanent buildings and other objects placed upon it during the term of the ground lease. At the end of the term of the ground lease, title to those improvements typically, by the terms of the ground lease, will revert to the landowner (most often at the end of their useful life). Similarly, development within air rights parcels above the land has become a popular means for utilising excess development rights associated with a parcel and enables developers to build taller towers with highly profitable upper floors.

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

This distinction arises in the case of a trust where the beneficiary of a trust holds a beneficial interest in the trust property and receives the benefits of ownership. Legal title to the trust property, however, is held by the trustee. A deed reflecting the ownership in trust would suffice and be recorded in similar fashion with a typical deed, without need for a separate recording. We are not aware of any proposals to change this in any jurisdiction.

Transfers of interests in real property held indirectly through ownership of interests in the entity holding legal title to the real property have no effect on the legal title to the property, but may have federal and state tax law implications. For example, in New York, with a few exceptions, if 50% or more of the beneficial interest in a property is transferred, transfer tax is applicable and the parties are required to file transfer tax forms, but no new deed would be recorded because legal title remains the same.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

While property rights are recorded and not registered, the Torrens system of property registration, and remnants of this system, do still exist. The Torrens system was historically used extensively in Illinois, Massachusetts and Minnesota. Illinois repealed its Torrens Act in 1992 and New York has also repealed its registration of title law. At one time, up to 20 states employed some form of the Torrens system, including Colorado, Georgia, Hawaii, Massachusetts, Minnesota, North Carolina, Ohio and Washington. The Torrens system, until recently at least, was in regular use only in certain parts of Massachusetts, Minnesota and Hawaii. In the jurisdictions in which some form of the Torrens system is still in effect, the system is voluntary, and it functions side by side with the more common title recording system.

### 4.2 Is there a state guarantee of title? What does it guarantee?

No. Most owners obtain "insurance" that they have good title by buying title insurance from title insurance companies, who search and underwrite the title of the property.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

Unlike many legal systems, there is no requirement in the U.S. that title be registered. There is no obligation to record evidence of ownership, leasehold, easement or other rights. The act of recordation protects owners or benefited parties from prior, unknown, unrecorded and subsequently filed/recorded third-party claims.

**4.4 What rights in land are not required to be registered?**

As noted above, there is no requirement in the U.S. that title be registered.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

This is not applicable.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

In most jurisdictions, title passes upon the delivery of the deed. Recordation of the conveyance instrument follows to preserve rights and protect against third-party claims. Title insurance is utilised in many jurisdictions to protect against any "gap" interests or claims arising between execution and recording of the deed.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Property rights are protected by recording. In virtually every jurisdiction, recordation in the real estate records establishes priority. A mortgage becomes perfected only upon recordation and it must be recorded within 10 days after execution to become perfected as of the date of delivery. Anything of record at the time of recording will be in right to the document that is recorded later. This basic premise may be altered, however, as follows:

- a significant change in the mortgage, such as the interest rate and/or maturity date, may result in the priority being brought forward to the date on which the modification is recorded; an intervening lien or encumbrance would have priority (title insurance can be procured to insure priority where appropriate);
- local taxes have priority over recorded deeds and mortgages irrespective of whether the taxes are due and payable after the recording of the deed or mortgage;
- federal tax liens may have priority;
- parties can allocate priority pursuant to intercreditor or other subordination agreements; or
- the filing and existence of mechanics' and materialmen's liens.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

Each county (or parish, in Louisiana) in each state has its own recording office, and certain states have different recording offices/books for conveyances and for mortgages. Requirements are state-specific, and may be county-specific. Some states require signatures in black or blue ink. Every state requires a state-approved form of notary acknowledgment. The variations thereafter range from page size and margins to legends that must be affixed to the document, to some state requirements that an attorney admitted to practise in the state must have prepared the document and/or be the stated party for the return of recorded documents.

**5.2 How do the owners of registered real estate prove their title?**

As noted above, in most jurisdictions, legal title passes upon delivery of the deed to the new owner. While recordation of the deed is not required, it is customarily done to provide evidence of priority of ownership and in most jurisdictions recording of the deed is sufficient evidence to establish priority of ownership. Thus, if an owner gave two deeds to two different parties on the same day, the party that recorded the deed first would usually prevail in any dispute over ownership. In order to minimise this risk, purchasers usually rely on title insurers to insure their ownership, and to underwrite such insurance policies, the title insurers rely on a variety of factors, including searching local real estate records, requiring surveys of the property to be conducted by a licensed surveyor, and requiring affidavits and indemnities from the seller.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

The Real Property Electronic Recording Act, completed by the Uniform Law Commissioners in 2004, has been enacted by Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Washington, D.C., Wisconsin, Wyoming and the U.S. Virgin Islands. The purpose of the Act is to give county clerks and recorders the legal authority to prepare for the electronic recording of real property instruments. Certain municipalities and counties already offer electronic recording systems, which may be accessed and searched by the general public. Typically, recording offices only accept fully executed documents, correctly notarised and meeting certain other requirements, for recording. To record a transfer of ownership rights, recording offices typically require, among other things, transfer documentation (deed) and evidence of payment of real estate taxes and real estate assessment valuations.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

No. Most documents are submitted to recording offices by third-party title insurance companies. In consideration of the payment of a premium, the title insurance companies issue a policy insuring that the deed or mortgage recorded has been validly recorded, subject only to scheduled encumbrances. The title insurance company is liable if there is a mistake, subject to limitations contained in the title insurance policies.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

There are no restrictions on public access to the recording office. A buyer can learn certain matters at the recording office. A buyer can identify the owner of the property and research recorded liens, easements, and other encumbrances. In addition, UCC filings evidencing any security interest in personal property located at the real property can be searched in the UCC records of the applicable state. The real estate records will not provide information as to whether a building has been built in accordance with local codes and is in compliance with zoning ordinances with valid certificates of occupancy, but this information is also publicly available from the applicable jurisdiction. Additionally, while a search of the records will reveal the existence of easements or other rights or appurtenances, only a survey of the subject property will show the location and the impact of such easements or other rights or appurtenances on any improvements located thereon. In addition to ordering a survey, many buyers also supplement their due diligence by contracting with third-party providers to conduct physical inspections, environmental testing, and zoning and building code analysis.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

In connection with an acquisition of real estate, different parties may assist depending on the type of asset. In all cases, a broker is likely to be involved. A purchaser will typically engage structural and environmental engineers to evaluate the property and improvements and they will evaluate zoning compliance, matters of title and survey, and any existing leases. An expert in zoning and municipal codes, an architect, and contractors might also be involved to assess the development potential of raw land.

**6.2 How and on what basis are these persons remunerated?**

The seller normally employs a broker to sell the property. The commission is usually a percentage of the sale price, payable by the seller. The percentage varies by product type and locality. If the purchaser identifies the property through a different broker, the seller's broker or the listing broker will share its commission with the purchaser's broker. Other service providers are compensated based on an agreed-upon hourly rate times the hours spent. Brokers are paid at the closing. Other service providers are paid a usual and customary fee for the jurisdiction based on the arrangements made in advance.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

Capital for investment in the debt and equity sectors remains abundant, but investors perceive a shortage of investments that promise desirable yields. Capital is readily available for refinancing and acquisition debt, and on a more disciplined basis for development. Regulation under Dodd-Frank and Basel III has required large commercial banks to be more conservative, but there is growth at the community and regional bank level. Life insurance companies make similarly conservative long-term investments, typically in core assets. CMBS lending remains a consistently important source of capital, particularly in secondary and tertiary markets, but no longer maintains a large pricing advantage and the lack of flexibility working with servicers can be a disincentive to borrower. Private debt funds and mortgage REITS provide more flexibility than the regulated or core-asset focused lenders, but at a higher price. Equity investment comes from the traditional sources such as institutional investors and REITS, but private equity is one of the fastest growing sources of investment capital. International investment is significant, particularly in the gateway markets, by large institutions such as insurance companies or sovereign wealth funds, and by individuals (including development capital made available under the EB-5 Immigrant Investor Program).

With respect to sources of debt capital, traditional institutional lenders such as banks are facing increased competition from non-traditional alternative lending sources such as private equity funds and private real estate investors and operators. As property values continue to appreciate, cap rates compress and interest rates begin to rise, the rates of return that these non-traditional alternative lenders received in the past on equity financing have become increasingly difficult to achieve. As a result, many traditional sources of equity financing have become increasingly involved in debt capital markets. Additionally, while these alternative lenders are increasingly providing debt financing, they are seeking higher rates of return than are usually sought by traditional institutional lenders, thereby making an abundance of debt capital available for riskier types of financing such as construction loans and bridge loans.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

Surplus capital, as well as competition and rising prices in the traditional gateway markets, has led investors to expand their interest in secondary and tertiary markets. These markets tend to have faster growing demographics (as the primary markets become less affordable, in some cases as a side effect of the state and local tax provisions of the 2017 Tax Cuts and Jobs Act in states where property taxes are highest), diverse job opportunities in desirable industries, and intentional development of urban centres that offer the benefits of urban living at a significantly lower cost. A number of midsized markets in the U.S. (Austin, Texas; Raleigh/Durham, North Carolina; and Nashville, Tennessee are examples) have consistently attracted investor capital over the past several years. State and local investment in infrastructure also promises to attract investment at a time when national funding has not been forthcoming. While investments in the gateway cities have traditionally provided the perception of security, the wealth of data that is now available to investors enables them to focus more precisely on defined neighbourhoods and asset characteristics in other markets that suit their investment profile.

There is a significant need for affordable housing projects throughout the U.S. as a result of the widening gap between median home prices and median household incomes. Following

the passage of the Tax Cuts and Jobs Act of 2017, the U.S. Congress created a new community development programme to encourage long-term investments in low-income urban and rural communities throughout the country. The "Qualified Opportunity Zones" incentive provides tax benefits for investors to re-invest their realised capital gains into "Qualified Opportunity Funds" that are dedicated to investing in property or businesses within designated Qualified Opportunity Zones. The legislation encourages long-term investment in these communities by providing greater tax incentives based on the amount of time the investment is held.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

It is difficult to identify a specific slowing trend for the entire country. Some asset classes perform better in different regions, and in some areas, a particular asset class may be considered over-built or on the verge of becoming so. Office properties have become more difficult to sell, but retail properties have become more challenging as investors become more interested in data centres, cell towers and suburban mixed-use properties as well as senior living and medical office properties. Regional malls, power centres and shopping centres serving middle-income households have failed to rebound over the last several years, while top-tier shopping malls and urban/high street retail have prospered, and therefore these assets may be less appealing for investment, although many are priced below replacement cost and are well-located for alternate uses. In addition, suburban office assets have suffered in recent years as a result of a trend of companies relocating from the suburbs into urban centres to attract young, talented employees.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

Customarily, the parties enter into a contract of sale, which sets up the mechanics of the closing as well as the conditions and actions that must be satisfied or occur between the date of signing and closing. While a contract is not required, it will protect both parties, neither of whom will be obligated to close if specified conditions precedent are not met. The form of deed must be sufficient to transfer title under the laws of the situs state. It must also be in recordable form so that a title insurance company will issue a policy of owner's title insurance. Even in the case of a transfer of a single-family home, a purchaser will want time to perform due diligence and will require seller representations with respect to the condition, water quality, certificate of occupancy, appliances, etc. For office buildings and other income-producing properties, evaluation of the leases will be an important due diligence consideration. In all cases, the requirements of a lender providing purchase money financing must be satisfied.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller does not generally have a duty of disclosure in a commercial transaction. Sales of real estate are "*caveat emptor*". However, if a question is asked and the seller answers fraudulently, the seller will be liable for damages. Specific disclosures are customary in the residential context.

States and municipalities have laws which do require disclosures in specific instances. In New York City, the existence of lead paint must be disclosed in residential sales. Similarly, the existence of asbestos must be disclosed. A statement regarding the potential presence of radon gas must be included in real estate contracts concerning Florida properties. These types of laws are local in nature.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes. The remedies for such misrepresentation will be set forth in the contract of sale. Customarily, a buyer may rescind the contract if the misrepresentation is discovered prior to closing; thereafter damages may be sought. Again, the representations must be in writing. Parties will negotiate the period of time after closing that the representations will survive and may agree to a cap on the seller's maximum liability for the breach of such representations.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Customarily, purchasers will acquire "as-is", with certain specific representations given as to matters that are more difficult for a purchaser to discover itself during its inspection period. The specific items warranted, caps on seller liability and the warranty survival period are heavily negotiated. The function of warranties is to apportion risk; however, sellers will attempt to limit liability when possible. In the case of leases, sellers will attempt to get a purchaser to rely on estoppel certificates from tenants rather than provide representation about the leases. Similarly, purchasers will rely on third-party assessments as to environmental and structural concerns.

State statutes provide for the use of various types of deeds ranging from full warranty deeds, which warrant title from the beginning of time, to forms that warrant only with respect to acts of the seller, to quit claim deeds which convey bare legal title. Subject to written agreement to the contrary, local custom typically dictates the extent of the warranty of title provided. Similar to contractual warranties, the form of deed and scope of warranties contained therein is negotiable but is usually not a buyer's best "guarantee" of title. Ultimately, most buyers view title insurance policies as their best form of "guarantee" of title.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

In virtually all jurisdictions, the "merger doctrine" provides that unless stated otherwise in the purchase and sale agreement, all obligations and liabilities contained in the purchase and sale agreement "merge" into the deed and are no longer enforceable after closing. For this reason, buyers customarily attempt to negotiate a post-closing survival period with respect to representations and warranties made by seller in the purchase and sale agreement, while sellers attempt to limit the

post-closing survival of seller's representations and warranties to as short of a post-closing period as possible. In addition, parties often negotiate as to which specific obligations and liabilities will survive closing. When a property has tenants, the seller also usually remains liable for any claims by such tenants which accrued prior to the date of closing. As noted above, agreed warranties of title can be included in the deed.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

Risks are apportioned in the contract of sale. The buyer is obligated to come to the closing table, ready, willing and able to close. That means bringing cash or cash equivalent (i.e., purchase money loan) to the closing. If the buyer breaches its warranties or obligations, the seller will be entitled to damages, often limited to retention of an earnest money deposit. The buyer's primary responsibility is to come up with funds when required. If the seller is paid in full at closing, it is hard for the seller to show damages. Allocation of closing costs (such as transfer taxes, title insurance and escrow charges) is dictated by local custom and is often negotiable.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

With respect to residential real estate, there are both federal and local requirements. At both levels, the purpose of the regulations is to protect the consumer. The federal regulations make sure that lenders fully disclose all costs and expenses of financing; i.e. all interest payments, fees and closing costs over the life of the loan. Localities have regulations dealing with physical risks, such as lead paint, radon gas and asbestos, among others.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

Most real estate lenders underwrite commercial or multi-family properties by looking at the cash flow, the projected rent stream, the physical and environmental condition of the property, and the as-is value and the projected value of the property as compared to the amount of the loan. Borrowers look for commercial loans to be non-recourse, meaning that the borrower or its sponsor – individual or entity – will not be personally liable if the loan is not repaid, but lenders will in turn protect themselves with a guaranty from a sponsor triggered by the borrower's bad acts, such as misappropriation, fraud, malfeasance or voluntary or collusive involuntary bankruptcy. Lenders require more equity if a property is risky; such equity may take the form of upfront capital as well as letters of credit and payment guaranties. In addition, lenders often impose cash management systems with varying levels of control over the property's cash flow, depending on the type of asset and the underwriting of the property and the borrower, pursuant to which revenues are deposited by tenants or the property manager directly into a controlled account and either applied directly to debt service or disbursed to the borrower, only so long as no default exists and certain loan performance thresholds continue to be met.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

Judicial foreclosure is available in every state (and required in many) and entails the foreclosing lender filing a lawsuit against the defaulting borrower. Upon judgment in the lender's favour, the property is typically subject to a public auction conducted by a court-appointed officer. With the spate of foreclosures in recent years, certain states have attempted to ensure the integrity of the foreclosure process by imposing certain restrictions and requirements on foreclosing lenders. In New York, for example, a foreclosing lender must be careful to comply with all notice requirements, especially as this may concern residential occupants of the subject property, and the attorneys of foreclosing lenders may be required to submit an affirmation that they themselves have taken reasonable steps to verify the accuracy of documents filed in support of residential foreclosures. If non-judicial foreclosure is allowed then, typically, if the borrower fails to cure a default after receipt of a notice of default and intent to foreclose from the lender, or use other lawful means (such as filing for bankruptcy to temporarily stay the foreclosure) to stop the sale, the lender or its representative may conduct a public auction of the property in a manner similar to the auction conducted in connection with a judicial foreclosure. The timeframe necessary to complete any type of foreclosure can vary widely depending on the circumstances and the requirements of the jurisdiction.

**8.4 What minimum formalities are required for real estate lending?**

In order to have an enforceable loan, most states require that contracts relating to real estate be in writing. In particular, each state's statute of frauds legislation will be applicable. In order for a lender to have a perfected security interest in the real estate, a mortgage or deed of trust meeting the requirements of state law must be recorded in the required recording office within 10 days of the execution thereof. In order for a lender to have a perfected security interest over personal property, accounts and receivables among other collateral that is categorised as personal property, the lender must record a financing statement in the place and in the manner required by the UCC governing the collateral.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

If the real estate lender has a properly perfected security interest in the collateral securing loan, the lender's security interest protects it from claims of other creditors. Title insurance insuring the first priority of the lender's lien on real estate assets securing a loan is an essential component of a real estate finance transaction. In transactions like mezzanine loans, where control over real estate assets is achieved by a pledge of ownership interests, the priority of filings under the UCC, adopted in all 50 states, the District of Columbia and the U.S. Territories can also be insured in many instances. It is important that security interests in real property and other assets interests be perfected in compliance with local law and the UCC, and that that appropriate filings are kept in effect. Covenants in loan documents

generally prohibit additional debt and transfers that might result in claims against the borrower, and guaranties are required to support specific borrower covenants not to take actions that could jeopardise a lender's security.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Insolvency laws, failure to comply with local law requirements and formalities, and borrower fraud can cause security taken by a lender to be avoided or rendered unenforceable. Lenders protect themselves against these risks by thoroughly investigating the credit status of their borrowers, by engaging local counsel to advise and opine as to specific local requirements and limitations of enforceability of loan covenants, and by obtaining third-party guaranties that can be enforced upon a borrower's breach of specific representations, warranties and covenants.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

Filing for bankruptcy protection is the most common method used by borrowers to frustrate enforcement actions. At a minimum the lender will be significantly delayed in exercising its remedies and motivated to reach agreement regarding a forbearance. In jurisdictions where judicial foreclosure is required, borrowers can more readily contest and delay enforcement actions. As noted above, a borrower's action to frustrate enforcement by a lender will typically trigger recourse to a third-party guarantor.

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The filing of a bankruptcy case triggers an automatic stay or injunction on collection activity which will prevent the secured lender from foreclosing without seeking relief from the stay. A real estate lender's secured claim in a bankruptcy case, however, will generally be protected in accordance with the priority of the lender's security interest in the real property collateral. If the real estate lender's collateral is disposed of through the bankruptcy process, and the real estate lender is unsecured, its claim will be bifurcated into its secured and unsecured components under Section 506(a) of the Federal Bankruptcy Code based on the value of the property. The secured claim will generally be paid in an amount equal to the value of the property, with a distribution to the lender on the unsecured portion of its claim on a *pro rata* basis along with the claims of other unsecured creditors of the debtor. As a result, the secured lender's valuation of real property can be contested in bankruptcy proceedings and potentially lead to litigation in the bankruptcy court over the correct amount to be allowed for the lender's secured claim. Additionally, there are some built in protections for real estate lenders in "single-asset" real estate bankruptcy cases, where the primary income from a debtor is based on a single commercial real estate project. On request of a creditor with a claim secured by the single asset real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor unless the debtor files a feasible plan of reorganisation or begins making interest payments to the creditor within 90 days from the date of the filing of the case, or within 30 days of the court's determination that the case is a single asset real estate case. The interest payments must be equal to the non-default contract interest rate on the value of the real estate lender's interest in the real estate.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

"Mezzanine" financing is a hybrid of debt and equity financing where the parent company of the borrower pledges its equity interest in the borrower to the lender as collateral for the loan, and it has increased in popularity as equity investors seek more leverage in order to improve yields. Perfection of the lender's security interest is governed by the UCC. In the event of a default, the lender has the right to foreclose on the parent company's equity interest, thereby taking control of the borrower and the property owned by the borrower. Foreclosure on an equity interest by a mezzanine lender is accomplished through a UCC foreclosure which is generally believed to be a less cumbersome and faster process than a foreclosure on real property by a mortgage lender. However, if the underlying real property is also mortgaged as collateral for a senior loan, the ability and desire of a mezzanine lender to foreclose on the equity interest in the borrower is usually limited by an intercreditor agreement between the senior secured lender and the mezzanine lender. Once an insolvency or reorganisation proceeding against the borrower is initiated, an automatic stay will initially prohibit the mezzanine lender from initiating a UCC foreclosure on the equity interest in the borrower.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

In most jurisdictions, there are state and sometimes local transfer taxes on a deed transfer, which are usually calculated as a percentage of the consideration being exchanged for the deed. In some jurisdictions (New York, for example), long-term leases (49 years or more) of real estate are subject to transfer tax. Some states impose their real property transfer tax in cases where an interest in an entity that owns real property in the state is sold (usually requiring the transfer of a controlling interest in the entity). Many states also have mortgage or intangibles taxes payable in connection with indebtedness secured by real estate. The obligation to pay transfer taxes can be allocated by contract but is typically allocated pursuant to local custom. In some states, the obligation to pay transfer taxes is joint and several, so even if the obligation is allocated to one party, the state is not bound by such allocation, so the state could seek payment from the other party if the proper amount of tax is not paid. Mortgage recording or note intangibles taxes are typically allocated to the borrower. If not paid, recording offices will not record deeds. Both the purchaser and the seller typically have liability.

### 9.2 When is the transfer tax paid?

Payment of the applicable transfer and/or mortgage recording or intangibles tax is a condition precedent to recordation of a deed or mortgage, as applicable. Payments are, however, subject to subsequent audit in many jurisdictions. In states that impose

the transfer tax on a transfer of a controlling interest in an entity that owns real property, a return must be filed within a certain time period, typically 30 to 60 days of the transfer.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Unless the transfer of real estate qualifies for special treatment under the U.S. Internal Revenue Code of 1986, as amended (the "Code"), the transfer of real estate by a U.S. person is a taxable transaction. The individual seller will have taxable gain or loss equal to the difference between the fair market value of the consideration received (including any liabilities assumed or to which the real estate transferred is subject) and the tax basis that the individual has in such real estate, which tax basis is reduced by depreciation deductions taken for tax purposes. The gain or loss will be capital in nature if the real estate was held as a capital asset (i.e., generally, held for investment). Long-term capital gains (i.e., gains with respect to capital assets held over 12 months) are currently taxed at significantly more favourable tax rates as compared with the tax rates on ordinary income in the case of individuals and other non-corporate taxpayers. Exclusions from taxable income (up to maximum dollar amounts) are available for gains recognised by individuals on the sale of a principal residence.

As mentioned above, if certain requirements are met, the exchange of real property with other real property that is of a like-kind may qualify as an exchange under Section 1031 of the Code. Section 1031 provides an exception to the general rule of current gain recognition and allows owners to postpone paying tax on the gain from the sale of real estate if the owner reinvests the proceeds in similar property located in the U.S. as a part of the like-kind exchange. The gain is deferred until the transferor exits out of its investment in the like-kind property received in the exchange.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

There is no VAT in the U.S. Most U.S. states do impose a transfer tax on the transfer of real estate. The rate is not uniform and there may be additional taxes imposed at the county or municipal level. Many states will require the purchaser to withhold state income taxes if the seller is not a resident of the state, or if the seller is a pass-through entity for tax purposes, will require the entity to pay the estimated state taxes owed by the partners who are not residents of the state.

Many states exempt transfers of real estate, the gain from which would be deferred for U.S. federal income tax purposes under special provisions (for example, the like-kind exchanges discussed above or transfers of real estate to wholly owned entities).

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

While foreign investors are generally not subject to U.S. income or withholding tax on proceeds or gains from the sale of U.S. investments (such as stocks and bonds), an exception applies in the case of a sale by a foreign person of "U.S. real property interest" ("USRPI"), which is generally subject to U.S. federal income and withholding tax pursuant to the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"). A USRPI includes an interest in real property located in the U.S. or the U.S. Virgin Islands, and also includes any interest, other than as a creditor, in any U.S. corporation that is a "U.S. real property holding corporation" ("USRPHC"). In general, a U.S. corporation is a USRPHC if the fair market value of the USRPIs held by the corporation during the five-year period prior to the sale of the corporation's shares has been equal to or exceeded 50% of the sum of the fair market values of the corporation's U.S. and non-U.S. real property assets and certain business assets. Gain from a sale by a foreign person of a USRPI is treated under FIRPTA as income from a U.S. trade or business for U.S. federal income tax purposes and is therefore taxable to the foreign seller in the same manner as a U.S. person (e.g., an individual or a corporation, as applicable) would be taxed. This requires the foreign seller to file a U.S. federal income tax return and to report and pay the resulting tax liability. If the foreign seller is an individual or a foreign trust or estate (looking through tax-transparent entities such as partnerships), gain, if any, from the sale of the USRPI generally is subject to U.S. federal income tax at a maximum rate of 20% if the USRPI was sold after a holding period of at least one year (i.e., long-term capital gain), or 37% if the USRPI was sold after a holding period of one year or less (i.e., short-term capital gain). State and local taxes may also be payable. Foreign sellers of USRPIs that are corporations are subject to U.S. federal corporate income tax of 21% on gain from the sale (whether the gain is short-term or long-term) and potentially also to an additional "branch profits" tax on the 79% after-tax gain amount at a 30% rate (which may be reduced or eliminated by a tax treaty). Collection of the tax under FIRPTA is enforced through an obligation of the purchaser/transferee (whether the purchaser/transferee is U.S. or foreign) to withhold, generally at a rate of 15%, of the gross purchase price (for dispositions before February 17, 2016, the withholding rate was 10%). There is a procedure that enables the parties to apply in advance of the sale for a "withholding certificate" from the IRS approving a reduced or zero withholding tax if it is established to the satisfaction of the IRS that the withholding tax would exceed the tax liability of the foreign seller on the sale. The difference between the actual tax liability of the foreign seller on the gain (if any) pursuant to FIRPTA and the amount withheld and remitted to the IRS by the purchaser is either paid by the foreign seller to the IRS when it files its U.S. federal income tax return for the year of the sale, or refunded to the foreign seller by the IRS as a result of a claim for refund made by the seller on such return. Some states, such as Georgia, have enacted similar withholding requirements for the sale of property by non-residents of the state.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

If equity interests in a "USRPHC" (defined in question 9.5 above) or interests in a partnership, a limited liability company or other pass-through entity that directly or indirectly holds U.S. real estate, are sold by a foreign person (or by a seller that is a partnership or other pass-through entity that has foreign owners), apart from transfer tax considerations as discussed above, the foreign seller (or foreign owners of a seller that is a partnership or other pass-through entity) will generally be subject to U.S. federal income tax on any resultant gain as discussed in question 9.5 above. If the foreign seller is a corporation and the sale is a sale of shares in a "USRPHC," the "branch profits" tax discussed in question 9.5 above does not apply. In addition, a variety of exemptions from FIRPTA are potentially available for certain sales of shares of certain "USRPHCs," including for: (i) sales of shares of a publicly traded "USRPHC" (including a publicly traded REIT) by small portfolio investors owning less

than 5% of the publicly traded "USRPHC" or less than 10% of a publicly traded REIT; (ii) sales of shares of REITs (including private REITS) that are domestically controlled (i.e., less than 50%-owned throughout a testing period by non-U.S. investors); (iii) sale of shares of a "USPRHC" that disposed of all of its U.S. real property assets in a taxable transaction (or transactions) prior to the sale of the corporation's shares; and (iv) sales of USRPIs (including sales of shares of "USRPHCs") by "qualified foreign pension funds" that meet certain requirements. The sale of stock of a foreign corporation is not subject to the FIRPTA tax; furthermore, the transfer of shares of a USRPHC may not be subject to tax if the transfer is pursuant to certain tax-free reorganisations.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

In addition to assessing local transfer and mortgage taxes as described above, a buyer should evaluate the impact of local *ad valorem* property taxes on the transaction, including the amount, schedule for payment, appropriate proration with the seller, and potential for reassessment or application of "rollback" taxes as a result of a transfer or change in use or real property. With respect to the acquisition of certain assets, sales taxes may be an issue as well, and a buyer should obtain a tax clearance certificate from the taxing authority to confirm there are no outstanding tax liabilities that would transfer with the asset. Some jurisdictions have bulk sales laws in place, that require, among other things, a buyer to notify the seller's creditors if it is acquiring a significant portion of the seller's business or assets.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

In most states, leases are contracts and governed by applicable contract law. Local law governs damages on breach and other remedies, and procedures to evict defaulting tenants. Local law will dictate whether a lease is subordinate to a mortgage, absent a provision in the lease that automatically subordinates the lease to any mortgage. If a landlord or tenant files for bankruptcy, their respective rights will be as set forth in the Federal Bankruptcy Code, which pre-empts state law.

**10.2 What types of business lease exist?**

There are "modified gross" leases, generally used in office buildings, which build into the rent a base for real estate taxes and operating expenses; the tenant will be allocated its percentage share of annual increases above that base. A net lease on the other hand, is generally used for long-term leases of entire buildings, industrial/warehouse leases, retail outparcel leases and some retail leases. In this type of lease, the tenant pays directly for utilities, taxes and property insurance, and is responsible for the maintenance of the premises. However, in most cases, they are not responsible for certain structural repairs. A land lease or ground lease is a long-term lease by which the tenant rents and uses land, but during the term of such a lease the tenant also owns the improvements it constructs on the land (and is therefore responsible for all maintenance, taxes and other costs related thereto).

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

These terms are negotiated for each individual lease:

a) Length of term
The length of the term can vary. Landlords prefer a longer term with frequent rent increases. Tenants may want to lock in space for 10 years but will not want rent increases. No right to renew will be afforded to a tenant unless set forth in the lease, and then the tenant must exercise this right in a timely manner.

b) Rent increases
See above. Renewal rents may be stipulated in advance, increased based on an independent factor (such as the Consumer Price Index) or reset based on the prevailing market rental rate.

c) Tenant's right to sell or sub-lease
See below.

d) Insurance
Typically, the landlord will obtain property insurance for the building (the cost of which may be passed through to its tenants), and the tenant will provide property insurance for the contents of its premises and its tenant improvements. Each party will obtain liability insurance for its acts or omissions. Other coverages may be required according to the tenant's use, the location of the property, a lender's requirements, and as the market dictates.

e) (i) Change of control of the tenant
See below.
(ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)
Provisions of leases dealing with assignment and subletting as well as mergers or reorganisations or changes of control are significant points of negotiation. In all events, the landlord will want the right to consent to a change of tenant, whether by assignment or subletting or change of control, but a significant tenant will want to preserve its ability to restructure. Minimum net worth requirements for the assignee and continued liability of the assignor are often utilised. The sale of stock of publicly owned companies, however, should not be prohibited by the terms of the lease. State law varies as to whether a change of control constitutes an assignment where a lease is silent or unclear.

f) Repairs
In most cases, interior repairs to the premises are the responsibility of the tenant and structural and systems repairs and common areas maintenance are the obligation of the landlord (subject to the ability of the landlord to pass the related costs through to the tenants). The exact allocation of repair obligations will vary by property type and location.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

The landlord pays income tax on rental income. Real estate taxes are allocated between the landlord and tenant. State sales taxes on rents, which apply in some states (Florida, for example), are usually allocated to the tenant. New York City has a commercial occupancy tax affecting part of the city.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Except in the case of certain financing leases that can be terminated upon payment, leases generally terminate at the end of a lease term. If a tenant fails to vacate its premises at such a time, the landlord can move to evict the tenant and typically has the right to charge a significantly escalated "holdover" rent during such period. Tenants and landlords can typically terminate leases upon a substantial condemnation or casualty. The degree of damage or loss and the time that the tenant is unable to use the demised premises determine a tenant's right to terminate, and these requirements are heavily negotiated. If the leased premises are being constructed, the tenant may have the negotiated right to terminate the lease if the premises are not completed by a certain date. A tenant may negotiate a right to terminate the lease if services are not provided for a designated period of time. A tenant may also be able to negotiate a termination right at one or more points during the term in exchange for payment of a termination fee to compensate the landlord for unamortised tenant improvement costs and leasing commissions and a portion of future rent.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

The answer to this question will depend on the language of the contract. The tenant signing the lease will be liable for the performance of the obligations thereunder. If the tenant assigns its interest under the lease, it may cause a new tenant to assume its obligations, but the assignment will not release the tenant from acts prior to or after the assignment unless specifically released by the landlord. If the tenant under a lease is a company and the shareholder sells the company, the shareholder will not have personal liability before or after the sale by virtue of the liability limits afforded to such shareholder by the statutes governing entity liability. Leases typically provide that the landlord's liability is limited to its interest in the property and that the landlord will be released from further liability following a sale of the property. One of the documents executed in a typical real estate sale will address the assignment of leases and assumption of obligations by the purchaser. The contractual terms of an assignment of leases are negotiable as to whether such assumed liability includes liability arising prior to the transfer as well as liability arising from and after the transfer. In some instances, state law may require an explicit assumption of liability for tenant security deposits transferred in connection with a sale.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green provisions are becoming more prevalent in leases today. Much of the demand for green buildings is being driven by corporate tenants with enterprise-wide sustainability programmes and landlords who are marketing the cost savings provided by "green" and energy-efficient projects and by municipalities tying bids for projects and incentives to similar objectives. Institutional investors have also shown a heightened interest in such projects, and environmental, social and governance principles generally are increasingly factors in investment decisions, particularly when millennials are driving such decisions. "Green" leases regularly include provisions which provide for compliance with established "green" standards such as the LEED Certification standards promulgated by the U.S. Green Building Council, the most widely accepted green building standard.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Whereas long-term leases have traditionally been viewed by landlords as a way to reduce risk and create stable cash flow, the fast-moving companies of today that are constantly transforming their business models and disrupting new industries have made long-term leases riskier since there is no way of knowing whether a tenant will still be relevant to the consumer in five to 10 years. As a result, demand for flexible workspace is high throughout the U.S. Similarly, developers of residential multifamily apartments are facing ever greater competition to attract tenants by providing the greatest amenities package. For example, communities that used to offer a basic fitness centre and package room for 24-hour package delivery are now offering game rooms with big-screen TVs, video games, pool tables and shuffleboard, flex-working spaces equipped with wi-fi internet, and concierge services that pick up and deliver dry-cleaning on-site and manage deliveries of groceries and other packages.

Co-living is increasingly common among people in their 20's and 30's, and also among older individuals, for those seeking cost savings as well as the opportunity to live with peers sharing common interests and values.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

As with commercial leases, in most states, leases of residential premises are contracts and governed by applicable contract law. Local law governs damages on breach and other remedies, and procedures to evict defaulting tenants. Generally, however, local law will provide for more protective treatment of residential tenants than commercial tenants. For example, in some states, security deposits must be held in segregated and or interest-bearing accounts, and must be returned to the tenant within a short period of time following expiration of the lease or penalties will apply to the landlord. Tenants may have a legal right to a walk-through at the beginning and end of a lease term to confirm any damage to the premises for which the tenant could be held responsible.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

Local laws often provide exemptions from certain residential tenant-protective requirements for owners leasing fewer than a stipulated number of units.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

Subject to requirements of local law, residential leases are typically for one year, with rents to be renegotiated upon renewal. Shorter term leases may require premium rents, depending on inventory and market conditions. A landlord's acquiescence to a tenant holding over may establish a new tenancy (month to month or otherwise), which requires a landlord to monitor its lease expirations. A typical multifamily residential lease (for an apartment development), would allocate responsibility for maintenance and insurance of the real property to the landlord. A tenant would be responsible for insuring its personal property and for the cost of repairs of damage in excess of ordinary wear and tear at the end of the lease.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Local law governs damages on breach and other remedies, and procedures to evict defaulting tenants, but termination and eviction rights are typically provided to landlords.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main laws governing construction, zoning, use, and occupation of the land are local in nature. Each state adopts governing or enabling legislation giving local authorities the power to enact zoning regulations. Local land use authorities then have their own ordinances, rules, and regulations. Be aware, however, that not every location in the U.S. is in an incorporated municipality, and not every locality regulates land use by zoning or land development under any mechanism. In some locations, federal or state law may affect land development or land use, often in special areas. For example, in California, there are specific provisions dealing with coastline property. In Maryland, development around the Chesapeake Bay is specially regulated. In Florida, the Everglades are subject to special rules. Federal and state governments exercise more comprehensive jurisdiction over environmental matters than local governments, who more typically regulate land development and land use. Under these laws, landowners must comply with a variety of statutes and regulations governing emissions to the air, discharges to water, and disposal on land. Real estate practitioners will want to pay particular attention to restrictions on development in or near wetlands and streams, discharges of storm water during construction and after completion of a project, storage facilities for potentially polluting materials like chemicals or heating oil, and equipment that may cause air pollution such as large space heating boilers or standby power generators. Similarly, certain materials raise questions if they are present in existing structures, and generally cannot be used in new buildings; examples include lead-based paints, asbestos, polychlorinated biphenyls, and urea formaldehyde foam insulation.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The U.S. Constitution includes a provision known as the Takings Clause, which states the "private property [shall not] be taken for public use, without just compensation". As such, the state can condemn (force the owner to sell the property to the state) property for public use, but, based on recent cases, the courts are split as to whether economic development is a sufficient public use of the property which would enable them to acquire title and transfer it to a private entity. The state must provide the owner with "just compensation". The price mechanism will vary from state to state, and from authority to authority taking land (as each may have a different statutory obligation with respect to public uses and compensation).

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Federal and state governments have jurisdiction over environmental law. As noted below, there are databases for violations of certain federal laws; states may maintain similar databases. Otherwise, parties hire environmental consultants (third-party experts) to perform Phase I Environmental Site Assessments, which consist of site inspections, interviews with people knowledgeable about current and historical uses of the property, and searches of electronic databases of regulated and contaminated sites. The prior or existing use of the property may require that sampling of soil, groundwater, surface water, or other environmental media be performed. Such sampling is commonly referred to as a "Phase II Environmental Site Investigation". Purchasers sometimes require the seller to provide extensive representations concerning environmental matters, which may cause the seller to make disclosures of past environmental issues.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Each local governmental entity has its own requirements. As a general matter, a building permit is needed for construction and a certificate of occupancy or certificate of use is needed specifying usage for each separate space in a building. Local ordinances are likely to require other forms of permission within the development stages, such as "site disturbance permits" or permits for water or sewage use.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Permits are obtained locally. Building permits must be issued

before construction can take place. Certificates of occupancy, or their local equivalent, must be issued before buildings (and tenant spaces) can be occupied. Requirements relative to reissuance and transfer of certificates of occupancy are governed by local law.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

This is totally dependent upon the request, the local requirements, and how busy the office granting the permits is at the time of the request.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The federal government, through the Secretary of the Interior, maintains a National Register of Historic Places and the federal government administers certain grant programmes and encourages the preservation of these sites through various financial incentives. State and local governments will generally have a historic preservation commission that will designate certain sites or districts as historic and this commission will consider preservation interests before issuing building permits and review actions of the zoning and planning boards when historic sites will be affected. A historic designation may affect the use of the property, but generally it does not affect the transfer rights.

Rather than stifling development, in some instances, regulations on the protection of historic monuments can foster development through tax incentives which make development projects that would not otherwise be financially viable for a developer worth the reward. The IRS tax code provides "historic tax credits" to developers who rehabilitate buildings constructed prior to a certain date or buildings that are "certified historic structures". These historic tax credits can then be passed on by the developer to a bank or other company which can use the tax credits to offset the company's substantial tax basis in exchange for an equity investment in the project.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

Generally, parties hire third-party environmental consultants to perform Phase I Environmental Site Assessments, as described in question 11.3 above. The Environmental Protection Agency, a federal agency, maintains a "National Priorities List" of the most contaminated known sites in the country, and many states have developed their own lists of contaminated sites. There are many contaminated sites that are not on federal or state lists, however. Thus, an adequate Phase I Environmental Site Investigation and, if warranted based on the findings of the Phase I, a Phase II Environmental Site Investigation, are the best means for obtaining the most reliable and comprehensive information regarding environmental conditions at a subject property.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

This is dependent on statute. Under certain federal and state laws, parties in interest, including some existing and prior owners, are liable for remediating property that is contaminated above applicable standards. Some states, including most notably New Jersey, also have laws requiring sellers to verify to state regulatory authorities the environmental condition of certain industrial and commercial property before it is sold, and if the property is contaminated, the seller must remediate it before the transaction can be consummated.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

There are no standards at this time.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

There are none that are applicable to real estate on a nationwide basis, but certain states, such as California, have enacted regulatory measures for reducing carbon dioxide emissions and have begun to implement emissions trading regimes.

**13.2 Are there any national greenhouse gas emissions reduction targets?**

There are certain states that have requirements.

**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

Most action on this front, thus far, has been taken by state and local governments. For example, New York and other jurisdictions have begun to require the auditing and reporting of energy consumption at the building level. California and Washington have begun requiring owners of non-residential buildings (including hotels) to release energy and water consumption data and ratings to parties in any transaction concerning the sale, lease or financing of a building. Many local jurisdictions in California have green building standards modelled on LEED or other standard building guidelines.

**Christina Braisted Rogers** focuses her practice on real estate matters, including acquisition, joint venture, disposition, leasing transactions and financing matters involving multifamily residential, office, retail and industrial properties. She represents institutional real estate investors, including investment trusts, pension fund advisors, and construction and permanent lenders and borrowers. Christina is experienced with conduit, traditional, mezzanine and construction lending, representing major financial institutions, conduit lenders and insurance companies.

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# Zimbabwe


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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.**

The right to ownership is enshrined in the Constitution of Zimbabwe. The Bill of Rights, in particular sections 71 and 72, provides for property rights in general and rights to agricultural land. Every person has the right, in Zimbabwe, to acquire, hold, occupy, use, transfer, lease, hypothecate, or dispose of all forms of property. The Deeds Registries Act [Chapter 20:05] establishes the country's deeds registries and provides for the registration of deeds and conventional hypothecations such as mortgage bonds and notarial bonds. It also establishes rights to immovable property, the creation of servitudes and leases and other limited rights to property. There are various other statutes that regulate real estate law but the aforementioned are the key statutes.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The common law in Zimbabwe is Roman Dutch law and it naturally applies to real estate. There is nothing unusual in Roman Dutch law with regard to real estate.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws are not relevant to real estate in Zimbabwe unless they have been adopted locally.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

Currently, there are no restrictions on foreign ownership or occupation in Zimbabwe. Section 71 (2) of the Constitution provides that every person shall have the right to own all forms of property.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The property rights which are recognised by our law may be categorised as real rights and personal rights. Personal rights are contractual and are only binding between the parties involved, whereas real rights are binding on everyone. Generally speaking, registration is required to convey ownership of land from one person to another, but in certain rare cases the courts will recognise the right of beneficial ownership without registration.

**3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?**

Generally, the owner of land is also the owner of all structures integrated with or affixed to the land, including crops, buildings, machinery, wells, dams, ponds, mines, canals and roads, among other things. These are commonly termed "improvements". This stems from the legal maxim "*Quicquid plantatur solo, solo cedit*: whatever is affixed to the soil belongs to the soil". There are instances where, contractually, parties may conclude an agreement to the effect that whatever improvements are made on the property remain the property of one party, while another owns the land. In other scenarios, an agreement might provide that the landowner will retain the improvements subject to compensation being paid. There is no separate procedure for the registration of a right to a building but the law relating to sectional title allows co-owners of a piece of land to have exclusive rights of occupation of that piece of land and any buildings thereon.

**3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?**

Yes. A common example is in the case of a holder of a lease which, when entered into, was for a period of not less than 10 years. Sections 65 to 70 of the Deeds Registries Act [Chapter 20:05] provide for the registration of leases at the Deeds Office. Section 69 provides for the hypothecation of leases and sub-leases by means of a mortgage bond. Where the land leased is mortgaged or subject to the rights of any other person, the consent of the mortgagee is required prior to registration of the

lease. The consequences of this split are best expressed by the maxim "*huur gaat voor koop*", where every successor of a lessor will be bound by the lease, irrespective of whether or not the successor was aware of the lease. The lessor may not necessarily require the consent of the lessee to sell, and in the event of a sale the lessee's rights are protected. There are currently no proposals to change these consequences.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

Land in Zimbabwe is classified into various groups; namely, communal land, agricultural land, residential land, and land which vests in the State. In terms of section 4 of the Communal Lands Act [Chapter 20:04], all communal land is vested in the President and requires no registration. Occupants may use this land, in accordance with the Act. Rights to that land are limited to occupation and use for agricultural and residential purposes. These rights are determined by customary law and in some cases, where a permit has been obtained. Communal land is not registrable. State land is registrable at the Deeds Registry. It is governed by the Rural Lands Act [Chapter 20:18]. The relevant Minister, acting in terms of the Act, may acquire any land and direct the Registrar of Deeds to cancel title deeds in respect of that land. Upon cancellation, the land will vest in the State. Agricultural land is governed by various statutes and more importantly, by the Constitution of Zimbabwe. Section 72 (1) provides that only "pieces of agricultural land" are registrable in the Deeds Registry. Residential land is registrable in the Deeds Registry. Upon registration, a Title Deed is issued, which confirms a person's real right to the immovable property.

**4.2 Is there a state guarantee of title? What does it guarantee?**

There is no guarantee of title by the State.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Real rights and limited real rights are compulsorily registrable. Common examples are ownership and mortgages.

**4.4 What rights in land are not required to be registered?**

Personal rights are not registrable. An example is found in short-term leases. Section 2 of the Deeds Registries Act [Chapter 20:05] provides that a short-term lease is any lease that is subject to a tenure of less than 10 years.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period following first registration. The right takes effect from the date of registration of the deed in the Deeds Registry.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Ownership is transferred to a buyer on the date that the relevant Deed is registered.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Real rights take priority from the date that they are registered. Common examples where some rights obtain priority over others are found in the case of mortgage bonds and registered lessees.

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

There are two deeds registries in Zimbabwe. One is in the capital city Harare, and the second is in the second largest city, Bulawayo. Each office has jurisdiction over a specified area, meaning a piece of land may be recorded in one of the two registries.

**5.2 How do the owners of registered real estate prove their title?**

A landowner proves title by means of producing a deed of transfer. A mortgagee will prove title by means of a bond. Where a lease is registered, the lease holder will prove title by means of a notarial deed.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

The deeds registries in Bulawayo and Harare operate a manual system. Electronic registrations are not yet in place and information cannot be accessed electronically. The documents required for registration of title include the identity documents of the seller and purchaser, power of attorney (where necessary), company resolutions (where necessary), an agreement of sale, and documentation showing that all relevant government taxes have been paid. The system, though manual, is efficient and organised.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

No. Section 84 of the Act provides that no act or omission by any registrar or any officer employed in the deed registry shall render the State or such registrar liable for damage sustained by any person in consequence of an act or omission.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Information at the Deeds Registry is accessible and available for public viewing and inspection. A search fee is not required. However, should the enquirer wish to obtain a copy of any document kept at the registry, a fee is charged. A buyer may obtain any information that he may reasonably require.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Conveyancers, estate agents, legal practitioners, and in some instances notaries public, are normally involved in a real estate transaction.

**6.2 How and on what basis are these persons remunerated?**

Estates agents charge commission, which is prescribed at 5% of the value of the property being sold. This may be varied by agreement. Conveyancers charge percentages (e.g. 4%), in terms of the Conveyancing Tariff provided for in Statutory Instrument 24/2013. VAT is due on commissions and fees. Where a general practitioner is needed, (for instance, in the drafting of the agreement), the fee is regulated by the Tariff of the Law Society of Zimbabwe. The Law Society of Zimbabwe regulates the fees payable by conveyancers, notaries and general legal practitioners.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

The main source of capital is mortgage bond loans. There has been no real change in recent years.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The appetite for investors to invest in Zimbabwe has improved, following the new political dispensation. Developments are awaited on the political front. The residential sector is the area of most interest, given the decline in the economic and industrial sectors.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Following the decline in the economic and industrial sectors of the economy, these sectors are proving less attractive to investors and developers.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

There must be an agreement of sale, preferably (but not necessarily) reduced to writing, which identifies the property and specifies the price and the terms of payment.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

Yes. The seller has a duty to disclose defects on the property. The duty extends to defects that are within the seller's knowledge but which may not be obvious to the eye.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, if the purchaser acted on the untrue statement and, as a result of it, entered into the sale agreement. The purchaser must have suffered loss as a result of the untrue statement. The recourse available to a purchaser is to institute an action for damages.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

Yes. Sellers may give warranties and representations and these must be expressly stated in their sale agreements. Examples of warranties are:

a) That the buildings on the land (if any) are built in compliance with relevant statutory requirements and building laws.
b) That the property is free from defects.
c) That vacant and undisturbed possession of property will be granted to the purchaser, upon transfer.

Warranties are designed to allocate risk between parties, as well as to provide information. They are not considered a substitute for the purchaser's carrying out his or her own diligence. The law will enquire whether the aggrieved took measures to mitigate risk. This necessitates the need for an independent enquiry by the purchaser.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

Under the common law the seller warrants only that the purchaser will have undisturbed possession of the property.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The purchaser is required to pay the relevant transfer fees to

the conveyancer, who will prepare the necessary documents and facilitate the transfer of the property to the purchaser. The purchaser is required to pay rates due to the City of Harare in advance for a period of three months. In addition, the purchaser is required to pay stamp duty to the government, which is prescribed in the terms of the Finance Act [Chapter 23:04]. In some instances, the purchaser and seller may agree that each will contribute to the commission payable to an estate agent, where one is involved, as opposed to the more usual position where the seller is solely responsible.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The Deeds Registries Act provides for the registration of a mortgage bond over the property to secure the payment of a debt. There are no differences in the rules relating to residents and non-residents, nor in those relating to individual persons and corporate entities.

**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**

The main methods by which lenders may protect themselves are as follows:

a) Mortgage bonds, which are registered over immovable property.
b) Notarial bonds, which are registered over movable property.
c) Suretyship Agreements entered into by the lender and the directors, shareholders or other third parties.
d) Hypothecations of leases.
e) Cessions of income generated by the property.
f) Pledges.

**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**

A lender cannot realise a mortgaged property without first approaching the court and obtaining a court order. Thereafter, the lender will proceed to have a writ of execution issued by the relevant court and only then may the lender proceed with a sale in execution. There are no other options.

**8.4 What minimum formalities are required for real estate lending?**

The parties involved must have the capacity to enter into the legal contract. The mortgage bond must be registered at the deeds registry. The owner of the immovable property must consent to the mortgaging of his or her property. There are no legal formalities *per se*, but the practice is that lenders usually put the agreement into writing signed by both parties and they usually require security in form of a mortgage bond over the property. The bond needs to be registered with the deeds registry where the immovable property is registered. To signify consent to registration of a mortgage bond, the owner of the property must sign a power of attorney and instruct conveyancers to register a mortgage bond over the property.

**8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?**

A real estate lender can be protected from claims against the borrower by reason of his or her mortgage bond. The first mortgage bond registered over the real estate asset takes precedence over subsequent bonds. If another mortgage bond has already been registered over the property, the real estate lender can seek to arrange that the mortgage bond ranks *pari passu* or at par with the first bond for the purposes of enforcement. The lender may even request a waiver of preference from the first mortgagee so that the new mortgage bond ranks first. The risk may also be averted through placing a caveat on the asset in question such that if the borrower wishes to sell, transfer cannot go through until the caveat is uplifted.

**8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Security taken by a lender may be difficult to enforce in cases where the company is placed under judicial management or liquidation, as it is deemed as an undue preference. In that scenario, leave of the court is mandatory if the lender needs to proceed with execution.

**8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

A corporate borrower may apply for the liquidation or judicial management. If it is an individual it will find it impossible to frustrate enforcement.

**8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?**

Insolvency may have the effect of delaying enforcement as all due processes will need the leave of the court. Insolvency will normally have no practical impact unless the real estate lender has received an undue preference by registering a mortgage bond over the property at the time when the debtor is in insolvent circumstances.

**8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?**

Shares can be delivered to the lender as a pledge for payment of the debt. The debtor can object to the appropriation of those shares and if the appropriation is unfair, where the debtor is made insolvent the creditor would have to agree with the trustee of the insolvent estate for the shares to be taken over. Otherwise, the shares will be sold by the trustee, with the creditor being a secured or preferred creditor

## 9 Tax

**9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?**

Yes, the transfer of real estate is subject to transfer duty, which is payable by the purchaser. The amount payable is governed by the Finance Act [Chapter 24:04].

**9.2 When is the transfer tax paid?**

Transfer duty is paid on registration of transfer.

**9.3 Are transfers of real estate by individuals subject to income tax?**

Transfers of real estate are not normally subject to income tax, unless the owner is a dealer in real estate.

**9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?**

Transfers of real estate are subject to VAT if the transfer of the property is regarded as being in the ordinary course of business of the owner. The Value Added Tax Act, however, provides that a disposal of land by a VAT operator is deemed to be a disposal in the course of his business. A registered operator who sells real estate as a going concern can make application for the transaction to be zero-rated for VAT purposes.

**9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?**

The seller is required to pay capital gains tax on the disposal of property.

**9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?**

The liability remains the same, whether the transaction involves a company or an individual; there is no distinction.

**9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?**

The buyer of real estate should ascertain whether or not the seller is VAT-registered.

## 10 Leases of Business Premises

**10.1 Please briefly describe the main laws that regulate leases of business premises.**

The Commercial Premises (Rent) Regulations SI 676/1983, regulate the letting of business premises. They define and distinguish commercial premises from residential, the procedure relating to the determination of fair rent and statutory tenancies in respect of commercial premises. The particular lease agreement will also prescribe the rights and obligations of each party.

**10.2 What types of business lease exist?**

There are no different types of business leases.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

Commercial leases are usually long-term leases, where the lessee has an option to renew. The situation in Zimbabwe is currently volatile and highly inflationary, and there is an increased risk of rent defaulters. This has forced commercial property owners to enter into shorter lease agreements, without renewal options.

Lease agreements will almost always contain provisions that deal with rent increases. Usually, rentals are reviewed biannually or yearly. The past two years have seen rentals fluctuating, depending on the economic climate. The introduction of the multi-currency system and the current "rating system" of currency have led to the frequent review of rentals. Property owners now demand payment of rentals in United States dollars, because local currency quickly loses value.

A tenant who wishes to sublet must have the landlord's express permission. Where the agreement is silent on the issue, it is presumed that sub-leasing is prohibited.

Matters relating to the transfer of rights in a lease are regulated by the lease agreement. Usually, a lease agreement will require the consent of the landlord before there can be a transfer.

Issues of insurance and repairs are generally the responsibility of the landlord. Most lease agreements provide that the landlord is responsible for basic structural work and the tenant is responsible for all other work needed to keep the property in good condition. The rent payable usually factors in the likely cost of maintenance and repair work.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

There are no taxes payable, save for income tax and possibly VAT.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

In terms of section 22 of the Commercial Premises (Rent) Regulations, termination of a lease over commercial property takes place by effluxion of time or where notice has been given by either the lessor or lessee, according to the timelines agreed upon in the lease agreement or by a court order where the lessor has established good and sufficient grounds.

There are no common law provisions allowing a tenant to renew and extend the lease. Statutory tenancies may, however, be created, whose effect is the inadvertent extension and renewal of the lease, in instances where the tenant continues to pay its rentals and performs other obligations of the lease, after the fixed lease period has terminated.

Compensation by the lessor may arise for improvements effected by a lessee on the property, in terms of the lease agreement.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

If a property is sold, the new owner steps into the shoes of the previous owner.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

There are no green obligations commonly found in lease agreements.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

Meaningful trends are yet to develop.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

Apart from the common law, the Rent Regulations Statutory Instrument 32/2007, regulate leases of residential premises. The regulations make use of the term "dwelling" to refer to residential premises. The definition of a dwelling includes a room, a flat, apartment, house and any other immovable property occupied as human habitation, under a lease. This further includes the grounds, parking space, garages, outside rooms, workers quarters and other improvements.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the laws do not differ. Section 3 of the Rent Regulations offers a wide definition of a dwelling/residential premises, such that premises for multiple different residential occupiers would be regulated by the same laws.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c)the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property "costs" e.g. insurance and repair?**

Residential leases vary in length of term. Generally, the term will range from one year to three years.

In volatile economic circumstances, rentals are increased biannually or quarterly. In more stable circumstances, rentals are reviewed yearly.

The tenant has an obligation to meet the costs incurred in respect of the property. The basis on which these costs are paid is determined by whether the lease is a net lease or gross lease. In a gross lease, the rent payable to the lessor by the lessee will include the estimated costs of repair and the lessor will have the responsibility of ensuring repairs are done. In a net lease, the rent payable will not include any allocation towards costs and the lessee will be responsible for ensuring all costs are met and repairs are done to the requisite standard.

At the end of the term of lease, the tenant is required to vacate the property. The tenant will not accrue any rights to remain on the premises, unless the tenant is deemed a statutory tenant.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A lease agreement will contain breach and cancellation provisions. If there is a statutory tenancy, a landlord may terminate a lease agreement where it is proved that the lessee has done or is doing material damage to the dwelling, or if the lessee has been guilty of conduct likely to cause material damage to the property or material or substantial inconvenience to occupiers of neighbouring or adjoining property. The lease may also be terminated where the landlord has given not less than three calendar months' written notice for the lessee to vacate and where the Rent Board issues a certificate to the effect that the requirement that the lessee vacates the property is fair and reasonable. The lessor would need to bring an application before the Rent Board, or a court.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

The main legislation that governs zoning and permits is the Regional, Town and Country Planning Act [Chapter 29:19]. The Act provides for the planning of regions, districts and local areas with the object of conserving and improving the physical environment and, in particular, promoting health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications. Further, it regulates the making of regional, master and local plans, provides for the control of development and the regulation of subdivisions and consolidation of land. Its objectives also extend to the protection of urban and rural amenities, the preservation of buildings and trees and, generally, the regulation of the appearance of the townscape and landscape. Section 31 of the Act authorises the relevant local planning authority to issue a preservation order in respect of any natural forest, woodland and any tree on the land.

The Environmental Management Act [Chapter 20:27] established the Environmental Management Agency (EMA), whose sole objective is to enforce the Act. The First Schedule of the Act lists all projects that require environmental impact assessment. The list is exhaustive and all-encompassing, and *inter alia* covers,

housing developments, dams and lakes, petroleum production, storage and distribution, power generation, roadworks, mining and quarrying, and industry. The EMA demands strict compliance with the provisions of the Environmental Management Act and the Regional Town and Country Planning Act. Heavy fines are imposed where there is non-compliance with these laws. Criminal sanctions are also available where offences are committed and these include imprisonment for up to 12 months.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

Sections 71 and 72 of the Constitution of Zimbabwe empower the State to compulsorily acquire immovable property. Section 71(3) provides the circumstances where deprivation of property is justifiable. Compensation is payable through the court. The claimant must apply to a competent court for the determination of the amount of compensation.

There is no compensation where the State compulsorily acquires agricultural land, as provided for in section 72 of the Constitution.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The local municipalities and town councils control land, building use and occupation. The EMA regulates environmental issues and concerns. Buyers should consult these bodies.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

Building plans must be approved by the town planning authorities.

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Yes. Building permits are readily obtainable from the relevant local authority or municipality. A permit must precede any development but in suitable cases one can apply to regularise any development, change of land use, where prior permission had not been obtained.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The cost and timeframes vary considerably, depending on the particular development concerned.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

The Regional Town and Country Act provides for orders for the preservation of buildings of special architectural merit or historic interest. The relevant local authority is empowered by the Act to issue preservation orders to owners of buildings which, in the opinion of the local planning authority, are special. The order will restrict the demolition, alteration or extension of that building.

Further, the National Museums and Monuments Act [Chapter 25:11] empowers the relevant Minister, in consultation with the Board of Trustees of the National Museums and Monuments, to declare and compulsorily acquire any building that it deems a national monument. The Act further empowers the Board to acquire any relic, fossil, or any land relating to the relic or national monument.

Any rights which ordinarily accrue to a landowner are affected at the time that notice is given to the property owner of the intended declaration or acquisition, once the Board identifies a property as having historic interest.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

The Environmental Management Act establishes the Board, which manages the operations of the Agency. The Board consists of members who must be experts *inter alia*, in ecology, pollution, waste management, soil science, hazardous substances, water, and sanitation.

Section 58 of the Environmental Management Act provides that all owners or operators of irrigation projects, sewerage systems, industrial production workshops or any other undertaking which may discharge effluents or other pollutants must submit to the Board accurate information regarding the quantity of the pollutant and the quality of such effluent or pollutant. The Board has a duty to maintain all data submitted by persons. A potential buyer can therefore approach the EMA for the purpose of obtaining information on contamination and pollution. This information is readily available and accessible. There is, however, no public register.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

Section 83 of the EMA provides that no person shall discard, dump, or leave any litter on any land or water surface, street, road or site. The section places a duty on every person or authority responsible for the maintenance of any place, to, at all times, ensure that containers are provided which are suitable for the discarding of litter.

Environmental clean-up is, by deduction, mandatory for every person.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

There are no regulatory requirements for the assessment of the energy performance of buildings.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

In 2001, the government of Zimbabwe introduced a carbon tax, being a levy on carbon dioxide-emitting, oil-based energies.

The tax enforces compliance on motorists against carbon emissions. The purpose of the tax is to enable government to deliver climate-sensitive interventions. The tax is collected by the Zimbabwe Revenue Authority (ZIMRA).

### 13.2 Are there any national greenhouse gas emissions reduction targets?

As early as the 1990s, Zimbabwe crafted methods for climate change mitigation, through climate sensitive agriculture and sustainable management of its natural resources. A study conducted by USAID shows that between 1990 and 2011 greenhouse emissions fell by 10%. The study revealed that land-use change and the forestry sector were the primary emitters, contributing 59% to overall emissions, followed by agriculture at 18%, industrial processes at 2% and waste at 1%. The EMA continues to pursue new strategies and projects, aimed at reducing emissions.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Zimbabwe launched the Green Building Council of Zimbabwe (GBCZW) on the 30th September 2016. The main objective of the Council is to advocate for sustainability in the built environment. The Council has engaged with various accredited professionals, with a view to setting up regulations that will help drive the Council's objectives. The Council has created a system of "rating" of buildings, to determine the sustainability. The Council, working with EMA, aims to carry out outreach programmes to raise awareness of the various building products and the effects these have on the environment.

**Cordellia Nyasha Midzi** graduated from the University of Zimbabwe in 2014 and joined the firm as an Associate in the same year. She was admitted into Partnership on 1st July 2019. She is a member of the Real Estate and Intellectual Property (IP) Departments. In the Intellectual Property department, she provides general legal support and advice on all aspects of this practice area, including Trademarks, Patents, Industrial Designs and Copyright matters. She lays emphasis on IP prosecution, enforcement, and advisory matters in various African countries. She is currently a Member of the Zimbabwe Institute of Trade Mark and Patents Agents (ZIPTA). She handles regional and local IP registrations through the Africa Regional Intellectual Property Organisation (ARIPO) and the Zimbabwe Intellectual Property Office (ZIPO) and has assisted various Zimbabwean entities with IP registrations in the European Union (EU), as well as in other African jurisdictions.
She holds a second Law Degree from the University of South Africa (UNISA), where she specialised in Intellectual Property Law. Apart from her IP practice, she offers services in various areas of Real Estate Law and Family Law, including adoption, custody and guardianship matters.

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- Member of the Zimbabwe Institute of Patents and Trade Marks (ZIPTA).
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**Peter Moor** is the Senior Partner of the Firm. He joined the firm on 1st December 1973 and became Partner on 1st January 1980. He is a conveyancing specialist and is head of our large Property and Estate Department. He is one of the leading Conveyancers for the country's largest building society and the largest commercial bank. He has been involved as a Conveyancer in major property developments that have taken place in Harare since Independence, including the Dandaro Retirement Village Scheme, the Borrowdale Brooke Housing Development, the Brooke Ridge Scheme, the Sun River Manors Development and Chishawasha Phase 1. He has been a longstanding steward of the Mashonaland Turf Club and Chairman of the Thoroughbred Breeders Association of Zimbabwe. He has a team of experienced Conveyancing Clerks who work under him in the Conveyancing Department.

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