

# PANORAMIC

# REAL ESTATE 2025

Contributing Editors

Craig Brown and Alex Rosenthal

Dechert LLP



 LEXOLOGY

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Panoramic guide (formerly Getting the Deal Through) enabling side-by-side comparison of local insights, including an overview of the legal system; registration and recording; treatment of foreign owners and tenants and of commercial versus residential property; planning and land use; compulsory purchase or condemnation of real estate; bankruptcy and insolvency; use of investment vehicles; acquisitions and leases, including environmental considerations; financing; and recent trends.

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# US commercial real estate overview

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## 2024 Year in review: Navigating the shifting tides

### CRE market overview

As 2024 comes to an end, players in the US commercial real estate (CRE) market continue to navigate a landscape filled with persistent challenges and emerging opportunities. An enduring environment of high interest rates, geopolitical tensions and evolving real estate usage patterns forced investors to be more selective about where and how they deploy capital.

A pending new presidential administration presents an additional layer of uncertainty but promises to bring changes and additional incentives to various regulatory frameworks affecting CRE more broadly. Investors remain focused on selective capital deployment, especially in sectors such as multifamily, industrial and data centres, driven by demographic trends, e-commerce, and the growing computational power demands (including electrical power) of artificial intelligence (AI).

Sector performance and interest varies. The office sector remains under pressure, as companies continue to reassess space and workforce requirements. Retail has shown resilience, particularly in open-air shopping centres, where vacancy rates remain at historic lows; despite consumer preferences shifting toward outdoor and mixed-use spaces, retail vacancy rates are expected to remain relatively stable. Retail rent growth is projected to continue, with limited new construction keeping supply tight. In general, investor interest is gradually returning to the CRE market, particularly in value-add projects in multifamily, industrial and alternative real estate assets such as life sciences facilities, which continue to draw investment as the need for specialised infrastructure in certain key niche areas grows.<sup>[1]</sup>

Looking ahead, there is cautious optimism for 2025, especially as many of the suboptimal economic conditions show signs of relenting, causing the Federal Reserve to signal a shift to an easing cycle in its fiscal policy. Although fundraising has been slow throughout 2024, the prospect of additional Federal Reserve rate cuts, anticipated to reach a low-to-mid 3 per cent range by the end of 2025, are likely to further stimulate market activity.<sup>[2]</sup> This policy shift is expected to boost liquidity, net operating income growth and overall financing conditions, particularly for floating-rate debt, and is likely to provide the jolt that the broader CRE market has been long anticipating.<sup>[3]</sup>

### Federal Reserve's influence on CRE

Market watchers broadly agree that the Federal Reserve's expected pivot toward rate cuts offers many potential benefits for CRE investors. As borrowing costs decline, the market should see an increase in liquidity, improving transaction volumes and stabilising asset values that were previously strained by high interest rates. However, challenges remain, particularly for the office sector, which continues to face headwinds caused by structural issues due to remote work and shifts in tenant demand. The Fed's actions will be critical in shaping the future landscape of CRE, but it is clear that certain sectors will recover more quickly than others, depending on how successfully they can adapt to the evolving economic and workplace environment.<sup>[4]</sup>

The multifamily and industrial sectors are expected to remain among the top-performing sectors in 2025, as lower financing costs will enhance investor appetite for these high-demand asset classes. The multifamily sector is likely to benefit from federal housing policies and tax incentives aimed at increasing housing supply and affordability. The Mortgage Bankers Association projects a 26 per cent growth in CRE lending for 2025, following a modest recovery in the second half of 2024.<sup>[5]</sup> This lending activity is set to reach US\$390 billion, reflecting renewed investor confidence.

Industrial remains a high-demand sector, although rent growth is likely to continue to show signs of moderating after the post-pandemic surge. Rent increases, which soared by 54 per cent between 2019 and 2023, are projected to stabilise at around 2-3 per cent annually in 2024 and 2025. Absorption rates are expected to recover, doubling in 2025, and vacancy rates will gradually decline toward pre-pandemic levels.

Cold storage, valued at US\$190 billion in 2024, continues to be a standout class due to growing demand from e-commerce and stringent food safety regulations. The US market will have to contend with global cold storage demand, which is forecast to grow at a 17 per cent compound annual growth rate through 2029, with key markets such as India, China and Brazil leading the charge.

### **Office sector challenges persist**

The office sector continues to grapple with significant obstacles. Remote and hybrid work models have permanently reshaped how businesses use office space, resulting in persistent vacancy rates and negative net absorption throughout the year. Although there may be a slight uptick in demand for modern, flexible office spaces that offer collaborative work environments, traditional office models, especially those in older, non-amenitised buildings, will continue to struggle. Employers are increasingly seeking shorter lease terms, prioritising adaptability over long-term commitments. A full recovery in office demand is likely to be a slow and uneven process, with certain submarkets faring better than others, depending on their ability to adapt to changing workplace preferences. For all but the most trophy and highly-amenitised assets in high foot-traffic locations and cities, the problems plaguing the office sector that we have catalogued in previous reports are likely to persist.<sup>[6]</sup>

One potential brighter note within the sector is medical office buildings, driven by demographic shifts toward outpatient care, which should continue to see investor interest, despite dampened investment in 2024. Volumes are down 48 per cent compared to 2019–2023, and cap rates have increased to 7 per cent. As borrowing costs decline in 2025, the sector could see renewed investor attention.

## Data centres: A key growth area

The data centre market continues to be a key growth area in CRE, driven by the increasing demand for digital infrastructure from cloud computing, AI, and other technology-heavy industries. The sector is experiencing strong demand, but supply remains limited, particularly in primary markets where electric power availability is becoming a critical constraint. Rental rates for data centres have risen as competition for space intensifies and developers face challenges related to rising construction costs. However, secondary markets are emerging as attractive alternatives for companies looking for more cost-effective solutions, particularly as they seek to expand their data-processing capacities. The outlook for 2025 remains positive, with further growth expected, although challenges around infrastructure and power availability will need to be addressed to sustain the sector's momentum.<sup>[7]</sup> Innovation in power delivery, including wind, solar and small modular nuclear reactors may in time relieve these challenges.

## Distressed properties attracting interest

The CRE market has shown some signs of having bottomed out, with transaction volumes beginning to improve after a steep decline in recent years. Sellers have been forced to offload properties at significant discounts, as seen with major office transactions in cities such as New York, San Francisco, St Louis and Chicago, but these price adjustments have begun to lure buyers back to the table. In particular, distressed properties have seen increasing interest, as seen in the recent surge of bids for loans tied to apartments and offices. Additionally, large-scale institutional investors are seeking to capitalise on opportunities in the commercial lending space, signalling that new CRE investment vehicles may emerge to help stabilise the market.

Broadly speaking, the market appears to be reaching a point of price discovery. With property values down nearly 19 per cent from their peak in 2022, buyers and sellers are gradually finding common ground. Discounted sales, particularly in the office sector, are expected to continue into 2025, as market participants adjust to new pricing norms. Lenders, meanwhile, are becoming more willing to offer financing, with loan offers on properties and portfolios increasing significantly since mid-2024. Gaps in debt financing are being filled as well by private credit providers. Investors looking to raise capital for acquisitions are benefiting from a more competitive lending environment, with debt bids for acquisitions increasing across sectors such as industrial and multifamily.

## Looking ahead to 2025

Looking to 2025, the CRE market is poised for gradual recovery, with some sectors such as multifamily, industrial and cold storage continuing to lead the way, reflecting an overall investor sentiment bordering on cautious optimism. As borrowing costs decrease, transaction volumes should increase, bringing more liquidity and flexibility to the market. However, the office market will remain under pressure, with only modest improvements expected as remote working trends continue. Retail and medical office sectors are projected to experience moderate but steady growth.<sup>[8]</sup>

Further analysis of the expected Federal Reserve interest rate cuts reveals how monetary policy changes could impact the CRE market, with a decrease in borrowing costs providing much-needed relief to investors who have been grappling with high capital costs throughout 2023 and 2024. Multifamily and industrial properties are likely to benefit the most, as lower interest rates will reduce financing barriers and make acquisitions more feasible. However, rate cuts alone may not be enough to contend with the high vacancy rates and evolving workplace dynamics in the office sector. While the anticipated rate cuts are a positive development for CRE overall, the broader economic context – such as inflation and labour market conditions – will continue to influence the market’s trajectory going into 2025.<sup>[9]</sup>

Industry watchers as a whole expect the CRE market to continue evolving, adapting to economic shifts, and overcoming the challenges that lie ahead, signalling cautious optimism for what the future has in store.

## Footnotes

1. <sup>^</sup> CBRE: US Life Sciences Real Estate Investment Trends: <https://www.cbre.com/insights/books/us-life-sciences-real-estate-investment-trends#:~:text=Life%20sciences%20real%20estate%20is%20one%20of%20the%20leading%20alternative,real%20estate%20leading%20this%20growth.>
2. <sup>^</sup> KKR Market Review (April 2024): <https://www.kkr.com/content/dam/kkr/insights/pdf/market-review-real-estate-april-2024.pdf>
3. <sup>^</sup> Deloitte Insights (<https://www2.deloitte.com/us/en/insights/industry/financial-services/commercial-real-estate-outlook.html>).
4. <sup>^</sup> MBA Forecast: <https://www.mba.org/news-and-research/newsroom/news/2024/08/29/mba-forecast-commercial-multifamily-borrowing-and-lending-to-increase-26-percent-to-539-billion-in-2024>
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6. <sup>^</sup> NAIOP Office Space Demand Forecast (Q2 2024): <https://www.naiop.org/globalassets/research-and-publications/report/office-space-demand-forecast-second-quarter-2024/office-demand-forecast-q2-2024.pdf>
7. <sup>^</sup> JLL US Data Center Report H1 2024: <https://www.cushmanwakefield.com/en/united-states/insights/fed-pivots-the-next-chapter-for-cre>
8. <sup>^</sup> CoStar Real Estate Industry Hopes for Lower Borrowing Costs: <https://www.costar.com/article/862850445/real-estate-industry-hopes-lower-borrowing-costs-will-bring-better-times>
9. <sup>^</sup> Altus Group: Fed Interest Rate Cut and U.S. CRE: [https://www.altusgroup.com/insights/will-the-fed-interest-rate-cut-boost-us-commercial-real-estate/?utm\\_source=google&utm\\_medium=organic](https://www.altusgroup.com/insights/will-the-fed-interest-rate-cut-boost-us-commercial-real-estate/?utm_source=google&utm_medium=organic)



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# Austria

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## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The Democratic Republic of Austria, a member of the European Union since 1995, is a federal state according to Article 2(1) its constitution. It is composed of nine autonomous states (*Länder*), which have limited legislative powers and some executive powers, but no separate judicial systems.

The constitutional law regulates the division of powers between the national, federal and local governments in the respective legal matters. National or regional laws must be consistent with constitutional law and the law of the European Union.

The states cooperate in the legislative activity of the Federation through the Federal Council, an institution similar to a second house of parliament, and they participate in the administration of federal law through their own bureaucracies.

Austria belongs to the civil law tradition. Therefore, Austrian private law is intellectualised within the framework of Roman law. The codification took place more than 200 years ago, in 1811. In contrast to the common law system, case law is not formally binding.

Judges are independent and not bound by instructions. Only the law binds them in their decisions. Appeals are available to review the lawfulness of statutory provisions and administrative and judicial decisions. Therefore, there are three Supreme Courts in Austria:

- The Constitution itself establishes a Supreme Court as the highest court in civil and criminal matters;
- the Supreme Administrative Court is the appellate court to which appeals may be made from the decisions of the country's 11 administrative courts can be appealed; and
- the Constitutional Court is the court of judicial review. For example, it reviews the constitutionality of laws and the constitutionality of decisions of certain other courts. It is the oldest functioning constitutional court in the world.

In terms of judicial procedures, the parol evidence rule does not apply in the civil law system. Various forms of injunctive relief are available.

Real estate law is a cross-cutting subject that is governed by many different laws. Important provisions can be found, for example, in the Civil Code, the Landlord and Tenant Act, the Condominium Act and the Land Registry Act. However, real estate transactions may also be affected by other legal provisions (eg tax and fiscal law, antitrust law or labour law). For foreign investors in real estate (and agricultural land), the relevant regulations are those of the federal states governing the purchase of land by foreign nationals.

Each state has different building regulations, which are set out in the respective building code. Regional planning, development and zoning are characterised by a large number of different authorities and a highly hierarchical structure.

Law stated - 2 October 2024

## Land records

- 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

In Austria, the land register (*Grundbuch*) is a public register maintained by the district courts. It consists of the main register (*Hauptbuch*) and the collection of documents (*Urkundensammlung*). All properties in Austria and the rights in rem to the same are recorded in the land register. The purpose of the land register is to provide reliable information on ownership and other real rights, such as easements or mortgages, relating to land. The register is kept as an electronic database, to which everyone may have access. Thus, everyone has the right to inspect the land register and obtain extracts and transcripts.

With very few exceptions, rights in rem in real estate can only be acquired by registration in the land register. The information contained in the land register is presumed to be correct and complete in relation to a person who relies on it in good faith.

Only certain rights can be registered in the land register, primarily rights in rem, such as right of ownership, building rights, liens, easements and mortgages. Certain rights to claim may also be registered and thus become rights in rem. These include rights of repurchase, rights of first refusal and the prohibitions on encumbrance or sale, and leaseholds for a fixed term. Leases do not have to be registered in the land register to be enforceable.

The land register operates on a 'first come, first served' basis. The rank or priority depends on the time at which the application for the registration of a right is received by the land registry court.

Law stated - 2 October 2024

## Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

It is mandatory that applications and required documents are submitted electronically to the competent land registry court by attorneys-at-law or public notaries. In order to acquire a right in rem by registration, the following documents are usually required:

- An appropriate document evidencing the acquisition of the right (eg, purchase contract). Note that, unlike public documents, private documents must meet special prerequisites for registration in the land register, in particular, notarisation is obligatory;
- an explicit statement of consent by the person whose right is to be restricted, encumbered, cancelled or transferred to another person (*Aufsandungserklärung*);
- a confirmation regarding the payment of the relevant taxes (real estate transfer tax and land registry fees);
- proof of citizenship of the parties to the contract; and

- if applicable, a permit for the purchase of real estate by foreigners.

To register a new mortgage, the following documents must be submitted:

- A notarised mortgage deed; and
- a unanimous declaration from both parties accepting the registration.

A separate registration fee must be paid not only for the registration of the right of ownership but also, for example, for the registration of liens. The costs of the registration fee is usually paid by the purchaser of the property.

Law stated - 2 October 2024

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

The relevant regulations for real estate investors are those of the countries that regulate the purchase of the real estate by foreign citizens. Natural persons and legal entities from the member states of the European Union or the signatory states of the Agreement on the European Economic Area have the same status as domestic natural persons and legal entities.

The transfer of property rights to foreign investors may be subject to approval under the respective law. Each state in Austria has its own provisions and regulations. Therefore, the restrictions approval procedures for the acquisition of real estate by foreign investors may vary depending on the location of the real estate. Without the required approval, the application for transfer of ownership will be dismissed by the competent court.

The transfer to foreign investors of property rights relating to public infrastructure and affecting public safety or order requires the prior approval of the Austrian Federal Minister for Economic Affairs, Family and Youth.

Law stated - 2 October 2024

## Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Regulations regarding measures to prevent money laundering and terrorist financing are very strict. The banks involved in the transaction are demanding and will examine documents to ensure that they prove the origin of the funds. Under Austrian law, a real estate transaction is generally classified as 'money laundering prone'. Hence, the identity of the respective investors and the source of funds must be verified accordingly. There are

exchange control regulations regarding the freezing or even the confiscation of funds in cases of suspected money laundering or terrorist financing.

Under certain circumstances, certain real estate transactions exceeding a value of €100,000 must be reported to the Austrian National Bank for trade statistics purposes.

Law stated - 2 October 2024

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The Austrian legal system provides for two types of liability. On the one hand, liability can arise from wrongful acts or omissions (tort liability) and, on the other hand, liability can arise from breach of contract (contractual liability).

According to article 1294 of the Austrian Civil Code (ABGB), fault (*Verschulden*) presupposes unlawfulness (*Rechtswidrigkeit*). In contract law, the burden of proof of fault is generally shifted to the damaging party (article 1298 ABGB – reversal of burden proof, *Beweislastumkehr*). Article 1313a ABGB provides for extensive vicarious liability for auxiliary persons – including independent entrepreneurs – assisting in the performance of contractual or other obligations (*Erfüllungsgehilfen*). The principal is the one, who is liable for the fault of the vicarious agent as for his own.

In relation to apartments, Austrian law provides for strict liability regardless of fault. According to article 1318 ABGB, the actual owner of an apartment is liable both for damage caused by the fall of a dangerously hung or placed object (in the apartment or on the window sill) as well as for damage caused by the throwing or pouring of an object out of the apartment. Persons who actually have the power of disposal over the apartment or room are qualified as apartment owners. The term ‘apartment’ is to be understood in a broad sense. In addition to the dwelling in the sense of the private ‘home’, storage rooms, business premises or garages are also covered. According to case law, article 1318 ABGB is also applied by analogue to cases where water damage in neighbouring flats is caused by water leaking from one's own flat, for example, due to an overflowing sink.

If parts (eg, roof tiles, but also roof avalanches) come loose from a building or if the building collapses, the owner of the building is liable if they did not take the necessary precautions to prevent the event according to article 1319 ABGB. The same applies to owners of ‘works listed on a plot of land’. A ‘work’ can be, for example, a scaffolding or a fence. Contrary to the above provision, the owner of a building is not liable regardless of fault.

Moreover, the person who bears the costs of constructing and maintaining a road is considered to be the owner. A road is any area of land that is open to the general public or to a limited group of users for any or a specific purpose. This includes, for example, hiking trails, ski slopes, roads or even parking lots, with their associated walls, bridges, planting or railings. If the path is not in a proper condition, the owner is only liable if they have acted intentionally or with gross negligence. At the same time, they are also responsible for ‘helpers’ who maintain the path – but only in cases of gross negligence.

Of course, maintenance and repair work can also be outsourced by the owner to independent third parties (eg, snow removal companies). In this case, the duty of care for each individual task is also transferred to the contracted company and the road owner is only liable for negligence in selection and supervision.

If damage is caused by unauthorised or improper use of the track, the track owner is not liable if the prohibition has been made clear by barriers or signs. In cases such as the purchase of a motorway toll sticker, a contract is concluded in advance with the road owner (motorway operator) and their duty of care arises from the fulfilment of their part of the contract. If the condition of the road is then defective, the user can rely on a contractual liability, which takes precedence over article 1319a ABGB. Here, the road owner is liable for any kind of fault, even in the case of the use of assistants.

In addition to liability for damages, Austrian law provides for a warranty for defects in any non-gratuitous contract for the delivery of goods. Article 922 ABGB defines the term 'defect' as a lack of conformity of the goods with the contract existing at the time of delivery. A lack of conformity includes defects of title (legal defects, *Rechtsmängel*), if the debtor is unable to transfer the promised right, and defects of quality and quantity (material defects, *Sachmängel*), if expressly stipulated or assumed qualities or quantities are lacking.

Unless the contracting parties have agreed otherwise, the real estate must comply with the characteristics that are usually assumed and with the characteristics that are expressly and conclusively agreed upon. The real estate shall also comply with the statements made by the seller in public statements or in advertising, for example, on real estate platforms.

For example, when buying or selling a 'building plot', the seller must in principle guarantee that the land is not contaminated, in addition to the zoning or building permission.

In the case of the purchase of an existing building, according to the Austrian Supreme Court, the buyer may assume that a building permit and a use permit exist or that it is possible to obtain such a permit; otherwise there is a defect in title which entitles the buyer to assert warranty claims.

Only those defects and signs of age that are to be expected with a certain probability according to the type of construction and/or age of a house or apartment must be accepted by the buyer. If a new house or apartment is bought or sold, the buyer can assume that it is as good as new.

The seller is also not liable for obvious defects. These are defects that are obvious during an inspection before or at the time of the contract, or that can be found in public records, such as the land register. Consensual or non-consensual conditions of a building are not to be understood as such, since a layperson cannot be accused of ignorance of building regulations.

Only if repair or replacement is impossible or disproportionate (ie, involves unreasonable costs), or if the debtor fails to fulfil their obligations, can the creditor demand a reduction in price (*Preisminderung*) or rescind the contract (*Wandlung*).

If a defect appears within six months of delivery, article 924 ABGB presumes that the defect existed at the time of delivery. The purchaser may claim primarily repair or replacement of the good.



Warranty claims must be asserted within two years of delivery of goods (or discovery of the defect in title) in the case of movable property, and within three years in the case of immovable property (real estate).

Law stated - 2 October 2024

## Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

In order to better protect the buyer from potential liability, it is strongly recommended that a due diligence be carried out prior to the purchase of a property. The due diligence on a property should focus on legal, economic, tax and technical issues and on questions regarding the quality of the plot of land. The aim is to identify potential liability risks. From a legal perspective, it is important to check the land register, the register of contaminated sites and the register of suspected contaminated sites. In addition, all contracts relating to the property should be analysed.

It is also advisable to take out appropriate liability insurance (eg, building insurance or environmental liability insurance).

In order to limit personal liability, it is possible to set up a legal entity with limited liability such as a limited liability company (*Gesellschaft mit beschränkter Haftung*), a stock corporation (*Aktiengesellschaft*) or a flexible capital company (*Flexible Kapitalgesellschaft, FlexCo*).

Law stated - 2 October 2024

## Choice of law

8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

In general, the parties may choose the law applicable to the real estate transaction. This does not apply to the respective rights in rem for real estate located in Austria. These rights are always governed by Austrian law. If the parties have not contractually agreed on the applicable law, Austrian law is generally applicable to transactions concerning real estate located in Austria.

Law stated - 2 October 2024

## Jurisdiction

9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Foreigners have legal capacity in Austria.

Statutory rules govern the jurisdiction of the courts: if a claim can be filed in Austria, it is clear beforehand which court and which judge have jurisdiction. In civil law disputes, the amount in dispute generally determines the competent court. As a rule, the district courts or – if the value limit exceeds €15,000 – the provincial courts have jurisdiction as courts of first instance. However, tenancy law cases exceeding the value limit are also heard by district courts. The district courts also have jurisdiction, in particular, in disputes relating to immovable property (disputes arising from tenancy or lease agreements, eg, actions for rent, actions for eviction or termination by court order, disputes relating to unlawful redemption payments).

In addition, the regional court where the property is located may have exclusive jurisdiction.

**Law stated - 2 October 2024**

## Commercial versus residential property

- 10** | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The acquisition of property in Austria, including real estate, whether commercial or residential, is governed by the provisions of the Austrian Civil Code.

Austrian tenancy law is governed by the Austrian Civil Code and the Tenancy Act. In the case of both residential and commercial real estate, it is therefore relevant whether the contract is subject to the Tenancy Act or not. The few tenancy law provisions contained in the Austrian Civil Code are largely non-binding and can be freely negotiated by the parties. The Tenancy Act aims to protect the tenant and therefore contains mandatory provisions.

**Law stated - 2 October 2024**

## Planning and land use

- 11** | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

With regard to the strategic development of cities and regions, specialised concepts or urban development plans are prepared by the competent authorities. These plans are strategic in nature and set the direction of urban and regional development.

The construction of real estate is subject to local building regulations, such as zoning and building codes. These vary from state to state. As a result, the requirements for obtaining a building permit vary depending on the location of the property to be built.

Failure to comply with planning decisions or zoning requirements, or carrying out construction without a building permit may result in an official order to demolish the building.

Historical monuments, especially old houses, are particularly protected under the Monument Protection Act.

Law stated - 2 October 2024

### Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The comprehensive protection of property is a fundamental right in Austria and also applies to foreigners. Hence, expropriations may only be carried out if certain strict conditions are fulfilled. If an expropriation takes place, the state must pay an adequate compensation to those affected.

Foreclosure of a property may also be authorised only if certain conditions are met. Foreclosure is a long-term process aimed at satisfying the obligee's claims from the proceeds of the auction.

Law stated - 2 October 2024

### Forfeiture

- 13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Property may be seized under certain conditions laid down in law (eg, to prevent illegal activities, in particular terrorist activities).

Law stated - 2 October 2024

### Bankruptcy and insolvency

- 14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The Austrian Insolvency Code (*Insolvenzordnung*) provides a system for the orderly liquidation of financial relations in the event of the economic failure of a company (including a natural person who does not run a company). In order for insolvency proceedings to be initiated, the debtor must be materially insolvent. The aim of insolvency proceedings is to ensure that the (unsecured) creditors are equally satisfied.

Another important purpose of these proceedings is to restructure a company in order to facilitate its survival. In the course of insolvency proceedings, restructuring may be carried out by means of a restructuring plan. In the restructuring process, the debtor may also opt for self-administration under certain conditions.

If the petition for opening insolvency proceedings is filed without a restructuring plan, the insolvency proceedings are called bankruptcy proceedings. However, the debtor may request the adoption of a restructuring plan until the end of the proceedings.

The public announcement of the opening of insolvency proceedings must explicitly state whether the proceedings are based on bankruptcy or on a restructuring attempt.

Law stated - 2 October 2024

## INVESTMENT VEHICLES

### Investment entities

- 15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

There are several types of companies regulated by Austrian law. A basic distinction is made between partnerships (*Personengesellschaften*) and corporations (*Kapitalgesellschaften*).

Partnerships may be formed by at least two persons, either as a general partnership (*Offene Gesellschaft*) or as a limited partnership (*Kommanditgesellschaft*). All partners in a general partnership are personally and unlimitedly liable (ie, with their entire private assets) for the company's liabilities. In a limited partnership, the liability of at least one partner is limited.

The limited liability company can be set up by one or more natural or legal persons, who are generally not personally liable for the company's liabilities. The limited liability company is the most popular form of company in Austria, particularly for small and medium-sized companies, but many top Austrian companies are also run as limited liability companies.

The shareholders of a stock corporation are generally also not liable with their private assets for the company's liabilities once they have paid up their share. The only capital available to the creditors is the company's assets.

The Company Law Amendment Act 2023, which entered into force on 1 January 2024, introduced a new Austrian corporate form (the flexible capital company, *FlexCo*), that is intended to provide advantages, especially for innovative start-ups and founders in the early stages.

In addition to corporate law, there are also tax aspects to consider when choosing the legal form of a company. For example, the costs of incorporation resulting from mandatory legal requirements as well as the operating costs of the chosen company must be considered when choosing the legal form.

Law stated - 2 October 2024

### Foreign investors

- 16** | What forms of entity do foreign investors customarily use in your jurisdiction?

The limited liability company is the most popular legal entity form chosen in Austria, particularly for foreign investors.

Law stated - 2 October 2024

## Organisational formalities

- 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The limited liability company and the stock corporation are formed by registration in the commercial register. Both can be formed by one or more natural or legal persons.

The minimum share capital required for a stock corporation is €70,000. A supervisory board is also mandatory. Therefore, the ongoing costs of a stock corporation are higher due to its legal structure than the ongoing costs resulting from the legal structure of other companies.

In recent years, several efforts have been made to facilitate the establishment of a limited liability company. In general, the minimum share capital amount is €35,000, of which at least €17,500 must be contributed at the beginning. In 2014, the option to limit the share capital to €10,000 for up to 10 years was introduced. At least €5,000 of this limited share capital must be contributed (*Gründungsprivilegierung* – ‘foundation’ or ‘incorporation privilege’). Since January 2018, it has also been easier to set up a standard one-person limited liability company (ie, without the obligatory use of a notary (a simplified establishment (*vereinfachte GmbH-Gründung*))). The Company Law Amendment Act 2023, which entered into force on 1 January 2024, introduced a new Austrian corporate form (*FlexCo*) and lowered the minimum share capital for a limited liability company (*GmbH*) to €10,000. The flexible capital company (*FlexCo*) builds on international examples and is intended to offer an internationally competitive option, particularly for innovative start-ups and founders in the early stages.

Originally, profits from limited liability companies and stock corporations were taxed at a rate of 25 per cent (corporate income tax), but in 2023 corporate income tax was reduced from 25 per cent to 24 per cent. This was followed by a further reduction to 23 per cent in 2024. Capital gains tax is 27.5 per cent. Individuals (such as shareholders of a general partnership or a limited partnership) are taxed at the personal level according to a progressive tax system. The maximum tax rate is 55 per cent.

The question of which structure should be chosen for a real estate transaction in terms of (tax) law, cannot be answered without analysing the individual case. Rather, it must be assessed on a case-by-case basis.

Both corporations and partnerships without a natural person as a partner with unlimited liability are required to file an annual financial statement. The commercial court imposes a fine for late filing.

Law stated - 2 October 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

The following rights in rem are recognised in Austria:

- freehold (*Eigentumsrecht*);
- condominium ownership (*Wohnungseigentum*);
- building rights (*Baurechte*);
- liens (mortgages) (*Hypotheken*);
- easements (*Dienstbarkeit*);
- servitudes (*Grunddienstbarkeit*); and
- land charges (*Reallasten*).

Apart from these, rights to repurchase and rights of first refusal or pre-emption rights as well as tenancy rights may also be entered into the land register. Upon registration, these become rights in rem which may then be enforced also vis à vis persons other than the contracting party.

A 'freehold' or 'fee simple' is a full right in rem allowing the holder to arbitrarily use the substance and the uses of an object and to exclude any other person therefrom.

Condominium ownership is the right in rem granted to the co-owner of a property to exclusively use and solely dispose of a separate condominium or other separate space (eg, a parking space).

A building right is the right to build a structure on or under the surface of land owned by a third party. The building right is limited in time and can be established for a minimum of 10 years and a maximum of 100 years.

A structure that has been established on land owned by a third party and is not intended to remain there forever constitutes a special right referred to as '*Superädifikat*'. The land plot and the structure may belong to different owners. The *Superädifikat* is originally acquired by way of construction.

Liens are rights in rem granted to a creditor to satisfy the creditor's claims on an object if an obligation is not fulfilled when it becomes due. In the case of an immovable object, this is called a mortgage.

Easements or servitudes are limited rights in rem to use a property. They require the owner of the property to tolerate something or to refrain from action. A distinction is made between real servitudes and personal servitudes. Personal servitudes are granted to a specific person. Real servitudes are bound to a specific property and enable the owner of a property to use a third-party property for a specific purpose.

Law stated - 2 October 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

Often a buyer will provide the seller with a non-binding letter of intent or a term sheet outlining the key terms of the transaction. The letter of intent will form the basis of the transaction process and should therefore be properly negotiated.

In order to better protect the buyer from potential liability cases, it is strongly recommended that a due diligence be carried out before entering into a real estate transaction. The due diligence process should analyse economic, tax, legal and technical issues, as well as potential liability risks. Hiring and relying on specialists in each field, as well as obtaining good legal advice, is essential to the success of the due diligence.

Preliminary agreements are less common. A preliminary agreement is used to outline certain terms that two parties have agreed upon before the execution of the formal contract. In order to be binding, a preliminary agreement must contain all of the essential terms of the subsequent main contract and the date on which the main contract will be concluded. Within one year of the agreed closing date, either party may bring an action for the conclusion of the main contract.

Although oral contracts are also binding on the parties, in order to register a transfer of ownership in the land register, a transaction document must be drawn up in accordance with the formal requirements. The required declaration of conveyance is usually included in the contract of sale, which is then executed in notarised form.

Law stated - 2 October 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

The acquisition process is concluded with a contract of sale. This is usually drafted by a lawyer in order to protect his client as much as possible. If the sale contract is set up by the seller's lawyer, it is vital that the buyer's lawyer knows how to negotiate the terms so that their client does not give more than is necessary.

Sale and purchase agreements typically contain the following provisions for the transfer of ownership with regard to real estate or a land holding entity:

- the parties and the structure of the transaction;
- the declaration of conveyance (in the case of an asset deal);
- the purchase price, including provisions on the payment of value added tax (VAT), if any;
- an escrow mechanism;
- conditions precedent to the closing of the transaction;
- representations and warranties;

- the remedies and penalties available in the event of a breach; and
- declaration of entitlement.

In general, a contract is concluded by concurring declarations of intent of (at least) two persons. The declarations of intent can be explicit or conclusive. Contracts can also be concluded orally. There are usually no special formal requirements. In the case of real estate transactions, however, specific formal requirements must be met in order to be entered in the land register and thus to transfer ownership.

Law stated - 2 October 2024

## Environmental clean-up

- 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

The party causing the pollution is primarily liable for providing remediation and bears the associated costs. However, if the owner of a contaminated property has tolerated the contamination or even consented to it, they and their legal successors may also be held liable.

Before purchasing a property, due diligence should also include checking whether the property is listed in the register of suspected contaminated sites or the contaminated site atlas. These two registers list all publicly known environmental contamination throughout Austria.

Contractual assurances that the property is not contaminated are also common. These assurances can take various forms. The form of chosen assurance is mainly a matter of negotiation.

Law stated - 2 October 2024

## Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typically, the seller of a property provides the following information in relation to existing rental agreements before the purchase agreement is signed (mostly within a due diligence process):

- information on the number of leases in place;
- proof of payment of all stamp fees;



- information about the effectiveness and enforceability of the contracts, as well as about their duration and the applicable termination options;
- information about any impending or already declared terminations of contracts;
- information about any renewal or extension options;
- information on the existence of contractually agreed bank guarantees or deposits;
- information about the amount of the agreed rent payments and operating cost payments;
- information about any payment arrears;
- information about any impending or ongoing legal disputes relating to rental agreements; and
- confirmation of the correctness of previous invoices.

In the purchase agreement itself, the seller typically warrants that certain rental objects in the building are leased upright at the time of signing the agreement. It is also common for the seller to assure that there are no rent arrears and that there are no pending arbitration or court proceedings relating to the leases. It is also common for the vendor to provide the buyer with a list of tenants and the security deposit deposit paid by the tenants.

Typically, the buyer enters into the leases. If the existing leases are to be terminated before the buyer takes possession of the property and the buyer is interested in a property free of leases, it is advisable for the buyer to obtain a contractual assurance from the seller to that effect or even a right to rescind the agreement.

Law stated - 2 October 2024

### Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Leases are not subordinate to a security instrument.

According to the Austrian Civil Code, a buyer also takes over the existing tenancy agreements when purchasing a property if the tenancy agreement is subject to the Tenancy Act. If this is not the case, the parties have an extraordinary right of termination, unless the tenancy agreement was registered in the land register.

It is therefore important to know whether the Tenancy Act or the Austrian Civil Code applies to a lease agreement.

According to section 12 of the Tenancy Act, the main tenant of an apartment who leaves the apartment may transfer his or her main tenancy rights to the apartment to his or her spouse or direct relatives, if they have lived in the apartment in the same household with the main tenant for at least the last two years.

In the case of a commercial lease, the lease is subject to the Tenancy Act and its mandatory tenant protection provisions. However, these mandatory tenant protection provisions of the Tenancy Act do not apply to ground leases.

In the event of the sale of the business operated by the main tenant in the rented business premises, article 12a of the Tenancy Act contains a provision according to which the lease agreement is transferred to the purchaser of the business without the landlord's consent being required.

As compensation for not being able to rent the business premises to a new tenant, the landlord has the option within six months of the notification of the sale of the business, to increase the rent to the amount permitted which he or she could earn by re-renting the property at the time of the sale of the business.

Law stated - 2 October 2024

### Delivery of security deposits

**24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Security deposits under a lease are very common. Usually, the deposit equals three to six months' rent.

The Tenancy Act contains specific provisions regarding the rent security deposit and its repayment to the tenant. If the deposit is paid in cash, the landlord is usually obliged to invest it in an interest-bearing account (eg, a savings account). At the end of the tenancy, the landlord must return the deposit, including any interest, without delay. The landlord may only withhold or claim the deposit if certain conditions are met.

In the case of lease agreements outside the scope of the Tenancy Act, landlords and tenants may agree on the conditions and the amount of the deposit at their own discretion. There is no legal limit to the amount of the rental deposit.

Law stated - 2 October 2024

### Due diligence

**25** | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

In order to protect the purchaser from potential liability claims, it is highly recommended to analyse all economic, technical and legal aspects of the target property and, in particular, to examine potential liability risks in the form of due diligence. The main focus of the legal

due diligence carried out prior to the purchase of a property must be the analysis of the information on the property contained in the land register. The information recorded in the land register is presumed to be correct. As a result, a bona fide purchaser will acquire ownership of a piece of real estate even if the seller is wrongfully registered in the land register.

The due diligence process should include a review of existing deeds in the land register, the building file, and the register of contaminated sites and the register of suspected contaminated sites.

If necessary, zoning plans and the provisions of the relevant building code should be analysed as well.

Law stated - 2 October 2024

### Structural and environmental reviews

**26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

To protect the purchaser from potential liability claims, technical due diligence is strongly recommended. As part of this due diligence, it is important to obtain information on the quality of the land plot and the building.

If the results of the technical due diligence reveal any risks, it is customary to obtain representations or an indemnities.

Environmental insurance is also available. Nevertheless, it is highly recommended to check the register of contaminated sites and the register of suspected contaminated sites as part of the due diligence.

Law stated - 2 October 2024

### Review of leases

**27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

In order to gather all relevant information for the purchaser, the lease agreements are usually reviewed by lawyers and tax advisors. The business part is usually reviewed by the client or a business consultant.

The legal analysis of lease agreements focuses on the following topics:

- applicability of Austrian tenancy law;
- effectiveness and enforceability of the individual contracts;
- duration of the lease agreements, and, if applicable renewal or extension options;
- termination rights of the tenants;

- contractual bank guarantees or deposits;
- the amount of the agreed rent payments and operating cost payments;
- payment of fees (eg, stamp fees);
- information concerning maintenance obligations;
- information concerning demolition obligations;
- where applicable, operating obligations vis à vis the tenants;
- right to rent increases; and
- change of control clauses.

Before starting the due diligence process, it is important to agree with the client on the key issues and define red flags.

Asking the right questions and requesting the right documents during the due diligence process is crucial.

Law stated - 2 October 2024

## Other agreements

**28** | What other agreements does a lawyer customarily review?

Typically, the following documents are reviewed by a lawyer:

- any title documentation relating to the proposed real estate transactions;
- any documentation relating to the financial aspects;
- easement agreements;
- material contracts;
- building permits;
- insurance agreements;
- brokerage agreements (if any); and
- escrow agreements (if applicable).

Law stated - 2 October 2024

## Closing preparations

**29** | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Especially in large transactions, it is highly important to keep an eye on the big picture and to organise the entire closing process. In order to be able to close the deal within the given

timeframe, the lawyer is often tasked with drawing up a precise timetable for the fulfilment of all closing conditions. Before closing, the lawyers need to check:

- whether all required documents have been provided;
- whether all conditions have been fulfilled;
- whether all deliverables have been met;
- whether all existing mortgages have been or can be released;
- agreements between condominium owners; and
- agreements with neighbours.

Law stated - 2 October 2024

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

All parties are usually present in person at the closing. However, it is possible to be represented by a representative with a valid special power of attorney. Documents must be signed by hand and the signature has to be certified by a notary. Usually, the closing process is prepared and accompanied by the parties' lawyers. Other than that, the presence of further participants is not required.

In general, in Austria there is a difference between a share deal and an asset deal with regard to the closing of a sale and purchase agreement. In the latter, a closing is not common, but there is an escrow solution.

Regarding the transfer of a property in the form of an asset deal, in addition to the handover, entry in the land register is required. This is only possible once various requirements have been met, for example, the land transfer tax has been paid or declarations from pledgees have been received.

To secure the mutual rights and obligations of buyer and seller, the lawyer therefore acts as a trustee. The lawyer receives and pays out the purchase price, but only when both the seller's rights and the buyer's rights have been secured.

Contractual trusteeships of real estate are settled according to the statute of the trustee audit of the Bar Association. This is also the case if trustee deposit exceeds more than €40,000 pursuant to section 10a of the RAO.

Law stated - 2 October 2024

### Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

Sales contracts usually contain provisions regarding possible breaches of contract and their legal consequences (including penalties).

Law stated - 2 October 2024

### Breach of lease terms

**32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

The Tenancy Act contains a limited number of grounds on which a landlord may terminate a lease. One example is non-payment of rent by the tenant, although not every instance of non-payment by the tenant entitles the landlord to terminate the tenancy. However, outside the scope of application of the Tenancy Act, further grounds for termination can be agreed between the parties.

If the landlord does not meet their obligations (in particular, to provide the tenant with a rental object free from defects), the tenant may be entitled to reduce the rent.

For those rental contracts that are not subject to the Tenancy Act, the provisions of the Austrian Civil Code apply.

Law stated - 2 October 2024

## FINANCING

### Secured lending

**33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Mortgages are usually registered in the land register as collateral for property financing. Most of the financing in Austria is provided by banks.

In addition to mortgages, the following security instruments exist:

- pledging of shares,
- accounts, or movable assets; and
- assignment of claims.

Law stated - 2 October 2024

### Leasehold financing

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**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In Austria, it is not common to finance ground or head leases. Hence differences cannot be illustrated.

However, there are also possibilities with regard to real estate leasing in general. At the request of the lessee, the immovable investment object is acquired from the lessor (the leasing company). The leasing contract stipulates that the lessee is granted the use of the object by the lessor for an agreed period of time in return for payment. The usual lease terms for real estate leasing in Austria are between 10 and 25 years.

Law stated - 2 October 2024

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

To create a mortgage, the pledgor and the pledgee must enter into a mortgage agreement in writing. The signatures of the parties to the mortgage agreement must be notarised in order for the mortgage to be recorded in the land register.

Law stated - 2 October 2024

### Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Valuation specialists require special education in order to obtain their licence. When searching for such a specialist, the relevant court registry can be a helpful resource, as many specialists are usually registered as court-appointed experts.

Most banks require a real estate valuation before granting a loan. The valuation of the real estate may be carried out by the bank itself or, alternatively, the services of valuation professionals may be used. Valuation professionals may be appointed by the pledgee or by the bank.

Law stated - 2 October 2024

### Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

In general, lenders from other jurisdictions may grant loans under the same conditions as Austrian lenders. However, such lenders must hold a banking licence recognised in the European Union. Loans from foreign lenders can also be secured by Austrian real estate collateral.

In order register a lien in the land register, a notarised deed of lien is required in Austria. The fee for an electronic application to register a lien in the land register is €47. There is also a registration fee of 1.2 per cent of the value of the right. From 1 April 2024, new rules will temporarily apply to the purchase of residential property and the related registration fee for the registration of the title and the registration of a related lien.

Law stated - 2 October 2024

### Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are generally based on EURIBOR (Euro Interbank Offered Rate). The legally permissible interest rates must always be determined on a case-by-case basis, taking into account the circumstances under which the loan is granted. The calculation of the legal interest rates does not take into account fees and costs of the lender.

In Austria, loan or credit interest rates are subject to the limits of immorality and usury under the Austrian Civil Code. Accordingly, an excessively high interest rate could be immoral, which would result in either the agreement on the interest rate contained in the loan agreement or the entire loan agreement being void.

Law stated - 2 October 2024

### Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

If a debt is not paid on time or in full, the creditor has the option of taking legal action against the debtor. The existence of real estate that is suitable for satisfaction considerably increases the immediate chances of success in debt collection. In court, the creditor has the opportunity to obtain an enforceable title. With an enforceable title, a lien on the debtor's property or a share in the property can be established at the operating creditor's request. It is particularly important to act quickly, as the land register operates on a 'first come, first served' basis.



With the foreclosure auction, the property is turned into money. Nevertheless, a much better economic result can often be achieved if the property is sold by way of a legal transaction (possibly in agreement with the operating creditor).

Law stated - 2 October 2024

### Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

The difference between the amount recovered in the foreclosure sale and any outstanding credit balance remains an outstanding obligation. This obligation can, in principle, be enforced immediately because the enforceable title already exists.

Law stated - 2 October 2024

### Protection of collateral

- 41** | What actions can a lender take to protect its collateral until it has possession of the property?

The lender's collateral can be protected by a lien. This requires the conclusion of a pledge agreement which must meet certain conditions. Austrian law also requires certain acts of publicity (eg, registration, etc).

Law stated - 2 October 2024

### Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Recourse to the entire assets of the borrower is not provided for. The 'principle of speciality' (*Spezialitätsprinzip*) applies. This means that only certain items can be accessed. Furthermore, the recourse is limited to collateral.

A lien acquired prior to insolvency even gives the creditor the right to separate the pledged property from the debtor's other assets.

If the insolvency proceedings are already pending, the debtor cannot register a pledge in the land register for the duration of the proceedings.

Law stated - 2 October 2024

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is not typical in Austria to demand a cash management system. Similarly, lenders usually do not take reserves with regard to real estate financing.

Law stated - 2 October 2024

## Credit enhancements

- 44** | What other types of credit enhancements are common? What about forms of guarantee?

Other common forms of credit enhancement are personal guarantees, comfort letters and cumulative assumption of debt.

Law stated - 2 October 2024

## Loan covenants

- 45** | What covenants are commonly required by the lender in loan documents?

The covenants in a loan agreement depend on the respective project and other related factors, such as the results of the due diligence conducted.

It is common for loan agreements to include a change of control clause to protect the lender in the event that the company comes under new ownership. Such clauses may stipulate that the lender can demand repayment in full if the clause is triggered. If a bank is unsure of the creditworthiness of the new owner, it may prefer to demand immediate repayment of the entire loan amount and terminate the loan.

Law stated - 2 October 2024

## Financial covenants

- 46** | What are typical financial covenants required by lenders?

Financial covenants can vary depending on the size of the loan. Another key factor is the loan-to-value ratio. For example, debt covenants and restrictions on the borrower's purchase of new assets, change of control and use of the finance funds are common.

Law stated - 2 October 2024

## Secured movable (personal) property

- 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The security interest in personal movable property can be protected by a lien.

A lien on movable property arises from a pledge agreement. Austrian law also requires certain acts of publicity (eg, registration, notification of third-party debtors, etc).

Law stated - 2 October 2024

## Single purpose entity (SPE)

- 48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

SPEs are very common in property transactions. There are no special rules for setting up an SPE.

Law stated - 2 October 2024

## UPDATE AND TRENDS

### International and national regulation

- 49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

The latest developments in Austrian real estate law deal, among other things, with the following topics:

On 20 March 2024, the National Council passed the measures of the 'Housing and Construction Package'. The aim is to stimulate the economy and encourage long-term investment in real estate. From 1 April 2024, the purchase of residential property will be temporarily subject to new rules. The new provisions of the Court Fees Act (-*Gerichtsgebührengesetz*, GGG) provide for an exemption from registration fees for the registration of ownership rights and related liens when purchasing a home under certain conditions.

The most recent comprehensive amendment to the Vienna Building Code (*Bauordnung für Wien*) contains, among other things, regulations that more strictly regulate the use of

residential space for short-term rentals (eg, Airbnb). One of the new provisions is that from 1 July 2024, an application for an exemption permit will be required if private individuals wish to offer short-term rentals of more than 90 days per calendar year.

In August 2022, the legislator enacted stricter regulations for the granting of loans (KIM Regulation). According to these rules, loans must have an equity ratio of at least 20 per cent. In addition, housing loans may not exceed 35 years and the repayment rate may not exceed 40 per cent of the household's net disposable income. In addition, banks have a number of exemption ratios within which they can, at their discretion and based on their risk assessment, lend to borrowers who do not meet all the strict KIM requirements. Minor relaxations of the KIM regulation have already been introduced on 1 April 2023. In 2024, the KIM regulation will be amended again. The new regulation will be legally binding from 1 July 2024 and will apply to newly agreed private residential property financing. The current amendment combines the previous four ratio-specific exemption rates into a single institution-specific exemption rate of 20 per cent of the new loan volume.

In addition, climate policy regulations also play a role, which affect the real estate sector as well as many other areas of daily life.

Law stated - 2 October 2024



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# Dominican Republic

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## GENERAL

## Legal system

## 1 | How would you explain your jurisdiction's legal system to an investor?

For the first 100 years since achieving independence in 1844, the Dominican Republic had a legal system based on French law, specifically on the Napoleonic Codes – Civil, Civil Procedure, Commercial, Criminal and Criminal Procedure – under a constitution based on the American model, with three branches of government: a strong presidency, a legislature and a judiciary with the power to strike down acts of the other branches found to be unconstitutional.

Since the first half of the twentieth century, however, there has been a move away from the French model, with the adoption of many statutes and codes inspired by other legal systems.

Examples include:

- Land Registry Law of 1920, founded on the Torrens system of Australian origin;
- Labour Code of the 1950s and 1992, modelled on South American codes;
- a new Code of Criminal Procedure of 2002, based on the same adversarial principles that govern American criminal litigation;
- a new arbitration statute of 2008, taken from the model arbitration code prepared by the United Nations; and
- a new bankruptcy and insolvency statute of 2015, greatly influenced by American bankruptcy law.

The Constitution of the Dominican Republic lays out the fundamental framework for the organisation and the operation of the Dominican government and its institutions, and recognises an impressive list of civil rights for all individuals – Dominicans and non-Dominicans – including an equal protection clause for non-Dominican citizens and investors. Article 25 of the Constitution expressly states that foreign nationals are entitled to the same rights and duties in the Dominican Republic as Dominican nationals, except, understandably, for the right to take part in political activities. Article 221 of the Constitution sets forth that the government will ensure equal treatment under the law for local and foreign investments.

Individuals and entities, domestic and foreign, have a quick and inexpensive remedy for the protection of their constitutionally protected rights: the writ of *amparo*, which is granted by all courts and is subject to an appeal to the Constitutional Court.

Cases in Dominican courts are decided by judges, not by juries. Judges rule based on the texts of the Constitution and existing statutes, the precedents of the Constitutional Court (which are binding), and the precedents of other courts (which are not binding). They do not rule in equity, as in some common law countries, but the principle of good faith is recognised by statutory law and grants the courts some discretion. Punitive damages are not awarded in injury cases – just compensatory damages.

Regarding evidence, parol evidence is admissible in criminal, labour and commercial matters, and, under certain circumstances, in civil and real estate matters.

Finally, real estate laws are national in scope and application.

Law stated - 10 October 2023

## Land records

- 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

The Dominican Republic has employed, since 1920, the Torrens system for real estate registration purposes. This system was developed in Australia in the nineteenth century and is now widely used in many countries. In the Torrens title system, a register of land holdings is maintained by the government, which guarantees an indefeasible title to the properties included in the register. Land ownership is transferred through registration of title instead of using deeds. The registrar has a duty to ensure that only legally valid changes are made to the register. Any interest affecting or limiting the ownership rights of the registered owner, such as mortgages, easements, liens, etc, must also be registered. Interest in real estate (property, mortgages, privileges, etc) is only valid and enforceable against third parties upon registration at the office where the register is located (called 'Registry of Title' in the Dominican Republic). Once registered, the system guarantees title and priority on a first-come, first-served basis.

In the Torrens system a third party, acting in good faith, can rely on the information in the land register as to the ownership of a property and the other rights and interests that may affect it. In a property purchase, the buyer is not required to look beyond the record in the register. In contrast, in a common law system, a vendor cannot transfer to a purchaser a greater interest than he or she owns, and the seller's title is as good or as defective as the weakest link in the chain of title, which necessitates a chain-of-title investigation at the record office.

As in most jurisdictions under the Torrens system, there are still some parcels of land in the Dominican Republic that are unregistered. However, most properties in the country – and 100 per cent of commercial properties – fall under the registered category. Unregistered property is governed by the French 'ministerial' system, whereby deeds affecting real estate are filed at a specific register that only serves as a recorder of documents, without any type of guarantee.

Law stated - 10 October 2023

## Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?



The legal requirements for recording conveyances are as follows:

- a deed of sale (sales contract), authenticated by a Dominican notary;
- a certificate of title, issued to the owner by the Registry of Title – a completely different document from the deed of sale, which serves as the only proof of ownership;
- certification showing that the seller is up to date with its property taxes;
- a receipt attesting to the payment of the real estate transfer taxes (currently 3 per cent of the government-appraised value of the property). The buyer is exempt from this tax in some cases (eg, first purchases in certain tourism projects and low-cost housing acquired with a bank loan);
- a copy of the identity card or passport of the parties, or tax card if a legal entity (non-resident foreigners need to provide an additional identity card from their country of origin in addition to their passports); and
- a copy of evidence of purchase price or mortgage payment through a non-cash method, for operations involving more than 1 million Dominican pesos.

Registration rules are established by the General Director of the Registries of Title and are applicable nationwide. The Dominican Civil Code states that buyers pay all the fees, expenses and taxes required for conveyances, unless agreed otherwise by the parties.

**Law stated - 10 October 2023**

### Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There are no restrictions on foreign individuals or entities owning or leasing real estate in the Dominican Republic. The process for purchasing or leasing real estate for foreigners is exactly the same as for Dominicans; there are no national defence or security limitations. Foreign individuals and entities and Dominicans must register locally with the tax authorities before registering purchases of real estate. Individuals must submit their application directly at the Internal Revenue office, while entities must first register at the Chamber of Commerce and obtain a mercantile registry certificate, before applying for their tax number. These are mere formal requirements that can be easily fulfilled.

**Law stated - 10 October 2023**

### Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Real estate can be purchased and sold in Dominican pesos or US dollars. There are neither controls nor restrictions on foreign currency exchange in place. Under current foreign investment laws, foreigners can freely repatriate capital and profits from their investment in the Dominican Republic.

Law stated - 10 October 2023

### Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Owners and tenants face a standard strict tort liability (custody-based liability) for real estate they own or lease for damages suffered by third parties on their property, if the property has played an active role in causing the damage, and for environmental damages.

Only current owners or tenants at the time of occurrence of the damage can be held liable, not subsequent owners or tenants. Lenders are exempt.

Law stated - 10 October 2023

### Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners can protect themselves by acquiring a civil liability insurance policy. The environmental law requires mandatory insurance for projects that require a permit from the Ministry of Environment. There are no legal structures in place that can shield owners from their liabilities.

Law stated - 10 October 2023

### Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The Dominican Civil Code mandates that all matters concerning real estate in the Dominican Republic are subject only to local law, no matter who owns the property (ie, a Dominican citizen or a foreign individual entity) or the place where the contract was signed. This is a rule of public order that cannot be amended or waived by the contracting parties. If a transaction involves properties from another jurisdiction as well, then the part of the transaction that refers to the Dominican real estate must be governed by Dominican law, hence all closing documentation must be drafted and executed according to Dominican

laws. Nevertheless, for estate purposes, Law 544–14, a conflict of laws statute, allows foreigners to have their national law determine the rules of inheritance in connection with real estate located in the Dominican Republic; previously, Dominican inheritance rules applied in all cases.

In contractual matters not involving real estate, the parties can choose the applicable law as long as they do not breach public order provisions under Dominican law. For example, labour relations in the Dominican Republic must be governed by Dominican law.

Law stated - 10 October 2023

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The Real Estate Registration Law provides a special jurisdiction for disputes over the registered real estate, consisting of land courts of original jurisdiction, with a single judge, as a court of first instance, and superior land courts, with five judges, as appeal courts. Both decide on matters of fact and law. Decisions of a superior land court may be appealed before the Supreme Court, which only verifies the correct application of the law.

All affected parties in a suit must be duly notified by a bailiff before it can proceed. For parties domiciled abroad, notice is served through a special procedure established for this purpose through the Dominican consulate in the country where the party is domiciled.

A foreign party does not need to be qualified to do business in the Dominican Republic and is not required to post a litigation bond to sue for remedies in the Dominican Republic.

Law stated - 10 October 2023

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

In general, Dominican law does not distinguish between commercial and residential properties: the same rules apply for both. However, properties held by commercial entities are taxed differently from those owned by individuals.

A 1 per cent annual tax is assessed on real property owned by individuals, based on the cumulative value of the properties owned by the same individual, as appraised by the government authorities. Properties are valued without taking into account any furniture or equipment to be found in them. For built lots, the 1 per cent is calculated only for values exceeding US\$150,000. For unbuilt lots, the 1 per cent tax is calculated on the actual appraised value without the US\$150,000 exemption. Individuals pay this tax every year on

or before 11 March, or in two equal instalments: 50 per cent on or before 11 March, and the remaining 50 per cent on or before 11 September. The 6.8 million pesos threshold is adjusted annually for inflation.

The following properties are exempt from the property tax:

- built properties valued at US\$150,000 or less;
- farms; and
- houses inhabited by owners who are at least 65 years old and have no other property in their name.

Properties held in the name of a corporation or other entities do not at present pay a property tax per se; however, a 1 per cent tax is levied on company assets, including real estate.

There are also different tax treatments with regard to leasing to individuals or to corporate entities: leases to entities are subject to value-added tax and leases by individual landlords are subject to a 10 per cent withholding tax that is credited toward the landlord's annual income tax.

**Law stated - 10 October 2023**

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

All planning and land use matters are handled by municipalities, the Ministry of Tourism (in tourist areas) and the Ministry of Environment.

The municipalities and the Ministry of Tourism establish the general rules regarding use (eg, residential, commercial, industrial, mixed, density or maximum height). Any construction or development that may affect the environment must also be approved by the Ministry of Environment.

**Law stated - 10 October 2023**

## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The Constitution and Law 344 of 1943 establish the legal regime for the government's compulsory purchase or condemnation of real estate. The Dominican Constitution states that:

No person shall be deprived of his or her property, except on justified grounds of public utility or social interest, for which a person shall be paid a fair value before expropriation, as determined by the mutual consent of the parties or by the judgment of a court of competent jurisdiction, pursuant to the law. In case of the declaration of a State of Emergency or Defence, compensation may not be paid before the expropriation.

Law 344 establishes the specific procedure that the government must follow in any case of expropriation. Because the provisions of this law are of public order, allocations cannot be modified by contractual arrangements between the parties.

Law stated - 10 October 2023

## Forfeiture

**13** | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

The Constitution allows the government to seize property without compensation if a definitive court ruling has confirmed that the property has been obtained through illegal acts (eg, drug trafficking or money laundering).

Law stated - 10 October 2023

## Bankruptcy and insolvency

**14** | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Under Law 141–15, foreclosure or sequestration processes pursued by creditors affecting more than 50 per cent of a commercial debtor's assets, among other conditions, can trigger a bankruptcy and restructuring process.

Aside from exceptions for certain regulated industries, such as banks and stock exchange-related entities, as well as government-owned entities, the law is applicable to any Dominican or foreign entity or commercial individual person with a permanent establishment in the country.

All of the following processes against the debtor will be deemed as automatically stayed or prohibited once the court approves the bankruptcy petition:

- all legal, administrative, tax or arbitration claims or lawsuits, including foreclosure and sequestration processes;
- computation of liquidated damages clauses and contractual or judicial penalties;
- disposition of a debtor's assets, including the filing of a non-registered deed of sale, unless otherwise authorised by the law; and
- payment against debts originated prior to the restructuring request.

These processes will remain stayed during the restructuring plan's execution, thereby prohibiting any asset seizure actions by the creditors. The stay will be lifted if the restructuring plan fails and the court authorises the debtor's asset liquidation.

During the restructuring's conciliation and negotiation stage, all creditors, including secured ones (registered securities, mortgages and pledges, etc), that wish to have voting rights assigned to them for the execution of the restructuring plan must formally register their credits before the Bankruptcy Court, prior to the court-appointed mediator's submittal of his or her final report to the court.

Law stated - 10 October 2023

## INVESTMENT VEHICLES

### Investment entities

- 15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

There are no restrictions regarding the structure or legal form of a foreign entity. If it is duly incorporated and recognised in the jurisdiction where it was formed, an entity can do business in the Dominican Republic upon registration at the Chamber of Commerce and Internal Revenue. However, trusts as they are known in most common law jurisdictions are not recognised as legal entities and cannot, therefore, directly hold property in the Dominican Republic.

As for Dominican entities, Dominican company law allows different types of commercial companies (eg, individually owned enterprises, or limited liability companies (LLCs)) and corporations (eg, regular or simplified stock corporations), all of which provide limited liability for their owners or shareholders. There are other investment entities recognised under the law, such as business partnerships, limited partnerships and per share limited partnerships, but they are seldom used because they do not offer full liability shields to their members and are subject to the same tax treatment as the other entities. Also, Law 189–11 introduced, in 2011, local fiduciary vehicles as a holding option.

Local law does not recognise the concept of pass-through entities. Any entity, local or foreign, is taxed as an entity, regardless of its legal structure, except real estate assets held through a closed-end investment fund approved by the Dominican Republic Security and Exchange Superintendency. These funds are considered fiscally neutral investment vehicles and, as such, are not subject to income tax; their shareholders or beneficiaries, however, will pay income tax on income received from the funds.

Law stated - 10 October 2023

### Foreign investors

- 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

The most common entity used by foreign investors is a local LLC. Some, preoccupied with the complexities of reporting a foreign entity to the tax authorities in their home jurisdiction, prefer to register their domestic entity in the Dominican Republic. Finally, high-income individuals with complex estate planning in place use the structures existing in their estate plan to acquire Dominican assets.

Law stated - 10 October 2023

## Organisational formalities

- 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The five basic steps for incorporating any local entity are:

- registering the company's name before the National Office of Industrial Property;
- the signing of the by-laws;
- payment of the incorporation tax (1 per cent of capital);
- recording the incorporation documents at the Chamber of Commerce and obtaining the mercantile registry certificate; and
- registering the company at Internal Revenue and obtaining a tax number.

The three basic steps for registering a foreign entity in the Dominican Republic (permanent establishment) are:

- translating into Spanish and authenticating the incorporation documents (by-laws, certificate of incorporation, designation of directors, etc);
- recording the incorporation documents at the Chamber of Commerce and obtaining the mercantile registry certificate; and
- registering the company at the Internal Revenue and obtaining a tax number.

All foreign and local entities are taxed equally regardless of structure: a flat 28 per cent on net corporate profits and 10 per cent tax on dividends or profits sent abroad.

The Dominican tax code has a general anti-tax avoidance provision ('substance over form principle) and specific rules for the sale of shares of foreign entities that own assets in the Dominican Republic.

All companies registered in the Dominican Republic, regardless of whether they are local or foreign entities, including those with no income or operations, must file income tax returns with the Dominican Republic's Tax Office every year. Aside from the penalties on overdue taxes, which amount to 11.1 per cent for the first month and 5.1 per cent for each additional month, entities that do not comply with the filings and subsequent payments of both income and asset taxes run the risk of having the Tax Office begin a lien registration process against the entity's properties.

Law stated - 10 October 2023

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Dominican real estate law recognises the following interests in real estate:

- absolute ownership;
- usufruct;
- easements;
- betterments;
- leases;
- condominium regimes; and
- privileges and mortgages.

It does not recognise cooperative ownership arrangements or other occupancy interests.

Law stated - 10 October 2023

### Pre-contract

**19** | What are the typical pre-contractual steps?

Non-binding agreements do not really fit into the Dominican legal system and are rarely used. A general rule of the Civil Code establishes that with an agreement on the property and the sale price, the sale is perfected between the parties, even if the property has not been delivered or the price paid. Although this rule can be waived, it is customary to characterise any agreement – including term sheets – as binding, meaning that penalties are applicable if, for example, the buyer decides not to buy or the seller decides not to sell, even in cases when the above-cited rule is subject to a suspensive condition. An agreement is usually considered binding and will be treated by the courts accordingly.

Customarily, real estate transactions in the Dominican Republic do not follow the North American pattern of a written offer tendered by the buyer to the seller, followed by the seller's written acceptance, or the signing of a non-binding term sheet or letter of intent. Instead, after an oral agreement is reached by the buyer and seller on the price, a binding promise of sale is prepared and signed by the parties. A property is usually only taken off the market if a binding contract with a non-refundable deposit is in place.

Real estate brokers are not regulated in the Dominican Republic.

Law stated - 10 October 2023



## Contract of sale

### 20 | What are typical provisions in a contract of sale?

A well-drafted contract of sale should contain, as a minimum, the following provisions:

- full name and particular of the parties (if the seller is married, the spouse must also be part of the contract, since Dominican law does not generally allow the sale of any property without the consent of both spouses);
- legal description of the property;
- purchase price and payment terms;
- obligation of the seller to deliver to the buyer at closing the documentation required for registering the purchase (certificate of title, tax receipts, etc);
- default clauses;
- date of delivery of the property; and
- representations by the parties and remedies in case of breach of contract.

The amount of the down payment depends on the circumstances of the sale, especially on when the buyer will take possession of the property. Before delivery, payment of 10 per cent of the purchase price is common. If possession is to take place from the time of signing the promise of sale, then a much higher amount might be due, up to the amount of the sale price, even if the title does not change hands. Escrows are used but are not mandatory and not always accepted by the seller; it is normally used when a part of the payment is subject to certain conditions (eg, delivery of title, city hall construction permits) or the payment is going to be done by several bank transfers.

Generally, the seller pays all taxes and utilities up to the date of closing. Unless agreed to otherwise, the seller bears the risk of loss until closing except if the buyer has taken possession of the property.

**Law stated - 10 October 2023**

## Environmental clean-up

### 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Issues of environmental clean-ups in real estate transactions are still very rare in the Dominican Republic. So far, this has been a problem only in the mining sector. Therefore, there are no general covenants in use. Of course, the parties to a contract are free to insert mutually agreed terms regarding long-term environmental liability and indemnity issues.

**Law stated - 10 October 2023**

## Lease covenants and representation

- 22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

The general recommendation for any real estate acquisition is to have the seller deliver the property without any tenants, considering the costs and duration of eviction procedures under Dominican law. The final payment should always be made subject to such a delivery without tenants or any other type of occupation.

If the buyer is interested in taking on the existing lease, the representations are extensive, starting with requesting full disclosure of the entire landlord-tenant subleases, related documents, lease receipts, etc. Leases survive a sale, but brokerage agreements do not. Requesting estoppel certificates from the tenants is not common in the Dominican Republic and the tenant is not obliged to sign them.

Law stated - 10 October 2023

## Leases and real estate security instruments

- 23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

In general, leases are not registered at the Registry of Title and are, therefore, subordinate to a registered security instrument, such as a privilege or mortgage. However, in the unlikely case that a lease has been registered before a security interest, the creditor must respect the terms of the lease.

Banks usually require a first-rank mortgage and will not accept subordination to a lease. Ground or head leases are not treated differently from other commercial leases.

Law stated - 10 October 2023

## Delivery of security deposits

- 24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Dominican law requires landlords to deposit mandatory security deposits (in an amount equivalent to one, two or three months of rent, depending on the term of the lease) at the government-controlled Agricultural Bank.

Leases commonly provide for periodic rent increases.

Law stated - 10 October 2023

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

The typical real estate due diligence overseen by the buyer's attorney regarding title consists of the following:

- obtaining a certification from the Registry of Title stating the legal status of the property;
- obtaining a certified report from an independent surveyor confirming that the official survey coincides with the property and that there are no overlapping surveys;
- obtaining a certificate from the Internal Revenue stating that the property tax, if any, has been paid;
- confirming that the property to be purchased may be used for the purposes sought by the buyer;
- investigating whether a third party is occupying the property;
- investigating the property's environmental status; and
- ensuring that the seller, especially if a corporation, has the authority to sell and can convey clear title.

As noted above, under the Torrens system, there is no need to do a chain-of-title search. Title insurance is available but is not used frequently for various reasons – especially limited protection and costs – even though the indemnity fund contemplated by the Real Estate Registration Law has not functioned properly.

The Real Estate Registration Law establishes that whoever registers first has priority over those who register after. Registration is deemed to be complete on the date the application is submitted for registration provided that the application is approved, not on the date the Registry of Title issues the corresponding certificate. Priority among different interested parties can be contractually reordered.

Law stated - 10 October 2023

## Structural and environmental reviews

- 26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Structural reviews by engineers or architects can be obtained but are not very common. There is no standard procedure: it is usually the buyer and the solicitor who instruct the engineer about the scope of the review. The sales contract may establish specific representations concerning the structure and environmental issues and the corresponding sanctions in the event of non-compliance (eg, penalties, indemnity, right to rescind, etc), but they are not customary.

Environmental insurance is available.

It is customary to review all permits regarding existing structures or projects. Legal opinion letters are only used for internal purposes.

Any real estate project, subdivision or infrastructure must apply for and obtain environmental approval from the Ministry of the Environment and Natural Resources, pursuant to the General Law on the Environment and Natural Resources 64–00, which regulates environmental pollution, the generation and control of toxic and hazardous substances, and the treatment of domestic and municipal waste, among other matters. Environmental due diligence is highly advisable for purchases of undeveloped land, as well as off-plan property purchases.

**Law stated - 10 October 2023**

## Review of leases

- 27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Leases are usually prepared and reviewed by lawyers. Dominican law is very protective of tenants' rights and there is no fast and efficient eviction procedure in place. Key lease issues include:

- the lease's term;
- tacit renewal clauses;
- ownership of betterments made by tenant during the lease;
- default clauses and waiver of certain tenant-friendly statutory provisions;
- a clear distinction between minor and major repairs and who will be the responsible party to cover these; and
- specific use of the property during the lease term (eg, the type of business or whether it will be a family's residence).

Very often, the tenant has to find a guarantor to co-sign the lease.

**Law stated - 10 October 2023**

## Other agreements

### 28 | What other agreements does a lawyer customarily review?

The buyer's lawyer has to carefully review any agreement regarding the property, including:

- service agreements;
- brokerage agreements;
- previous sale agreements if the price has not been paid in full; and
- the agreements on which any registered interest is founded (eg, easement agreements and mortgage contracts).

The lawyer should also review carefully the seller's marital status, and, if he or she is married, review any existing marriage contract. Dominican law does not generally allow the sale of any property without the consent of both spouses.

Law stated - 10 October 2023

## Closing preparations

### 29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The lawyer's preparation for closing involves obtaining, reviewing or preparing the following:

- certification from the Registry of Title stating the legal status of the property;
- a certified report from an independent surveyor confirming that the official survey coincides with the property and that there are no overlapping surveys;
- a certification from the Internal Revenue stating that the property tax, if any, has been paid;
- pertinent permits or zoning reports;
- reports from engineers, if applicable;
- any agreements, receipts and discharges (services, employees and tenants) related to the property;
- the identification and marital documents of the parties, and, if entities, the complete corporate documentation (by-laws, mercantile registry certification, tax ID, corporate resolution, etc);
- if the property is a condominium unit:
  - a copy of the condominium declaration;
  - a copy of the condominium regulations;
  - a copy of the approved construction plans;
  -

certification from the condominium administration showing the seller is current with condominium dues; and

- copies of the minutes of the last three condominium meetings;
- information as to how payment of the price of sale will be made;
- the contract of sale; and
- the closing checklist.

Law stated - 10 October 2023

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The closing usually takes place in the lawyer's office with all the parties present or represented by power-of-attorney. It is not necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction, except for a notary public, who must be present to attest to the signatures of the parties.

At the closing, the buyer's lawyer receives two originals of the contract of sale – one for registration purposes and the other for his or her file – and the seller's original certificate of title.

Ideally, the signing of the contract of sale, payment of the purchase price and delivery of the seller's documentation will happen simultaneously. Regarding financing, the bank usually insists on registering the mortgage first before disbursing the funds to the seller.

Law stated - 10 October 2023

### Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

If the seller backs down after signing a binding promise of sale or similar contract, the purchaser can:

- enforce the sales agreement (specific performance) by filing suit at the Land Court demanding the transfer of property (the suit is automatically recorded as a lien on the property at the Registry of Title);
- ask for specific performance plus damages; or
- sue to rescind the contract and obtain damages.

Similarly, the borrower can sue the bank for specific performance and damages.

The seller is allowed to retain either the purchaser's down payment or any other funds that have been advanced against the purchase price provided that the purchase contract contains a liquidated damages clause authorising this deduction.

Both seller and purchaser may claim damages.

Law stated - 10 October 2023

### Breach of lease terms

**32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Tenants can sue landlords for the specific performance of any obligation assumed by the landlord in the lease and damages. The landlord, likewise, can sue for specific performance and damages, as well as for eviction; remedies available to landlords do not differ depending on whether the nature of the lease is commercial or residential.

The customary procedure to evict a defaulting tenant is to sue in court. The process is very time-consuming for two reasons:

- before suing, the landlord is required in many cases to go through an administrative procedure that usually grants the tenant grace periods of six months or more; and
- eviction orders by lower courts are subject to appeals to two higher courts, which lengthens the process to three or more years if the tenant retains the services of a savvy lawyer; evictions cannot be enforced while appeals are pending.

General contract law applies to the lease but is limited by various statutes that protect the tenants. For example, if there is no escalating clause for rent in a lease, the landlord cannot raise it unilaterally without undertaking a lengthy administrative procedure.

Law stated - 10 October 2023

## FINANCING

### Secured lending

**33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Mortgages (financing from third parties) and privileges (seller's financing) are customary security interests. Both grant the lender a registered right on the property (collateral) that can be enforced in case of default through a foreclosure process, not an automatic defeasible conveyance in case of default. In both cases (mortgages and privileges), in

the event of default, the enforcement is made through a foreclosure process before the competent Civil and Commercial Court of First Instance.

Law stated - 10 October 2023

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

There is no financing available for ground leases.

Law stated - 10 October 2023

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

Mortgages are created by a contract between the owner and the lender, or by a tripartite agreement between seller, buyer and the lending institution. The contract is authenticated by a Dominican notary and then registered at the Registry of Titles after payment of the 2 per cent mortgage tax.

Privileges of the unpaid seller are automatic: upon review of the registration application submitted to the Registry of Titles, the registrar will register a privilege in favour of the seller if he or she can determine from the documents in the file that part of the price of sale has not been paid. The registration of the privilege is tax-exempt.

The registration of a security interest, be it a mortgage or a privilege, is perfected by filing the documentation at the Registry of Title in the jurisdiction where the property is located. The documents required for filing a mortgage are:

- a mortgage contract;
- original of the certificate of title of the borrower;
- mortgage tax receipt; and
- certification attesting to the payment of property taxes.

For a privilege, the documents required are the same as for a sale.

Law stated - 10 October 2023

### Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?



Lenders customarily require third-party real estate appraisals when underwriting loans. The appraiser, usually a surveyor or engineer, must be a recognised professional accredited by the Dominican Institute of Appraisers. The lending institution is required to order an appraisal prior to approving the credit facility.

Law stated - 10 October 2023

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

A foreign lender does not need specific authorisation to do business in the Dominican Republic. To register a mortgage in its favour, the foreign lender should obtain a local tax number. Once this tax number has been obtained, the lender is no longer subject to the general withholding taxes established for payments sent abroad (28 per cent in general, or 10 per cent for interest paid to foreign financial institutions). The lender will be taxed as a permanent establishment, under the same conditions as a Dominican entity.

Regarding required documents and registration taxes, the same rules that apply for local lenders apply to foreign lenders:

Mortgages are created by a contract between the owner and the lender, or by a tripartite agreement between the seller, buyer and the lending institution. The contract is authenticated by a Dominican notary and then registered at the Registry of Titles after payment of the 2 per cent mortgage tax.

The registration of security interests is perfected by filing the documentation at the Registry of Title in the jurisdiction where the property is located. The documents required for filing a mortgage are:

- a mortgage contract;
- original of the certificate of title of the borrower;
- mortgage tax receipt; and
- certification attesting to the payment of property taxes.

Mortgages and underlying credits can be transferred without paying additional taxes.

Law stated - 10 October 2023

## Loan interest rates

**38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Local interest rates are commonly set to the Dominican market standard rate, published by the Central Bank of the Dominican Republic.

Loans can be obtained in local currency or in US dollars.

References to Libor or any other international indexes are only used in international loans.

There is no effective consumer protection in place for unreasonably high interest rates. A usury law dating from 1919 was nullified in 2002.

Law stated - 10 October 2023

### Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

The remedies against a debtor in default are enforced through a specific judicial procedure at the first instance court. It is a three-step procedure, usually based on monetary default: the creditor notifies a specific notice of payment to the debtor; when the notice expires without payment being fulfilled by the debtor, then the creditor files an embargo at the Registry of Title to completely block any further registrations on the property and then initiates the court procedure for the foreclosure, which ends in a public auction sale of the foreclosed property. All the rules regarding foreclosure are of public order. Foreclosure can only be judicial; non-judicial foreclosure is prohibited by law. Defaults other than monetary defaults are possible (unauthorised distribution of dividends, unauthorised changes in the corporate structure, etc) if properly established in the loan documents or mortgage act and proven by the creditor.

The usual time for an ordinary foreclosure is around six to 12 months. Financial institutions benefit from an expedited procedure that takes around three to six months. In any case, dilatory procedures can be initiated by the debtor or by any other party with a registered right on the property.

Law 189–11 introduced trusts and collateral agent structures for mortgage securities as an alternative to standard mortgage-foreclosure processes, providing better protection of collateral and including an expedited foreclosure procedure, now available to all types of creditors after a 2017 court ruling.

Aside from the mentioned judicial foreclosure process, there are no other legal avenues available to enforce a loan against a defaulting debtor.

Law stated - 10 October 2023

### Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered

in the foreclosure? Are there time limits on a lender seeking a deficiency judgment?  
Are there any limitations on the amount or method of calculation of the deficiency?

Yes. The statute of limitations for suing for recovery is 20 years. There are no limits on the amount or method of calculation of the deficiency.

Law stated - 10 October 2023

## Protection of collateral

41 | What actions can a lender take to protect its collateral until it has possession of the property?

Throughout the foreclosure process, the debtor remains the owner of the property until it is sold to the highest bidder or adjudicated to the lender. Once the foreclosure procedure has begun and has been registered at the Registry of Titles, the property is blocked from any registration by third parties. In addition, the lender can request an injunction designating a judicial administrator. By law, the lender also has a preferential right to collect any rent produced by the collateral during the foreclosure process.

There are no risks of liability during the foreclosure process or to possession since control of the property can only be granted if, at the end of the foreclosure process, the property is adjudicated to the creditor in case bidders do not show up or meet the minimum bid at the public auction.

Law stated - 10 October 2023

## Recourse

42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Yes, security documents may provide recourse to all the assets of the borrower. It is customary to insert a clause to that effect in all bank loans.

The existence of such a clause has no significance in a bankruptcy or insolvency filing. Personal recourse is not limited to actions such as bankruptcy filing, etc. The lender has a choice to foreclose on the collateral or collect from other assets of the borrower. As for guarantors, personal recourse against them is also unlimited: a special clause to that effect is customarily included in the mortgage contract.

Law stated - 10 October 2023

## Cash management and reserves

**43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Financial institutions usually require the necessary reserves to pay taxes and insurance. For commercial loans, it is common for financial institutions to only require segregated accounts rather than lockboxes.

Law stated - 10 October 2023

## Credit enhancements

**44** | What other types of credit enhancements are common? What about forms of guarantee?

The main method used by local banks for credit enhancement is to establish a scrutinised structure with two main elements: first, the loan is usually granted as a line of credit and any disbursement is subject to specific conditions (completion of a construction phase, obtaining of a specific permit). Second, the bank is in control of a segregated account, which constitutes the only account that the borrower can use for receiving funds and making payments. Banks also require borrowers to issue personal and corporate promissory notes as an independent credit enhancement, which may be executed against any of their assets in the case of default.

Law stated - 10 October 2023

## Loan covenants

**45** | What covenants are commonly required by the lender in loan documents?

The commonly required covenants are the following:

- a prohibition from disposing of the collateral in any possible way (sale, pledging as collateral for any other loan, etc);
- maintenance of an insurance policy in favour of the lender;
- a prohibition from merging with another entity or acquiring other major assets without the approval of the lender;
- a prohibition from implementing changes to the corporate structure without the approval of the lender;
- a prohibition from disbursing company dividends without the approval of the lender; and
- controlling and inspection structures.

These requirements usually do not depend on the asset class, but the situation of the borrower.

Law stated - 10 October 2023

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

Typical financial covenants required by lenders are based on loan-to-value ratios (usually anywhere between 50:100 and 70:100), debt-service coverage ratios and financial reporting requirements. Ongoing appraisals are usually only required in specific cases.

Law stated - 10 October 2023

## Secured movable (personal) property

### 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The first requirement for the creation and perfection of collateral of movable property, according to Dominican law, is always a notarised contract in Spanish that establishes or confirms the debt and describes the collateral to be pledged. Depending on the asset, there might be additional requirements, such as handing over the movable asset to the lender and registration at the Civil Registry (regular civil pledge) or registration of opposition at the Internal Revenue (vehicles).

Chattel mortgages, created by the Agricultural Promotion Law 6,186 of 1963, are commonly used for securing machinery, inventory and other movable assets. This type of pledge enables the debtor to keep possession of the asset while the security is in place. In the case of chattel mortgages, registration is made by filing the documents in the appropriate court.

As for aircraft, security agreements need to be drafted before a notary public and executed and filed at the Civil Registry Office and the National Institute of Civil Aviation. Securities over ships are registered at the Industry and Commerce Department.

As for intangible assets, they can be securitised as follows.

## Company shares

Securitisation will depend on the type of entity (stock corporation, simplified stock corporation or limited liability company) and on the procedure established by the company's by-laws.

In most cases, a shareholder who wishes to pledge his or her shares to a third party must notify other shareholders, directly or via the board of directors, to receive approval prior to executing a share pledge agreement and registering the pledge in the company register.

All pledges over shares must also be registered at the Chamber of Commerce of the company's domicile.

### **Contractual rights**

This requires the execution of a pledge agreement, its notification to the contract's counterparty and registration of the notified documentation at the corresponding Civil Registry Office.

### **Receivables**

Securitisation is done through the execution of a pledge agreement, its notification to the corresponding debtors and registration of the notified documentation at the corresponding Civil Registry Office.

### **Intellectual property**

This is achieved by the execution of a pledge agreement and its registration at the National Office of Intellectual Property.

**Law stated - 10 October 2023**

### **Single purpose entity (SPE)**

**48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

No. SPEs do not exist in the Dominican Republic. This does not prevent an SPE from a foreign jurisdiction from registering and doing business in the Dominican Republic.

**Law stated - 10 October 2023**

## **UPDATE AND TRENDS**

### **International and national regulation**

**49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

There are no updates at this time.

Law stated - 10 October 2023



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# Finland

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The Finnish legal system is a civil law system. Injunctions may be obtained to prevent an action. Courts may rule in equity but it is quite rare that an agreement between two companies would be amended for reasons of equity. Parol rule is not generally applicable, but the parties typically agree that the final agreement supersedes all the previous written or oral agreements or other understandings between the parties. Oral contracts are generally binding (however, certain transactions such as a direct real estate transfer will need to be made in written form). The laws applicable to real estate are national in scope but the local municipalities and cities have power on local planning and decision-making.

Law stated - 10 October 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

In the Finnish real estate system, the land and water territory is divided into real property units and other register units. The latter mainly consists of public and common water areas and such areas are generally not transferable. The Finnish Real Estate Formation Act (554/1995, as amended) defines real property as an independent unit of land ownership (including water areas belonging to such unit), which under the Real Estate Register Act (392/1985) is to be entered into the Real Estate Register maintained by the National Land Survey of Finland (referred to as real property unit). Such real estate units each have their own registration number and, in addition to the land and water area, the units consist of components and accessories thereof and easements vested therein.

Title transfers to the buyer are in accordance with the parties' agreement and is not dependent on registration of the buyer's title. However, a transfer of title must be registered with the Title and Mortgage Register, which is also maintained by the [National Land Survey of Finland](#). Prior registration has priority in the case of conflicting transfers of title.

Further, certain land lease agreements and transfers of such leases must be registered with the Title and Mortgage Register. Mortgages may be registered to encumber any freehold properties and leasehold properties that are subject to mandatory registration. Mortgages must be registered in order to become effective. The priority of mortgages is determined based on the dates on which the application for mortgage has been registered with the Title and Mortgage Register.

Law stated - 10 October 2024

## Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Under the Finnish [Land Code \(540/1995, as amended\)](#), title registration of freehold title and registrable leasehold titles must be applied for within six months of executing the document transferring ownership. In the case of a direct real estate transfer, the tax is 3 per cent of the transfer price on transfers concluded on or after 12 October 2023 and 4 per cent of the transfer price on transfers concluded prior 12 October 2023. The fees payable to the National Land Survey for the registration of title and other rights are nominal. It is the buyer's responsibility to pay the taxes and fees (unless otherwise agreed between the parties). A 3 per cent tax is typically avoided by selling the shares in a holding company owning the real estate rather than directly selling the real estate, in which case the applicable tax is only 1.5 per cent of the transfer price on transfers concluded on or after 12 October 2023 and 2 per cent of the transfer price on transfers concluded prior 12 October 2023 .

Special rights over a real estate, such as lease rights or rights to extract land or resources or another comparable right of extraction as well as different kinds of easements may be registered but are not mandatory (unless regulated in other legislation such as, for example, mining legislation). A land lease agreement (a leasehold) is subject to mandatory registration if the leasehold (1) is in force for a fixed term, (2) is transferable without the landowner's consent and (3) if the leased area has buildings belonging to the tenant or the terms of the lease provide that such buildings may be built on the leased area.

Mortgages may be registered on any freehold properties. Mortgages may also be registered on such leasehold properties which are subject to mandatory registration of the leasehold title.

Law stated - 10 October 2024

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Total holdings of foreign property investors accounted for around 35 per cent of the total Finnish real estate investment market at the end of 2023. Finnish legislation is generally rather liberal in terms of foreign investment and allows both direct investment in property and into domestic companies holding Finnish real estate, subject to the below exceptions.

Acquisition of Finnish real estate by buyers located outside the EU/EEA is subject to permission by the Ministry of Defence, on grounds of national security interests (if more than 10 per cent of the ownership or control of the buyer entity is outside the EU/EEA, the buyer entity is deemed to be located outside the EU/EEA for the purposes of Act on Permissibility of certain Real Estate Acquisitions 470/2019, as amended). The Finnish Ministry of Defence may permit an acquisition based on an application by the buyer. If the

permit is not granted, the government has a right of redemption or pre-emption. The permit must be applied for either before or within two months of the transaction. The limitations pertain to freehold title of real estate. Tenancy is not limited.

In relation to indirect property investment (and as further defined in the Act on the Monitoring of Foreign Corporate Acquisitions in Finland (172/2012), as amended), foreign buyers must apply for prior approval from the Ministry of Employment and the Economy (the MEA) for an acquisition resulting in the buyer holding more than one-tenth, one-third, or one-half of the voting power (or corresponding influence) of a Finnish defence company. Foreign buyers may also submit a notification to the MEAE for an acquisition resulting in the buyer holding more than one-tenth, one-third, or one-half of the voting power (or corresponding influence) of a company or business holding a key position in relation to maintaining vital functions of Finnish society.

These rules are not applied to the Åland Islands (an autonomous region of Finland), which means that foreign persons are restricted from buying real estate located on the Åland Islands, unless specifically allowed by the government of those islands.

In March 2023, a working group considered further restrictions on foreign real estate acquisitions and submitted its report to the Ministry of Defence. The report includes several possibilities for improving the supervision of real estate ownership of buyers located outside the EU/EAA. According to the working group, there is a particular need for licensing of real estate acquisitions, especially in the case of mergers and acquisitions where a non-EU/EAA party indirectly acquires ownership of real estate.

Finally, at the beginning of March 2023, an amendment to the Income Tax Act (1535/1992, as amended), section 10a entered into force, which allows Finland to tax capital gains arising from the indirect transfer of real estate property located in Finland. Even if Finnish domestic law would allow Finland to tax capital gains in the future, an applicable tax treaty may prevent Finland's right to tax.

**Law stated - 10 October 2024**

## Exchange control

5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

No, there are not.

**Law stated - 10 October 2024**

## Legal liability

6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Environmental liability is determined by the 'polluter pays' principle, meaning that the party who causes the damage is generally liable for the damage and remediation of the potentially contaminated areas.

Under Finnish law, liability for environmental damage is strict (that is, it has not been limited) and does not depend on whether the damage has been caused negligently or intentionally.

Liability for compensation lies with any of the following (Act on Compensation for Environmental Damage (737/1994, as amended):

- a party whose activity has caused environmental damage or loss;
- a party *comparable* to the person carrying out the activity that caused the environmental damage or loss; or
- a party to whom the activity which caused the environmental damage or loss has been assigned, if the assignee knew or should have known at the time of the assignment about the damage or loss, or the threat of it.

In the assessment of the comparability, due consideration shall be given to the competence of the person concerned, their financial relationship with the person carrying out the activity and the profit they seek from the activity.

Thus, a buyer can inherit liability for environmental damage or loss if the buyer knew or should have known at the time of the purchase about the damage or loss, or the threat of it.

In addition, as further defined in the Environmental Protection Act (527/2014, as amended), liability for remediation of a contaminated area can be inherited by a buyer if the buyer knew, or should have known, at the time of the purchase, about the relevant contamination or if the contamination has occurred with the buyer's consent.

A lender does not generally incur environmental liability in connection with real estate financing. However, it can indirectly suffer a decrease in the value of the real estate if it turns out to be contaminated. Furthermore, if the debtor falls into bankruptcy, the bankruptcy estate can become liable for environmental damage in certain situations.

The new Act on the Environmental Damage Fund was adopted by Parliament at the end of 2022. The Act will enter into force on 1 January 2025, when the new Environmental Damage Fund will also start operating. In the future, the Environmental Damage Fund will pay compensation for environmental pollution damage where the polluter is not liable or the polluter is not known. The scope of the Fund will be wider than under the current insurance scheme, and funding will be collected from the operators of the activities causing the risk. The Fund will also provide discretionary grants to bodies responsible for organising rescue services for the purchase of equipment to combat environmental damage.

Law stated - 10 October 2024

## Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

According to the Environmental Damage Insurance Act (81/1998, as amended), private companies whose activities involve a substantial risk of environmental damage or harm to the environment, in general, must take out environmental damage insurance. The insurance covers personal injury and damage to property, minor economic damage, the costs of remedying the damage and the restoration of the polluted environment.

As a buyer, it is also advisable to carry out environmental due diligence before purchase and to ensure that the purchase contract includes adequate environmental insurance and any specific indemnities the seller may have. However, the seller will often seek to clarify any warranties.

Warranty and indemnity insurance providers may, on a case-by-case basis, provide insurance covering environmental issues in connection with an acquisition.

Pursuant to the new Act on the Environmental Damage Fund, which will enter into force in 2025, the Environmental Damage Fund will pay compensation for environmental pollution damage where the polluter is not liable or the polluter is not known. The scope of the Fund will be wider than under the current insurance scheme, and funding will be collected from the operators of the activities causing the risk.

**Law stated - 10 October 2024**

## Choice of law

- 8** | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

In the case of a direct real estate transfer of Finnish real estate, the transfer agreement needs to fulfil the minimum requirements under the Finnish Land Code. In the case of an indirect transfer of ownership of real estate (ie, through the sale of shares in a real estate owning company), the general conflict of laws rules apply. In this case, the governing law of the agreement may be other than the laws of Finland, but the agreement should include the necessary Finnish law specific provisions.

**Law stated - 10 October 2024**

## Jurisdiction

- 9** | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

At the outset, the district courts all over the country have subject-matter jurisdiction over real estate located on their territory, but typically the sale and purchase agreement includes provision on the location of the court or arbitration. Either party may raise a claim and

the party does not need to be qualified to do business in Finland to enforce remedies. Authorisation for representing the party typically derives straight from the agreement.

Law stated - 10 October 2024

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

### Ownership

The laws regarding freehold title to property (direct ownership) do not differentiate as between the purpose of use of the property. The right of ownership is not affected by whether the property is used for residential or commercial purposes. Where property is owned indirectly by shareholding in an mutual real estate company or a mutual housing company, the provisions of the Housing Companies Act and/or the Companies Act mandate certain rights and liabilities as applicable.

### Tenancy

The Act on Residential Leases (481/1995, as amended) is applicable to residential leases, and the Act on Commercial Leases (482/1995, as amended) to leases of business premises. Residential tenants have a slightly more extensive protection as there are certain provisions of law that are mandatory for the benefit of residential tenant, such as that the tenant is always allowed to compensation if the condition of the leased premises does not correspond to what has been agreed and the tenant is not responsible for the deficiency. Further, the notice periods in the case concerning termination of a residential lease that is in force until further notice are (1) landlord: six months if the lease has been in force continuously at least for one year and three months if under a year (2) tenant: one month, and in the case of a commercial lease (1) landlord: three months unless otherwise agreed (2) tenant: one month unless otherwise agreed.

Availability of financing depends on the quality of the target and not necessarily on the asset type.

### Enforcement

In the case where the lease agreement has been terminated and the tenant has not moved out of the premises, the landlord is entitled to apply for eviction from the district court. After receiving a positive ruling on the eviction, the landlord will forward the ruling to an enforcement official who will then issue a removal notification to the tenant with a set deadline (typically within two to three weeks of the date of notification). If the tenant has not moved out by the set date, the enforcement official will remove the tenant's belongings from the premises. In aggregate, the whole eviction process typically takes from two to six months. In the case of residential apartments, a tenant may seek postponement of the

date of vacation of the premises through an action against the landlord on certain social grounds. The court may grant a postponement of up to 12 months. As regards commercial leases, the tenant may apply for postponement of vacation for up to six months only.

Law stated - 10 October 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Applicable zoning and planning limits what can be constructed on real estate. However, deviations on applicable plans or drafting of new plans may be negotiated with the relevant city or municipality for development projects. Any new plan is subject to a right of appeal by parties that have an interest in the plan. Also, certain existing buildings are protected in their entirety or partially, limiting the possibility to develop or demolish the protected building. Deviations on protection may be negotiated with the Finnish Heritage Agency.

If a building or structure does not comply with the applicable zoning or planning rules, the local construction supervisory authority has the right to require the owner of the building/structure to demolish or restructure the building/structure to comply with the zoning/planning rules.

Law stated - 10 October 2024

## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Municipalities have pre-emption rights in relation to the sale of real estate in their area if the size of real estate sold and purchased between the parties (or any entities under the control of the parties) in the area, during the preceding two years, exceeds the threshold of 5,000 or 3,000 square metres (depending on the municipality or city). The use of such a right of pre-emption is subject to the land being acquired for community buildings or for recreational or protection purposes. However, municipalities quite rarely use their priority acquisition right with respect to the transfer of commercial real estate and often a waiver of this right from the municipality is obtained prior to the transfer of the real estate.

Pursuant to the Land Use and Building Act (222/2003, as amended), within local detailed plan areas, the local authority may, without a specific permit, expropriate such public areas and such plots of public building based on the local detailed plan which the plan designates to a municipal agency or for other needs of the local authority. The expropriation may also be based on an expropriation permit issued by the Ministry of the Environment. If the objectives of the expropriation can be reached by other means, or if the inconvenience



caused to a private interest exceeds the public interest, the expropriation may not be executed.

Property owners are entitled to compensation for the expropriation. Pursuant to the Act on the Redemption of Immovable Property and Special Rights (603/1977, as amended), the amount of compensation must be assessed on the basis of the fair market value of the land.

Law stated - 10 October 2024

## Forfeiture

**13** | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Under the Finnish Criminal Code (39/1889, as amended), the person who commits the offence can lose the property related to the offence. The property must be closely connected to the offence committed.

The court will impose a forfeiture penalty. The confiscated property is then usually sold by forced auction; the state receives the profit from the auction as uncompensated forfeiture of the property.

Law stated - 10 October 2024

## Bankruptcy and insolvency

**14** | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

There are two primary insolvency regimes under Finnish law. The first, bankruptcy, is primarily designed to liquidate and distribute the assets of a debtor to its creditors and wind up the debtor company. The second, company reorganisation, aims to evaluate whether the business has the ability and sufficient resources to carry on and, if so, to rehabilitate the company's viable business, ensure its continued viability and make arrangements with creditors (eg, a reduction of debt or extension of payment schedules).

Voluntary liquidation proceedings are primarily used to wind up solvent companies.

Separately, the Finnish Patent and Registration Office may order a company into liquidation or that the company be de-registered if the company does not meet certain minimum requirements of form under the Companies Act, or if the company has been placed in bankruptcy but the bankruptcy proceedings have been terminated early because of insufficient funds to finance the proceedings.

### Bankruptcy

According to the [Bankruptcy Act](#) (120/2004, as amended), a debtor or a qualifying creditor may file an application for bankruptcy with a court of competent jurisdiction if the debtor is other than temporarily unable to pay its debts.

If the application is approved, the administrator(s) will be appointed by the court. Upon commencement of bankruptcy, the bankrupt debtor forfeits control over the assets belonging to the bankruptcy estate and all transactions conducted by the debtor with respect to such assets thereafter are void.

A bankruptcy covers all the liabilities of the debtor, and its objective is to liquidate the assets of the debtor and use the proceeds received in payment of the creditors' claims. The bankruptcy estate may (in exceptional situations) continue the company's business operations, but the disposal of property should be realised as soon as reasonably possible. The debtor's assets are, from the beginning of the bankruptcy, subject to the authority of the administrator. The creditors are represented through the meeting of creditors.

Rent receivables belong to the bankruptcy estate unless the rent receivables have been duly pledged for the benefit of the lender or security agent.

Generally, a Finnish company cannot be taken out of bankruptcy proceedings once the proceedings have been initiated. The bankruptcy proceedings end with the liquidation of the company. However, the bankruptcy may be dissolved if the assets of the bankruptcy estate are insufficient to cover the costs of the bankruptcy proceedings and none of the creditors assume the costs, or if the amount of the assets of the bankruptcy estate that would accrue to the creditors would be so small that it would be inappropriate to continue the bankruptcy proceedings. In certain special circumstances, bankruptcy proceedings can be converted into liquidation proceedings under the Limited Liability Companies Act (624/2006, as amended), or to publicly funded bankruptcy proceedings.

#### **Company reorganisation**

The Company Reorganisation Act (47/1993, as amended) lays out a statutory framework for reorganising companies that are in financial difficulties but have the potential to become viable operations in the long run. Reorganisation proceedings are usually initiated by the debtor-company, the creditor(s) or the person to whom the insolvency of the debtor by reason of a circumstance other than the shareholding would be likely to cause financial loss by virtue of a right of claim (the likely creditor) filing an application with the competent court.

However, standard company reorganisation proceedings may not be commenced if, *inter alia*, it is likely that the debtor's insolvency cannot be eliminated or there are reasonable grounds to assume that the main target of the application for commencement of company reorganisation proceedings is to prevent enforcement or foreclosure of a creditor or other breach of a creditor's right. It is also possible for the debtor-company to apply for early reorganisation proceedings with a competent court. Early reorganisation proceedings can be commenced if the debtor is at risk of insolvency. Unlike standard reorganisation proceedings, early reorganisation proceedings are only prevented by issues relating to the insolvency of the debtor.

The court shall notify the debtor's application to the creditors who are deemed to be significant in view of the size of their claims and to any other creditors whom the court

considers it necessary to hear on the application, and shall give them the opportunity to submit a written statement within the time limit. In the case of an application by several creditors, the procedure may be initiated without hearing the other creditors.

If the court approves the application and decides to commence the reorganisation proceedings, it will simultaneously appoint an administrator. The reorganisation administrator is entitled to review the company's books, obtain any information on the company's business activities, as well as to participate in meetings of the debtor's corporate bodies. As a rule, the commencement of reorganisation proceedings has no effect on the debtor's existing contracts. However, there are some exceptions regarding premature termination of certain contracts, for example, lease agreements. All contractual obligations that allow the creditor or other contracting party to terminate or cancel the agreement or otherwise unilaterally change the agreement on the basis of initiation or application of reorganisation proceedings are invalid.

The reorganisation programme proposal will be drawn up by the administrator, and the court will ratify it subject to the approval of all or certain specified creditors or subject to the terms specified in the Company Reorganisation Act.

The company reorganisation programme will last for a set period, typically several years. If the company follows the agreed payment schedule and other steps of the programme, the company reorganisation proceedings will lapse at the end of the programme. The programme can be terminated early if all the restructuring liabilities are repaid.

The commencement of standard reorganisation proceedings, or – if so applied by the debtor or a creditor and decided by the relevant court – the filing of an application for the same, imposes a moratorium on most legal proceedings and other enforcement actions against the debtor. This creates a suspension period during which the company reorganisation programme is drafted. The time it takes to draft the company reorganisation programme varies significantly depending on the debtor company and its creditors, but the average time for the drafting of the programme is nine months. The moratorium as a main rule prohibits the enforcement and granting of security, the repayment and enforcement of debts that have fallen due before the commencement of the reorganisation programme and the seizure of assets. In early reorganisation proceedings, the court will decide whether a moratorium on most legal proceedings is required. The moratorium must be imposed in early reorganisation proceedings unless it is deemed likely to be unnecessary or the applying debtor asks for no moratorium to be imposed.

The suspensions are in force until the company reorganisation programme has been confirmed by the court or the proceedings have been dismissed. Debts arising after the filing of the application of the reorganisation proceedings must be repaid as they become due. The same applies to fees, charges and other running expenses (eg, lease payments) based on a continuous contractual relationship or on a continuous contract on use or possession, to the extent that these relate to the period after the filing of the application. However, even during the moratorium, the court may upon application permit a secured creditor to enforce its security interest:

- if the asset that is subject to a security is clearly not necessary for the reorganisation procedure to succeed;
- if the debtor has failed to pay interest on the secured debt;

- if the debtor has failed to compensate any depreciation of the respective security asset due to its use during the moratorium; or
- if the debtor has failed to maintain proper insurance on the security asset in question.

Even though secured creditors are also subject to the moratorium on most enforcement actions, the Company Reorganisation Act provides them with special protection in respect of their rights as secured creditors during the proceedings. However, it should be noted that a creditor is considered a secured creditor only to the extent that the value of the security at the time at which the reorganisation proceedings are commenced is sufficient to cover the debt so secured.

As a main rule, reorganisation does not affect a security. However, the reorganisation plan may require the secured creditor to agree to the replacement of its security with another comparable security. A secured creditor may vote against the reorganisation plan but may not unilaterally prevent the restructuring of its receivable.

Law stated - 10 October 2024

## INVESTMENT VEHICLES

### Investment entities

- 15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

#### Mutual real estate companies

The most common structure used in the Finnish real estate market for owning or possessing real property is indirectly through a mutual real estate company (MREC).

To some extent, MRECs differ from ordinary real estate companies (RECs). For example, whereas a REC is merely a Finnish limited liability company that owns real estate, an MREC has certain special characteristics that include, for example:

- Rental income from a property owned by an MREC is paid directly to the shareholder(s) of the MREC and not to the MREC itself. However, with a REC, rental income is payable directly to the REC, and the shareholder(s) must make a resolution in order to distribute the rent as dividends to the shareholder(s). As opposed to a REC, an MREC receives its income from its shareholders through the collection of monthly maintenance charges according to terms provided by the articles of association of such MREC, which are meant to cover liabilities of the MREC, such as:
  - the costs of maintaining and upkeep the building(s) owned by the MREC;
  - real estate taxes; and
  - insurance payments.
-

With respect to partially owned entities, shares in an MREC can be deemed more liquid than shares in a REC, as the shares in an MREC provide shareholders with the exclusive right to possess and use an independently functioning specific part of the premises (such as a flat or a floor of office space). With a REC, a partial ownership, for example, 30 per cent, would entitle the shareholder to own 30 per cent of the building(s) owned by the REC, but not necessarily to possess certain independently functioning specified areas within the building(s).

- Unlike with a Finnish housing company, the purpose of use of the building(s) (or area of the building(s)) owned by an MREC is not restricted. For example, buildings owned by an MREC do not necessarily need to be residential apartments but can be, for example, office space.

### **Limited partnerships**

Another common structure in Finland for indirect property investment is the limited partnership, where the fund management company usually functions as the general partner.

There are significant tax advantages to these structures, since limited partnerships are tax transparent structures and their investment income is taxed according to the relevant investor's tax status, provided that certain conditions are met.

The investment income of limited liability companies investing in real estate is subject to corporate taxation and could therefore be regarded as less favourable from a tax perspective.

### **Special investment funds**

Finnish legislation also enables the establishment of special investment funds that invest in real estate. These funds are structures managed by a separate fund management company. They are normally not taxable entities and are considered as fully transparent for Finnish tax purposes. In order to qualify as tax-exempt entities, however, they must fulfil certain criteria, such as being based on a contractual fund structure (partnership agreement) and having not less than 30 unit holders.

Fund-of-fund structures are recognised in Finnish taxation practice and sub-funds may also be treated as tax-exempt entities, provided they comply with the requirements set out in Finnish investment funds laws and regulations.

### **Tax-exempt companies**

Forming a tax-exempt listed company with a structure resembling a real estate investment trust (REIT) is currently only possible for companies investing in residential rental property.

Under Finnish law, to maintain this tax exemption, the relevant company must (among other things):

- pay not less than 90 per cent of its relevant annual profit as dividends; and
- be listed within three years of its foundation.

There are currently no REITs in Finland.

Real estate investments can also be made through a foreign or non-resident company. If shares in a non-Finnish holding company (indirectly holding Finnish real estate) are transferred between non-Finnish tax residents, tax can be avoided. However, if either of the parties to the transaction is a Finnish tax resident and more than 50 per cent of the non-Finnish holding company's assets comprise of real property located in Finland, tax at a rate of 1.5 per cent of the relevant purchase price must be paid.

Law stated - 10 October 2024

## Foreign investors

16 | What forms of entity do foreign investors customarily use in your jurisdiction?

The most popular form of entity in Finland is a limited liability company. However, the choice depends on the transaction and the investor.

Law stated - 10 October 2024

## Organisational formalities

17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The establishment of, for example, an MREC or REC or other Finnish limited liability company needs to be registered with the Finnish Trade Register and the registration typically takes a few weeks. Further, in fund formation, a real estate fund needs at least to be registered with, but may require a licence from, the Finnish Financial Supervisory Authority (FFSA). Obtaining such licence typically takes one to two years.

Generally, from a company law perspective, provision of audited annual financial statements and corporate decision making/governance-related responsibilities are required after a limited liability company has been established. Further, financiers typically impose additional reporting responsibilities, such as the provision of valuation reports or full authorised property valuation on the properties at regular intervals. Moreover, the FFSA constantly monitors the activities of real estate funds, and such funds must regularly provide certain financial and other information to the FFSA. The FFSA confirms the rules of the fund and approves any changes in the management of the fund.

Any real estate investment structures should be carefully considered and analysed before it is established, to determine which structure works best in the case at hand to avoid paying unnecessary tax or cash trap situations.

Law stated - 10 October 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

In Finland, the direct ownership of real estate (freehold) grants the owner the exclusive right to:

- possess, use, manage and dispose of the land; and
- own any components or substances derived from the real estate.

However, some restrictions may limit the owner's rights, for example planning legislation regarding land use.

Real estate can also be jointly owned by more than one person or entity.

Ownership of housing and corporate buildings in Finland is frequently arranged through indirect ownership through a limited liability company (typically a mutual real estate company (MREC)) with the express purpose of owning the relevant real estate, including the buildings on it.

If the land and buildings on it are owned by different persons, the owner of the building(s) usually has a tenancy right (leasehold) to use the land granted by the landowner under a fixed-term land lease. The buildings are not registered as separate units.

Most of the rights to real estate (eg, titles, encumbrances, special rights (such as leaseholds) and security interests by way of mortgage) can be registered with the Title and Mortgage Register. In the case of co-owners of a real estate, it is typical to agree on a joint possession agreement containing, designating the possession of the different areas of the property as between the co-owners, provisions on the use of the property, maintenance responsibilities, etc, and register such agreements with the Title and Mortgage Register. When such agreement is registered with the title and mortgage register, it will become binding towards third parties, such as creditors of any of the owners.

In addition to rights to real estate, easements, which are permanent or exceptionally fixed-term rights to use an area of a real estate to the benefit of another real estate unit, can be established and registered with the Real Estate Register. Easements are generally established through an agreement between the owners of encumbered and benefitting real estate units and once registered, it is binding as between the real estate units and subsequent title holders thereof. Easements may also, in certain circumstances, be established without the consent of the owner of the encumbered real estate. Easements may also derive from the applicable planning and zoning.

As of 2018, the formation of a three-dimensional real estate is enabled alongside the traditional two-dimensional real estate. Title to real estate was formerly linked to an area formed by the x- and y- coordinates of the ground level, that is, title to real estate included also the areas above and below the ground (two-dimensional real estate). Therefore, the underground or air space could not be separately owned in the past, and joint possession agreements had to be used to effectively designate the ownership and possession of



the below-ground, on-ground and above-ground areas. Following the new legislation, the dimension of real estate is also determined by the z- coordinate, making the formation of a separate real estate of an area above or below the ground level possible (three-dimensional real estate). It is therefore now possible to form, for example, an underground car park as a separate real estate unit. The first three-dimensional real estate was registered in the city of Espoo in January 2020. In the case of multiple owners, the division of possession of a property with underground and/or above-ground structures is still mostly organised through application of joint possession agreements.

As regards ownership and occupancy of any individual space in a building, such as multi-family, retail, industrial and office, an MREC is the most used structure in Finland. An MREC is either the owner of the freehold or leasehold title to real estate and the building(s) on it, but pursuant to provisions the articles of association of an MREC, the shares in an MREC provide shareholder(s) with the exclusive right to possess and use a specified part of the premises (typically a flat or specific office space). The shareholder may lease the specified area in its possession by virtue of the articles of association and the rental income from such area of the property is paid directly to such shareholder(s) of the MREC and not to the MREC itself. The articles of association of an MREC may also designate certain areas of the property as remaining in possession of the MREC itself, typically technical areas, storage and sometimes parking areas. Leases of any such areas are to be entered into by the MREC itself, and income therefrom paid directly to the MREC.

Law stated - 10 October 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

Agreements typically entered into between the parties during the initial phase of the sale negotiations include:

- letters of intent
- exclusivity agreements; and
- non-disclosure agreements.

A non-disclosure agreement will typically be entered into at the commencement of the marketing of the property and it is binding. A letter of intent typically mainly reflects the intention of the parties to further negotiate and potentially later to agree on the contemplated sale and is not a binding agreement to execute the transaction. If any of the terms and conditions of the letter of intent are meant to be legally binding, this should be clearly stated in the letter of intent and often exclusivity, non-disclosure and dispute resolution clauses are agreed as being binding on the parties. If exclusivity is agreed between the parties, the property is not actively marketed during the exclusivity period and no discussions on the sale of the property may be taken with any party other than the bidder.

In direct real estate transactions, a preliminary real estate sale and purchase agreement is sometimes executed between the parties; for example, pending the fulfilment of the agreed



conditions precedent for closing of the transaction. A preliminary agreement for direct sale and purchase of real estate must be in the form specified in the Land Code, confirmed by a notary public and registered in the Title and Mortgage Register. This agreement may be agreed to only be binding on the other contracting party, and not both of the parties. If binding on a party, the other party may claim for execution of the sale and purchase as agreed under the preliminary agreement and claim for damages from the other party incurred due to a breach of the preliminary agreement. Furthermore, if the real estate is sold to another party not party to the preliminary agreement, the buyer under the preliminary agreement is entitled to claim for damages from the seller.

Brokers are very often involved in the early marketing of real estate sales, and usually prepare, for example, the information memorandum and other sales material.

Financing is typically obtained via a separate work stream and brokers are not typically involved in financing negotiations.

The brokers do not necessarily need to be qualified to broker real estate but many professional brokers are licensed real estate agents. Most of the brokerage activity is regulated by mandatory law which includes, for example, a vast disclosure obligation on information to the buyer prior to purchase. There is no set cap for commission, but the amount of commission should be reasonable considering the tasks conducted by the broker.

Law stated - 10 October 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

The main real estate provisions of a typical **share purchase agreement** (ie, an indirect sale of real estate through shares of an MREC or similar company) include details of:

- the parties;
- transfer of ownership;
- the purchase price;
- warranties (including full title warranty);
- indemnities;
- limitations of liability;
- taxes;
- governing law; and
- dispute resolution.

Further, the seller is bound under Finnish law by certain statutory warranty obligations regarding the **direct sale of real estate**, including those relating to:

- valid title to the real estate;
- accuracy of the information disclosed to the buyer; and

- additional warranties given to the buyer may include those relating to:
  - validity and content of any lease(s) relating to the real estate;
  - compliance with relevant laws and permits, such as environmental laws and building permits;
  - condition of buildings located on the real estate; and
  - absence of any encumbrances.

The seller usually strives to limit its warranties to matters within the seller's knowledge. The amount and quality of warranties vary heavily on a case-by-case basis depending on the target, seller, warranty and indemnity insurance, etc. Full title warranty is, however, typically always given by the seller. The costs and taxes relating to the time prior to and up to closing are typically the responsibility of the seller (as is all income from the real estate, such as rental income) and thereafter the buyer is responsible for the costs and expenses and entitled to the profit from the real estate. The tax year is typically a calendar year.

Typically, in a professional indirect real estate sale and purchase in Finland, there is no down payment. The title to real estate may be confirmed from the public register with nominal cost. The state is liable for damages caused by:

- an obvious spelling or calculation mistake;
- a mistake caused by a technical error; or
- other, similar errors or defects in the Title and Mortgage Register's records, or in extracts obtained from the relevant register.

If the damage is caused by an error in the information sent to the Title and Mortgage Register, the damage is not compensated by the state.

Law stated - 10 October 2024

## Environmental clean-up

**21** | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

If environmental liability is known prior to the purchase, it is typically taken into account in pricing. A seller's undertaking to compensate the cost of remedying a specified known contamination may be agreed. Survival provisions are not common. A typical warranty provided by the seller is that the seller is not aware of any environmental contamination (save for any previous soil or other further analysis in this respect, as disclosed to the purchaser). Only if the seller breaches this warranty (ie, if the seller would actually have been aware of environmental contamination and did not share the information with the buyer) would the seller need to compensate the buyer for future environmental clean-up. Further, however, on certain individual deals the seller may provide further warranties on environmental contamination or liability and in certain cases the buyer is able to

obtain insurance cover for environmental damage (in force typically for 12 to 24 months post-closing). Depending on the transaction, the parties may conduct an environmental due diligence of the property, and agree on division of liability for specific findings therein.

Law stated - 10 October 2024

## Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Lease agreements, or an agreed representative sample/templates thereof, are typically thoroughly reviewed in due diligence. The seller typically gives a warranty on the lease agreements being in force as disclosed, the specific content of which will depend on the type of property (eg, large residential site versus single tenant commercial property). Warranty on the rent roll is typically pushed by the buyer and often (but not always) obtained. Also, information on the lease payments and tenants is disclosed in the data room and forms part of the disclosure material, the correctness and completeness of which is warranted by the seller.

Between signing and closing, typical covenants by the seller include that the seller will not execute new leases (or deviate from a disclosed lease template) or amend or terminate existing leases without the consent of the buyer and the business otherwise needs to be typically carried out in the ordinary course (ie, all tenant improvement or other reparation or construction work on the real estate needs to be continued in the ordinary course, etc). If the seller or target has asset management or brokerage agreements in place, these agreements typically terminate at closing. Estoppel certificates are not market practice in Finland.

Law stated - 10 October 2024

## Leases and real estate security instruments

- 23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

In the case of a land lease, any mortgage registered on the land lease has priority in payment order over other (non-secured) creditors of the leaseholder. However, as stated above, mortgages can only be created over such a leasehold property which is subject to mandatory registration.

With respect to other land leases (as well as leases of office premises) the lease receivables under the lease agreement are typically pledged to a third-party financier of the landlord which has a priority to those lease payments by a separate security agreement. If not pledged, the landlord has the first priority to the lease payments.

Law stated - 10 October 2024

## Delivery of security deposits

- 24 | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

A lease security is a commonly used instrument. A lease security in Finland is typically in the form of a bank guarantee, deposit or pledge of a bank account, but different security instruments may be agreed between the landlord and the tenant freely. If the lease security is not provided on time, the landlord is entitled to terminate the lease agreement. The rents are typically tied to a minimum fixed annual increase and/or to increases in the Finnish cost-of-living index over the lease period.

Law stated - 10 October 2024

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Real estate due diligence is typically performed by the relevant professionals, such as legal, technical, environmental, financial and tax advisers. The results of due diligence are often presented in reports, which include relevant findings and related recommendations. Due diligence is typically conducted in stages prior to (and possibly after) the signing of the purchase agreement, but before closing.

Due diligence typically covers:

- public registers relating to the real estate (including review of title, special rights and mortgages and any other possible encumbrances from the Title and Mortgage Register as well as easements registered over the real estate, zoning restrictions and cadastral survey information from the Real Estate Register, etc);
- leases relating to the real estate, especially the terms of lease agreements and payments of rent by the tenants;
- pending or threatening litigation or other claims;
- environmental issues;

- technical investigations; and
- tax and financial issues.

The special rights (such as leaseholds) that may be registered over the real estate and mortgages have priority based on the date on which the application for registration of the right/mortgage was registered as received in the Title and Mortgage Register. If all the holders of the special rights/mortgages that have a priority agree, the order of priority may later be amended so that a later registered right/mortgage may be ranked higher in priority to the earlier registered rights/mortgages.

Law stated - 10 October 2024

### Structural and environmental reviews

- 26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Yes. Technical due diligence and environmental due diligence are often conducted on the target. Such due diligence requires site visits and documentation on the real estate and is often not exhaustive (eg no deep drilling to the ground to confirm soil contamination is typically conducted). The seller does not typically provide comprehensive warranties on the environmental or technical condition of the target, but the targets are sold 'as is'. In certain deals, environmental insurance is available.

Law stated - 10 October 2024

### Review of leases

- 27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Usually, only lawyers review the lease agreements. However, for institutional real estate investors, real estate investment funds and similar professional landlords, it is typical of asset management professionals to prepare standard lease documents whereas lawyers are involved in more complex lease cases only (such as sale and leaseback transactions).

Typical issues are:

- lease term and termination;
- rent and any clauses affecting rent;
- purpose of use of premises (VAT-deductible or not);
- any limitations on the use of the premises;
- division of maintenance responsibilities;
- rent security;

- tenant improvements;
- mutual acceptance of the completed additional and modification works and payment of the related costs;
- transferability of the lease;
- right of first refusal or first offer;
- extension option;
- break option; and
- responsibilities at the end of the lease term.

Law stated - 10 October 2024

## Other agreements

### 28 | What other agreements does a lawyer customarily review?

All service and maintenance agreements, utility agreements, municipal utility connections, joint possession or easement agreements, security agreements, asset management agreements and, construction agreements and related contractors' guarantees are reviewed.

All of the register extracts pertaining to the real estate and applicable detailed plan are also reviewed as well as any disputes or claims, general corporate documentation, insurances, etc.

Law stated - 10 October 2024

## Closing preparations

### 29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The closing is typically divided between transaction closing and financing closing (if acquisition financing is obtained).

Typical deliveries on the transaction or deal side include:

- evidence of buyer's payment of purchase price and repayment of existing loans;
- resignation of the members of relevant corporate bodies and appointment of new ones;
- share certificates, if applicable;
- signed notices to tenants notifying the tenants of the change of landlord, if applicable;
- updated shareholder register and duly endorsed share certificates, if any, of the target company, or, in the case of a direct sale, issuing of an application to register

the title of the buyer with the Title and Mortgage Register, accompanied by the signed sale and purchase agreement;

- security release letter;
- transferring to the buyer any lease security;
- delivery of the decisions of the relevant corporate bodies of the parties authorising the deal;
- delivery of data room material; and
- any other deal specific deliveries (eg waivers by third parties)

Typical deliveries on the financing side include:

- completion of the deal-side deliveries;
- delivery of constitutional documents and real estate register extracts with respect to each company and each real estate;
- copies of board and shareholder resolutions (or similar) of each group company approving the financing;
- director's certificate and signature samples of signatories;
- sub-financing agreement (SFA)/loan agreements;
- fee letters;
- structure chart;
- valuations;
- rent roll;
- 'know your customer' documentation;
- security release letter;
- financial statements;
- evidence of insurance cover;
- inter-creditor agreement (ICA) or other subordination agreement
- security agreements and all perfection measures required thereunder (such as notices, applications to register mortgages, etc);
- legal opinion(s);
- asset management agreement(s) and related deeds of adherence;
- funds flow;
- utilisation request(s);
- evidence of payment of any costs and expenses;
- intra-group and shareholder loan agreements; and
- any other deal specific deliveries.

Law stated - 10 October 2024

## Closing formalities

- 30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

In the case of a share deal, closing can be done both remotely and/or in person at the offices of a law firm. Financing closings are customarily completed remotely, if possible (eg share certificate(s) might need to be endorsed in person). Direct real estate transactions will always need to be closed in person as a notary public must be present at the closing and notarise the transfer agreement. In the case of a share deal, the closing may take place either in-person or completely or partly remotely. Leasing closing can, in most cases, be done completely remotely but in the case of high-profile leases closing is also done in person.

Law stated - 10 October 2024

## Contract breach

- 31** | What are the remedies for breach of a contract to sell or finance real estate?

The remedies depend on what has been agreed under the agreement and the type of breach. If the sale and purchase has been agreed (signed) and all the closing conditions have been fulfilled, but the other party refuses to close, the sale and purchase agreement can typically be specifically enforced by the other party in court or through arbitration. Alternatively, liquidated damages or a down payment may have been agreed for the failure to close. Depending on the type of the breach, a breach of the terms of the relevant financing agreement may entitle the lender to accelerate the loan thereunder and enforce the security created over the financed real estate.

Law stated - 10 October 2024

## Breach of lease terms

- 32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

The remedies depend on what has been agreed under the agreement and the type of breach and lease. Most of the provisions of lease agreements can be agreed freely between the parties, but in the case of residential leases certain provisions derive from mandatory law and cannot be agreed otherwise to the detriment of the tenant.



As for remedies, for example if the tenant fails to pay rent, the landlord is typically entitled to deduct the default payment from the lease security and/or terminate the lease. Also, damages or payment of late interest are typically available.

If the leased premises are not in the agreed condition or the tenant may not use the leased premises, the tenant is typically entitled to rent reduction, rent-free periods and/or termination of the lease and claim for damages.

In the case where the lease agreement has been terminated and the tenant has not moved out of the premises, the landlord is entitled to apply for eviction from the district court. After a positive ruling on the eviction, the landlord will forward the ruling to an enforcement official, who will then issue a removal notification to the tenant with a set deadline (typically within two to three weeks of the date of notification). If the tenant has not moved out by the set date, the enforcement official will remove the tenant's belongings from the premises. In aggregate, the whole eviction process typically takes from two to six months.

Law stated - 10 October 2024

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Typically, lenders protect themselves by means of a security package that includes:

- a real estate mortgage (including mortgage over freehold and/or qualifying leasehold properties, as applicable);
- a pledge of rental income;
- a pledge of shares (in the case of indirect real estate ownership);
- a pledge of the borrower's and other group companies' bank accounts;
- a pledge of insurance receivables; and
- a pledge of intra-group and shareholder receivables.

A real estate mortgage can be regarded as the most important security interest in relation to real estate, but in indirect ownership a share pledge may be superior, as the enforcement of a share pledge is more flexible than enforcement of a real estate mortgage.

The creation of a mortgage is agreed upon under a security agreement. The owner of the real estate can apply to the National Land Survey to register for the mortgage if the owner's title has been registered with the Title and Mortgage Register. The mortgage and the holder of the mortgage are also registered (electronically) by the National Land Survey. Accordingly, the security over real estate is perfected by recording the secured creditor as the holder of the mortgage in the Title and Mortgage Register.

No notarial deed is needed.

No mortgage tax is payable on the registration of a mortgage.

Enforcement of mortgage requires first obtaining an enforcement title from a district court, after which an enforcement official will conduct a sale of the property. However, the enforcement of a share pledge in a real estate owning company does not require obtaining of enforcement title but the share pledge may be enforced (ie, sold) directly by the pledgee outside of court proceedings and is therefore more flexible than enforcement of a mortgage.

Banks are the most common providers of financing. Real estate bonds and debt funds are also used. Crowdfunding platforms have also increased in popularity lately. Generally, financing is available for each asset type and for development, construction, renovation and mere purchase of plots, but the quality, location and type of the asset or project naturally affects the terms of and availability of financing.

There are generally no restrictions on who may provide financing in Finland. In essence, non-bank lenders do not require a licence. For bank lenders, a licence/passport is required only if they solicit an entity in Finland.

**Law stated - 10 October 2024**

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Financing is generally available for land lease plots and other leases but may not be available if the terms of the lease are not good enough (eg, with respect to the lease term, tenant, cash flow, location and renovation needs etc). Land leases are typically made for long periods (eg, 50 to 80 years) and are registered to the name of pledgor, which gives the pledgor's lease priority over the landowner's right to the leased land during the validity of the land lease.

Only such land leaseholds which are (1) in force for a fixed term, (2) transferable without the landowner's consent and (3) the terms of which provide that the leased area includes buildings that belong to the tenant or buildings belonging to the tenant may be built on the leased area, may be mortgaged and used as a security. The fact whether the land leasehold qualifies for a mortgage as per the above will have an impact on the financing available.

**Law stated - 10 October 2024**

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

The creation of mortgage is agreed upon under a security agreement. The owner of the real estate can apply to the National Land Survey to register mortgage if the owner's title has

been registered with the Title and Mortgage Register. The mortgage and the holder of the mortgage are also registered (electronically) with the Title and Mortgage Register by the National Land Survey. Accordingly, the security over real estate is perfected by recording the secured creditor as the holder of the mortgage in the Title and Mortgage Register.

Law stated - 10 October 2024

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Yes, lenders commonly require third-party appraisals of financed real estate assets. The Finnish Chambers of Commerce have certain requirements for valuation (the appraiser must be certified as a Finnish Authorised Real Estate Appraiser (AKA) or a Real Estate Appraiser approved by the Finnish Chamber of Commerce (KHK)) and the Act on Real Estate Funds (1173/1997, as amended) and related government decree and the Act on Alternative Investment Fund Managers (162/2014, as amended) apply to the valuation of real estate assets of real estate funds. Typically, the third-party appraisal needs to be executed by an appraiser from a pool agreed between the borrower and the lender. The borrower is required to order and pay for the appraisals.

Law stated - 10 October 2024

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Generally, there is no need for a licence for a foreign lender lending money to a Finnish borrower secured by a Finnish real estate asset, but this depends on the regulatory status of the lender and whether solicitation of a Finnish borrower has taken place. Typically, lenders protect themselves by means of a security package that includes:

- a real estate mortgage (including mortgage over freehold and/or qualifying leasehold properties, as applicable);
- a pledge of rental income;
- a pledge of shares (in the case of indirect real estate ownership);
- a pledge of the borrower's and other group companies' right to use their bank accounts;
- a pledge of insurance receivables; and
- a pledge of intra-group and shareholder receivables.

A security agreement is entered into between the pledgor and the financier to agree on the above security.

Perfection of a real estate mortgage requires registering the mortgage with the Title and Mortgage Register and recording the secured creditor as the holder of the mortgage.

Perfection of a pledge of rental income requires notification of the pledge to the tenants and instructing them to make payments to the pledgee.

Perfection of a pledge of shares is carried out by notifying the company the shares of which are being pledged and registering the pledge to the shareholder register of the company as well as duly endorsing in blank the related share certificate(s), if any, and delivering them to the pledgee. In the event the shares to be pledged have been entered in the Residential and Commercial Property Information System, the pledge is perfected electronically by recording the secured creditor as the pledgee.

A pledge of bank accounts is perfected by notifying the account bank of the pledge and blocking the user rights of the bank account holder to the bank account.

A pledge of insurance receivables is perfected by notifying the insurance provider of the pledge and recording the financier as the beneficiary to the insurance policy.

The creation of any of the above security instruments does not give rise to any taxes or stamp duty in Finland, and may be assigned without payment of any tax. The creation of security only gives rise to minor registration fees. Any assignment of security will need to be perfected as per the above.

**Law stated - 10 October 2024**

### Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

In commercial real estate financing, the loan typically has a fixed margin of plus three months, six months or 12 months of the EURIBOR rate. The interest rate is not generally restricted in agreements between commercial entities but may be adjusted or set aside if found unreasonable. However, in practice, commercial entities may freely agree on the interest rate, and lowering the interest rate due to reasons of equity is highly unusual.

**Law stated - 10 October 2024**

### Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

The general prerequisite for the enforcement of a security is that the secured claims have become due and payable (whether through scheduled maturity or acceleration or otherwise) and remain unpaid. The lender, or the security agent acting on behalf of the lender(s), may in such a case proceed to enforcement.

A pledge of most movable assets, such as shares in a mutual real estate company (MREC) or a real estate company (REC), bank accounts, rent and inter-company receivables and insurance proceeds, may be enforced without a court judgment or the involvement of an enforcement official, which typically allows for a swift realisation of the security. Typically, a pledge of the REC/MREC shares is realised by means of a private sale, and the timing depends on how quickly a buyer can be sourced. Appropriation of the collateral (ie, assumption of title) is not allowed (except for certain financial collateral), but the lender or security agent must pay to the debtor any amount of the net realisation proceeds that is not used to satisfy the secured claim (and such other claims that the lender or security agent may be entitled to charge and set off from the proceeds).

However, if a judgment has been obtained, the lender or security agent may also choose to enforce the security through enforcement officials. Similarly, should the value of the security be insufficient to fully discharge the debt, the lender or security agent will have to obtain a judgment in order to seek attachment of other assets of the debtor by the enforcement officials.

For the enforcement of real estate mortgages or business mortgages, a judgment must first be obtained, and the realisation process must be conducted by enforcement officials. The enforcement time for real estate mortgages and business mortgages is, accordingly, considerably longer and the process is much more regulated and less within the control of the lender or security agent.

The possibility and method of enforcement also depends on when the enforcement takes place (prior to or during the insolvency proceedings of the debtor).

**Law stated - 10 October 2024**

## Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Should the value of the security be insufficient to fully discharge the debt, the lender or security agent will have to obtain a judgment in order to seek attachment of other assets of the debtor by the enforcement officials. If any guarantees have been issued for the benefit of the lender to secure payments by the debtor, such guarantees may be enforced freely by the lender or security agent, subject to the conditions of the guarantee.

**Law stated - 10 October 2024**

## Protection of collateral

- 41 | What actions can a lender take to protect its collateral until it has possession of the property?

These aspects would typically be covered by the representation and undertaking of the borrower included in the financing agreements and the lender requiring the borrower to comply with these (under the threat of damages). In many cases, the finance documents also give the lender the right to act independently of the borrower to maintain the value of security assets. In certain cases, seeking an injunction or attachment from the court could also be an option.

Law stated - 10 October 2024

### Recourse

- 42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents provide recourse only to the collateral collateral they purport to grant security over. Typically, a third-party guarantee would, however, cover all receivables of the lender from the debtor.

Law stated - 10 October 2024

### Cash management and reserves

- 43 | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

No direct lock box is typically introduced under the finance documents, but the loan covenants (eg loan-to-value ratio (LTV) and interest coverage ratio (ICR)) include some requirements for the borrower's cash flow and value of financed assets. Also, the bank account structure of the borrower group is typically carefully considered so that the lender may control the money flow of the group.

Law stated - 10 October 2024

### Credit enhancements

- 44 | What other types of credit enhancements are common? What about forms of guarantee?

In addition to security, guarantees are typically obtained or required, which includes guarantees by all the group companies or only by the parent company. Such guarantees may usually be enforced by the lender or security agent directly without limitation in the event of a payment default by the borrower.

Law stated - 10 October 2024

### Loan covenants

45 | What covenants are commonly required by the lender in loan documents?

Covenants typically required by the lender follow the covenants of a loan market association-based facility agreements and include restrictions to, inter alia, financial indebtedness, distributions, granting of security and guarantees and corporate restructurings, such as mergers and demergers.

Law stated - 10 October 2024

### Financial covenants

46 | What are typical financial covenants required by lenders?

LTV and ICR, and financial reporting (including updated valuations of properties) are required by lenders.

Law stated - 10 October 2024

### Secured movable (personal) property

47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

If not separately pledged, the movable property of the pledgor may be pledged by registering a business mortgage (aka a floating charge) over such property of the pledgor. The business mortgage is second in priority to such other secured creditors that have a separate pledge over certain movable property. Further, only 50 per cent of the lender's total receivables that are secured by the business mortgage pledge have a higher priority in enforcement than the other (ordinary) creditors of the debtor and the remaining 50 per cent ranks *pari passu* with the other (ordinary) creditors of the debtor. A business mortgage pledge is created by agreeing on the same under the terms of a security agreement, after which the pledgor will issue a so-called business mortgage promissory note and register the promissory note and the business mortgage with the Finnish Trade Register. The Finnish Trade Register will, after registration, deliver the promissory note to the possession of the lender or security agent. In the case of enforcement of the business mortgage,

the lender or security agent will need to have the original business mortgage note in its possession.

Law stated - 10 October 2024

### Single purpose entity (SPE)

- 48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

No, borrowers are not required to be SPEs.

Law stated - 10 October 2024

## UPDATE AND TRENDS

### International and national regulation

- 49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

At the beginning of March 2023, an amendment to the Income Tax Act (1535/1992, as amended), section 10a, entered into force, which allows Finland to tax capital gains arising from the indirect transfer of real estate property located in Finland. Even if Finnish domestic law would allow the right to tax capital gains in the future, an applicable tax treaty may prevent the Finnish right to tax.

A working group at the Ministry of Justice is proposing changes to the Land Code (540/1995, as amended). The Land Code, which entered into force at the beginning of 1997, is the key piece of legislation in the area of private legal relations relating to real estate. The circumstances surrounding the ownership and exchange of real estate have changed substantially during the period of the Land Code, which makes it necessary to assess the functioning of the law and the need for amendments. The working group's proposal assesses the possibilities for developing the regulation of electronic real estate transactions. The working group also proposes changes to the regulation of, *inter alia*, the registration of a special right over real estate and the right of lien on real estate. The proposed changes relate, for example, to the possibility of entering into preliminary real estate sale and purchase agreements without using the public purchase witness, the registration of a contract for the division of property and a non-pledge obligation in the register of deeds and mortgages. The changes are expected to enter into force by the end of 2024.

Moreover, a comprehensive reform of the Land Use and Building Act (132/1999, as amended) is in the pipeline. On 24 February 2023, Parliament approved the bill on the information system for the built environment and the amendment to the Land Use and Building Act with the amendments recorded in the Environment Committee's report. The



entry into force of the Building Act and related acts has been postponed to 1 January 2025, while the Act on the Information System for the Built Environment entered into force on 1 January 2024.

As of the beginning of 2019, Finnish housing companies and mutual real estate companies to which the Finnish Housing Companies Act (1599/2009, as amended) is applied, including the list of shares of such companies, must have been transferred to the Residential and Commercial Property Information System maintained by the National Land Survey of Finland by the end of 2023. The Residential and Commercial Property Information System was formed in 2019 by the Act on the Residential and Commercial Property Information System (1328/2018, as amended).

The information services of the Residential and Commercial Property Information System are provided as printouts (lists of shares and apartment information). The printouts include basic information about ownership. In the future, the information content of the system will also be expanded to housing companies' administrative information. For example, the system will show the percentage of the housing company loan covered by apartment owners.

Law stated - 10 October 2024

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# Germany

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

German law is regulated by various statutory standards. Case law plays virtually no role and is merely used to interpret individual statutory provisions.

A key aspect of German law is freedom of contract.

German real estate law essentially consists of the categories 'tenancy law' and 'real estate transactions'. Both categories are regulated in the German Civil Code (BGB).

So-called 'social tenancy law' applies, which protects residential tenants in particular. The protection of commercial tenants is less pronounced by law, as they are considered to be less in need of protection due to their economic situation.

Real estate transactions involve the purchase and sale of real estate (buildings and special property, such as apartments). Here, the laws grant purchasers and sellers rights and obligations in a balanced manner. Due to the economic significance of real estate transactions, these must also be notarised.

Supplementary provisions for the processing of real estate transactions are regulated in the Land Register Regulations (GBO).

The acquisition of real estate takes place in two stages: first, the parties conclude a contract under the law of obligations, which requires notarisation (*Beurkundung*). However, the transfer of ownership only takes place once the result of the contract has been entered in the land register.

The basic tax treatment of real estate transactions is regulated nationwide. Only the amount of real estate transfer tax can vary between individual federal states (3.5 per cent –6.5 per cent).

The legal process has three stages. After the first instance, an appeal instance can be called upon to fully review the first instance judgment. The third instance (the Federal Supreme Court) only reviews the previous decisions for legal errors.

Law stated - 21 November 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

In Germany, (almost) all properties are recorded in the land registers. There are also land registers for special ownership of buildings (eg, condominiums). The land registers are kept in the local district courts.

The building is considered part of the property and cannot be sold separately.

Each land register consists of four sections: the designation of the property, the owner (section 1), encumbrances on the property that are not mortgages (section 2) and mortgages (eg, land charges, section 3).

For the acquisition of a property right (eg, the purchase of a property), entry in the land register is mandatory.

The purchaser of a property can therefore rely on the accuracy of the land register.

Law stated - 21 November 2024

### Registration and recording

#### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Any changes to or establishment of property rights (eg acquisition of ownership, registration or transfer of mortgages) must be registered in the land register in notarised form. The changes only become effective once they have been entered in the land register.

Rental agreements and lease agreements are not publicly registered. Both contracts are transferred to the purchaser automatically when a property is sold (section 566 BGB).

Law stated - 21 November 2024

### Foreign owners and tenants

#### 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

The acquisition of real estate by foreigners is generally possible and permissible without restriction in Germany.

However, the purchase of a residential property does not automatically entitle each foreigner to live in the property. For this, a non-EU foreigner generally needs a residence permit or a visa.

When the contract of sale is notarised, it is read out by the notary. The notary must be convinced that the foreigner understands the German language. Otherwise, a translator must be consulted. Alternatively, the foreigner can be represented at the notarisation.

Foreigners who are not resident in Germany are subject to 'limited income tax liability' in Germany. This means that the foreigner must pay income tax on the income earned in Germany (eg, rental income). Double taxation agreements between Germany and the foreigner's country of origin must be taken into account.

The sale of real estate is tax-free after 10 years.

Additional taxes in the foreigner's country of origin are also possible.

Details should be coordinated with a tax advisor.

Law stated - 21 November 2024

### Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

In general, there is no foreign exchange control with regard to real estate transactions by foreigners in Germany.

Details should be coordinated with a tax advisor.

Law stated - 21 November 2024

### Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

As a consequence of the legal right of ownership, the owner is liable for the condition of the property. This means that he or she is generally liable if a person is harmed by the property.

Furthermore, the owner is liable for the removal of any contamination of the building and the land and for property taxes.

In relation to the purchaser, the seller is generally liable for a defect-free property. Liability can be limited by contract, with the exception of liability for intent.

Similarly, the owner owes the tenant, in principle, a defect-free rental property and the absence of defects during the rental period (Section 535 I BGB). This obligation can also be partially waived by contract.

The tenant is generally only liable in the event of damage to the rented property.

Law stated - 21 November 2024

### Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Accurate commercial, legal and technical due diligence should be carried out during the acquisition process.

A lawyer should also be consulted for the coordination, drafting and negotiation of the purchase agreement.

After the purchase, the owner should take out various building insurance policies, in particular property liability insurance and natural hazard insurance. The costs of both insurances may be contractually passed on to the tenant.

Law stated - 21 November 2024

## Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

German law applies to real estate located in Germany. This applies both to real estate transactions and to disputes under tenancy law.

Foreign law can also be agreed for share deals (sale of shares in real estate companies).

Law stated - 21 November 2024

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The civil courts have jurisdiction over disputes between sellers and purchasers and between landlords and tenants.

The administrative courts have jurisdiction for disputes between the owner and authorities (eg, due to building planning law).

An action is generally only directed against another party to the contract or the authority. Another party does not have to be involved.

There are no special requirements for out-of-jurisdiction service.

Parties do not have to be qualified to do business in Germany to enforce remedies in your jurisdiction.

With the exception of the local courts, parties must be represented by a lawyer in court. Nevertheless, it is also strongly advisable to instruct a lawyer for legal disputes at the local court.

Law stated - 21 November 2024

## Commercial versus residential property

- 10** | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Germany has a so-called 'social tenancy law', which particularly protects residential tenants. The protection of commercial tenants is less pronounced by law, as those are considered to be less in need of protection due to their economic situation.

Social tenancy law has no influence on a transaction.

Residential and commercial real estate are financed in the same way.

**Law stated - 21 November 2024**

### Planning and land use

- 11** | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Large parts of Germany (especially cities) are subject to development plans. Development plans are issued by the cities or municipalities. The development plans regulate the permitted development of a specific area.

In areas, which are not covered by development plans, development is generally permitted if this does not conflict with public interests, adequate development is ensured and certain economic and ecological requirements are met (Section 35 BauGB).

For the construction of a building an individual building permit is required. Building permits are granted by the local authorities on the basis of the development plans. Depending on the individual case, a building permit may also be subject to ancillary conditions (eg, fire protection).

**Law stated - 21 November 2024**

### Government appropriation of real estate

- 12** | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Expropriation is only possible in exceptional cases.

In the event of expropriation, the previous owner must be adequately compensated by the state.

**Law stated - 21 November 2024**



## Forfeiture

- 13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Property can only be confiscated in the context of criminal proceedings if it has been used for criminal activities.

Law stated - 21 November 2024

## Bankruptcy and insolvency

- 14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The reasons for opening insolvency proceedings are (imminent) insolvency and (balance sheet) over-indebtedness.

The insolvency application can be filed by the insolvency debtor or a creditor.

If insolvency proceedings are opened, an insolvency administrator is appointed by the insolvency court, who then has the right (instead of the insolvency debtor) to manage and dispose of the assets.

Tenancy agreements continue to exist in the event of the insolvency of the tenant or landlord. However, the insolvent tenant has a special right of termination (Section 109 InsO), irrespective of the agreed term of the contract.

Law stated - 21 November 2024

## INVESTMENT VEHICLES

### Investment entities

- 15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Real estate can be acquired using any legal form. Usually, the legal form of the GmbH (limited liability company) or the legal form of the GmbH & Co KG (limited partnership with a limited liability company as general partner) are used.

Both legal forms have the advantage that the shareholders only have limited liability (with their deposit). Hence both legal forms allow ultimate owners to be shielded from liability.

Law stated - 21 November 2024

### Foreign investors

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**16** | What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors usually acquire real estate in the legal form of a GmbH (limited liability company) or in the legal form of a GmbH & Co KG (limited partnership with a limited liability company as general partner).

Both legal forms have the advantage that the shareholders only have limited liability (with their deposit). Hence both legal forms allow ultimate owners to be shielded from liability.

Law stated - 21 November 2024

**Organisational formalities****17** | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

In order to be active in legal transactions, companies must be entered in the commercial register.

The founding of a company takes place at a notary's office. Articles of association must be drawn up, the share capital must be paid in and (at least) one managing director must be appointed. The share capital must be at least €25,000.

There are no special requirements for existing foreign companies.

The tax consequences depend on the individual case and should be discussed with a tax advisor.

Law stated - 21 November 2024

**ACQUISITIONS AND LEASES****Ownership and occupancy****18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

A distinction must be made between (normal) ownership and joint ownership.

Joint ownership is only relevant when purchasing individual units of a property divided according to the Act on the Ownership of Apartments (WEG). This is uncommon in the case of commercial properties. Due to the WEG, the purchaser acquires the special ownership of a unit (usually an apartment) and a corresponding co-ownership share of the property.

There is also the hereditary building right. This grants the beneficiary the right to have a building on or under the surface of a (third-party) property. As hereditary building rights

are usually granted for a maximum of 99 years, this form of investment is not considered very attractive.

Rooms or buildings are usually leased to the respective users. The landlord must make the leased property available to the tenant and the tenant must pay rent in return (main duties).

Less common is the usufructuary leasing of rooms, buildings or land. In the case of a lease, the tenant is entitled to the use of the leased object and the enjoyment of its fruits. This is primarily relevant for agricultural land.

Law stated - 21 November 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

It is common to instruct an estate agent if the purchaser does not yet have a specific property in mind. In addition, it often makes sense to commission an estate agent to find tenants.

As the purchase of a property must be notarised, prior (simple) letters of intent are not binding. Nevertheless, letters of intent and exclusivity agreements are usually concluded in order to at least take the property off the market.

Non-binding letters of intent are also conceivable when letting space but are not very common.

Law stated - 21 November 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

A purchase agreement typically contains the following provisions:

- Parties to the purchase agreement
- Designation of the property (including encumbrances due to the land register)
- Purchase price, due date provisions
- Tax agreements
- Transfer of ownership
- Condition of the object of purchase, statute of limitations
- Regulations on tenancies
- Assumption of other contracts
- Rights of withdrawal
- Cost regulations

- Regulations on the execution of the purchase contract

Law stated - 21 November 2024

## Environmental clean-up

- 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

In general, the owner is responsible for environmental clean-up if the polluter cannot be held liable.

In purchase contracts, the seller can exempt the purchaser from environmental liability. Whether such an agreement can be enforced from the purchaser's point of view is a matter for negotiation.

The consequences in the event of necessary environmental clean-up could be claims for damages or the purchaser's right to withdraw from the purchase contract.

Law stated - 21 November 2024

## Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Tenancy agreements are automatically transferred to the purchaser upon acquisition of the property (Section 566 BGB).

As the rental agreements are often of great importance to the purchaser due to the resulting rental income, it is common for the seller to assume liability with regard to rental agreements for:

- The untermiated existence of the rental agreement
- A rent roll
- The non-existence of rent reductions
- The non-existence of legal disputes with tenants
- The existence of agreed rental deposits

It is usually agreed that between the conclusion of the purchase contract and the transfer of ownership (which can take several months), the seller may only make significant changes to the contract (eg, terminations, rent reductions) with the consent of the purchaser.

Law stated - 21 November 2024

## Leases and real estate security instruments

- 23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Tenancy agreements are automatically transferred to the purchaser upon acquisition of the property (Section 566 BGB).

Exceptionally, the purchaser from an insolvency administrator (Section 111 InsO) and the purchaser in the context of a forced sale (Section 57a ZVG) have a special right of termination for commercially used properties.

In order to avoid these cases, some tenancy agreements provide the entry of a tenant easement in the land register. This grants the tenant the right to use the rented property – after termination of the rental agreement – on the basis of the easement in the land register.

This legal situation is independent of the type of tenancy agreement.

Law stated - 21 November 2024

## Delivery of security deposits

- 24 | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Rental security is usually agreed in rental agreements. In commercial tenancy law, these are usually guarantees or cash deposits. Cash deposits are common in residential tenancy law.

In purchase agreements, the transfer of rental security to the purchaser is regularly agreed.

In commercial leases, rent adjustment options are generally agreed (rent scales or rent adjustments based on statistical data).

For residential leases (only), the German Civil Code (BGB) also provides rent increase options without a contractual agreement (section 558 BGB).

Law stated - 21 November 2024

## Due diligence

- 25 |

What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Before entering into contract negotiations, the potential contractual partner is usually checked.

At the same time, the land register should be checked both the potential object of purchase (what encumbrances are there?) and the ownership position of the potential seller.

The following types of due diligence are usually carried out during the contract negotiations, but in any case before the contract is concluded:

- Legal due diligence
- Tax due diligence
- Technical due diligence
- Environmental due diligence

In the case of the planned acquisition of company shares, a financial due diligence of the relevant company should also be carried out.

The existence and scope of the object of purchase and the ownership position of the potential seller are of course essential.

In principle, there is no sequence between the aforementioned types of due diligence. In this respect, the specific individual case is decisive. Identified risks can be secured by contractual warranties from the seller.

The examination of the planning law situation is part of the legal due diligence and is carried out on the basis of the relevant development plans. Additional official appraisals are generally not required.

**Law stated - 21 November 2024**

## Structural and environmental reviews

**26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

An engineering or environmental review is part of the technical due diligence.

The inspection relates to the functionality and legal admissibility of the technical systems as well as any environmental damage.

The handling of any environmental damage should be regulated in the purchase contract. The seller usually tries to limit his liability for environmental damage. This depends on the individual case.

Insurance for environmental damage is possible in individual cases, but is usually very expensive.

Law stated - 21 November 2024

## Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Rental agreements are reviewed from both an economic and a legal perspective.

The economic review includes in particular the rent amount and the term.

The legal review includes in particular the admissibility and effectiveness of individual clauses. In addition to the effectiveness of the transfer of the maintenance burden to the tenant, this particularly involves compliance with the written form (Sections 550, 126 BGB). These are the most economically relevant topics. In case of a breach of the written form requirement, long-term tenancy agreements can be terminated with six months' notice to the end of a quarter. As the existence of written form errors and the transfer of the maintenance burden to the tenant must be examined primarily on the basis of the case law of the German Federal Court of Justice, it is recommended to consult experienced tenancy lawyers.

Law stated - 21 November 2024

## Other agreements

28 | What other agreements does a lawyer customarily review?

Under German law, only tenancy agreements and employment contracts are automatically transferred to the purchaser.

Therefore, the examination of other contracts in the course of a real estate purchase is of secondary importance.

If shares in a real estate company are acquired, all contracts relating to the property must be reviewed, in particular management contracts, maintenance contracts, insurance contracts and financing contracts.

Law stated - 21 November 2024

## Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Real estate transactions usually have a signing day and a closing day.

The contract is signed on the signing day.

Various contractual conditions must then be fulfilled by the closing day. If the conditions are not met, there will be no closing. Both parties therefore usually endeavour to bring about the prerequisites (eg, payment of the purchase price, handover of documents, deletion of land register encumbrances, provision of security deposits).

In the case of rental agreements, the tenant must provide rental security by the closing date and the landlord must hand over the rental property in the contractually agreed condition.

**Law stated - 21 November 2024**

### Closing formalities

- 30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

While the signing of purchase agreements must take place before a public notary, there are no specific formalities for the closing. The notary, who supervises the execution of the purchase agreement, often informs the parties that the closing requirements have been met and the resulting closing day.

The closing of rental agreements usually takes place between representatives of the landlord and the tenant and essentially involves handing over the keys.

Lawyers are only involved in the closing in exceptional cases.

**Law stated - 21 November 2024**

### Contract breach

- 31** | What are the remedies for breach of a contract to sell or finance real estate?

In the event of breaches of contract, the other party has claims for damages for each type of contract and – in the event of significant breaches of contract – a right of termination.

In addition, contracts usually contain modifications to the aforementioned rights (eg, limitations of liability) and often contractual penalties.

**Law stated - 21 November 2024**

### Breach of lease terms

- 32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate



rules apply? Are the remedies available to landlords different for commercial and residential leases?

The rights of both parties to the tenancy agreement are regulated in the sections 535 – 580a BGB.

As with other types of contract, the parties may be entitled to claims for damages and/or an extraordinary right of termination without notice. In addition, the tenant has the right to reduce the rent in the event of defects in the rented property.

The main reasons for termination by the landlord are rent arrears (of at least two months' rent) or other continued breaches of the rental agreement by the tenant. The most important reasons for termination by the tenant are significant defects in the rented property.

In the event of termination without notice by the landlord, the tenant is obliged to vacate the property upon receipt of the notice of termination. If the eviction is not pursued within a reasonable period of time, the landlord can file an action for eviction.

The only significant legal difference between terminations under commercial tenancy law and residential tenancy law is that the residential tenant can cancel the termination without notice if he settles the entire rent arrears.

Law stated - 21 November 2024

## FINANCING

### Secured lending

**33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Land charges are the usual instrument for securing loans. These are entered in the land register. On the basis of the registered land charge, the lender can enforce the property if the owner defaults on payment.

Other possible securities are the assignment of rent receivables and the pledging of accounts.

Typical real estate lenders are banks, savings banks and insurance companies.

As theoretically anyone can grant loans, care should be taken to ensure that the bank has a German or EU banking licence.

Law stated - 21 November 2024

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The above comments on secured lending apply accordingly to the financing of leaseholds. Any overlaps with owner financing must be considered on a case-by-case basis.

Law stated - 21 November 2024

## Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

A land charge is created by agreement and registration. This means that the owner and the creditor agree on the land charge. The entry of the land charge requires notarisation. The application for entry in the land register is usually made by the notary.

Law stated - 21 November 2024

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

In any case, it makes sense to obtain a valuation report before purchasing a property or obtaining financing.

Banks and other professional real estate financiers have valuations drawn up on the basis of internal specifications or require this from the borrower.

Valuers must have a special qualification. The highest standard is guaranteed by 'publicly appointed' experts who are also consulted by the courts.

Law stated - 21 November 2024

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Foreign lenders require a German banking licence or an EU licence.

Otherwise, the same regulations apply as for German lenders.

Law stated - 21 November 2024

## Loan interest rates

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- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

The interest rate is made up of a reference interest rate and an additional margin. The EURIBOR (Euro Interbank Offered Rate) is often used as the reference interest rate.

In addition to the interest, there are additional fees charged by the lender.

Excessive interest rates are illegal and void. If interest is to be regarded as excessive, it must be assessed on the basis of the risk-relevant circumstances of the individual case.

**Law stated - 21 November 2024**

### Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Every enforcement in Germany requires a 'title'. A typical example of a title is a court decision, in particular a judgment. As part of loan agreements, lenders obtain an enforceable copy of the land charge deed. With this document, the lender can initiate enforcement against the property, ie, foreclosure, without a court judgment.

Subject to any contractual provisions to the contrary, the lender can apply for foreclosure of the property if the borrower defaults.

The duration of the proceedings depends on the court. A duration of more than half a year does not seem unrealistic.

**Law stated - 21 November 2024**

### Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Lenders can also assert claims against the borrower or a guarantor in court.

The usual limitation rules of the BGB apply.

In the event of insolvency of the debtor, the legal proceedings are interrupted by law (Section 240 ZPO).

**Law stated - 21 November 2024**

## Protection of collateral

**41** | What actions can a lender take to protect its collateral until it has possession of the property?

Enforcement from the land charge is not about the lender becoming the owner of the property, but about the lender being satisfied from the proceeds of the forced sale of the property.

The protection of the collateral is based on the loan agreement. The borrower cannot dispose of this without the consent of the lender.

Law stated - 21 November 2024

## Recourse

**42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

As part of the loan agreement, the borrower usually submits to enforcement against his personal assets in addition to enforcement against the property.

Enforcement from a court decision, in particular a judgment, can also take place against the borrower's personal assets. Liability is only limited to the extent of the claim.

In the event of the borrower's insolvency, the court proceedings are interrupted by law (Section 240 ZPO).

Law stated - 21 November 2024

## Cash management and reserves

**43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

In individual cases, lenders require the establishment of reserve accounts, for example for foreseeable payment obligations of the borrower.

The requirement for a cash management system is unusual.

Law stated - 21 November 2024

## Credit enhancements

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**44** | What other types of credit enhancements are common? What about forms of guarantee?

In addition to land charges and reserve accounts, guarantees and letters of comfort from parent companies and the assignment of claims against third parties are occasionally required.

Law stated - 21 November 2024

### Loan covenants

**45** | What covenants are commonly required by the lender in loan documents?

In addition to the main obligations of the borrower (repayment obligation and its collateralisation), information obligations are regularly agreed and adequate insurance cover for the property is required.

Law stated - 21 November 2024

### Financial covenants

**46** | What are typical financial covenants required by lenders?

Lenders often require certain loan-to-value ratios, loan-to-cost ratios and a defined minimum rental income, which must be proven on a regular basis.

Law stated - 21 November 2024

### Secured movable (personal) property

**47** | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The pledging or transfer by way of security of movable property shall be governed by a corresponding contract.

Law stated - 21 November 2024

### Single purpose entity (SPE)

**48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders do not usually require the borrower to be an SPE. This would not always make sense from the lender's point of view, as a large company can naturally provide more collateral as a borrower. On the other hand, it may make sense for a borrower to establish a limited liability SPE in order to shield the shareholders from liability.

If an SPE is a German company, German company law applies to the founding and existence of the SPE.

There is no concept of an independent managing director.

Law stated - 21 November 2024

## UPDATE AND TRENDS

### International and national regulation

- 49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Recently, various laws on energy saving and sustainability have been passed in Germany on the basis of EU regulations. For some owners, especially of older properties, the implementation of these laws is associated with considerable costs. Costs may also increase for new buildings.

In general, there are economic uncertainties due to various current trouble spots (Ukraine, Middle East), which can lead to cost increases in all areas and difficulties in recruiting workers.

Law stated - 21 November 2024

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# Italy

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## UPDATE AND TRENDS

- International and national regulation



## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The Italian legal system is a civil law system based on statutory law.

Parties may bring an injunction before the competent court to prevent an action, dictate a particular behaviour or invoke a right.

The general rule that provides that judges must make decisions in accordance with applicable law can be overruled in certain cases when the courts are allowed to rule in equity (eg, the determination of *tortious* or contractual damages - including penalty clauses - that are not pecuniary in nature or found to be excessive by one of the parties).

The type of evidence that is admissible in court is strictly indicated in the [Civil Code](#) and the Procedure Civil Code and may:

- be oral (*id est* confession, formal deposition, oath or testimony);
- or written (*id est* IT document, private deed, private deed authenticated by the signature of the notary or public deed);
- or both.

Contracts may be oral or written, unless otherwise provided for by Italian law (eg, real estate can be validly disposed of only through a written contract, and companies can be incorporated only in writing). Real estate transactions are regulated by the provisions of the Civil Code, as well as by other specific administrative, environmental and tax laws and regulations.

Town and landscape planning and building regulations may vary from region to region.

Law stated - 10 October 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Deeds conveying property over real estate or creating other *in rem* rights must be registered on a public recording system managed by the revenue service through the "Agenzia delle Entrate - Servizio di Pubblicità Immobiliare".

Deeds regarding real estate that are not registered may create valid and enforceable rights and obligations with regard to the parties but are not enforceable with regard to third parties unless and until they are registered; therefore, registration secures priority of title over other parties who register a right *in rem* on the property.

Leasehold rights exceeding a duration of nine years must also be registered to be fully enforceable against third parties because long-term leases are deemed to be comparable to *in rem* rights.

Law stated - 10 October 2024

## Registration and recording

### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The legal instruments conveying rights in rem that are registered are court decisions, public (notarial) deeds or deeds of conveyance where the signature and the date of execution are certified by a notary or judicially.

In certain parts of the country that were previously under Austrian rule since such areas were part of the Austro-Hungarian Empire (ie, Trento, Bolzano, Trieste and Gorizia), a different system applies whereby the registration of instruments conveying real estate and rights on real estate is perfected through a court decree, the effect of which is to make such instruments legally binding for all purposes.

In general, documents may be validly executed digitally; however, registration with the "*Agenzia delle Entrate - Servizio di Pubblicità Immobiliare*" still requires that the relevant deed be executed before a notary. Title conveyances are subject to registration, hypothecary and cadastral fees, fixed at rates that vary considerably (from 4 per cent to 19 per cent) depending on the nature of the transaction.

Certain title conveyances are also subject to VAT, including:

- sales made by construction or renovation companies within five years of the completion of construction or intervention, or even after five years have elapsed if the seller chooses to subject the sale to VAT at rates ranging from 10 per cent to 22 per cent;
- sales of residential buildings intended for social housing, for which the seller chooses to subject the sale to VAT; and
- sales of real estate instrumental to a business activity, if the parties to the sale are subject to VAT in relation to their activity.

Deeds of conveyance that are subject to VAT are subject to registration tax at a nominal amount. The obligation to pay VAT to the other party or the revenue service is regulated by law, whereas the responsibility with regard to the tax authorities to pay the other transfer taxes is joint and several of all parties in respect of the deed of conveyance. The purchaser usually also agrees to pay transfer taxes on behalf of the seller, and certain lease agreements (mostly related to leases of business assets that are instrumental to a business activity) are subject to the-VAT dual system.

Law stated - 10 October 2024

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Foreign investors are entitled to purchase properties in Italy subject to reciprocity or as otherwise provided in the relevant international treaties, as applicable. To sign the deed and buy a property in Italy, the foreign citizen must be in possession of the tax code issued on request by the Revenue Office.

Law stated - 10 October 2024

## Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

In general, Italy has no exchange control issues for foreign investors, and no restrictions apply to currency transfers subject to reporting requirements.

Foreign investors may repatriate profits to their home jurisdictions.

Law stated - 10 October 2024

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The liabilities of an owner include:

- obligations assumed as a part or consequence of the building titles issued to build the asset, including execution of works to the benefit of the municipality or community (eg, sewage systems, public lighting, road access and green areas);
- liabilities arising from polluting the air, the soil or the subsoil or from exposing tenants, subsequent owners, employees or third parties to dangerous substances (eg, asbestos, radon and hydrocarbons). Such liabilities include criminal liabilities, damages to third parties and cleaning obligations;
- redressing violations of zoning and building obligations, including administrative and criminal charges and obligations to demolish abusive or illegal constructions;
- payment of transfer taxes and VAT on property conveyance; and
- tortious or contractual liability in case of collapse, in whole or in part, of the property or lack of proper maintenance.

While criminal liabilities and fines are personal and do not attach to tenants or sub-purchasers of foreclosing lenders, other sources of liability either follow the property as is transferred (obligations arising from building titles and in relation to the community, tax payments to the extent that they create a lien and preferential rights in favour of tax authorities) or may survive in part on the purchaser's hands (eg, cleaning obligations of a polluted asset and tortious liability for defects of the asset).

Available protections include:

- constructor liability of up to two years for defects and 10 years for collapse, which are generally assisted by corresponding insurance that is transferable to each subsequent owner;
- warranty and indemnity insurance; and
- civil liability insurance.

Law stated - 10 October 2024

## Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners can protect themselves from liability by entering into a civil liability policy to cover any type of risk related to an asset (ie, all-risk insurance) or specific risks related to an asset (eg, fire or explosions or weather events).

With specific regard to environmental issues, owners may enter into environmental risk insurance to cover risks related to production or storage activities, charge or discharge of polluting substances, or transport for hire, as well as for own account.

Law stated - 10 October 2024

## Choice of law

8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Possession, ownership and other *in rem* rights in movable and immovable property are governed by the law of the state where the property is located, except in matters of succession and in cases where the attribution of an *in rem* right is dependent upon a family relation or a contract.

This means that where the transfer is an effect of an agreement, as in the case of sale of real property, the applicable law to the transfer arising thereby is the law of the place, which may not be the same as the law of the agreement, which shall govern the purely contractual aspects of the matter.

Law stated - 10 October 2024

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

For lawsuits relating to ownership and other *in rem* rights over real estate, as well as for cases of termination of leases, jurisdiction lies with the court of the place where the property is located.

For trespassing, repossession and similar actions related to the property's possession, jurisdiction lies with the court of the place where the reported fact occurred.

Actions may be brought by the owner or landlord, the tenant and any interested third party.

Foreigners are entitled to bring actions before an Italian court and against an Italian citizen, subject to reciprocity.

Law stated - 10 October 2024

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Laws regarding real estate ownership and financing are the same for commercial and residential properties. Commercial and residential properties are subject to a different tenancy regime (*id est* Law no. 392/1978 for commercial leases and Law. no. 431/1998 for residential leases).

Leases for commercial properties have a statutory minimum duration of six years (nine years for hotels and similar businesses) and can be automatically renewed for the same term, unless terminated by the parties. Pursuant to Article 29 of Law no. 392/1978, at the end of the first six-year term, the landlord has limited ability to avoid automatic renewal. The tenant has a statutory right to terminate the lease agreement at any time for 'serious reasons' by giving six months' notice by virtue of Article 27, paragraph 8, of Law no. 392/1978 .

Tenants also enjoy, in certain cases, a pre-emption right on new leases and sales and a goodwill loss indemnity if they are forced to move their business.

However, most compulsory tenant rights may be waived pursuant to [Law Decree No. 133/2014](#) in the case of leases with annual rent equal to or exceeding €250,000 (ie, major leases).

Law stated - 10 October 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

The planning process and zoning regime in place for real estate assets is regulated by both a set of rules at the national level, which provides for rules of general application, and regional and local laws (municipal or provincial levels).

The landscape and the protection of the environment and of historical, artistic or otherwise culturally relevant sites or buildings fall, for the most part, on the authority of the central government or the region.

Zoning, urban planning and building regulations are governed by general planning instruments or variations thereof issued or approved by municipalities.

Building permits or titles are ultimately issued or approved by municipalities at the end of a procedure where consents or comments of other authorities (usually the Ministry of Cultural Affairs or the regional government) are involved.

In the case of failure to comply with planning decisions or zoning requirements, demolition by the municipality of the place where the unlawful asset is located can be ordered at the cost and liability of the owner.

Law stated - 10 October 2024

## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The compulsory purchase of real estate assets is provided for by [Presidential Decree No. 327/2001](#), as amended by Decree Law No. 76 of July 16, 2020 (converted, with amendments, by Law No. 120 of 11 September 2020) and then by Decree Law No. 17 dated 1 March 2022 (converted, with amendments, by Law No. 34 of April 27, 2022), according to which owners have the right to receive compensation for compulsory appropriation, which is due without exception. The amount is determined by:

- a contractual arrangement between the parties; or
- if the arrangement in the point above is not reached, the proceedings under article 21 of Presidential Decree No 327/2001.

In the case of the second point, a technical survey procedure where the owner may participate and challenge the valuation of the asset will determine the fair compensation amount for the owner.

Law stated - 10 October 2024

## Forfeiture

**13** | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

The government can seize:

- real estate assets without compensation in the event of condemnation (with reference to assets that served or were intended to commit a crime, and assets that are the product or profit thereof);
- assets related to organised crime offences;
- assets obtained by entities in violation of regulations relating to the administrative liability of the entities; and
- unlawful allotment of land for construction purposes.

The government may also carry out building interventions in areas subject to historical, artistic, archaeological, landscape or environmental constraints, in essential variation, in total violation of or in the absence of a building permit or cases of emergency related to natural disasters or earthquakes.

**Law stated - 10 October 2024**

## Bankruptcy and insolvency

**14** | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy is an automatic stay as it must be declared by the bankruptcy section of the court after valuation proceedings. Should a seller, a buyer, a landlord or a tenant go bankrupt, the agreements to which he or she is part are suspended until the liquidator decides whether to take over or terminate them.

The liquidator may exercise an action for revocation, which allows the administrator to obtain a declaration of ineffectiveness of acts of disposition of assets, whether for payment or free of charge, by which the debtor prejudices his or her rights. Such action, when exercised during bankruptcy proceedings, has different features to the ordinary one.

The lender cannot collect rent during bankruptcy.

All the creditors of the bankrupt company compete together to have their claims paid, under conditions of equal treatment, except where there are legitimate causes of pre-emption.

Apart from bankruptcy pursuant to Italian law, there are other insolvency procedures, such as composition with creditors, composition with creditors with reservation, administrative compulsory liquidation, extraordinary administration and special extraordinary administration.

**Law stated - 10 October 2024**

## INVESTMENT VEHICLES

### Investment entities

- 15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Foreign Investment entities may conduct their business in Italy through a branch, which, in itself, does not represent a separate entity from a legal viewpoint and is treated for the purposes of Italian law as a foreign company; however, from an Italian tax law perspective, a branch normally constitutes a permanent establishment that is treated as a separate tax entity that is subject to the same tax treatment provided for companies carrying on business activity in Italy.

As an alternative, foreign investors may decide to set up their local subsidiaries by establishing a company under Italian law, usually in the form of a joint-stock company (SpA) or a limited liability company (Srl).

In addition to corporations, general partnerships can also be formed under Italian law to perform business activities; however, such partnerships are seldom used by foreign investors since they do not create a separate legal entity and, as a general rule, partners have unlimited liability.

A representative office is not allowed to handle commercial or financial transactions of any kind, nor can it act as agent or distributor of the foreign company.

Alternatively, foreign investors may operate in Italy through collective investment vehicles (SICAF) recognised within the European Union and, as such, also authorised to operate in other jurisdictions. To the extent that those entities are subject to regulatory controls applicable to investment companies in accordance with EU legislation, they may enjoy legal and tax benefits that may be attractive for foreign investors.

Italian legislation also regulates real estate alternative investment funds (FIA) characterised by a special tax status (no income taxes are paid until distribution of proceeds to investors, and favourable VAT and transfer tax treatment if certain conditions apply). FIAs are not legal entities; they are pools of assets managed by an asset management company that is independent from the assets managed and the investors (Società di Gestione del Risparmio (SGR)). SGRs are subject to the control of financial regulatory authorities (eg, the Bank of Italy).

Law stated - 10 October 2024

### Foreign investors

- 16** | What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors customarily use SpAs or Srls because:

- partners have limited liability;



- there are no restrictions on foreign shareholders or quota holders, provided that the reciprocity condition is met;
- incorporation formalities are limited;
- quota holders or shareholders have the right to supervise and control the actions taken by the management of the company; and
- each quota holder or shareholder is entitled to a portion of the profits generated by the company proportional to its ownership of the company's capital by means of a specific quota holders' or shareholders' resolution.

Foreign investors often invest in SICAFs and FIAs owing to the tax advantages that they may offer and to the possibility for financial or passive investors to avail themselves of the asset management, property and facility services that SGRs are equipped to provide.

Law stated - 10 October 2024

### Organisational formalities

- 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Both SpAs and Srls can be incorporated by a sole shareholder with limited liability, provided that capital contributions are fully paid-in and certain publicity requirements are complied with. The articles of incorporation must be signed before a notary public and filed with the local companies' registry.

A company is considered to exist when the registration process, which usually takes about five to 10 days from the date of incorporation, is completed. Reporting requirements mainly comprise filing the following documents and information at the competent companies' registry:

- the annual financial statements and consolidated financial statements (where applicable);
- the quota holders' or shareholders' list;
- the appointment of directors; and
- statutory auditors and auditors, as well as deeds relating to extraordinary corporate transactions (amendment of by-laws, capital increase, merger, demerger, etc).

SpAs and Srls are subject to full corporate taxation in Italy at rates that are currently in the range of 28 per cent. SICAFs and FIAs may enjoy a different tax regime, which includes no income taxes except upon distribution of income and reductions of VAT and indirect transfer taxes on the purchase of real estate. SICAFs are, from an organisational standpoint, corporations for all corporate law purposes and, therefore, subject to the same regulations and restraints. In addition, controls and authorisation to operate from regulatory authorities may also apply.

Italian FIAs can only be established by SGRs that are SpAs acting as asset managers. SGRs are subject to several requirements (eg, minimum capitalisation, professional and qualification requirements of the directors and managers) and control by the Bank of Italy.

Law stated - 10 October 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Rights involving the enjoyment, use, possession or exploitation of real estate are, in general terms, divided into two categories:

- rights *in rem*, which attach to the real estate, and the same is transferred to third parties; and
- other rights of enjoyment, which are generally enforceable in relation to the parties to a contract and only to a limited extent to third parties.

Leases are considered as quasi rights *in rem* because they are automatically transferred with the property and are registered in the land registry if in excess of nine years' duration. The rights *in rem* include:

- the freehold interest or ownership title, which confers the broadest authority to use, transform and dispose of the real estate indefinitely;
- the surface right, which is equivalent to a right of ownership only on the structures on the real estate and may be limited in duration;
- the usufruct right (ie, the right to exploit the real estate while the freehold interest remains with another party until the usufruct right ceases and full ownership returns to the holder of the freehold interest); and
- easements and other rights of minor use and importance.

All rights *in rem*:

- are created, with few exceptions, through deeds or contracts of conveyance;
- must be executed in writing; and
- for the purposes of registration in the land registry, notarised by a public notary.

The adoption of condominium regulations is mandatory in buildings where there are more than 10 co-owners under Article 1138 of the Civil Code.

The source of the condominium regulations may be contractual when it has been adopted by the first unique owner or by the decision of a co-owners meeting.

Law stated - 10 October 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

It is customary to execute a letter of intent (LOI), which is non-binding, except for specific obligations, such as confidentiality, applicable law, jurisdiction and, if provided, exclusivity.

LOIs are aimed at setting forth preliminary understandings and, sometimes, an initial estimated purchase price subject to due diligence. Although not bound to complete the transaction, the parties to a LOI are still subject to general obligations of good faith negotiation, the violation of which may generate a liability for costs and other damages, if any, to the other party.

While the LOI applies, the parties will carry out due diligence, at the end of which a final purchase price is confirmed, and the parties generally enter into a binding preliminary agreement.

Law stated - 10 October 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

A contract of sale is defined as a preliminary agreement insofar as it binds the parties but does not transfer the property. If registered in the land registry – which creates a lien on the property and a priority of the promissory purchaser over other subsequent purchasers or liens – a down payment is also paid at signing.

Down payments may be held in escrow or counter-guaranteed by the seller. This payment may also carry the obligation of the seller to pay back double its amount if the seller breaches the obligation to sell under Article 1385 of Civil Code.

The preliminary agreement also serves the purpose of dealing with conditions precedent (eg, pre-emption rights, completion of construction, permits, cancellation of mortgages and other liens on the property).

To confirm good and valid title, the public notary in charge of the sale must also carry out a title search, which will in any event be confirmed prior to the closing and transfer of the property.

Representation and warranties are generally stipulated with the preliminary agreement and include:

- title;
- no liens;
- no adverse litigation;
- compliance with building permits;
- no environmental issues;

- no unpaid taxes on property;
- no defects on the building and its technological equipment; and
- fitness for use certification.

The tax year ends on 31 December, and taxes, condominium charges and utilities are prorated accordingly; a post-closing reconciliation clause is generally provided in the agreement.

Upon satisfaction of all the conditions precedent, the parties will proceed with the notarial deed of conveyance of the property, which will in turn be registered in the and registry. Escrow amounts may remain in place, sometimes in the hands of the notary or banks, as security for breaches of representations and warranties or in connection with any condition subsequent.

**Law stated - 10 October 2024**

## Environmental clean-up

- 21** | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

According to the EU principle ‘the polluter pays’, the polluter must clean up the contaminated sites in accordance with a specific procedure and on the basis of a clean-up project approved by the competent authority, provided that the clauses regarding long-term environmental liability and indemnity that survive the term of a contract are common.

However, clean-up obligations that are not satisfied by the polluter (including cases in which the polluter is unknown) may be enforced against the owner, who may be required to clean up its property if the pollution infringes applicable laws.

In general terms, these clauses provide appropriate representations and warranties.

In the event of a breach, the buyer may trigger the indemnification procedure provided for in the contract of sale, which usually obliges the seller to indemnify, defend and hold the buyer harmless and reimburse the latter, as a separate and independent obligation, for, from and against and in respect of any and all losses owing to environmental liability.

Escrow agreements or other form of guarantees are also provided in the event of detected risks of existing contamination.

**Law stated - 10 October 2024**

## Lease covenants and representation

- 22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from

tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations made by sellers of property regarding existing leases concern:

- the full force and effect of those leases;
- the compliance of the tenants to their obligations under the relevant lease or the lack of defaults by the tenants under the leases;
- the lack of pending or threatened litigation concerning the lease;
- the delivery of the security deposit by the tenant to the seller, and the good standing and validity of the first demand guarantee for the payment of six to 12 months of rent;
- the execution by the tenant of an insurance policy to cover risks related to the rented property; and
- the registration of the leases with the tax authority.

Typical covenants made by sellers of property concerning leases between signing and closing are the undertaking of the seller not to execute new leases or amend existing leases without the consent of the buyer and to avoid behaviour that will cause the tenant to terminate or withdraw from the lease.

Estoppel certificates from tenants are not customarily required.

Law stated - 10 October 2024

### Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Leases are not generally subordinated to a security instrument pursuant to their provisions; however, it is common for rent and other income streaming from leases to be assigned as security to the lender. Assignment of rent may be registered and take corresponding priority in relation to creditors. The entering into, as part of the security package, non-disturbance agreements is also becoming more of a common practice.

Law stated - 10 October 2024

### Delivery of security deposits

**24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

To ensure the delivery of a tenant's security deposits to the buyer, the delivery is usually a condition precedent or subsequent to closing. Security deposits for damages or reinstatement of the property are usually in the range of three months' rent. Additional guarantees, also in the form of bank guarantees, are also posted to guaranty of rent payments. These are usually six to 12 months of rent.

Pursuant to article 32 of [Law No. 392/1978](#) (the Commercial Properties Lease Law), the rent may be annually reviewed in accordance with national statistics on the cost of living, up to 75 per cent to 100 per cent of such cost of living increase.

Law stated - 10 October 2024

## Due diligence

- 25** | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Before executing a contract, due diligence on the ownership titles and encumbrances as well as on the cadastral, building and urban compliance of the property is conducted. Research with reference to ownership titles is usually carried out with the notary's help by examining the official public registries known as the Real Estate Registries.

The purchasers may protect themselves against issues relating to titles by means of insurance policies relating to ownership titles or indemnity funds on escrow.

Law stated - 10 October 2024

## Structural and environmental reviews

- 26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

A technical due diligence review is customary, whereas an environmental review is less common, unless for properties where activities with an impact on the environment or which are considered as sources of pollution are carried out. The purpose of a technical review is usually to check the cadastral, building and zoning compliance of the property (ie, that the *de facto* condition of the property matches the building title and the cadastral registrations of the property). Environmental first and second phase investigations are also carried out where risks of contamination are more evident.

In the sale agreement, representations or indemnities are usually provided to cover issues related to such matters. In any case, environmental insurance is available.

Law stated - 10 October 2024

## Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Leases are usually reviewed by lawyers and on the business side.

Generally, verification of the following is carried out: whether the lease is compliant with or derogate to statutory provisions of Law No. 392/1978 or [Law No. 431/1998](#) (the Residential Properties Lease Law), and whether the derogated law provisions may be derogated pursuant to [Law Decree No. 133/2014](#) .

With specific regard to commercial properties, the following items are verified:

- the duration of the lease;
- withdrawal or break option of the tenant;
- maintenance obligations;
- guarantee for the landlord;
- goodwill indemnity;
- statutory pre-emption right on the purchase; and
- right of first refusal on the new lease agreement.

Law stated - 10 October 2024

## Other agreements

28 | What other agreements does a lawyer customarily review?

Lawyers customarily review:

- titles of ownership;
- easements agreements;
- financing granting a mortgage on the asset;
- sublease agreements;
- bailment agreements; and
- agreements granting a right of use on the asset.

Law stated - 10 October 2024

## Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Actions at closing are generally set forth in the preliminary agreement where the parties have agreed and described the terms of the deal.

Actions at closing include:

- delivery or documentation pertaining to the property;
- deposit of the purchase price prior to and until the title confirmation search is completed;
- execution of deed of conveyance and instructions to the public notary for the registration of the deed;
- when appropriate, setting aside part of the purchase price for undisclosed or contingent liabilities or satisfaction of other conditions; and
- termination of existing mortgages and perfection of new mortgages on new financing.

Funding is mostly simultaneous with closing. Exceptions may apply owing to time for consolidation of transfer against clawback provisions applicable under bankruptcy laws.

**Law stated - 10 October 2024**

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The closing of the transfer, leasing or financing is usually done in person or by means of an attorney-in-fact acting in the name and on behalf of one of the parties before the public notary.

In the event of a non-notarial agreement (eg, a lease agreement with a duration of less than nine years), the agreement may also be executed by means of exchange of correspondence, including certified signatures or emails.

Lease agreements shall be registered with the Revenue Agency, and the relevant registration tax shall be paid. As for agreements that are to be executed before the notary, registration, notarial, cadastral fees, mortgage registration fees and VAT shall be paid.

**Law stated - 10 October 2024**

### Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

Italian law offers several remedies in the event of breach of contract, namely specific performance, termination of the agreement and damages.



According to Article 1385 of the Civil Code, if the party who gave the deposit is in default, the other party may withdraw from the contract, retaining the deposit; on the other hand, if the party who received the deposit is in default, the other party may withdraw from the contract and demand double the deposit.

Law stated - 10 October 2024

### Breach of lease terms

- 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

When one of the contracting parties of the lease agreement does not fulfil its obligations, the other may, at its own discretion, request the fulfilment or the termination of the contract, without prejudice, in any case, to damages.

If the tenant is in default, the landlord may exercise an action for eviction. Eviction procedures differ significantly for commercial and residential assets, whereby special protections for evicted individuals may apply in the latter case.

Law stated - 10 October 2024

## FINANCING

### Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

The usual security instrument for real estate that is available to lenders is mortgage, which is a security interest that gives the lender, in the event of insolvency of the debtor, the right to expropriate the property over which the mortgage was registered.

Pursuant to article 2808 of the Civil Code, a mortgage confers lenders the right to expropriate the property bound as their credit warranty and be paid with the income of the expropriation price, with privilege over any other creditor who is not supported by the guarantee.

A mortgage is automatically terminated after 20 years; therefore, in the case of loans of a longer duration, the security instrument must be renewed.

Mortgages are usually recorded on the property for an amount higher than the loan amount (in most cases double the amount paid to the borrower) because the interest payments due, the interest on any arrears and any other charges that the lender may face in recovering the debt are taken into account.

Law stated - 10 October 2024

## Leasehold financing

- 34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Financing for ground leases is available, which does not differ from financing for land ownership transactions, except for the payment of the loan amount, since in financing for ground leases, the payment is calculated on the basis of the stage of progress of the work.

To make a ground lease financeable, a mortgage encumbering the plot of land where the property will be built is usually granted in favour of the lender, together with the assignment of rent to be paid by the tenant to the lender upon completion of the rented property.

Law stated - 10 October 2024

## Form of security

- 35** | What is the method of creating and perfecting a security interest in real estate?

According to article 2827 of the Civil Code, a mortgage must be registered at the real estate registry of the place where a property is located. In that case, registration perfects the guarantee for all legal purposes, including rights of priority over other rights on the property (sale, attachments, expropriations, etc).

Law stated - 10 October 2024

## Valuation

- 36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Third-party real estate appraisals are usually required by lenders for their underwriting of loans in real estate deals. There are no government approved standard as such; however, industry standards exist, and appraisers must have specific qualifications and industry certifications (as provided under UNI 11558/2014 and UNI/PdR 19/16). Appraisers are usually qualified engineers or architects.

Appraisals are normally requested by and addressed to lenders, but the relevant costs are borne by the borrowers.

Law stated - 10 October 2024

## Legal requirements

- 37 | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Generally speaking, the provision of finance under any form constitutes restricted activity in Italy and is usually reserved to banks and other financial intermediaries holding a valid lending licence. This condition applies regardless of whether the loan is secured by collateral over the property of the borrower.

Security over real estate property must be registered by a licensed notary public and requires a written registration note. A mortgage usually attracts stamp duty ranging between €200 and 0.5 per cent of the guaranteed amount, plus a 2 per cent mortgage tax. Certain qualifying lenders, including Italian banks, may elect to apply a 0.25 per cent substitute tax on medium and long-term loans, applied in lieu of other indirect taxes (ie, registration tax, mortgage and cadastral tax, stamp tax and public concession tax) otherwise applicable on the loan and the relating securities and guarantees. The election is available only if the loan has a maturity exceeding 18 months (ie, medium/long-term maturity) and is made (ie, executed) in Italy. The substitute tax is levied on the amount made available by the bank and is applied only upon specific option exercised by the parties in the relevant financing agreement.

In addition to mortgage over real estate property, other types of security (more akin to a common law floating charge) are available for certain types of loan agreements (special liens). A special lien may be created over some classes of assets (present or future plants and machinery, concessions and equipment; raw materials, work-in-progress and finished goods, stock, livestock and merchandise; goods purchased with the proceeds of the relevant financing; and present or future receivables arising from the sale of the assets or goods listed above). A special lien must also be registered by a licensed notary public by means of a deed in writing.

Law stated - 10 October 2024

## Loan interest rates

- 38 | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates on commercial and high-value property loans are typically set by reference to a floating rate (eg, EURIBOR) plus a spread (ie, margin). Interest rate is subject to a usury cap. The cap on interest rates, which is above the usury rate, is calculated by raising the average overall effective rate by one-quarter and adding a margin of an additional four percentage points; the difference between the ceiling rate and the average rate cannot exceed eight percentage points (this calculation method was introduced by [Decree Law No. 70/2011](#), which modified article 2, paragraph 4, of [Law No. 108/1996](#)).

Should the loan provide an interest rate that exceeds *ab origine* the usury ceiling rate, no interest is due pursuant to article 1815, paragraph 2 of the Civil Code, whereas should the loan provide an interest rate that exceeds the usury ceiling rate during the life of the loan, the exceeding interest is not due.

Law stated - 10 October 2024

## Loan default and enforcement

- 39 | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Several types of enforcement proceedings may be initiated against a debtor in default. All actions must be based on judgments or other legal instruments known collectively as enforceable instruments or instruments executed by authorities (enforceable instruments). Enforcement can be effected only where there is a valid authority to execute and in relation to an obligation that is certain, the quantum of which has been fixed and that has fallen due.

Enforceable instruments are:

- judgments and measures enforceable pursuant to Italian law;
- promissory notes, as well as other negotiable instruments enforceable pursuant to Italian law (eg, checks);
- private law instruments, including contracts, deeds and other private law instruments executed before a notary, but only as far as pecuniary credits are concerned.

Before enforcing an enforceable instrument, the instrument must be made judicially executory and served to the debtor with a formal request to pay the amount due within a period of not less than 10 days after the formal request is served. In the case of non-payment by the deadline indicated in the formal request, the creditor can start enforcement proceedings by:

- seizing the debtor's assets, which will then be auctioned under the judge's directions to enable the creditor to recover his or her credit through the auction proceeds; or
- seizing the debtor's funds or credits owned by a third party, which the judge will then allocate to the creditor.

Law stated - 10 October 2024

## Loan deficiency claims

- 40 | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered

| in the foreclosure? Are there time limits on a lender seeking a deficiency judgment?  
| Are there any limitations on the amount or method of calculation of the deficiency?

Lenders are entitled to pursue borrowers for any deficiency between the matured, due and payable (including interest) amount of the loan and the amount recovered through the foreclosure, up to such time as the statute of limitation applies. The statute of limitation, however, does not run to the extent that the lender pursues the borrower for the full payment.

Law stated - 10 October 2024

### Protection of collateral

41 | What actions can a lender take to protect its collateral until it has possession of the property?

The lender does not take legal possession of the property but can initiate legal proceedings to recover the due amount. Landlords may be subject to the collection of rent by the lender, who may either approach the tenant directly, ordering him or her to pay the due amounts into his or her own account, or attack the landlord's current account into which the sums are credited.

Law stated - 10 October 2024

### Recourse

42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

The extent of the recourse will specifically depend on the type of security that is created but is usually limited to the specific asset over which a lien is created: this can be a real estate asset for mortgages, the shares of a company in the case of a pledge over corporate capital, the receivables existing and specifically assigned in the case of an assignment of receivables by way of security, the pledged bank accounts in a pledge over bank account, etc.

The special lien, available only for selected types of loans, can secure a wider number of goods and receivables that are strictly connected to the economic activity of the grantor; however, those goods and receivables must be individually listed in a deed that is filed by a notary public with a public register.

Finally, with a personal guarantee, the guarantor is liable with all its existing assets, present and future.

The judicial mortgage – which is a mortgage constituted by a judge after an unsatisfied creditor’s request – can be registered on all the immovable property belonging to the debtor. On the other hand, banks are given the possibility of starting or continuing, even after the declaration of bankruptcy, individual executive actions on the mortgaged assets used to guarantee mortgage loans, while the liquidator would only have the right to intervene in the execution for the portion exceeding that assigned to the bank. Passive or active legitimacy is attributed exclusively to the liquidator.

Law stated - 10 October 2024

### Cash management and reserves

**43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Cash reserves are used in certain financing arrangements and may constitute a typical feature, depending on the specific terms and characteristics of the deal. They are usually purported to cover financial liabilities or contingencies.

Law stated - 10 October 2024

### Credit enhancements

**44** | What other types of credit enhancements are common? What about forms of guarantee?

Among the collateral guarantees are right of lien, mortgages and pledges. Among personal guarantees are, among other things, surety, omnibus surety and the first-demand guarantee.

Patronage letters, factoring agreements and collection mandates are also commonly executed.

Law stated - 10 October 2024

### Loan covenants

**45** | What covenants are commonly required by the lender in loan documents?

Loan agreements usually contain sets of covenants, which are dependent on the specific financing product (real estate, leverage, restructuring, acquisitions etc). These are usually in line with Loan Market Association standards and can include financial covenants, covenants relating to the real estate assets, restrictive covenants and information covenants.

Law stated - 10 October 2024

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

Depending on the loan products and the specific deals that are negotiated, financial covenants may be based on loan to value, debt-service coverage, debt yields or a combination thereof. Financial reporting usually occurs on a quarterly basis, with the delivery of compliance certificates prepared by the borrower and its financial advisers.

Law stated - 10 October 2024

## Secured movable (personal) property

### 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The creation of a security interest will be strictly dependent on the type of assets that are mortgaged and the type of security document that the specific asset requires. Security documents all require written agreements between the parties, but certain assets (eg, real estate, corporate quotas, company equipment and trademarks) require registration with a publicly held register.

The creation of security requires the existence of a valid debt obligation between the lender and the borrower on the basis of a written agreement and usually requires that the security be created by means of a deed bearing a certified date, according to Italian law, in order to make it effective in relation to third parties and bankruptcy proceedings.

Law stated - 10 October 2024

## Single purpose entity (SPE)

### 48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders in Italian deals do not necessarily require on every occasion that each borrower be an SPE; however, it is not uncommon to adopt such a form, particularly for extraordinary corporate transactions (eg, acquisition financings). It can offer lenders greater protection, given the fewer number of creditors competing in a potential bankruptcy filing.

However, an SPE is structured as a normal company in Italy (usually a limited liability company) and is not subject to a special statutory regime, so the bankruptcy remoteness is sought essentially by means of negative covenants in the financing arrangements.

It is not essential to appoint an independent director; however, lenders often require that the shares of the SPE be pledged in favour of the lender as a guaranty in case of default and with the effect that voting rights switch to the lender in case of default.

Law stated - 10 October 2024

## UPDATE AND TRENDS

### International and national regulation

**49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

The new international trends that are affecting the behaviour of investors in real estate principally concern compliance with new environmental, social and governance standards of building and construction procedures. Tax grants and other benefits are being offered as part of the recovery plan from the covid-19 pandemic and the eco-transition to relaunch the economy on new grounds. This significantly affects the building, real estate and real estate financing industries. In this respect, it is changing the attitude of institutional investors, who are looking with high interest to buildings that meet the new requirements.

As regards national government changes, in 2024 the government has issued the Law Decree no. 69/2024 (so called *Decreto Salva Casa*” which has amended several provisions of the National Consolidated Building and Zoning Act (Presidential Decree no. 380/2001, also known as *Testo Unico Edilizia*).

In particular, the Law Decree no. 69/2024 purports to simplify the regularisation of a number of minor but widespread infringements of building regulations which, under the previous regime, needed to be cured through complex, expensive and time-consuming procedures.

These include:

- the simplification of the procedures provided in the National Consolidated Building and Zoning Act to cure partial or essential discrepancies with respect to the project submitted to and approved by the municipality (Article 36-*bis* of Presidential Decree no. 380/2001);
- the simplification of the procedure to apply for and obtain, when possible, changes to the permitted uses of buildings, according to the applicable zoning regulations, especially among permitted uses that, from a zoning perspective, are considered as similar (eg residential, commercial, hospitality and office), subject to local zoning constraints and, if applicable, the payment of certain charges as provided by such local regulations (Article 23-*ter* of Presidential Decree no. 380/2001);
- the provision of broader “tolerated discrepancies” between the actual internal surface of buildings and the one approved in the building titles (*tolleranze costruttive*), with respect to buildings completed prior to May 24, 2024 (eg, 2 per cent tolerance for surfaces over 500 sqm; 3 per cent for surfaces between 300 and 500 sqm; 4 per cent for surfaces between 100 and 300 sqm; 5 per cent for surfaces under 100 sqm);



- limited to buildings not subject to cultural (historical) and landscape liens, the above tolerance has also been extended to other minor discrepancies, such as the size of a building being smaller than projected, failure to include non-structural architectural elements provided for in the project, improper execution of external and internal walls, misplacement of internal openings and a range of other minor construction mistakes and discrepancies;
- the possibility for surveyors to certify the legitimacy of a building, by making reference, under certain conditions, only to the latest building permits (provided such building permit concerns the entire building), without the need to recover – as it was under the previous legislation – all of the building's previous permits;
- the exemption from any need to obtain a building permit for minor parts of the buildings, such as the installation of removable panoramic windows, awnings and tents on pergolas, porches, balconies protruding from the body of the building, provided, *inter alia*, that these additions do not alter the inside volumes of the buildings or lead to a different use not permitted by applicable zoning rules;
- a decrease in the minimum surface area required for residential units, which is now 20 sqm, down from 28 sqm.

The measures introduced by Law Decree no. 69/2024 will make it easier for property owners to comply with current regulations, thus facilitating the regularisation of building irregularities and reducing the bureaucracy associated with building files, with the aim of improving the marketability and value of properties.

Law stated - 10 October 2024



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# Japan

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## GENERAL

### Legal system

1 | How would you explain your jurisdiction's legal system to an investor?

Japan is a civil law country with a unified court system. While the courts can exercise some discretion to achieve an equitable outcome, Japan does not have separate equity courts. A court may order specific actions in a multitude of circumstances and pre-emptive injunctions are available. Oral contracts are valid in the same way as written contracts; generally, the only difference is the relative difficulty in proving the existence and contents of an oral contract in court. Parol evidence is generally admissible. Real estate-related laws are generally nationally applicable.

Law stated - 30 September 2024

### Land records

2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Japan has a nationwide real property registration system for matters such as the conveyance of ownership or other rights over real property, with registration being required for that conveyance to be perfected. Registration generally only has the power to perfect interests, and interests can be created without registration; the existence (or non-existence) of the registration of interests does not guarantee the existence (or non-existence) of interests.

Law stated - 30 September 2024

### Registration and recording

3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

For most matters that can be registered, the parties involved (eg, the seller and the purchaser) should jointly apply for registration. Applications can be made electronically, and electronic signatures are acceptable.

Registration tax is payable at the time of registration of the conveyance of ownership, and is generally 2 per cent of the value of the conveyed real property. (At the time of writing, it has been temporarily reduced to 1.5 per cent for land conveyances.) In addition, real property acquisition tax is payable, generally at a rate of 4 per cent for non-residential buildings and 3 per cent for land and residential buildings. As a matter of custom, registration tax and real property acquisition tax are typically borne by the purchaser.

Reduced tax rates are available for certain types of real estate transactions. For example, a single purpose entity (SPE) established under the Act on the Securitization of Assets (ie, a specified purpose company or *tokutei mokuteki kaisha* (TMK)), is entitled to reduced tax rates, provided certain criteria are satisfied. Further, in order to reduce transaction tax costs, it is common in commercial real estate transactions to place the real property in trust and to thereafter transfer the rights to that real property in the form of a trust beneficiary interest. The registration tax for transferring the subject's real property to the trustee is 0.4 per cent of the value of the conveyed real property (currently temporarily reduced to 0.3 per cent for transfers of land to the trustee); and once the subject's real property is so entrusted, the registration tax payable upon a change of the beneficiary is only ¥1,000. Subsequent changes in beneficiaries will be similarly recorded in the real estate registry and the registration tax payable each time per property is ¥1,000. In general, real property acquisition taxes are not assessed on transfers through the trust arrangement.

**Law stated - 30 September 2024**

### Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Generally, there are no restrictions on foreign investors investing in, owning or leasing real property in Japan. Under the Foreign Exchange and Foreign Trade Law, there is a post-facto reporting requirement that must be filed with the Ministry of Finance, through the Bank of Japan, for certain types of acquisitions of ownership rights or other rights in real property by non-residents. We also note that, under the Critical Land Use Regulation Law, which became effective in its entirety in September 2022, 'watch areas' and 'special watch areas' in the vicinity of important facilities such as defence-related facilities have been designated. Prior notification to the government is required in general for purchase and sale of real properties of more than 200 square meters in 'special watch areas'.

**Law stated - 30 September 2024**

### Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Other than the post-facto reporting requirement under the Foreign Exchange and Foreign Trade Law (and possible fund transfer restrictions aimed at money laundering prevention), generally, there are no material exchange control issues in connection with direct investment in Japanese real property by a non-resident.

**Law stated - 30 September 2024**

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Generally, the owner or tenant of real property may face tort liability if it wilfully or negligently acts, or fails to act, causing a breach of its duty of care in connection with the property and, as a result thereof, damage is sustained by a third party. Generally, the lender is unlikely to face any tort liability in this kind of situation, as, generally, the lender will not have much control over the management of the property.

A person in possession of a building, tree or other structure on the land will be liable for any harmful conditions of structures existing as a result of his or her negligence. If, however, a person in possession establishes that he or she has taken due care in preventing such a condition from causing harm to others, the owner of the subject structures will be strictly liable instead.

In Japan, the existence of asbestos in older buildings has become a major environmental issue. The concept of strict liability may apply in the case of damage caused due to the existence of inadequately maintained asbestos.

Environmental contamination of land is another major environmental concern. A landowner may be liable for damage resulting from environmental contamination caused by it or the former owners of the land.

It is standard for a seller to provide a contract non-conformity liability to a purchaser in a contract of sale. In the case of a sale of real property from a professional seller (a licensed real estate broker) to a non-professional purchaser, the seller is statutorily required to provide a minimum of two years' contract non-conformity liability.

Law stated - 30 September 2024

## Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

A real property owner may obtain general liability insurance to insure against general liability claims brought against it. Insurance covering environmental liabilities, however, is extremely rare and costly. The only realistic protection available to an owner for this would be legal recourse against the previous owner of the subject real property. Such legal recourse would, for example, be available to the extent covered by environmental warranties in the relevant contract of sale and, unless expressly waived, would also be covered by a statutory contract non-conformity liability. Recourse under tort law may also be available against any person responsible for an environmental problem.

Law stated - 30 September 2024

## Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Choice of law in Japanese courts is governed by the Act on General Rules for Application of Laws, which provides that the contracting parties can choose the contract's governing law and, generally, such choice will be upheld by Japanese courts.

The law applicable to matters in relation to real property (such as the method of change of ownership and the perfection thereof) will be the law of the jurisdiction where the real property is located, which, in the case of real property located in Japan, will be Japanese law.

Generally, contractual choice-of-law provisions are enforceable in Japan.

Law stated - 30 September 2024

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The ordinary Japanese courts, which have subject-matter jurisdiction over most civil matters, have the authority to hear cases and render decisions regarding disputes with respect to real property located in Japan. The parties necessary to take an action will depend on the subject matter of the particular dispute. Generally, the court will affect service within Japan by post. The appropriate method of out-of-jurisdiction service will depend on the terms of the relevant treaty entered into between Japan and the country of the other party. There is essentially no requirement that a party be qualified to do business in Japan to enforce its rights and remedies in a Japanese court.

Law stated - 30 September 2024

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Generally, there is no difference between commercial and residential properties with regard to real estate ownership, tenancy and financing, or the enforcement of those real estate interests.

Law stated - 30 September 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

The City Planning Act generally provides for rules on the use of the land. This law categorises the land into various zones and requires permits for certain developments of the land in certain zones, and provides certain limitations on the use of the land and on the buildings that can be built in each zone. Further, the Building Standards Act generally provides detailed rules on the buildings that can be constructed.

Generally, local governments have the authority over the planning and zoning for real estate development, and the local governments set the rules for allowing for deviation from the default rules. Buildings not in compliance with planning or zoning requirements are illegal and are subject to receiving orders from the local government, such as to rebuild, renovate, or remove the building, or suspend or limit the use of the building, in addition to potentially being required to pay fines.

There are more laws that regulate and control matters that relate to real estate. Advice from lawyers or real estate agents should be sought for additional details.

Law stated - 30 September 2024

## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The Expropriation of Land Act provides rules regarding the compulsory purchase of real estate by the government, municipal governments and other authorities. Generally, a person who is expropriated of its rights, including the owners and tenants of the real estate and lenders with certain security rights over the real estate, will receive compensation. The valuation of the interests and the allocation of the compensation are determined by the expropriation commission.

Law stated - 30 September 2024

## Forfeiture

- 13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

A court may order the forfeit of real estate that it is related to, or the subject of, illegal activities.

Law stated - 30 September 2024



## Bankruptcy and insolvency

**14** | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

There are several types of bankruptcy or insolvency proceedings in Japan. Bankruptcy and insolvency proceedings can be commenced either voluntarily or involuntarily. In the case of bankruptcy proceedings, generally, a bankruptcy trustee will be appointed. Although there is no automatic stay upon the filing of an application for bankruptcy in Japan, upon such filing, the bankruptcy court will normally issue a preliminary court order staying execution against the assets of the bankrupt borrower. Thereafter, once a bankruptcy proceeding has officially commenced, a stay against such execution will come into effect. Upon a seller's bankruptcy or insolvency, the seller's fraudulent conveyance can be voided (even if it is implemented before the bankruptcy) under certain statutory conditions.

Law stated - 30 September 2024

## INVESTMENT VEHICLES

### Investment entities

**15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Various legal entities are used in real property transactions in Japan. Incorporated entities, such as joint-stock companies (KCs), limited liability companies (GKs) and specified purpose companies or *tokutei mokuteki kaisha* (TMKs), which provide limited liability to their shareholders, are the most common. Foreign corporations are also recognised and can be used as investment entities by first registering a branch office in Japan.

To achieve pass-through tax treatment, a silent partnership (TK) is commonly used. A TK is a two-party contractual arrangement between an operator (TK operator) and an investor (TK investor), pursuant to which the profits and losses of the silent partnership business (TK business) receive pass-through tax treatment in accordance with the TK agreement.

In addition, a TMK can constitute a tax pass-through entity (although only with respect to profits), if it satisfies certain criteria. Foreign investors generally prefer the TMK arrangement, as it is believed that Japan's tax authorities are less likely to challenge the legitimacy of a TMK's pass-through tax treatment.

In the case of the TK arrangement, there exists a possibility that the Japanese tax authorities may challenge the pass-through tax treatment by re-characterising the TK as an ordinary partnership arrangement, which would result in the foreign investor being deemed to have a permanent establishment in Japan, thereby resulting in more taxes being imposed on the foreign investor. A tax specialist should be consulted for details on the application of Japanese tax on these investment structures.

Shareholders of KKKs, GKs and TMKs have limited liability. Furthermore, a TK investor will have limited liability with respect to the TK's business conducted by the TK operator.

Among these alternatives, the TK arrangement may have a slight disadvantage in light of the possibility of being re-characterised as an ordinary partnership arrangement, which would result in the loss of limited liability.

Law stated - 30 September 2024

## Foreign investors

16 | What forms of entity do foreign investors customarily use in your jurisdiction?

TK and TMK investment structures are commonly used by foreign investors.

Law stated - 30 September 2024

## Organisational formalities

17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Roughly speaking, most forms of incorporated entities can be incorporated with nominal capital and relatively simple documentation (such as articles of incorporation), accompanied by registration in the corporate registry, and maintained without any further formalities. A foreign entity operating its business continuously in Japan is required to register at least one individual to act as its representative in Japan, and of its representatives, at least one must reside in Japan.

Corporate taxation of Japanese corporate entities and of branch offices of foreign companies is basically the same, except for the special tax pass-through arrangements mentioned above (those for TKs and TMKs).

Law stated - 30 September 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

18 | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Ownership (absolute interest similar to fee simple interest) is the primary right in real estate. The holder of the ownership right will have the right to dispose of and use the real estate. Land and buildings are construed as separate, different types of real estate, and

ownership of the land and ownership of buildings constructed on that land can be dealt with independently.

Generally, there is no other type of ownership interest (such as leasehold rights given by the government for a limited time period) for real estate. Ownership interests can be transferred by contract and there is no requirement on the formality of the transfer instrument; theoretically, it can be transferred by oral agreement, although that is not typical for real estate transactions.

Co-ownership is the typical way to allow real estate to be owned by more than one person. The right of the co-owner extends to the entire real estate and not only to part of it.

In order to allow a parcel of land to be owned by more than one person without using co-ownership, the parcel of land can be subdivided into more than one lot and each person can become the owner of a particular lot of the land.

In order to allow a building to be owned by more than one person without using co-ownership, the owners can subdivide one building into condominium units (by satisfying certain conditions that each condominium unit will have certain independence from the others).

The typical way to provide a right to use the land or building is through a lease, which can be created by a contract. Generally, there is no requirement regarding the formality of the lease contract except for certain types of leases that provide for fixed terms. A master lease structure is commonly used.

Generally, other types of benefits to, and burdens on, real estate are created by contract with the owner of the real estate.

Law stated - 30 September 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

With regard to the sale of real property of substantial value (typically, ¥100 million or more), it is common for the potential purchaser to submit a letter of intent to the seller before undertaking a comprehensive due diligence investigation and it is not common for the seller and potential purchaser to engage in negotiations over the term sheet for the contract of sale. Whether such letter of intent is binding will depend on its provisions. A letter of intent that is intended to be non-binding should expressly state that it is non-binding to ensure that a court will interpret it as such.

Customarily, sellers used to be reluctant to explicitly agree to take the subject property off the market while negotiating a definitive contract of sale. However, recently it became more common to give exclusivity and to take the property off the market before the execution of a binding agreement.

It is common to have real estate brokers involved in sale and purchase transactions with respect to real estate. Financing arrangements are generally handled by investment managers or directly by one of the lenders acting as an arranger. Real estate brokers are

required to have a brokerage licence and are also required to have a certain number of employees, each of whom must be licensed brokers. There is a cap on the commission for real estate brokers. Real estate brokers are required to provide to related parties certain documents, such as those outlining or explaining important matters with respect to transactions.

Law stated - 30 September 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

A contract of sale typically includes a description of the real property to be sold, the sale price, date of closing and a contract non-conformity liability.

A typical contract of sale for commercial real property additionally includes seller's representations and warranties, closing conditions and seller's covenants.

In real property sale and purchase transactions, it is not unusual to require a 10 per cent to 20 per cent deposit at the time the contract is entered into. Generally, no escrow arrangement is used. The deposit will be forfeited if the purchaser cancels the transaction without cause, and the deposit will be returned and an amount equal to the amount of the deposit will be paid by the seller to the purchaser if the transaction is cancelled by the seller without cause.

Under Japanese law, it is difficult to obtain irrefutable evidence of good title to property. Rights over real property must be registered with the real estate registry to be perfected; however, while the register can serve as strong evidence of the existence of such registered rights, it does not serve as conclusive evidence. Accordingly, a purchaser will have to rely on the representations and warranties of the seller as to the quality of title to the conveyed property. The cost of the search of the real estate registry is borne by the purchaser, unless otherwise agreed.

Law stated - 30 September 2024

## Environmental clean-up

### 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

The owner of contaminated land may be ordered by the relevant government authority to take appropriate measures to avoid any harm being caused to the neighbourhood by such contamination. When purchasing commercial real property, it is common for the purchaser to commission an environmental survey of the land and, generally, the cost of this survey will be borne by the purchaser. If any contamination is found as a result of the survey, generally the seller will be responsible for the clean-up of such contamination.

Although it is common for commercial real property contracts of sale to contain representations regarding environmental matters, it is not common for future purchasers of the subject land to rely on representations made in past contracts of sale. In some cases, the purchaser is willing to rely on the results of the environmental survey and purchase the land on an as-is basis. In such cases, the seller will not be responsible for any contamination clean-up.

Clauses regarding long-term environmental liability and indemnity that survive the term of a contract are not common in Japan. Exceptions exist in the case of real estate securitisation contracts and other commercial deals in which comprehensive and detailed environmental representation and warranty provisions and contract non-conformity liability provisions that survive for a certain time after the closing may be commonly found. Japanese law does, however, provide for a post-closing statutory contract non-conformity liability, which, although not mandatory and waivable by agreement under certain circumstances, is generally understood to cover environmental problems discovered after the closing.

If any environmental defect is discovered on a target real estate before the execution of a real estate sales contract, a purchaser usually requires a seller's covenant to cure that environmental defect before or after the closing, noting completion thereof as one of the closing conditions, or by setting that covenant as a post-closing obligation of the seller. Alternatively, a purchaser may require a price discount for the real estate, taking into consideration the environmental risks resulting therefrom while accepting that environmental defect.

In the case of a breach of a contractual covenant by a party, the non-breaching party may assert a claim for damages, and also apply for compulsory enforcement of the breaching party's obligation to the court, such as the delivery of possession of the subject property (or alternatively, terminate the contract of sale).

Law stated - 30 September 2024

## Lease covenants and representation

**22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations made by sellers of real property regarding existing leases relate to, among other things:

- the major terms of such leases (eg, the term of each lease and the rent, common area charges and security deposits payable thereunder);
- the existence or non-existence of any default under such leases;
- the existence or non-existence of tenants experiencing financial difficulties;
- the existence or non-existence of tenants of an antisocial nature;
-

the existence or non-existence of any disposal of rights under such leases (eg, the creation of pledge over the right to demand the return of the security deposit); and

- the existence or non-existence of any requests by a tenant to reduce its rent or any other disputes with the tenants.

For major leases, it is typical for the seller to covenant to not take any action in relation to such a lease between the contract date and the closing date without the prior consent of the purchaser. However, for minor leases, such as lease agreements for residential condominiums, such a covenant from the seller is not usually provided, as it is typical to leave matters concerning the operation of the property to the seller until the closing date, as long as the property is operated in the ordinary course of business.

Generally, representations and covenants do not cover brokerage agreements.

Lease representations and covenants generally do not survive after the closing of the sale.

Estoppel certificates from tenants are not customarily required as a condition to the obligation of the buyer to close under a contract of sale.

Law stated - 30 September 2024

## Leases and real estate security instruments

- 23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Generally, a lease agreement will not provide for its subordination with regard to security instruments. Priority between a lease and a security instrument is determined according to the chronological order of perfection of such right over the real property. Generally, the perfection of a right over real property is done by registration in the real estate registry.

In addition to registration, a lease for land can be perfected where the lessee owns the building that is located on the leased land and the ownership of the building is registered in the real estate registry.

Further, the lease of a building, or a part of a building, can be perfected by delivering possession of the leased premises to the lessee. Most leases are not registered and are instead perfected using the latter alternative methods of perfection. If a lease has priority over a security instrument, the lease will survive, and be unaffected by, the foreclosure of the security instrument. It is not typical for a lender to require subordination and non-disturbance agreements from a lessee. Generally, the business practices related to real estate leases and the statutes and legal framework to be applied to real estate leases are largely different from other commercial leases of movable assets.

Law stated - 30 September 2024

## Delivery of security deposits

- 24 | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

When ownership of real property is transferred to a buyer, all rights and obligations of the lessor under a perfected lease that is held by the seller with respect to such real property (including the obligation to return security deposits to the existing tenants) are in principle transferred to the buyer without the consent of the tenants. For a buyer to ensure delivery of all security deposits, it is common for the buyer to offset the amount of such tenants' security deposits against the purchase price. Generally, security deposits are paid in cash, not by a letter of credit. Under most leases, security deposits are required to secure the tenant's performance of its obligations, such as its obligation to pay rent. It is common for residential leases to have a short term (one or two years) and to have rent reviews at the end of the term. Various rent review methods are used in the case of commercial leases.

Law stated - 30 September 2024

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

For large-scale real estate transactions, it is common to have an engineering company review the legality of the structure, use and occupancy of the relevant real estate and, further, to have a law firm perform a legal due diligence investigation. Due diligence is generally completed prior to the execution of the contract.

As mentioned above, for a purchaser to perfect its ownership as against third parties, the transfer of ownership must be registered with the real estate registry. Although registration is not conclusive evidence of ownership, it is generally understood that the real estate registry serves as strong evidence of ownership. To perform a title search in Japan, one will typically order and examine a certified copy of the real estate registry. It is common to use the services of a real estate broker or a lawyer to assist in this. There is no practice to use title insurance, legal title opinion or indemnity funds.

Japan provides 'statutory priority' for recorded documents at the real estate registries (which are prepared for each of the real estate lots managed by governmental registration offices) in the sense that the real estate registry is based upon a 'race' registration system (ie, first in time, first in right priority), irrespective of the signing date of contracts between the parties. This priority system, which relies on the real estate registry, applies to the order of priorities of various other interests with regard to real estate.

It is not customary to obtain government confirmation, a zoning report or a legal opinion regarding legal use and occupancy, which generally will be reviewed by an engineering company, as mentioned above.

Law stated - 30 September 2024

## Structural and environmental reviews

- 26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

It is common to arrange for an engineering and environmental review when acquiring high-value real property (typically, ¥1 billion or more), especially in the context of a securitisation transaction. An engineering review will typically cover such matters as legal compliance with national and local codes and regulations related to building, construction and fire prevention, structural integrity, asbestos, soil contamination and other environmental matters, as well as other physical conditions of the building.

When acquiring high-value real property, it is customary to obtain representations, warranties and indemnities in relation to legal compliance with applicable laws and regulations, engineering and environmental matters. It is extremely rare to purchase environmental insurance.

Law stated - 30 September 2024

## Review of leases

- 27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

It is common practice to have lawyers review leases in securitisation transactions or in important commercial lease transactions.

The Act on Land and Building Leases is favourable to lessees. For example, under this Act, subject to certain exceptions, a lessor is not permitted to refuse a lessee's request for lease term renewal unless the lessor can demonstrate a justifiable reason for its refusal (under Japanese case law, the concept of 'justifiable reason' has been construed quite narrowly); and notwithstanding the express terms of its lease agreement, a lessee may, in principle, seek a court order reducing its lease rent (if it is unreasonably high), even in the middle of a current lease term. Disputes relating to commercial leases are not unusual. A lender will typically not object to a lease having priority over its mortgage; however, it is extremely unusual for a lender to permit a property management agreement or other management agreements to have priority over its mortgage.

Law stated - 30 September 2024



## Other agreements

### 28 | What other agreements does a lawyer customarily review?

In commercial property transactions, in addition to the real property contract of sale itself, it is customary for lawyers to review a variety of other transaction-related documents, including the following:

- a certified copy of the real estate registry;
- brokerage agreements;
- trust agreements (where the transaction will be accomplished by way of a transfer of real estate trust beneficiary interest);
- asset management agreements (where the purchaser is a special purpose vehicle requiring asset management services);
- silent partnership (TK) agreements (where equity investments to the purchaser are to be implemented through TK investments);
- property management agreements and other service agreements; and
- debt financing-related agreements, if applicable.

A judicial scrivener usually drafts documents necessary for registering the transfer of title upon closure of a sale.

Law stated - 30 September 2024

## Closing preparations

### 29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Lawyers are involved in closing high-value commercial real property transactions (including acquisition, leasing and financing transactions). In the case of a hard asset conveyance, the principal closing deliverables will be the following:

- a purchase and sale agreement;
- asset management agreements (where the purchaser is a special purpose vehicle requiring asset management services);
- TK agreements (where equity investments to the purchaser are to be implemented through TK investments);
- property management agreements and other service agreements;
- the debt financing-related agreements, if applicable;
- a property risk report – a statutorily required report from the seller to the purchaser explaining the material risks in relation to the target property;
-

those required for registering the transfer of real property ownership (eg, documented proof of the seller's ownership of the subject property, possibly in the form of an officially stamped application for registration when the seller obtained ownership to the subject property); and

- powers of attorney from both the seller and the purchaser.

In the case of a transfer in the form of a real estate trust beneficiary interest, trust agreements and written consent from the trustee with a certified date stamp from a notary public will be the principal closing document.

In a typical lease transaction, a lease agreement and a property risk report are delivered. A typical real estate securitisation transaction could involve more than 100 closing documents (including lease documents, equity investor sponsor letters and borrower counsel's legal opinions).

Japanese parties usually use corporate seals to execute documents, with confirmation of due corporate authorisation being accomplished through confirmation that the proper corporate seal has been used.

As a debt finance advancement is usually necessary for sourcing a part of the real estate purchase price, and a lender or other debt finance provider always requires immediate perfection of its security interest over the purchased real estate upon advancement of its loan, the timing of the closing and funding must normally be simultaneous.

The contract and closing of acquisition sometimes occur on the same date, but it depends on the case. The typical period between the contract and closing is one month, due to debt financing arrangements, preparations for acquisition and debt financing closing documents, etc.

Law stated - 30 September 2024

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Typically, a closing meeting for the transfer is held at the office of the purchaser's lender that is offering debt financing for part of the real estate acquisition price. At the meeting, the relevant parties and their respective legal counsel and a judicial scrivener confirm the various acquisition and debt financing closing documents. The parties are typically the following:

- the seller;
- the seller's lender;
- the purchaser;
- the purchaser's lender; and
- a trust bank representative (in a real estate trust beneficiary interest transaction).

After the confirmation of the closing documents, the purchase payment is wired from the purchaser's bank account to the seller's bank account. Then, documents for registering the cancellation of the security interests of the seller's lender and for registering the real estate title transfer to the purchaser are released to the purchaser. Application documents for those registrations as well as application documents for the registration of the security interests of the purchaser's lender are immediately filed with the relevant governmental office managing the real estate registry. Registration taxes levied on those registrations must be paid at the time of the registration applications.

Law stated - 30 September 2024

## Contract breach

### 31 | What are the remedies for breach of a contract to sell or finance real estate?

In the case of a seller's breach of the contract, a purchaser is entitled to request a court order for specific action (ie, an order to deliver the real estate title to the purchaser and to register the title transfer to the purchaser). In this case, the purchaser is entitled to claim for damages and, instead of a specific action, to terminate the contract.

In the case of a purchaser's breach of contract, the seller is entitled to claim payment of the purchase price or terminate the contract, claim for damages and, if there is a down payment, the seller may or may not retain it depending on the terms and conditions with regard to the down payment in the sale and purchase agreement.

In the case of a borrower's material breach of the debt finance documents (including the borrower's misrepresentation or breach of any of its covenants under such documents), a lender is typically entitled to perform the following:

- accelerate the maturity date of the debt;
- demand payment of default interest; and
- exercise its foreclosure rights under the mortgage(s) over the underlying real estate.

In some instances, a contract provides a monetary penalty payable by the breaching party, irrespective of the actual damage incurred by the non-breaching party. Japanese courts generally respect those monetary penalty clauses.

Law stated - 30 September 2024

## Breach of lease terms

### 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Upon breach of the terms of the lease by the tenants or landlords, the non-breaching landlords or tenants are entitled to claim for damages against the breaching tenants or landlords. If the breach is material, the non-breaching party is even entitled to terminate the lease. However, Japanese case law requires that the tenant's material breach be substantial enough to destroy the trust between the landlord and the tenant for the landlord to terminate the lease for the tenant's material breach.

In other words, Japanese courts tend to interpret landlords' rights to terminate the lease restrictively (irrespective of the wording of the contract) and are reluctant to affirm the termination of leases due to minor breaches by tenants. For example, Japanese courts tend to require two to three months' worth of rent to be unpaid for a landlord to be able to terminate the lease for the tenant's failure to pay rent. The remedies available to landlords are the same for commercial and residential leases.

Law stated - 30 September 2024

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Typical security instruments available to lenders in Japan are mortgages and revolving mortgages over real estate (in the case of hard asset transactions), and pledges over real estate trust beneficiary interests (in the case of real estate trust beneficiary interest transactions). Under these security instruments, the lenders are granted certain rights similar to those rights held by holders of liens or charges. Historically, a defeasible conveyance over real estate that has been affirmed under Japanese case law has also been widely used for real estate security instruments. However, due to the lack of detailed written rules regarding defeasible conveyances, there remains uncertainty in the foreclosure, etc, of defeasible conveyances. At present, the above-mentioned statutorily defined security instruments are more widely used.

Commercial banks and other licensed moneylenders are the typical finance providers for real estate transactions.

Those who intend to lend money repeatedly must be registered under the Money Lending Business Law. Furthermore, in the case of the use of *tokutei mokuteki kaisha* (TMKs), there are certain limitations on finance providers; however, generally, commercial banks are qualified to act as finance providers to TMKs.

Law stated - 30 September 2024

### Leasehold financing

- 34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In Japan, the rights of lessees to ground leases are generally well protected by the Act on Land and Building Leases; therefore, it is standard for financial institutions to grant debt financing to borrowers that are secured by mortgages over buildings located on leasehold land. Certainly, a ground lessee's transfer of its rights, interest and position in and under a ground lease typically requires consent from the landowner (ie, the lessor of the ground lease), and the landowner usually requires payment of a fee for such consent, or may even refuse to give such consent. This can be a hurdle for the financial institution to overcome when it seeks to exercise its foreclosure rights under the mortgage over the building with the ground lease.

However, in such a case, under this Act, the financial institution may petition a court for an order consenting to the transfer of the ground lessee's rights, interest and position in and under a ground lease, upon the foreclosure of such financial institution's mortgage over the building with the ground lease. The court will usually issue such an order, subject to the payment of a certain amount, as a consent fee, to the landowner. Thus, this landowner consent requirement is not an insurmountable hurdle to prevent debt financing secured by mortgages over buildings located on leasehold land.

As long as the ground lease is subject to this Act and has the minimum term as provided for in this statute, financing will generally be available. However, if the ground lease is a lease that falls under some exceptions to the protection under this Act (such as a lease for temporary use), financing will be unlikely available.

There are no specific lease provisions required in a ground lease to make it financeable. Also, there is not a minimum term for a lease being financed or a shorter maximum term for the financing in relation to such a lease.

Law stated - 30 September 2024

## Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

Mortgages and revolving mortgages are the typical methods for creating security interests over real property. They are created by a contract and are perfected by registration in the relevant real estate registry. In the case where the transaction is accomplished by way of an acquisition of real estate trust beneficiary interests, a pledge is created by a contract over the real estate trust beneficiary interests, and this pledge is perfected by way of written consent of the trustee (with a certified date stamp by a notary public).

Law stated - 30 September 2024

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Usually, lenders of real estate loans obtain third-party real estate appraisals to evaluate the underlying real estate. This is absolutely necessary in the case of real estate non-recourse loans (in Japan, real estate loans are generally recourse loans unless a specific non-recourse carve-out clause is provided in a loan document), where lenders will not have recourse to other assets of borrowers. There is a government standard for real estate appraisals, and real estate appraisers must be licensed to provide official real estate appraisals.

Law stated - 30 September 2024

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

The mere making of a loan secured by collateral situated in Japan will not trigger any licensing requirements. However, a lender who makes loans as its business to residents of Japan is considered to be engaging in the business of money-lending and is thus subject to rules under the Money Lending Business Law and required to register thereunder as a professional moneylender.

A mortgage or revolving mortgage is usually granted by execution of an agreement between the lender and the borrower (who is the owner of the real property to be mortgaged). Initial registration of a mortgage or a revolving mortgage is subject to a substantial registration tax (basically 0.4 per cent of the amount of a secured loan in the case of a mortgage, or of the maximum amount of loan secured in the case of a revolving mortgage).

A mortgage is typically assignable without the consent of the mortgagor or any other mortgagees, and a revolving mortgage is typically assignable with the consent of the mortgagor, but without the need for consent from any other mortgagees. The registration tax rate for the transfer of a registered mortgage or revolving mortgage will usually be 0.2 per cent.

In the case of a pledge over a real estate trust beneficiary interest, no registration tax is applicable because it can be perfected with the trustee's consent without registration.

Separate from registration tax, stamp duties are applicable to loan and bond documents signed by a borrower. However, the amount of stamp duties is small in comparison with the amount of registration tax and should not affect the lender's choice of a debt financing structure.

Law stated - 30 September 2024

## Loan interest rates

**38** |

How are interest rates on commercial and high-value property loans commonly set?  
 What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Reference to the Tokyo Interbank Offered Rate (TIBOR) to determine a floating loan's interest rate is common. Interest rates established as a spread amount over TIBOR or central bank interest rate indexes are essentially enforceable in Japan. However, interest rates exceeding 15 per cent per year (where the principal amount of the loan is ¥1 million or more) are not enforceable. If a loan's interest rate exceeds 109.5 per cent (20 per cent in the case of a professional moneylender) per year, the lender will be subject to criminal sanction. Fees and costs, irrespective of the names given to them, received by the lender in relation to money lending are generally included as interest for the calculation of legally permissible interest rates.

Law stated - 30 September 2024

### Loan default and enforcement

**39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Enforcement of a debtor's obligations under a loan agreement can be made through judicial proceedings. In the case of a mortgage or revolving mortgage, the loan collateral can be foreclosed through judicial proceedings.

The loan agreement will typically specify what constitutes a 'foreclosure event', with default of a material loan agreement obligation typically serving as an event of default, and then grounds for loan acceleration and foreclosure. Although there will be some amount of variation from case to case, typically it will take from several months to more than a year to complete a mortgage or revolving mortgage foreclosure.

A separate foreclosure action must be brought on each type of collateral. Japan does not have concepts similar to the 'one-action', 'one at a time' or 'security first' rules. Once a lender's claim has been satisfied through the foreclosure of its lien on collateral securing the debtor's obligations under the note, the lender is required to suspend all other actions to collect on the said note, enforce obligations under a guarantee, or otherwise.

Law stated - 30 September 2024

### Loan deficiency claims

**40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

In Japan, real estate loans are generally recourse loans unless a specific non-recourse carve-out clause is provided in the loan documents.

Lenders are generally entitled to recover (until the claim becomes unenforceable because of the statute of limitations) any deficiency between the outstanding loan balance (and permitted additions) and the amount recovered in the foreclosure from the borrower or guarantor (if any), except in cases of non-recourse loans that explicitly provide a non-recourse carve-out clause. In the case of recourse loans, upon default, lenders are entitled either to foreclose the security instruments and recover the deficiency separately from the borrower or guarantor, or to recover the full amount of payment owed by the borrower or guarantor without foreclosure.

In the case of non-recourse loans, lenders are only entitled to foreclose the security instruments and are not entitled to recover deficiencies that are not recovered in the foreclosure.

Law stated - 30 September 2024

### Protection of collateral

**41** | What actions can a lender take to protect its collateral until it has possession of the property?

Generally, the lender will not have possession of the property unless the security agreement provides for the contractual right of the lender to obtain possession and make a private sale. For the mortgagee to collect rent during a foreclosure, the mortgagee must obtain a judicial order to appoint a receiver and have the receiver collect rent and distribute the rent as dividends or obtain a judicial order for the attachment of rent and require that the tenants of the mortgaged property pay their rent over to the mortgagee.

Law stated - 30 September 2024

### Recourse

**42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Unless otherwise provided in the loan agreement, a lender will have recourse against all the assets of the borrower. Recourse loan agreements are typical. There is basically no difference between recourse and non-recourse security arrangements in a bankruptcy filing. Typically, a lender's recourse, as against a guarantor, will not be limited to an action forcing the guarantor into bankruptcy, an action foreclosing on the mortgaged property, or an action compelling the guarantor to obtain additional financing to protect said guarantor's interest in the mortgaged property or ownership interest in the borrower.



Law stated - 30 September 2024

## Cash management and reserves

- 43 | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

In the case of a non-recourse loan to a special purpose company, it is typical to require that a cash management system be established pursuant to which the borrower must establish and maintain reserves for various purposes (such as reserves for future interest payments, tax payments, insurance payments, return of tenant security deposits (tenant security deposits need to be returned to tenants upon the termination of the leases), and repair and maintenance costs) and to require the borrower to open an account at a lender bank to manage all cash flow of the borrower. It is relatively rare to require cash management systems and reserves for other types of loans.

Law stated - 30 September 2024

## Credit enhancements

- 44 | What other types of credit enhancements are common? What about forms of guarantee?

It is relatively rare for a lender to obtain credit enhancements beyond mortgages and other security arrangements mentioned in the answers above. Letters of credit, holdbacks and guarantees are not common, especially in Japanese non-recourse real estate loan transactions. On occasion, the equity sponsor to a special purpose company receiving a non-recourse loan will provide a recourse carve-back guarantee letter (a 'sponsor letter') to the lender with regard to 'bad boy acts'. Such recourse carve-back guarantee letters are generally considered enforceable. Use of completion guarantees in development transactions is relatively rare except for a constructor's completion guarantee in a project finance deal.

Law stated - 30 September 2024

## Loan covenants

- 45 | What covenants are commonly required by the lender in loan documents?

In the case of a non-recourse loan, it is common to incorporate a set of covenants aimed at protecting the lender. Such covenants may include the borrower's obligation to maintain its bankruptcy remoteness status, to effect loan repayments through a predesignated cashflow waterfall and to refrain from taking on additional debt or selling or otherwise disposing of the assets subject to the lender's collateral. Covenants in a recourse loan

arrangement (typically corporate loans) are much more limited in scope and number. Covenants in loan documents are not generally different, depending on asset classes.

Law stated - 30 September 2024

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

In the case of a non-recourse loan, it is common to incorporate a set of financial covenants, including loan-to-value ratio and debt service coverage ratio covenants. To effect such financial covenants, it is common to require that the borrower submit financial reports and update collateral appraisal reports periodically. The above-mentioned financial covenants are relatively rare in a recourse loan.

Law stated - 30 September 2024

## Secured movable (personal) property

### 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Typically, mortgages or revolving mortgages over real property (in the case of hard asset financing transactions) and pledges over real property trust beneficiary interests (in the case of trust beneficiary interest transactions) serve as the key security interests for lenders. In addition to these key security interests, sometimes security interests in movable (personal) property assets, such as pledges over furniture, fixtures and equipment and other movable assets that are necessary or useful for real property operation are also provided to the lender. Pledges over movables are perfected by the transfer of possession to the lender or registration. No 'control' agreement is required for perfection.

Law stated - 30 September 2024

## Single purpose entity (SPE)

### 48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

In the case of a non-recourse loan, the lender will usually require that a borrower be an SPE. For this purpose, a limited liability company (GK) incorporated under the Companies Act or a TMK incorporated under the Act on the Securitization of Assets is typically used. The incorporation of these companies is neither difficult nor materially different from the incorporation of the more standard forms of companies. However, in the case of a TMK,

an asset liquidation plan must be submitted to the relevant local office of the Financial Services Agency.

To achieve remoteness from the influence of a bankruptcy of equity sponsor and asset manager, the non-recourse lender will commonly require the appointment of an independent director as well as an independent shareholder for the SPE. Furthermore, it is quite common for the non-recourse lender to require the independent director and shareholder to submit a non-petition letter for the purpose of trying to preclude a bankruptcy filing; however, the enforceability of such a non-petition letter is arguable and has not been judicially tested in Japan.

Law stated - 30 September 2024

## UPDATE AND TRENDS

### International and national regulation

**49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Recently, an increase in land whose owners cannot be identified has caused various problems; for example, severe difficulties for the government or private companies to proceed with infrastructure projects or other development activities due to a failure in identifying or locating the landlords of the project sites or neighbouring lands. This social problem resulted from various reasons, such as an omission or failure to apply for registration with respect to the change of landlord due to death, since the heirs of the landlord are not always interested in owning and managing the land; in particular, land located in rural areas with less value. In response to this problem, a series of new rules, which includes the following, was promulgated in April 2021:

- an amendment to the existing rules under the Japanese Civil Code with respect to co-ownership and property inheritance;
- an establishment of new rules in connection with the management of property whose owners cannot be identified;
- an amendment to the Real Property Registration Act, among other things, so that:
  - heirs of landlords will be required to apply for registration in respect of the change of their registered landlords (which came into force in April 2024); and
  - each registered property owner will be required to apply for registration in respect of a change in its name or address (scheduled to come into force by April 2026), and in each case, the application must occur within a certain period of time; and
- a new legislation that enables the heirs of landlords, who do not want to own the land, to transfer the ownership of the land to the national treasury with the approval of the Minister of Justice.

In January 2024, a draft outline of an amendment to the Act on Building Unit Ownership, etc, which governs various matters related to the management and disposal of the whole or a part of buildings held in a form of multiple condominium units, has been decided and publicised by the Legislative Council of the Ministry of Justice. Further, a possible amendment to a part of the Japanese Civil Code relevant to collateral is also under discussion in the Legislative Council – which, if enacted, would have a major impact on the real estate industry, .

Law stated - 30 September 2024

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# Malaysia

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[SKRINE](#)

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

As a former British colony, Malaysia's legal system is, to a large extent, based on English common law. In the absence of domestic law on a particular area, English common law and rules of equity would apply.

In certain circumstances, Malaysian courts would grant an anti-suit injunction to prohibit a party from bringing an action. Such powers are often granted to prevent multiplicity of judicial proceedings.

Oral contracts made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, are effective and enforceable unless they are required by law to be in writing. Generally, no evidence of any oral agreement or statement shall be admitted as between parties to any such written agreement for the purpose of contradicting, varying, adding to, or subtracting from its terms. However, there are several exceptions to this rule. For instance, oral evidence may be admitted for the purpose of proving the existence of any separate oral agreement constituting a condition precedent to a contract, grant or disposition of property.

The principal legislation for real estate within Peninsular Malaysia and the Federal Territories is the National Land Code (Act 828) (NLC). The respective state within Peninsular Malaysia is empowered to make rules for carrying out the NLC's objects and purposes. There are also state laws governing Malay reserved lands, customary lands and padi lands.

Law stated - 1 October 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Under the NLC, all lands are vested in the state and can be alienated upon application to the state authority. Such alienation only takes effect upon registration of a register document of title (RDT), which is conclusive proprietorship evidence. The subsequent property transfer, lease (being a rental for more than three years), charge and easement needs to be effected by the NLC-prescribed instrument and registered with the relevant land registry or office. Upon registration, the title or interest is indefeasible save for instances specified in the NLC such as fraud or misrepresentation. The title or interest acquired by a purchaser (other than the immediate purchaser in such instances) in good faith and for valuable consideration is not affected.

Despite no registration:

-

beneficial interests can be created in property by way of equitable trust. A vendor who receives the full purchase price holds his proprietary interest as his purchaser's constructive trustee until RDT's registration of the transfer. The purchaser may also enter a private caveat over the property, thus prohibiting the registration of other instruments of dealing presented thereafter;

- a tenancy exempt from registration which is for three years or less can be protected by an endorsement on the RDT; and
- a third party with whom an issue document of title (IDT) or duplicate lease is deposited becomes entitled to a lien over the property or lease upon entry of a lienholder's caveat.

Law stated - 1 October 2024

### Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The transfers, leases and charge over lands shall be in the NLC-prescribed forms, executed and attested in accordance with the NLC. Presentation for registration of such forms remains by way of lodging the physical copy together with the original IDT and other requisite documents at the Registry.

Each state (including the respective district land office) may impose additional requirements. The State of Malacca Registry requires a transferee company's secretary to confirm on the company shareholding, whereas the State of Johor Registry requires such confirmation from both transferor and transferee companies' secretary. If the property to be transferred is valued at 5 million ringgit and above, the State of Selangor Registry requires biometric fingerprint verification of the transfer instrument's signatories.

The amount of registration fees payable to each land registry or office (Registry) is also different. The purchaser customarily bears the registration fee for the transfer instrument and the state authority's approval for foreigner's acquisition (foreign consent) (if applicable), whereas the seller usually bears the registration fee to withdraw his encumbrances and the state authority's consent due to restriction in interest (RIT) in the IDT (if applicable). Presentation beyond 90 days (depending on the Registry) is subject to penalty.

A transfer instrument is subject to stamp duties payable by the purchaser at the applicable rate prescribed under the Stamp Act 1949 (unless exempted or remitted thereunder) and which will be ascertained based on the property value. A property sale with gains is subject to real property gains tax (RPGT) payable by the seller, unless exempted under the Real Property Gains Tax Act 1976 or falling within the purview of income tax. The applicable RPGT rate depends on the type of seller and the year of disposal. The stamp duties and RPGT, if payable, shall be paid within the prescribed period to avoid incurring penalty.

Law stated - 1 October 2024



## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Each state imposes a minimum purchase price for different types of property to be acquired by a non-resident. The non-resident should first check such price for the type of his intended property.

The NLC also requires a non-resident who intends to own or lease property or endorse his tenancy on the register document of title to obtain the state authority's approval for a foreigner's acquisition, lease or conveyance.

Law stated - 1 October 2024

## Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

A non-resident may pay to or receive payment in Malaysian ringgit for settlement of any Malaysia property. It may borrow in ringgit from a resident to finance construction or purchase of a residential or commercial property, or in foreign currency from a licensed bank in Malaysia or a non-resident.

Any repatriation of funds, including income earned or proceeds from divestment of such property, needs to be in a foreign currency.

Law stated - 1 October 2024

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Failure to pay the annual rent to the state authority on alienated land may give rise to forfeiture of the land by the land administrator. Every condition and RIT binds the owner and every other person having interest in property such as the lender (if registered as a chargee). Upon breach of any condition, the proprietor may be fined or be called upon to take remedial action. The land administrator may alternatively take temporary possession of the property or declare the property forfeit to the state authority.

Landowners may be held liable under various torts including negligence and the doctrine of *Rylands v Fletcher* for contamination which leaks or 'escapes' from their land. Under the Environmental Quality Act 1974 of Malaysia (EQA 1974), landowners and/or occupiers of land may be held liable for pollution or environmentally hazardous substances from their

property going into drains, inland waters, groundwater, the atmosphere or in the land itself if these emissions, discharges or deposits exceed the acceptable conditions set.

The EQA 1974 was amended with effect from 7 July 2024 with enhanced penalties for various infringements such as atmospheric pollution, noise pollution, soil pollution, pollution of inland waters, the discharge of oil and wastes into Malaysian waters and open burning, including the increase of maximum fines and the introduction of minimum fines and mandatory imprisonment.

Under the Contaminated Land Management and Control Guidelines issued by the Department of Environment (DoE) (DoE Guidelines), the landowner is responsible to determine any subsurface contamination through an environmental site assessment (ESA), and if not caused by its current or historical onsite operations, to identify the polluter to be responsible to undertake subsequent remediation actions in respect of the contamination. If such polluter is no longer operating in Malaysia, the landowner will bear responsibility for said remediation.

Separately, the DoE Guidelines require the landowner to also notify the DoE of any subsurface contamination relating to its property, in the form prescribed thereunder.

The DoE Guidelines have not been enacted as law, but in practice, the standards referred to therein are used by the DoE as benchmarks. The DoE may also require compliance with the DoE Guidelines as a condition of the licences it issues.

**Law stated - 1 October 2024**

## Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Landowners may obtain insurance policies for pollution incidents and other environmental issues.

Environmental liability may also be apportioned under the relevant transaction documents. If a business or activity carried out on the property requires compliance with various environmental requirements (ie, manufacturing), the purchaser typically requests the seller to warrant such compliance, as well as to provide specific indemnities for any actual or threatened pollution incident identified.

In general, landowners should perform an ESA on their properties prior to any sale or transfer so that they have baseline data which they may rely upon in the event of any third-party claims in the future alleging that a source of pollution is from their site.

**Law stated - 1 October 2024**

## Choice of law

8 |

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Transacting parties are free to contractually decide on the law governing the transaction. Save in certain circumstances, such as where the transaction in question involves immovable properties that are governed by Malaysian land law, Malaysian courts would generally respect contractual provisions in respect of the governing law.

If parties have not agreed to the law governing the transaction, the Malaysian courts would generally apply Malaysian law, subject to the principles of conflict of law, to ascertain the place most closely connected to the dispute or contract in question.

Law stated - 1 October 2024

## Jurisdiction

9 Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Depending on the claim amount and the remedies prayed for, the Malaysian Magistrates' Court, Sessions Court and High Court, generally have the jurisdiction to try real estate actions or suits of civil nature. Alternatively, parties may refer their contractual dispute(s) to the arbitral tribunal if the relevant contract contains an arbitral award.

The defendant must be made as a party to the claim. Where a defendant is outside Malaysia, the plaintiff must make an application to the Malaysian courts for leave to serve the cause of papers out of jurisdiction. For leave to be granted, the plaintiff must show, among other things, that he or she has a good arguable case for the relief claimed, that the defendant is in the particular jurisdiction outside Malaysia, and that Malaysia is the most appropriate forum to determine the dispute.

A party who intends to enforce a judgment in Malaysia need not be one who is qualified to do business in Malaysia.

Law stated - 1 October 2024

## Commercial versus residential property

10 How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The NLC does not distinguish between commercial and residential properties regarding ownership, tenancy and financing or the enforcement of the relevant interests in lands. A foreigner, however, is not allowed to acquire certain types of properties depending on the respective state's requirement.

Law stated - 1 October 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

In Peninsular Malaysia, development is managed by the relevant local planning authority (LPA). Land use for development must conform with the local plan and land title. A landowner or developer may apply to the relevant land registry or office for land use conversion.

Planning permission from the LPA is required for development. If an area has no local plan, neighbouring landowners may object to applications for planning permission. The LPA's decision vis-à-vis planning permission may be appealed.

Where the development involves building construction, the local authority's permission is also required.

Under the Town and Country Planning Act 1976, use of land not in compliance with the local plan or developing without planning permission are offences. A person may be subject to a fine, imprisonment or both.

Law stated - 1 October 2024

## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The Land Acquisition Act 1960 governs the regime in Peninsular Malaysia. The Land Administrator would award compensation after enquiring into the market value of the scheduled land as at the date of the gazette declaring acquisition and the respective interests of persons claiming compensation. Compensation for any severance damage, any injurious affection damage and reasonable expenses for changing residence or place of business can also be awarded. The value of land and building which had been increased due to unlawful use will be disregarded. The persons receiving compensation can be the owner, lessee, tenant and chargee, but not a tenant at will. Parties who are dissatisfied with the Land Administrator's award can commence a land reference at the High Court.

Law stated - 1 October 2024

## Forfeiture

- 13 |

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

A property may be forfeited:

- for non-payment of annual rent or breach of condition under the NLC; or
- if proved to be terrorist property, or the subject matter of an offence under the Dangerous Drugs (Forfeiture of Property) Act 1988 or the Malaysian Anti-Corruption Commission Act 2009.

Law stated - 1 October 2024

## Bankruptcy and insolvency

14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

A creditor may commence bankruptcy proceedings against an individual who is unable to pay a judgment debt of at least 100,000 ringgit while winding up proceedings may be commenced against a company who fails to pay a debt exceeding 50,000 ringgit.

An individual debtor may apply for a stay of the bankruptcy proceedings pending any appeal of the underlying judgment debt, whereas a company debtor may apply for a *Fortuna* injunction to prohibit the filing of a winding-up petition.

Once a bankruptcy or winding-up order is granted, the debtor's assets will be assigned to the Director General of Insolvency (DGI) or taken over by the company's liquidator.

Depending on the terms of the underlying contract or security instrument, a seller or landlord creditor who holds security over asset(s) charged by the debtor may exercise its right to sell the same. Such seller or landlord is considered as a secured creditor. For creditors who do not hold any security against the debtor, they are considered as unsecured creditors and their debts (including liquidated damages arising from a termination of the underlying contract), if accepted by the DGI or liquidator, will be paid on a *pari passu* basis.

It is also open to companies under financial distress to restructure their debts under the various corporate rescue mechanisms and arrangements available under the Companies Act 2016.

Law stated - 1 October 2024

## INVESTMENT VEHICLES

### Investment entities

15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The possible vehicles for a foreign company to use to perform business in Malaysia include:

- a company incorporated under the Companies Act 2016 (CA), with separate legal personality (SLP) from its members although its corporate veil may be lifted in circumstances such as if it had been set up for fraudulent purposes;
- a foreign branch registered under the CA, which is an extension of its parent foreign company and has no SLP; or
- a limited liability partnership (LLP) registered under the Limited Liability Partnerships Act 2012 (LLPA) to carry on business (including a professional practice) and has SLP. A foreign LLP can also register under the LLPA in order to carry on business in Malaysia.

Pass-through entities are not subjected to corporate income tax and include:

- registered sole proprietorships and partnerships (excluding LLPs and foreign LLPs) set up by a foreigner with permanent resident (PR) status; and
- listed real estate investment trusts, whose total income for a year of assessment is exempt from tax if 90 per cent or more thereof is distributed to its unit holders.

Law stated - 1 October 2024

## Foreign investors

**16** | What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors typically carry on business in Malaysia by incorporating a private company limited by shares under the CA. Such incorporation is generally straightforward and inexpensive. Many local regulators also require such incorporation as a pre-requisite to obtaining certain licences.

Law stated - 1 October 2024

## Organisational formalities

**17** | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

A foreign investor may under the Companies Act 2016 (CA):

- incorporate a company with at least one director (for private companies) and two directors (for public companies), and one Malaysian or PR secretary, with such director(s) and secretary in each case being ordinarily resident in Malaysia by having a principal place of residence in Malaysia;
- purchase another incorporated shelf company and have its members and name of director(s) or secretary(ies) changed; or

- register a foreign branch with an agent appointed to answer for all requisite acts and be personally liable to all penalties imposed.

A company or foreign branch generally is subject to filing requirements including to lodge financial statements and annual return with the Companies Commission of Malaysia (CCM), failing which a fine may be imposed. The CA has also been recently amended to enhance the existing beneficial ownership (BO) reporting framework thereunder, to be read together with CCM's *Guidelines for the Reporting Framework for Beneficial Ownership of Companies*. A "beneficial owner" generally means a natural person who ultimately owns or controls a company. The requirements under the BO reporting framework apply to both companies and foreign branches and include the collection, verification and maintenance of BO information, as well as lodgement of BO information with CCM, although CCM extended the requirement for the latter until 30 September 2024.

The tax rate on a resident company's chargeable income differs based on its capital sum. Certain payments such as royalties and service fee made to its foreign holding company may attract withholding tax. There is no such tax on remittance of a foreign branch's profits to its foreign company.

A limited liability partnership (LLP) or foreign LLP needs to appoint at least one Malaysian or PR compliance officer ordinarily residing in Malaysia, from amongst its partners or persons qualified to act as secretaries under the CA, and annually lodge with the CCM a declaration by two partners on its ability to pay debts, failing which it is liable to a fine. An LLP or foreign LLP does not enjoy as much tax incentives as a resident company. CCM has also published a public consultation paper setting out guidelines for the introduction of a BO reporting framework for LLPs and foreign LLPs, which will coincide with the coming into force of proposed amendments to the Limited Liability Partnerships Act 2012 (LLPA) to such effect. CCM had previously issued guidelines providing for a transitional phase during which both companies and LLPs are to obtain and maintain BO information prior to the implementation of the amendments to the CA and the LLPA, after which companies and LLPs will also be required to lodge BO information with CCM (Transitional BO Guidelines). As mentioned above, amendments to the CA have since come into force and CCM's *Guidelines for the Reporting Framework for Beneficial Ownership of Companies* provides that it supersedes the Transitional BO Guidelines without mentioning whether the Transitional BO Guidelines are to continue to apply in the case of LLPs. Hence, it is unclear whether the transitional requirements as stated under the Transitional BO Guidelines will continue to apply to LLPs pending the coming into force of the proposed amendments to the LLPA.

Law stated - 1 October 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

- 18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

The state authority may:

- alienate a state land to any owner in perpetuity or for not exceeding 99 years, and under a qualified title or final title (if the land has been surveyed by the state authority);
- lease any reserved land not exceeding 21 years (reserved land lease);
- issue a temporary occupation licence (TOL) no later than at the end of the calendar year in which it is to commence; or
- issue a permit not exceeding 21 years to erect a structure on or over a state land or reserved land as an adjunct to any structure on the adjoining land.

An owner is empowered to assign or transfer their property title (whether freehold or leasehold, and subject to the relevant state authority's consent due to any relevant restriction in interest endorsed on the property title), and such ownership does not extinguish upon their death or bankruptcy. Any reserved land lease transfer may be restricted under the relevant agreement with the state authority, and TOL is not capable of assignment. Both reserved land lease and TOL also terminate on the lessee or holder's death or dissolution.

An easement can be registered with the relevant land registry or office using the National Land Code (Act 828) (NLC)-prescribed form. Other rights of way, air rights and access in respect of an alienated land may be created by contract with the landowner.

A condominium and its communal ownership usually fall under stratified scheme which is legally governed. A master lease for multiple properties is not common, save for between the same lessor and the same lessee for properties within the same building. Depending on the type and use of properties, the covenants required from the lessee or tenant may differ.

Law stated - 1 October 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

A pre-contract document typically in the form of letter of intent or offer, or term sheet or heads of term is common (but not mandatory) to set out the agreed salient terms, exclusive negotiation and buyer's due diligence period. A document expressed to be subject to contract does not necessarily prevent the formation of a contract. The courts will look into certainty of the transacting parties, the subject properties and the essential terms, and whether any intention for a concluded contract.

A real estate agent (REA) may be engaged by a seller or purchaser. He or she shall not provide professional services where he or she has a personal or contemplated interest unless having disclosed this to all affected parties. A REA needs to complete the requisite course and test of professional competence, and be registered under the Register of Valuers, Appraisers, Estate Agents and Property Managers and issued with an authority to practise. Estate agency fees are legally regulated, for instance a maximum fee of 3 per cent in a property sale, while for a tenancy it is 1.25-months' gross rental.



Law stated - 1 October 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

The typical down payment amount is 10 per cent of the sale price out of which a 1 per cent to 3 per cent earnest payment (depending on the sale price) is commonly required from a buyer to reserve the property pending execution of the sale contract. If there is any condition(s) precedent (CP) to be fulfilled, such payment is usually requested by the buyer to be held by a stakeholder. Upon full purchase price payment under the sale contract, the cash purchaser may proceed to be registered at the relevant land registry or office as the proprietor. If separate title has yet to be issued, the purchaser's interest in such sale will be evidenced by a stamped assignment (by way of transfer) which will be notified to the developer.

A title search is usually done at the purchaser's cost. Customary seller's warranties include:

- seller is the legal and beneficial owner and has capacity to sell;
- there is no other subsisting sale or dealing which may affect his or her rights to sell;
- there is no claim by third party(ies) on the sale property; and
- not to permit further encumbrance upon execution of sale contract.

Any real property gains tax assessed for a property sale will be imposed on the seller, and the year of assessment is calendar year. The land's outgoings may be apportioned as at the full payment of the sale price or the delivery of possession. Risk of loss remains with the seller until such payment or delivery.

Law stated - 1 October 2024

## Environmental clean-up

### 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Based on the Contaminated Land Management and Control Guidelines issued by the Department of Environment (DoE Guidelines), the current landowner is responsible for determining any subsurface contamination through an environmental site assessment (ESA) and thereafter undertaking subsequent remediation for the land clean-up unless they can identify the actual polluter to undertake the remediation themselves. However, under a sale and purchase agreement, if there is no contamination found at the closing through an ESA conducted by the current landowner, or if the purchaser does not require the same as a CP, then the maxim *caveat emptor* (let the buyer beware) applies and the responsibility for future environmental clean-up will fall on the purchaser. It is also not unusual for contracting parties to agree for the environmental warranties and indemnities to survive for a longer

period than other warranty claims. Typically, there will be provisions for a clean-up by the landowner of any contamination found on the site as a CP, and indemnities for any claims arising from such contamination, in addition to usual provisions for termination for breach of warranties as to condition of the land.

Law stated - 1 October 2024

## Lease covenants and representation

**22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations in a sale contract (subject to lease or tenancy) include:

- no variation (except as disclosed) nor default of the lease or tenancy agreement; and
- the lease or tenancy is in effect and enforceable.

Typical covenants in such a sale contract include:

- not to terminate the lease or tenancy, or enter into any settlement with the lessee or tenant, without the buyer's approval;
- to execute and deliver to the buyer novation of the lease agreement or tenancy; and
- to transfer the security deposit and to apportion paid rental to the buyer on completion of the sale.

Law stated - 1 October 2024

## Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease generally is not subordinate to a registered charge. The owner of a charged land, however, is not capable of granting a lease without the registered chargee's consent. The interests of a registered lessee under the NLC are not distinguished between a ground lease and other commercial leases.

Law stated - 1 October 2024

## Delivery of security deposits

- 24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

The seller usually covenants under the sale contract to remit the security deposits to his or her buyer on completion of the sale. If such deposits are in the form of letter of credit, the seller should cause the tenant to provide a new letter to the buyer.

Security deposits are common under a lease to secure the lessee's performance. It is also typical to have rent resets or reviews at such agreed interval.

Law stated - 1 October 2024

## Due diligence

- 25** | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Depending on the complexity of the sale property and any specific development intended by the purchaser, legal due diligence is usually completed before executing a property sale contract. A purchaser should conduct title search at the relevant land registry or office to verify, amongst others, the registered proprietorship, the category of land use and conditions of title, and any registered encumbrance. If separate title has yet to be issued, a purchaser should (1) review the previous contract of the landowner acquiring the property to determine, amongst others, if there is any surviving covenant binding on the landowner's successor or transferee, or subsisting default by the landowner, and (2) obtain the developer's written confirmation that the landowner is the beneficial owner and whether the property is assigned to any financier. Malaysia practises the Torrens System and registered title or interest enjoys indefeasibility unless in the cases spelt out in the NLC, such as fraud or misrepresentation. Legal opinion regarding legal use and occupancy is not commonly obtained as any express condition of use of the land will be stated in the property title and the implied condition of use is under the NLC, but the purchaser may write to the relevant land registry or office to ascertain whether the purchaser's intended development complies with such conditions of use. For the zoning which is not stated therein, buyer will and should check with the relevant local authority.

Law stated - 1 October 2024

## Structural and environmental reviews

- 26** |

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

An environmental impact assessment (EIA) is required under the Environmental Quality Act 1974 of Malaysia (EQA 1974) before carrying out any activity prescribed under the environmental laws as having a significant environmental impact (ie, agriculture and manufacturing activities with specified production values), and a report of the EIA must be submitted to the Department of Environment (DoE) for approval (EIA Approval). The latest amendments to the EQA 1974, which came into effect on 7 July 2024, introduce both mandatory imprisonment and minimum fines, and an increase in maximum fines, for failing to conduct an EIA for prescribed activities under the EQA 1974. Furthermore, under the DoE Guidelines, the current landowner is responsible for identifying any subsurface contamination through an environmental site assessment (ESA).

Please see above on ESAs.

Insurance policies for pollution incidents and other environmental issues are also available in Malaysia.

**Law stated - 1 October 2024**

## Review of leases

**27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lease agreements are usually reviewed by lawyers. Issues normally highlighted are:

- if advising lessee – indemnities from lessor, consequence of termination, restriction on lessee's change of shareholding control, any lessor's right to sell the property without being subject to the lease, and the mechanism to determine renewed rent (if not fixed); and
- if advising lessor – whether the lease is subject to registered chargee's consent, and who is to carry out the lease registration.

Lenders in a retail and commercial property financing generally do not require subordination of property management agreements.

**Law stated - 1 October 2024**

## Other agreements

**28** | What other agreements does a lawyer customarily review?

Depending on the nature of and issues surrounding the subject property, lawyers will review agreements as to where the sale will be subject or which the buyer will assume such as service contracts, lease agreements and management agreements.

Law stated - 1 October 2024

## Closing preparations

**29** | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The seller's lawyer will prepare to deliver title (if issued) as part of the required closing documents under the sale contract and the latest outgoing receipts to the buyer's lawyer. The common completion period after fulfilment of condition(s) precedent (CP) (if any) is three months with an automatic one-month extension subject to interest. Apportionment of outgoing is usually on completion or possession.

If financing is involved for property purchase, the financier's lawyer will advise on fulfilment of conditions for the loan disbursement towards settlement of the sale price within the completion period, including the differential sum settlement, and presentation for registration of the transfer and charge instruments (if property title is issued).

After execution of a lease agreement and fulfilment of any CPs therein, the lessee or lessor's lawyer will attend to stamping and presentation for registration of the lease instrument (if property title is issued).

If the contracting party is a corporate body, the constituent documents and resolutions will be checked to verify their authorisation to enter into the transaction and to execute the transaction documents.

Law stated - 1 October 2024

## Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Signing of the contract documents and closing need not be done with all parties present at the same time and/or at the same place but they need to be witnessed or attested accordingly. The signing of land-related instrument for Malay reserved lands, has to be attested by a land administrator. The property transaction need not be verified or confirmed by a government agency or representative (except where biometric fingerprint verification of the transfer instrument's signatories is required by the relevant land registry and offices in the State of Selangor), but the registrable instruments must be registered with the Registry.

Law stated - 1 October 2024

## Contract breach

I

**31** | What are the remedies for breach of a contract to sell or finance real estate?

The remedies for breach are usually provided under the sale or financing contracts. Typically, parties will agree, under the sale contract, on an agreed liquidated damages sum to be paid to or forfeited by the non-defaulting party upon termination. Alternatively, the non-defaulting party may apply for specific performance of the contract, but such remedy is at the court's discretion.

If there is payment default under the financing contract, the registered chargee may apply for an order for sale under the NLC and enforce any other securities.

Law stated - 1 October 2024

**Breach of lease terms****32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

The remedies for breach are usually provided under the lease or tenancy agreements (whether for commercial or residential property) which includes forfeiture of the security deposit if the tenant breaches, and the power of forfeiture under the NLC.

To distrain for arrears of rent, a landlord may apply to court for a warrant of distress directing a bailiff to distrain movable property found on the premises to realise the rent when they are sold. To recover possession from a tenant who continues to remain there, the owner must obtain a court order pursuant to the Specific Relief Act 1950.

Law stated - 1 October 2024

**FINANCING****Secured lending****33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Lenders providing financing in Malaysia must be licensed by the Malaysian Ministry of Finance or approved by the Central Bank of Malaysia (BNM). The main providers of real estate financing are licensed onshore commercial banks.

Statutory land charge is the predominant form of security taken by a lender to acquire legal and proprietary rights in the land instead of just contractual rights. The registration details endorsed on both the issue document of title and the register document of title are conclusive under the National Land Code (Act 828) (NLC).

If the property is without title, the creation of security is by way of an assignment of the relevant purchaser's rights and interests under the principal property sale and purchase agreement in favour of the lender.

Borrowing companies may enter into a specific debenture over the relevant property as an alternative to a statutory land charge which cannot be created due to ongoing land processes.

Law stated - 1 October 2024

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In lease financing, the lessee's rights and interests under the lease agreement will be assigned to the lenders. In head lease financing, the lenders would also require an assignment cum novation provision in all sub-lease agreements and all rental proceeds thereunder will be assigned to the lenders as security.

Law stated - 1 October 2024

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

The methods for creating and perfecting a security interest in property are:

- property with title – by the registered owner or lessee creating a statutory land charge in favour of the lender under the NLC; or
- separate title has yet to be issued – by way of an assignment. Such security typically includes the granting of powers of attorney by the property purchaser to the lender, of which such instrument must be registered with the High Court.

The details of such charge or assignment must be lodged with the Companies Commission of Malaysia (CCM) within 30 days of the creation thereof by the charging or assigning company, failing which the security is void against its liquidator and creditors.

Law stated - 1 October 2024

### Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Professional valuation on real estate security will be required by the lender from its approved third-party panel of valuers before loan disbursement to ascertain the market value as not less than that represented by the borrower. Such valuer or appraiser must be registered under the Register of Valuers, Appraisers, Estate Agents and Property Managers and issued with an authority to practise.

Law stated - 1 October 2024

### Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Borrowing in foreign currency and the giving of financial guarantees or security as collateral to foreign lenders are both regulated by the BNM. Such borrowing up to the equivalent of 10 million ringgit by resident individual borrowers or 100 million ringgit by resident borrowing entities is permitted. The giving of such financial guarantee (which includes a security or charge over real estate) by a non-bank resident is allowed to secure a non-resident's borrowing, except where:

- such non-resident borrower is a special purpose vehicle; or
- the underlying borrowing is being utilised by the resident; or
- the resident has entered into a formal or informal arrangement to make repayment of the borrowing in foreign currency other than under a call-upon of a financial guarantee by the lender in the event of default.

The BNM's prior approval is required for any such borrowing in excess of the said threshold or the giving of such financial guarantee in the said exceptions.

Law stated - 1 October 2024

### Loan interest rates

**38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

The bank lending rate is set by the BNM which has issued guidelines to regulate the charging of default interest by local licensed financial institutions. These institutions are required under the guidelines to use the standardised base rate as the reference rate for the pricing of retail financing facilities irrespective of the type of property.

Law stated - 1 October 2024

### Loan default and enforcement



- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Remedies against a defaulting debtor depend on the terms of the security instruments which may include a lender's right to appoint a receiver and manager to deal with the secured assets and realise their value to repay the outstanding loan sum. Generally, enforcement actions must commence within six years of the accrual of the payment default to avoid being time-barred by the statutory limitation laws.

In Peninsular Malaysia, the property foreclosure process is prescribed in the NLC. Depending on the registration office of the property title, the lender as registered chargee may:

- registration at land registry – apply to the High Court for an order for sale by way of court auction; or
- registration at land office – submit an NLC-prescribed form and supporting documents to the relevant land administrator for an order for sale by way of public auction.

Law stated - 1 October 2024

### Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Secured lenders are entitled to recover from borrowers or guarantors such deficiency including any chargeable late payment interest by proving their debt like any other unsecured lenders. Recovery actions generally must commence within six years of the accrual of such deficiency. There are no limitations on the amount of deficiency or prescribed method to calculate the same.

Law stated - 1 October 2024

### Protection of collateral

- 41** | What actions can a lender take to protect its collateral until it has possession of the property?

The lender of a defaulting company may appoint a receiver and manager (R&M) if empowered under the relevant security instrument. The appointed R&M will act within the scope of powers prescribed therein and/or under the Companies Act 2016, such as

extending control over the secured assets and carrying out business dealings arising therefrom to maximise their realised value.

Under Malaysian company laws, a company may enter into a moratorium by way of an application to the court pre-insolvency. There are also claw-back provisions for setting aside of a company's pre-insolvency transactions which have the effect of favouring one creditor over other creditors on its winding-up.

**Law stated - 1 October 2024**

## Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Recourse of a lender is provided by the relevant laws and the terms of the security instrument with respect to its collateral.

A general debenture which creates a fixed and floating charge over all the borrowing company's available assets and undertakings will provide recourse to all such assets. The lender's right to appoint a receiver and manager to deal with such assets is derived from the security instrument and the Companies Act 2016.

The claims of unsecured lenders on the insolvency of a borrower or charging or guaranteeing company will rank after secured lenders who will have first priority in claims over the relevant secured assets and preferential lenders under the laws.

**Law stated - 1 October 2024**

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

No.

**Law stated - 1 October 2024**

## Credit enhancements

- 44** | What other types of credit enhancements are common? What about forms of guarantee?

Credit enhancement by way of individual or corporate guarantee is common. There are no standard net worth or liquidity requirements for individual and corporate guarantors, respectively.

Law stated - 1 October 2024

## Loan covenants

45 | What covenants are commonly required by the lender in loan documents?

Standard covenants apply to all asset classes, including:

- to obtain and maintain all requisite authorisations;
- to provide further security and negative pledge;
- not to incur further indebtedness;
- on pari-passu ranking of all unsecured liabilities;
- to notify the lender of events of default or material adverse change to the borrower's financial position;
- to maintain insurance over the borrower's assets;
- to comply with all applicable laws;
- not to part with assets of substantial value; and
- to perform all obligations contained in the loan agreements.

Law stated - 1 October 2024

## Financial covenants

46 | What are typical financial covenants required by lenders?

The lenders typically require from a borrowing company:

- financial covenants, including financial reporting requirements, maintenance of minimum balance in debt service account and periodic appraisal of its financial performance; and
- if granted a loan on a clean basis, covenants to maintain a specific debt-to-equity ratio and debt service coverage ratio, and not to pay dividends or similar distributions unless these ratios are met.

Law stated - 1 October 2024

## Secured movable (personal) property

47 |

What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Different types of security interest entail different perfection formalities prescribed by the relevant laws. Typically, control provisions relating to a security interest are found in the relevant security instrument.

The creation of a security interest in movable (personal) property depends on the subject property. The instrument of security may be by a general or specific debenture, charge or assignment.

Under Malaysian law, an absolute legal assignment of rights must be in writing, and a written notice of such assignment must be given by the assignor to the counterparty for the lender as assignee to be entitled to make a direct claim to the counterparty in the event of the borrower's default.

The perfection of a security interest will generally also be subject to applicable stamping and registration requirements, including the lodgement with the Companies Commission of Malaysia and registration of the powers of attorney with the High Court.

Law stated - 1 October 2024

### Single purpose entity (SPE)

48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders do not generally require each borrower be an SPE. In project financing, however, a borrower is usually an SPE set up to hold project-related assets. Lenders commonly take security over the SPE shares by way of share charge to provide an alternative enforcement option. The concept of an independent director of SPEs to be appointed by lenders is not adopted.

Law stated - 1 October 2024

## UPDATE AND TRENDS

### International and national regulation

49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

The Hulu Selangor District Land Office in the State of Selangor has, with effect from 19 August 2024, and the Kuala Selangor District Land Office in the same state has, with effect from 1 October 2024, implemented biometric fingerprint verification for all

transfer instruments irrespective of the property value, in their efforts to safeguard property ownership against fraud in title document, identification and attestation.

The Environmental Quality Act 1974 was amended on 7 July 2024 to impose several new offences and enhance penalties for a number of existing offences thereunder. Such enhanced penalties will hopefully have the desired effect of becoming a stronger deterrent against the flouting of environmental laws and compelling businesses to raise their level of compliance.

Following the rapid growth of data centre investment in Malaysia, particularly in the State of Johor, the Johor State Town and Country Planning Department (PLANMalaysia Johor) published the Johor State Data Centre Development Planning Guidelines in April 2024 with the objective, among others, of facilitating industry players in referencing technical requirements for data centre development in the State of Johor.

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Law stated - 1 October 2024

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# Portugal

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The Portuguese legal system is based on civil law with written legislation as the main source of law. Real estate laws apply to the entire country, with some regional variations in Madeira and the Azores, and some local real estate taxes that vary by municipality.

Portuguese judges cannot create law but only interpret and apply it. Case law is merely a complementary source of interpretation and application of the law as the rule of precedent does not exist in Portugal.

The Civil Procedure Code provides for two types of interim remedies: specified (intended to protect against a risk of injury specifically provided for and regulated by the law) and common. The Civil Code and the Civil Procedure Code list the following types of evidence:

- admission;
- documentary evidence;
- expert evidence;
- inspection;
- witness evidence; and
- presentation of movable or immovable objects.

Some types of contracts must be in writing but, depending on the subject matter, an oral contract may be admitted.

Law stated - 6 October 2023

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

The land registry offices are the public bodies responsible for the public system of registration, which is essential to prove the title over a property. Under the principle of priority of registration, if there are multiple entries in the land register of incompatible rights over the same property, the right that was registered first prevails (even if the latter was created prior to the registration date). Ownership of a property is transferred by a deed of sale and purchase, and not by registration. The transfer is subject to mandatory registration at the Land Registry Office and this must be filed within two months of the date of completion (a fine is due after that period). Failure to register means the purchaser is not protected against third parties and cannot transfer the property. Mortgages must be registered to be valid.



Law stated - 6 October 2023

## Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Only facts determining the constitution, recognition, transfer or other changes of in rem rights over a property can be registered (eg, acquisitions, leases with a duration of more than six years, mortgages, easements, horizontal property). Registration can be requested in person, by courier or electronically through an active digital signature, either by the interested party or by a lawyer, a notary or a paralegal. The application must contain all the relevant documents that prove the act to be registered. Registration fees are established in the Regulation on Fees for Registries and Notaries and are usually paid by the purchaser, except for cancellation of charges which are paid by the seller.

Law stated - 6 October 2023

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There are no exchange controls in Portugal and no currency restrictions on non-residents. Residents and non-residents are free to hold deposits in any currency with Portuguese banks. Companies and other investment vehicles in Portugal can also organise their books and financial statements in a currency other than the euro (ie, in their functional currency). In this case, parallel books and financial statements in euros must also be prepared and organised.

Law stated - 6 October 2023

## Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange controls in Portugal and no currency restrictions on non-residents. Residents and non-residents are free to hold deposits in any currency with Portuguese banks. Companies and other investment vehicles in Portugal can also organise their books and financial statements in a currency other than the euro (ie, in their functional currency). In this case, parallel books and financial statements in euros must also be prepared and organised.

Law stated - 6 October 2023

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The owner/occupier must comply with legal requirements and do all necessary maintenance and conservation works provided under law or contractually agreed. This includes urban planning and environmental requirements, such as, for instance, the performance of actions for the prevention of rural wildfires and the adoption by employers (regardless of whether they are the owner or the tenant) of measures to ensure that workers' exposure to asbestos is reduced to a minimum and not above the legal exposure limit, which may entail the removal of asbestos. Also, the owner/occupier is liable for any damage caused by the property to third parties, unless it is proven that the owner/occupier was not at fault or that, even with due diligence, the damage could not have been avoided. However, if such damage was caused by construction defects, the seller may be liable towards the purchaser within five years (10 years for structural defects in case of consumers acquiring from professional entities) and the contractor can also be required to remedy any damage suffered by the owner or a third acquiring party within the guarantee period of five years.

The current owner will always be liable towards third parties and the authorities for any illegal works done by a prior owner or prior tax debts attached to the property. However, if a prior owner is responsible for the damage or infraction, the current owner has the right of redress against them.

In addition, in the case of contamination of soil and water lines, where there is no level of contamination likely to be significant for human health, if it is not possible to hold the contaminating operator liable, and the owner needs to carry out construction work involving the excavation of contaminated soil, the owner must first license the soil remediation (decontamination) work and perform it accordance to the licensed terms.

Law stated - 6 October 2023

## Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners may set forth in lease agreements that the tenants are obliged to carry out periodic analysis to assess contamination of soils and water lines, as well as asbestos levels.

Furthermore, owners can protect themselves from liability through insurance policies. Fire insurance is mandatory, both for the autonomous units and the common parts. There are other mandatory civil liability insurance policies for certain activities (eg, private healthcare units, labs and pharmacies, industrial activities with great impact on the environment and on peoples' safety and health).

Some operators (depending on their activity) must set up one or more financial guarantees that enable them to assume the environmental liability inherent to their activity, by taking out insurance policies, obtaining bank guarantees, participating in environmental funds or constituting own funds reserved for this purpose. The law does not define minimum insured capital, so it should be obtained after a technical audit assessing the environmental risk. If constituted through bank guarantees, the financial institution will be liable under the terms established in the guarantee.

Environmental insurance policies are available on the market, even for operators who are not legally obliged to contract them.

Law stated - 6 October 2023

## Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The governing law must comply with Regulation (EC) No 593/2008 of the European Parliament and of the Council. Under this Regulation, where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. In the case of a transaction or lease involving a property located in Portugal, Portuguese law cannot be excluded.

Law stated - 6 October 2023

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The courts that have subject-matter jurisdiction over real estate disputes are the common judicial courts that deal with civil and criminal cases, with jurisdiction in all matters not allocated to other judicial bodies. If the dispute involves the state or relates to potentially public property, the administrative courts have jurisdiction.

A party does not have to be qualified to do business in Portugal or to be allowed to submit claims or enforce remedies in the Portuguese courts.

Law stated - 6 October 2023

## Commercial versus residential property

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- 10** | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Ownership only differs regarding the warranties in the purchase of a property, as the period for complaints about defects is longer for consumers. The urban leasing regulations establish specific rules depending on whether the lease is for residential or non-residential purposes. Specific regulations govern residential mortgages (loan to value with a maximum ratio of 90 per cent) and enforcement proceedings for family homes (special protection against eviction).

**Law stated - 6 October 2023**

### **Planning and land use**

- 11** | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Development, construction and the use of real estate must comply with the urban planning legislation and all the administrative procedures regarding licensing and use permits. These are based on the principle that urban development must comply with all relevant plans governing the occupation, use and transformation of land. Territorial management instruments are divided into different levels: national, regional and municipal. In Portugal, the Legal Framework of Urban Development and Construction (RJUE) and the General Regulation of Urban Construction (RGEU) regulate the development, construction and use of real estate. The municipal bodies are responsible for these administrative procedures, including construction and use of buildings and division of land into separate plots. At the beginning of 2024, an amendment to the RJUE came into force which aimed to increase the exemption of urban planning operations from these procedures and to shift the responsibility for compliance with the legal requirements to private developers. Depending on the development, other public authorities could also be called on to give binding opinions. Failure to comply with planning decisions or zoning requirements can lead to fines, embargoes, prohibition on the use, demolition and compulsory works. Planning or zoning decisions can be appealed to the administrative authority and the courts.

**Law stated - 6 October 2023**

### **Government appropriation of real estate**

- 12** | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Properties and the rights inherent to them may be subject to compulsory purchase or condemnation for reasons of public utility under the powers, purposes or object of the expropriating entity, upon contemporaneous payment of fair compensation under the

Portuguese Expropriation Code. When the need for expropriation arises from a public calamity or from internal security or national defence requirements, the state or the public authorities may take immediate administrative possession of the assets to meet the need that determined their intervention, without any prior formality, following, without further steps, the provisions of compensation established for litigious proceedings.

Law stated - 6 October 2023

## Forfeiture

- 13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Whenever there are situations that may put the safety or health of people at serious and imminent risk, the public authorities may, as a matter of urgency and without hearing the interested parties, order the immediate suspension of the activity and temporary closure of the property, in whole or in part.

Illegal use of buildings can result in an order from the local authority to cease the use, and if the order is not complied with, the occupants of the building or unit in question can be evicted without compensation.

Law stated - 6 October 2023

## Bankruptcy and insolvency

- 14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Under Portuguese law, insolvency is a process of universal execution whose purpose is to satisfy the creditors through a recovery plan, under which measures may be approved, including a haircut of principal and interest, and amendment of maturities or interest rates, or, if not possible, through the liquidation of the insolvent debtor and the distribution of the proceeds (if any) to the creditors.

As for outstanding rent or expenses, any creditor can submit a credit claim in the insolvency proceedings, as a rule, within 30 days of publication of the insolvency declaration. Thus, a lender's claim would be a claim on the insolvency and would compete with the other creditors' claims, so it may be satisfied in whole or in part. Furthermore, the creditor would be entitled to participate in the creditors' meetings and have the right to vote on any plans submitted.

The Insolvency Code has special rules on lease agreements where the tenant is the insolvent party.

Law stated - 6 October 2023

## INVESTMENT VEHICLES

## Investment entities

- 15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Investment entities can simply take on the form of a limited liability company (Lda) or a public limited company (SA), both of which shield owners from liability and can be shaped into real estate trading companies in their articles of association (thus benefiting from a property transfer tax exemption on acquisition of properties for resale if all applicable conditions are met). Branches of foreign entities can and must be established when regularly doing business in Portugal. However, specific collective investment undertakings (OICs) such as securities or real estate investment companies or funds as well as real estate investment trusts, can also be established (these also shield ultimate owners from liability). These are not pass-through entities but benefit from a specific tax regime under which investment income, property income and capital gains are generally excluded from the determination of the taxable income of the OIC. Moreover, the entities are exempt from the municipal surcharge and state surcharge. Income earned by resident participants (companies and individuals) from OICs is taxed in general terms, while property income distributed to non-residents is taxed by applying a withholding tax rate of 10 per cent. Other income is exempt.

In contrast, income obtained through venture capital funds will only be taxed at the level of the unit holders. Other possible forms of investment entities include joint ventures and economic interest groups (ACEs) or unincorporated joint ventures (under a consortium or profit-sharing arrangement).

Law stated - 6 October 2023

## Foreign investors

- 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

The most common forms used for doing business in Portugal are limited liability companies, public limited companies or established branches of foreign entities. Other vehicles, such as investment funds or investment companies, are also available, particularly for tax reasons, although setting them up is more complicated and time-consuming, and the incorporation and running costs are much higher. They are used in some cases of more complex investment structures or when the aim is to raise money from other investors.

Law stated - 6 October 2023

## Organisational formalities

- 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences

for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The equity capital of public limited companies by shares is of €50,000. They must initially have a minimum of five shareholders (or one, if incorporated by a corporate entity). Additional formalities will apply if the shareholders make contributions in kind.

For limited liability companies by quotas, the minimum initial share capital is €2 and a minimum of two shareholders is required. The law also allows limited liability companies to be formed by a sole quota-holder and the minimum initial amount of the share capital is €1.

Public limited companies and limited liability companies by quotas must both be incorporated by a deed of incorporation and registration with the Commercial Registry, and a list with details of the ultimate beneficial owner(s) is required.

A SIGI must be incorporated as a public limited liability company with a minimum share capital of €5,000,000 and maintain its registered office in Portugal. SIGIs may be newly incorporated by a sponsoring entity, by private placement or a public offering, or they may be converted from other public limited liability companies or real estate collective investment schemes (real estate funds or companies). The tax rules for collective investment schemes also apply to SIGIs.

Law stated - 6 October 2023

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Ownership in Portugal comprises the full and exclusive right of use, enjoyment and disposal of the property, although fiduciary ownership of assets located abroad is also accepted in the Madeira Free Trade Zone.

Co-ownership of property is admissible and surface rights (rights to build or maintain a construction on land owned by third parties) can be settled perpetually or temporarily and may be constituted by contract, will or adverse possession. The usufruct right is also legally allowed and gives its holder the powers of use, enjoyment and administration – during an agreed period or lifetime. The law imposes the sole limitation that the holder retains its form, substance and economic purpose. It is also possible for a building or a set of functionally interconnected buildings to be subjected to ‘horizontal property’ and condominium regulations.

The transfer or constitution of rights *in rem* is normally completed by a public deed executed before a notary, but it can also be executed by means of a certified private agreement, signed in the presence of a lawyer or a paralegal.

The assignment of use of properties may be agreed by a lease agreement under the Urban Leasing Law. The regime applicable to non-residential properties (such as retail, industrial

and offices) gives the parties more flexibility to negotiate the conditions of the lease when compared to residential leases. To assign the use of non-residential properties, services agreement (eg, if services are provided and not only the use of the premises is assigned) or an atypical contract of use of shop agreement (eg, if the premises are in a shopping centre or commercial complex and ancillary services are provided) can also be considered.

Law stated - 6 October 2023

## Pre-contract

### 19 | What are the typical pre-contractual steps?

Typical pre-contractual steps include letters of intent, binding and/or non-binding offers, memorandums of understanding or heads of terms. A reservation agreement to secure the property for a specific period of time could be agreed, to complete the due diligence process (property searches and research into and analysis of any relevant information) and to further negotiate the transaction terms and conditions. To reserve a property, the buyer may be asked to pay a specific amount. Parties should expressly agree whether the reservation payment is refundable at the end of the reservation period if the transaction does not go ahead or is converted into a deposit and initial part-payment of the price if the Parties agree to go ahead. Courts will not enforce non-binding agreements, but pre-contractual responsibility based on the violation of good-faith principles is provided by law and, in certain cases, attended by courts

Brokers are usually involved in transactions, on behalf of each of the contracting parties. The activity of brokers is regulated in Portugal and all real estate agents must be licensed by the Portuguese Real Estate Regulator (IMPIC). By law, real estate agency agreements must be executed in writing and include a minimum set of provisions. A broker cannot be remunerated by both parties for the same transaction and the broker's commission can be a fixed amount or a percentage of the property sale price.

Law stated - 6 October 2023

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

Whenever the conditions to complete the transaction are still to be met, the prospective seller and buyer can sign a promissory contract for sale and purchase in which they undertake to complete the transaction and set the terms and conditions for the transaction, such as conditions precedent to the definitive agreement (eg, completion of works, licensing, financing, due diligence, pre-emption rights to be notified, others). The promissory contract must be in writing and signed by the parties in person or by their legally appointed representatives, and the parties' signatures must be certified under Portuguese law. It is customary for the buyer to be asked to pay a deposit which – according to market practice – varies between 10 per cent and 20 per cent of the price. This payment is specifically regulated under Portuguese law and works both as an initial payment on



account of the price and, in the event of a breach of contract, as a penalty for the defaulting party. If buyers default, they lose their deposit and if sellers default, they must pay double the deposit to the buyer. As a rule, this deposit is paid directly to the seller and not held in escrow by any third party. Representations and warranties are normally based on the outcome of the due diligence exercise. Title to the property is evidenced by its land registry certificate, to be provided by the seller. The seller is usually responsible for all expenses relating to the cancellation of any charges over the property, taxes and mandatory contributions relating to a moment prior to the transfer deed of the property. The seller usually also bears the risk of loss until closing.

The definitive contract for sale and purchase is normally completed by a public deed executed before a notary, who will guarantee compliance with the legal requirements for the transaction to take place. Whenever there are any special arrangements desired by the parties or financing arrangements, they are governed in ancillary documents that are annexed to the deed.

Law stated - 6 October 2023

### Environmental clean-up

- 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Environmental law is built on a logic of accountability, which determines the assumption, by polluting agents, of the consequences of their actions and omissions on natural resources; this is to say that environmental liability is attributed to the subject that caused the damage. Specifically, in the case of environmental damage to soil and water (ie, soil contamination which creates a significant risk to human health and adverse and significant water contamination), as well as in situations where the contamination has caused damage to third parties, remediation can be demanded for 30 years from whoever carries out the activity subject to the environmental responsibility legal regime that produced the damage. Notwithstanding, public authorities may intervene as a last resort if the operator does not act accordingly or if it cannot be identified; also, in contamination situations that are not considered environmental damage, if the current owner wishes to excavate contaminated soil and the liable operator is not identified, the owner may have to take on the remediation (decontamination) operations under the terms of a previous licence that was obtained.

It is possible to use indemnities or other contractual agreements to transfer liability. However, these types of contracts do not bind regulators, which, in the case of environmental damage as defined by law, will always consider the party responsible for the activity that harms the environment. The contracts might, however, have an influence on the regulators, especially where the damaging activity continues and it may be difficult to establish when the fact that caused the damage occurred and establish a causal link with an operator.

Law stated - 6 October 2023

## Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Promissory agreements typically include lease related representations and warranties (eg, leases are being complied with; rent roll is accurate; no termination notices have been provided, etc) and covenants to be observed between signing and closing (eg, the seller will not execute new leases or terminate or amend existing leases without the consent of buyer; the seller will not execute any brokerage agreements for leases, etc).

Representation and warranties usually survive completion (time limits and cap compensation amounts usually depending on the size of the transaction). Estoppel certificates are not customary.

Law stated - 6 October 2023

## Leases and real estate security instruments

- 23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Security instruments, such as mortgages, are often created over real estate.

Recent court decisions determined that when a lease is completed over a property subject (before or after the lease) to a security instrument, such lease will not prevent the enforcement of the security instrument and will remain valid and in force in case of judicial sale as a result of enforcement of the security instrument and/or of judicial sale occurring within an insolvency proceeding.

Lenders usually require that upon the creation of security instruments the borrowers undertake not to encumber the property without the lender's prior consent. Lenders may also subject their consent to the creation of an assignment of revenues mechanism, according to which the rents under the lease are allocated to the payment of the debt.

The above applies to all type of leases.

Law stated - 6 October 2023

## Delivery of security deposits

- 24 |

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

In transfers of the property by the landlord, the new owner automatically assumes the landlord's position, with the terms of the lease in force between the tenant and the new owner remaining unchanged (an assignment of the contractual position is not required). Guarantees provided by the tenant to the prior owner or landlord remain in force but must be assigned; if consent for the assignment is not foreseen, it must be previously obtained. Security deposits are transferred to the buyer (via direct transfer or adjustment to the purchase price). Leases customarily have annual rent reviews (which is the subsidiary regime, if nothing different is contractually set forth).

Law stated - 6 October 2023

### Due diligence

25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Buyers are advised to conduct technical, commercial, legal and other types of due diligence to evaluate the status of the property, check the ownership title, licences and permits, pre-emption rights, tax debts and other charges (eg, condominium), covenants and encumbrances (whether or not registered at the Land Registry Office), etc. Representations and warranties, specific indemnities and conditions precedent to the transaction (eg, obtaining a licence or insurance, a registry correction or a mortgage cancellation, etc) are normally based on the outcome of the due diligence. Provisional registration at the Land Registry Office is also common in asset deals to guarantee priority of the acquirer. In some cases, registry of the promissory agreement itself (with *erga omnes* effects) is also required by the buyer. Depending on the amount of the transaction, warranty and indemnity insurance may also be considered.

Law stated - 6 October 2023

### Structural and environmental reviews

26 | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

A technical engineering or environmental due diligence or inspection may be performed and can be important to check the quality of the construction and compliance with all applicable legislation and regulations. Depending on the results of the inspection, the

parties may agree to a price reduction or partial price retention, and compensation in the case of future sanctions (including fines) or obligation of proceeding to corrective actions may be agreed.

Environmental insurance, or other financial guarantee, is mandatory for certain activities, but environmental insurance policies are available on the market, even for operators who are not legally obliged to contract them.

Law stated - 6 October 2023

## Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lease agreements are usually reviewed by lawyers, namely to check the title of the landlord to assign the use of the premises, to ensure compliance with all the mandatory issues (eg, use permits and energy certificates) and to review the provisions agreed between the parties, such as those regarding the duration, termination, renewal, insurances, guarantees, obligations concerning costs and works, and its conformity with the applicable law. Duty of care agreements are usually requested by the financing banks.

Law stated - 6 October 2023

## Other agreements

28 | What other agreements does a lawyer customarily review?

A lawyer customarily reviews the past acquisition deeds and all the agreements relating to a property, such as brokerage, property management, development, construction, architectural, services, maintenance, and loan agreements, as well as easements, restrictive covenants, supply agreements, and guarantees associated with any of the above.

Law stated - 6 October 2023

## Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The timing between the contract and closing depends on the agreed conditions precedent (eg: notification of entities entitled to a pre-emption right, obtaining financing, carrying out repairs, property licensing, etc) and how long these take to be fulfilled. A down payment is usually paid with the promissory contract and the remainder of the price on closing (upon transfer of ownership). Normally, a closing checklist is organised by a lawyer to list

all steps and documents required – including documents to verify powers to represent each party – identifying the party responsible for them, which helps the parties monitor the closing deliverables. A typical list of deliverables contains all the documents pertaining to the building such as licences, plans, certificates, original agreements and bank guarantees, pre-emption right notices, payment receipts, etc.

Law stated - 6 October 2023

### Closing formalities

- 30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

A contract for sale and purchase (asset deal) is normally completed by means of a public deed executed before a notary, who will guarantee compliance with the legal requirements and documents for the transaction to take place, these being, among others that might apply, title to the property (land registry certificate), a tax certificate, an energy certificate, an official document with the technical characteristics of the unit (if applicable), tax payment receipts (stamp duty and property transfer tax (IMT)), pre-emption rights' waivers, condominium charges certificate and a declaration of the Ultimate Beneficial Owner. Nonetheless, the law provides that the definitive agreement can also be executed as a certified private agreement, signed in the presence of a lawyer or a paralegal. As the deed is always executed in Portuguese, non-Portuguese speaking parties should appoint an independent translator. Whenever there are any special arrangements agreed by the parties or financing arrangements, they are governed in ancillary documents that are annexed to the deed. In 2022, a temporary legal regime applicable to the performance, via videoconference, of authentic acts and authentication of private documents, including sale and purchase of real estate deeds (through the Distance Services Platform) entered into force. This new service ran until April 2024, after which its continuation should have been evaluated. However, for the time being, it has not yet been renewed.

A lease contract must be made in writing and identify the parties, premises, purpose (residential or non-residential), the rent, use permit and energy certificate. A lease for a purpose different to the authorised use under the use permit is null and void.

In a share deal, the shares are transferred by private agreement between the parties. In certain cases, the acquisition of shares in public limited liability companies must be notified to the company. It should also be notified to the tax authorities and regulatory bodies. Acquisitions of quotas in private limited liability companies must be registered at the Commercial Registry.

Law stated - 6 October 2023

### Contract breach

- 31** | What are the remedies for breach of a contract to sell or finance real estate?

Specific performance is a legal mechanism that allows a non-defaulting party to enforce the completion of a promised sale in court. The mechanism can be used when all the conditions for closing are met but the other party refuses to complete the transaction or breaches the promissory agreement. If the court orders specific performance, it will have the same effect as a deed of sale and purchase and the registration at the Land Registry will be made on the basis of the court order.

The deposit (down payment) is specifically regulated under Portuguese law and works both as an initial payment on account of the price and, in the event of a breach of contract, as a penalty for the defaulting party. If a buyer defaults, it loses its deposit and if the seller defaults, it must pay double the deposit to the buyer. In contrast to many other jurisdictions, as a rule, this deposit is paid directly to the seller and not held in escrow by any third party. Despite this general rule, the parties may agree on specific solutions to secure the reimbursement of the deposit if the transaction is not completed, either due to a breach of contract or for any other external reason, such as the exercise of any applicable pre-emption rights.

Law stated - 6 October 2023

### Breach of lease terms

**32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Either party may terminate the lease agreement whenever there is a breach which, due to its gravity or consequences, renders the subsistence of the lease non-demandable to the other party.

In addition, the applicable Portuguese lease regulations establish a non-exhaustive list of cases of default justifying a landlord's decision to terminate the lease contract. The landlord's termination must be declared judicially except when based on the tenant's opposition to works ordered by public authorities or on a delay equal to or higher than three months in the payment of the rent, charges, costs or expenses or delay for a period higher than eight days, in the rent payment, for more than four times, in a row or interpolated, in a period of 12 months with reference to each agreement.

In the case where a tenant does not vacate the premises after lease termination, the landlord may resort to the Landlord and Tenant Desk (*Balcão do Arrendatário e do Senhorio*) to obtain eviction.

A landlord's failure to perform works (if the landlord is obliged to do these works) and if the omission compromises the habitability of the leased premises and, in general, the suitability of the leased premises for the use provided for in the contract, constitutes a breach that gives the tenant the right of termination.

Law stated - 6 October 2023

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

In Portugal, real estate projects are usually financed by security-backed financing, which usually covers all stages of the property development (subject to the milestones and utilisation conditions contractually agreed). Banks are the typical providers of real estate financing in Portugal but direct lenders are increasingly starting to become significant players in the market.

A facility agreement secured by a mortgage and additional security is the most common financing and security method for real estate projects in Portugal. Securities usually associated with property financing comprise mortgage of property, assignment of income, pledge of shares or quotas, assignment of credits as security, pledge of bank accounts or sureties.

A mortgage creditor is not entitled to benefit from a right of appropriation over of the mortgaged assets under Portuguese law, as only judicial enforcement is permitted. Thus, a mortgage is commonly combined with a pledge over the shares or quotas representing the share capital of the borrower to enable the step-in of the lender. A pledge over shares might benefit from the financial collateral regime which enables the lender to enforce the pledge and the right of appropriation over the shares and benefits from an insolvency protection regime which permits the enforcement of creditor's appropriation rights even in the context of an insolvency of the collateral grantor. A commercial pledge over quotas can also include appropriation rights but it does not benefit from the same insolvency protection regime.

The assignment of income arising from immovable assets (commonly, the rent) in favour of the lender is also a typical security (it must also be registered at the Land Registry). A similar security is the pledge of credits, which captures other types of credits not covered by the assignment of income. In addition, a pledge of operational bank accounts (notably for receivables) is also a typical security and subject to the financial collateral regime.

Law stated - 6 October 2023

### Leasehold financing

- 34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The tenant's interest in the lease is a mere contractual right that cannot be given as collateral in favour of the lender. Thus, the common structure in Portugal for leasehold financing is the one under which the bank acquires the real estate asset and then enters into a financial leasing agreement with the lessee (with an option to buy for a residual value).

Law stated - 6 October 2023

## Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

The creation of security interests over real estate assets located in Portugal is, under the applicable conflict of laws rules, mandatorily governed by Portuguese law. But obligations secured thereunder may be subject to foreign law.

Mortgages are created by means of a notarial deed, which is a contract made before a notary public. However, to be fully valid and enforceable it must be registered at the Land Registry.

The mortgage automatically covers all the fixtures incorporated in the property pursuant to the exercise of construction rights. Together with the mortgage, incomes arising from the real estate assets are usually assigned to the lender as security for the payment of the financial obligations.

Law stated - 6 October 2023

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

The appraisal of the immovable property must as a rule be done by real estate appraisers registered with and regulated by the Portuguese Securities Exchange Commission.

The property valuation is a requirement for any mortgage credit agreement (subject to particular rules on consumer mortgage credits) and might be requested by the lender or borrower.

Law stated - 6 October 2023

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

The provision of lending activities in Portugal is a licensed activity that may only be conducted by entities with a local licence or benefiting from EU passport regime for credit institutions. These requirements apply whether services are provided to consumers or



professional clients. Banco de Portugal oversees compliance with prudential and business conduct rules.

In turn, providing collateral does not trigger any licensing requirements, governmental permissions or any other restriction regardless of the lender's home state. Therefore, a lender from another jurisdiction may have loans secured by Portuguese immovable or movable assets. However, there are certain assets (eg, those located in the public domain or connected to public services) that cannot be pledged as collateral.

Mortgages are typically created by means of a notarial deed. Other connected security agreements are also typically entered into before a notary, as such a document would be an enforcement title and could be directly enforced.

Both the financing and the granting of collateral (if not granted and registered simultaneously upon execution of the financing agreement) is subject to stamp duty at a rate of 0.5 per cent or 0.6 per cent of the value of the financing or the secured obligations, depending on whether the maturity is below or above five years.

**Law stated - 6 October 2023**

### Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Property loans can be contracted with a variable, fixed or mixed interest rate.

The reference interest rate generally corresponds to the EURIBOR, the most common being EURIBOR at three, six and 12 months. EURIBOR replacement language is usually included, but no replacement index is typically indicated. The spread is negotiated and freely defined by the lender for each agreement, taking into account its cost of financing, the borrower's credit risk, the loan-to-value ratio and the security package. Fixed rates are now more common due to the current interest rate hikes.

Real estate financing agreements granted by credit institutions are not subject to usury limitations or other types of caps or limitations on interest rates. In the event of arrears, credit institutions may charge default interest. Default interest is capped at a maximum annual surcharge of 3 per cent, which is added to the compensatory interest rate. The capitalisation of default interest is not permitted, except in the case of debt restructuring or loan consolidation.

**Law stated - 6 October 2023**

### Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

In the case of default of the secured obligation, the mortgage creditor cannot appropriate the mortgaged asset and must initiate enforcement proceedings requesting a judicial sale. Nevertheless, it will take priority over other creditors whose claims are not preferential or who have no registered priority. In the enforced sale, assets are transferred free of any liens and of any other real rights with no registration prior to any seizure, pledge or guarantee.

Enforcement to pay a fixed sum of money where the creditor's claim is backed by a mortgage depends firstly on the enforced obligation being certain, due, and net. Where the mortgage creditor wishes to enforce mortgages constituted in its favour, the enforcement action must be brought against the owners of the assets, even if these are not its debtors.

The mortgage creditor will also be entitled to sue the debtors in this enforcement. Thus, where enforcement is brought by the mortgage creditor only against a third-party owner of the asset and if it is established that the mortgaged asset is insufficient, the creditor can ask for the action to continue against the debtor to fully satisfy its claim. Any creditor may obtain the suspension of the enforcement to prevent the payments by demonstrating that the recovery of the company or the insolvency of the debtor was requested.

It is very difficult to define the average duration of enforcement proceedings, but, in our experience, enforcement proceedings for the payment of a fixed sum of money, where the creditor's claims are secured by a mortgage, normally takes between 18 and 36 months (longer if there are any appeals). This period also varies depending on which court has territorial jurisdiction.

**Law stated - 6 October 2023**

### Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Lenders are entitled to recover money judgments against borrowers or guarantors for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure. There are no limitations on the amount or method of calculation of the deficiency.

**Law stated - 6 October 2023**

### Protection of collateral

- 41** | What actions can a lender take to protect its collateral until it has possession of the property?

The purpose of a mortgage is to provide security for a loan against property, rather than facilitating possession of the property. For this reason appropriation of the property in the

case of default is prohibited. The concepts of receivership and mortgagee in possession are not recognised under Portuguese law.

A mortgage must be enforced in court. Therefore, creditors enforcing a mortgage can only be paid from the proceeds of a forced sale of the mortgaged property and the debtor's other assets can only be pursued if the proceeds of sale are insufficient to pay the debt in full. In enforcement, the property can be sold in several ways, such as sealed bids, private negotiations and auctions. The creditor can also ask for the property asset to be handed over directly to it.

During a foreclosure, a lender may solely collect rents with priority over the remaining creditors in the enforcement proceedings, provided it has a security interest over the rents (eg, a pledge, an assignment of income or even an assignment by way of security). Otherwise, mortgages will not cover the rent arising from lease agreements over the mortgaged property.

Despite the above, upon an event of default, there are no restrictions on the parties agreeing that the outstanding balance should be repaid by way of deed in lieu of the mortgaged property. If there is a financial pledge over the borrower's shareholdings, the lender may also obtain an effect similar to entering into possession of the property in question. Under certain conditions the acquisition of the borrower's shareholdings by the financial pledge beneficiary is allowed and, consequently, so is the indirect acquisition/control of the property.

**Law stated - 6 October 2023**

## Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

The creditor, usually the lending bank, can pursue the debtor's other assets if its security over the property is not sufficient to pay the debt. Consequently, the creditor will first enforce the mortgage and if its claim is not satisfied. It can seek enforcement against the debtor's remaining assets. Ultimately, the creditor can file a petition for insolvency in the event the remaining borrowers' assets are insufficient for the repayment of the outstanding debt. Typically, the security documents do not make reference to having recourse to all assets of the borrower, because this is the general rule under Portuguese civil law.

**Law stated - 6 October 2023**

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is common to find cash management clauses in property loan agreements. This is a standard clause included by a lender in a loan agreement to restrict the borrower's use of income generated by the property secured by the loan, other than for approved purposes (eg, permitted payments to permitted distributions to investors in the case where certain financial covenants and project milestones are met).

Law stated - 6 October 2023

### Credit enhancements

44 | What other types of credit enhancements are common? What about forms of guarantee?

Real estate financing projects typically provide for guarantees and security to secure the construction of the project until its completion. These are conceived by the parties to reach the stage at which the project may start operating to generate revenues in the business-like manner on which the project was based.

For example, utilisation requests made during the term of the loan agreement may depend on achieving the milestones and the likelihood of complying with the works schedule by completion (which is typically assessed by an external or independent appraiser). Interest reserve or cash reserve accounts are also typical in financing agreements to develop real estate projects.

Law stated - 6 October 2023

### Loan covenants

45 | What covenants are commonly required by the lender in loan documents?

Covenants can be financial, meaning they pertain to some sort of financial requirement (such as loan to value or debt service coverage ratio), or operational, meaning they pertain to property operations. Alternatively, they can relate to the loan's collateral.

An operational covenant relates to the day-to-day operations of a property and its aim is to give the lender an early warning about any material deterioration in the performance of the property or the borrower's financial situation. Common examples include reporting obligations (including material adverse changes) or meeting certain milestones.

Collateral covenants pertain to the collateral securing the loan. Common examples include negative pledges or restrictions to disposals. The purpose of these types of collateral covenants is to ensure the lender will continue to maintain its first position in the repayment priority in the event of default.

A borrower's failure to meet these covenants is typically an event of default event under the financing agreements (remedy periods are also typical).

Law stated - 6 October 2023

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

Property projects and developments usually have financial covenants in line with global market practice (ie, focused on financial ratios), notably: loan-to-value ratios, interest coverage ratios, net debt/EBITDA and debt-service coverage ratios.

Under real estate financing involving non-consumers, these financial covenants have particular relevance as they could involve reinforcing security whenever the ratios fall below what was agreed. In this event, if the borrower does not reinforce the collateral following a lender's request, this constitutes a default event. Therefore, the parties typically give undertakings and reporting covenants (notably, the periodic provision of financial statements and interim balance sheets or periodic real estate valuations) to ascertain compliance with the above ratios.

Law stated - 6 October 2023

## Secured movable (personal) property

### 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The concept of a security interest is very broad under Portuguese law. In relation to security interests in movable property, the most common category of security is the pledge. This may be created over tangible assets, such as equipment and machinery, or intangible assets, such as accounts, equity interests, and insurance receivables in connection with the project or development. Nonetheless, in real estate financing, the parties typically create additional securities to strengthen the security package securing loans, notably, by way of assignment of receivables, bank guarantees or sureties, etc.

Under the Portuguese Civil Code, a pledge corresponds to an *in rem* security which gives creditors preferred payment status over other creditors, for the value of a specific movable asset or amount of other credits or asset rights which cannot be mortgaged. While the Portuguese Civil Code establishes that only the party that has the right to dispose of the movable assets can create pledges over them (ie, the owner), a commercial pledge or financial pledge (created over funds or securities), subject to certain requirements, grants the creditor the right of appropriation over the security assets.

The concept of 'control agreement' is not common in Portugal, nor it is required to perfect a pledge (or even a security interest). In effect, a symbolic transfer of possession is considered by scholars and case law to be sufficient to perfect a pledge.

Law stated - 6 October 2023

## Single purpose entity (SPE)

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- 48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

It is not a requirement under Portuguese law and in our experience lenders do not require that each borrower be an SPE. However, this is market practice for certain real estate developments to ring-fence the project and the pledge of shares or quotas representing the borrower share capital in favour of the lenders.

Law stated - 6 October 2023

## UPDATE AND TRENDS

### International and national regulation

- 49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Incorporated loan funds are already entering into the initial borrowing transactions market in Portugal. We estimate that these loan funds will become active players in the real estate financing market, competing with traditional banks and diversifying funding available to real estate projects.

Regarding real estate-related legislation, the previous government approved, through Law 56/2023, of 6 October 2023 (in force from 7 October 2023), the More Housing Programme (*Programa Mais Habitação*), which introduced significant alterations in several areas, namely local lodging (*alojamento local*), lease law, mobilisation of vacant properties, residence permits for investment activity and tax benefits.

However, some of these measures, such as (i) the creation of an extraordinary contribution and a tax coefficient applicable to local lodging establishments and (ii) the compulsory rental of vacant properties, are being progressively reverted by the current government, which was appointed in April 2024.

In terms of urban planning measures, the previous government approved Decree-Law 10/2024 (*Simplex Urbanístico*), on 8 January 2024, with the aim of reforming and simplifying the licensing of urban planning procedures. The purpose of this legislation is to shift the responsibility for compliance from the municipal bodies to private developers. To achieve this, the law redefined the urban planning procedures applicable to urban planning operations, by granting additional exemptions and making the prior communication (a simplified municipal control procedure) a mandatory regime for certain urban planning operations. To accelerate the procedures, the law has also implemented new time frames and the possibility of tacit approval of licensing requests. In addition, the use of buildings is no longer dependent on authorisation for use, but to a prior communication, which in certain circumstances allows immediate use. This law came fully into force on 4 March 2024. The changes to the RJUE apply to all ongoing procedures submitted before the law came into force, except for tacit approval. Although this law is still recent, the new government is preparing some amendments, which are expected to be published shortly.

Contrary to what happened at the end of 2022 – where the Portuguese government, in light of the high inflation rate levels throughout Europe, limited the legal rent update coefficient for 2023 (which should have been 5.43 per cent) to 2 per cent, providing a tax compensation for landlords – the rent update for 2024 did not face any similar limitation and the legal update coefficient was set at 1.0694 (6.94 per cent). However, support measures for housing tenants with low incomes were approved.

In terms of tax measures in the real estate field, the 2024 state budget approved a 5 per cent update on the taxable value for the property transfer tax (*Imposto Municipal sobre as Transmissões Onerosas de Imóveis*) applicable to residential urban properties. Also, the Non-Habitual Resident (NHR) tax regime, which allowed individuals to benefit from a special tax status for a period of 10 years, was revoked. However, it still applies under certain conditions (eg, for those who become residents by 31 December 2024 and declare having, for example, a lease agreement or a promise of acquisition of a real right over property in Portugal, both concluded by 10 October 2023, or a residence visa or permit application submitted to the competent authorities by 31 December 2023).

The growing importance of sustainability remains a trend in 2024. For 2025, real estate players are concerned about compliance with energy efficiency requirements, more efficient use of water, including the use of recycled water for non-drinking purposes, waste reduction strategies and, in general, improving the environmental performance of real estate properties subject to transactions and lease agreements.

Also, with regard to reducing greenhouse gas emissions in the building sector and contributing to its progressive decarbonisation, EU Directive 2024/1760 of 5 July imposes on large companies the obligation to create and carry out a transition plan that includes climate change mitigation measures and goals for the decarbonisation of buildings in accordance with the Paris Treaty.

As regards soil contamination, two legal texts await approval – a national decree-law and a proposal for an EU directive – both containing innovative provisions.

The Portuguese decree-law will oblige certain operators to carry out specific soil assessments that lead to the issuance of proofing documents and to perform further tasks, depending on the results, which may include further investigations and/or decontamination actions. Also, the text aims to set out a chain of responsibility for soil contamination, making the owner of the land the ultimate responsible entity under certain circumstances. Furthermore, as a rule, the proofing documents will have to be presented to sell the properties and to change the uses they are assigned to. Finally, a database of contamination sites will be developed.

The proposed EU directive aims to create soil districts (according to, among other factors, the soil type and climatic conditions), which must be monitored. Member states must also define sustainable soil management practices, as well as the ones that must be avoided. Furthermore, the European Commission will create a digital portal on soil health, while the European Environment Agency and member states must draw up a public register of contaminated sites and potentially contaminated sites. It should also be noted that the proposed sanctioning regime must include fines proportionate to the turnover of the infractors.

Another issue of relevance to the real estate sector is its entry, from 2025, into the EU's Emissions Trading System regarding greenhouse gas emissions from fuels used in building heating systems. This was introduced by Directive (EU) 2023/959 of 10 May, which amended the EU ETS Directive (Directive 2003/87/EC). It requires complementary regulations and the necessary transposition into Portuguese law to enter into force.

Law stated - 6 October 2023



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# South Korea

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## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The legal system of Korea is a civil law system, which is mainly based on written statutes and influenced by European legal regimes, especially German law. A party can obtain an injunction to prevent an action, typically through a court decision. We do not have a separate system of equity as in the common law system, but our courts take into account fairness in applying statutory laws when dealing with cases. While Korea generally places heavy reliance on written contracts, parol evidence can also be admissible under certain conditions, especially if the written contract is unclear or there are claims of fraud or mistake. Furthermore, there has been a recent trend in contract drafting to include an entire agreement clause, which is relevant to the parol evidence rule. In Korea, oral contracts are legally valid if a party can prove the existence of a contract. Laws applicable to real estate are national in scope, meaning they are consistent throughout the nation.

Law stated - 31 October 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Korea has a single registration system for real estate and thus there is no dual system separating registered and unregistered real estate. Registration is required for real estate transactions, such as transfer of ownership, creation of security interests (eg, mortgages), to be legally valid. Thus, the failure to register real estate transactions will make them void. However, in the case of a leasehold interest, while an unregistered lease is still valid between the parties, it is not effective against third parties and ranks lower in priority to a registered leasehold interest. *Jeonse-kwon* is a type of leasehold interest unique to Korea, which must be registered in the real property registry to become effective. *Jeonse-kwon*, properly registered, secures both the (i) leasehold interest, and (ii) the return of the lease deposit.

Law stated - 31 October 2024

### Registration and recording

#### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The legal requirements for registration of conveyances, leases, and real estate security interests are stipulated in the Real Estate Registration Act and its relevant regulations.

The registration process, which is national in scope and does not vary by region, involves submitting a registration application of, principally, both parties, to the relevant registry office in the jurisdiction where the real property is located. The application needs to be submitted together with supporting documents such as, in the case of a conveyance, the sale and purchase agreement, identification of the parties, seller's certificate of registration completion, land ledger and building ledger. The process can be completed online via the Supreme Court of Korea's Electronic Registry system that allows for electronic submission of documents and registration applications. Digital signatures are accepted under the Electronic Signature Act.

When a company or an individual acquires real property in Korea, it must pay an acquisition tax of 4.6 per cent (inclusive of surtax) of the purchase price (ie, actual acquisition cost) reported at the time of the acquisition. However, if the real property is located in a specific region designated as an overpopulated control area, a stepped-up tax rate of 9.4 per cent will apply. The acquisition tax is inclusive of a registration tax. Acquisition tax is exempt if property is purchased on the condition that it will be donated to the state or a local government. Stamp duty of up to 350,000 South Korean won is payable on the acquisition contract and generally paid by the buyer. The buyer must also purchase national housing bonds at a rate of approximately 5 per cent of the purchase price of the real estate. In practice, these bonds are immediately resold at a 10 per cent to 15 per cent discount on the purchase price of the bonds. Both the seller and purchaser cover brokerage fees (if an agent is involved).

Law stated - 31 October 2024

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Non-residents can generally own, lease or invest in real estate in Korea without restrictions. However, foreigners acquiring land must file a report with the local government within 60 days of signing a sale and purchase agreement. Additionally, if the land is located within a military facilities protection area, cultural heritage protection area, ecological protection area, or wildlife conservation area, prior government approval is required. Also, foreigners acquiring a 50 per cent or more equity stake in a land-owning company are required to file a report with the government. However, such report is unnecessary if the foreigner elects to file a general real estate transaction report (a report that resident purchasers are required to file) with the local government. Further, pursuant to the Foreign Exchange Transaction Act, a report must be filed with the Bank of Korea, prior to a foreigner acquiring certain types of ownership rights or other rights in real property.

Law stated - 31 October 2024

## Exchange control

- 5 |

6 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Non-residents can invest in real estate in Korea and repatriate both profits and capital with no major restrictions, provided they comply with tax and reporting regulations under the Foreign Exchange Transaction Act. The key considerations for repatriation are proper reporting, payment of applicable taxes, and documentation. There are no strict capital controls preventing the transfer of funds out of Korea, but all transactions are monitored and must be reported through authorised foreign exchange banks and the government.

Law stated - 31 October 2024

## Legal liability

6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The owner and occupant (eg, a tenant) of a real property are liable to others for damage caused by defects in the real property. The occupant, who assumes primary liability, may be exempt from liability for negligence if the occupant exercised the necessary level of care to prevent the damage, but the owner, who assumes ultimate liability, will remain liable nevertheless.

If soil contamination is found on the property, the current owner is responsible for addressing it by conducting a soil survey and remediating the contaminated soil pursuant to the Soil Environment Conservation Act. However, if the current owner was unaware of the contamination and not negligent at the time of acquiring the property, it is not responsible for the remediation. If the owner obtained a soil environmental assessment at the time of the purchase and verified that the level of contamination was below regulatory concern, the owner is presumed to have acted in good faith without negligence. The Supreme Court has ruled that if a landowner transfers contaminated property, it is liable to the new owner and any future owners in tort for the cost of cleanup or waste disposal.

Lenders also assume these responsibilities if they take title after foreclosure.

Law stated - 31 October 2024

## Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

In purchasing real property, owners should conduct thorough due diligence to identify any potential issues, especially environmental concerns, zoning restrictions and outstanding legal claims. When leasing out real property, owners can include specific indemnification clauses in the lease agreement which obligate the tenant to be responsible for certain liabilities. Owners can also limit their liability exposure by structuring ownership through

newly set up legal entities. In general, owners can obtain various types of insurance to mitigate risks and protect themselves from liability such as property insurance, elevator accident liability insurance, director and officer (D&O) liability insurance, warranty and indemnity (W&I) Insurance, commercial general liability insurance and environmental liability insurance.

Law stated - 31 October 2024

### Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Contracts are governed by the law expressly or implicitly chosen by the parties. If the parties have not chosen a governing law, the contract is governed by the law of the country most closely associated with the contract, which is presumed to be the law of the country where the real property is located in the case of a contract concerning rights in real property.

Law stated - 31 October 2024

### Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

In general, a lawsuit in Korea is brought in the court of the defendant's domicile. Exceptions to this rule are cases involving real estate, which can be filed in the court where the real estate is located, and parties can also stipulate the jurisdiction of a district court by agreement. Korean courts have a three-tiered system: district courts, high courts, and the Supreme Court. The real estate owner must be included in any dispute related to ownership, boundary issues or title. In disputes involving landlord-tenant issues, such as eviction or lease contract breaches, both the landlord and the tenant must be parties to the case. If the real property is subject to a mortgage or security interest, the lender must be included in the case. If there are third parties who have a registered interest in the real property, they are also required to be joined in the litigation to ensure their rights are considered. Service of process for parties outside of Korea can be carried out through the relevant authorities of a foreign country in accordance with international conventions such as the Hague Service Convention. A foreign party does not need to be registered to do business in Korea to enforce legal remedies in a real estate dispute, but they must follow proper legal procedures and may need a Korean attorney for representation.

Law stated - 31 October 2024

## Commercial versus residential property

- 10** | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Korean laws and regulations regarding real estate differ between commercial and residential properties. First, the laws governing the licensing for construction of residential and commercial buildings are different, with the former being governed by the Housing Act and the latter by the Building Act. While both types of properties are subject to the same principles under the Civil Act and Real Estate Registration Act, there are key distinctions in the way the law treats these properties in terms of tenant rights, lease agreements, financing structures and regulatory frameworks. Both the Housing Lease Protection Act and the Commercial Building Lease Protection Act aim to protect the rights of tenants, but there are differences because their purpose and protections are different. The former is a law to promote the stability of housing, and thus it protects all tenants regardless of the deposit amount. In contrast, the latter governs leases for profit-making activities, providing stronger protections for tenants with deposits below a certain threshold, while leases with higher deposits are regulated with greater emphasis on landlord's rights. Financing options and structures for commercial and residential properties vary, with commercial properties often involving more complex financial arrangements.

Law stated - 31 October 2024

## Planning and land use

- 11** | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Korea has a comprehensive planning process and zoning regime that govern development, construction, use and protection of real estate. The National Land Planning and Utilisation Act and its related regulations provide the basic framework for zoning and urban planning, and the Ministry of Land, Infrastructure and Transport is the primary national authority responsible for overseeing zoning laws and urban planning. Local governments, including municipalities and provincial governments, are responsible for implementing zoning plans within their jurisdictions. The process of obtaining planning permission or varying zoning classifications in Korea is detailed and involves several steps, including submitting applications, providing necessary documents (such as site plans, environmental impact assessments and traffic impact studies) and undergoing thorough reviews. Failure to comply with planning decisions or zoning requirements can lead to serious consequences, including fines, demolition orders or revocation of permits.

Law stated - 31 October 2024

## Government appropriation of real estate

- 12** | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The government's taking of land (including for purposes of an industrial site development project) is permitted for public interest projects as stipulated in the Act on Expropriation of Land for Public Works and Compensation. To expropriate property, the government must make a public announcement of the property to be expropriated, notify the property owners and implement a compensation plan. The government must assess the compensation amount and negotiate with the property owners.

If an owner agrees to transfer their property at the price offered by the government based on the government's assessment, an agreement for the property transfer may be executed at such a price. However, if an owner does not accept the government's proposal, the government may file, or must file at the request of the owner, a motion to determine the appropriate purchase price for the relevant property with the Central Land Expropriation Committee, which will examine the value of the property, assign a certified appraiser to assess the property, and consider briefs from the government and the property owner.

In approximately three to four months, the committee renders a decision on the purchase price for the property subject to the expropriation. The government must then pay the purchase price as determined by the committee. Ownership of the expropriated property is then transferred to the government on the expropriation date indicated in the committee's decision, even if the owner files an objection or a lawsuit regarding the decision.

Law stated - 31 October 2024

## Forfeiture

- 13** | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Real estate can be forfeited without compensation when it is connected to a criminal activity such as:

- conveyed or intended to be conveyed for purposes of criminal activity;
- built or acquired as a result of criminal activity; or
- acquired in exchange for any one of the above real estates.

Further, in case a property owner fails to pay taxes or significant fines, the government has the authority to seize the property to recover the unpaid taxes or fines. The government can also order the demolition of a building that has been constructed without the necessary permits.

Law stated - 31 October 2024

## Bankruptcy and insolvency



**14** | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy, insolvency and reorganisation in Korea is governed by the Debtor Rehabilitation and Bankruptcy Act. A bankruptcy petition can voluntarily or involuntarily be filed and do not have the same automatic stay effect as US federal bankruptcy law. Upon such filing, the bankruptcy court can issue an order for provisional attachment or other necessary conservation measures against the debtor's asset. In case of executory contracts where both the debtor and the counterparty have not yet performed the contract such as a sale, lease or loan at the time of bankruptcy, the bankruptcy trustee may decide to perform or terminate the contract. The counterparty to the contract can issue a notice to the trustee urging it to make a decision within a reasonable period of time, the failure of which will result in the contract being deemed to have been terminated.

Law stated - 31 October 2024

**INVESTMENT VEHICLES****Investment entities****15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The three most common types of legal entities in Korea are (1) the *chusik hoesa* or a 'joint stock company', (2) the *yuhan hoesa* or a 'limited company', and (3) the *yuhan chegim hoesa* or a 'limited liability company'. For all three entity types, the liability of shareholders/members is limited to the extent of their contributions and multiple shareholders/members may contribute to the entity's capital.

The *chusik hoesa* is the most common form of legal entity in Korea. This form of legal entity is typically appropriate for a large enterprise that will need substantial capital, as it is the only type of entity that may issue corporate bonds or list its shares on the Korea Stock Exchange. The *yuhan hoesa* is appropriate for small or medium-sized businesses owned by a small number of individuals or entities because it offers greater flexibility in terms of corporate governance (eg, formation of a board of directors is not mandatory but optional). Lastly, the *yuhan chegim hoesa* is a mixture of a corporation and a partnership, as it is modelled after the limited liability company (LLC) in the United States. A *yuhan chegim hoesa* is increasingly used as the preferred local entity type by foreign companies since it is exempt from an annual external audit requirement.

Although Korea does not have general and limited partnership, there are five special forms of investment vehicles, RETF, RECF, REIT, CR-REIT and PFV as pass-through entities.

**Real estate trust fund (RETF)**

A real estate trust fund classified as a trust that is required to have its assets managed by an asset management company with net assets of at least 1 billion South Korean won and at least three asset management professionals.

### Real estate corporate fund (RECF)

A real estate corporate fund classified as a *chusik hoesa* that is required to have its assets managed by an asset management company with net assets of at least 1 billion won and at least three asset management professionals.

### Real estate investment trust (REIT)

A general real estate investment trust classified as a *chusik hoesa* that is required to invest at least 70 per cent of its assets in real estate and have its assets managed by an asset management company with net assets of 7 billion won and at least five asset management professionals.

### Corporate restructuring real estate investment trust (CR-REIT)

A corporate restructuring real estate investment trust (CR-REIT) classified as a *chusik hoesa* that is required to invest at least 70 per cent of its assets in 'CR-REITable' assets, as defined in the relevant regulations, and to have its assets managed by an asset management company with net assets of at least 7 billion won and at least five asset management professionals.

### Project financing vehicle (PFV)

A project financing vehicle (PFV) classified as a *chusik hoesa* that is required to invest most of its assets in real estate development projects and have its assets managed by an asset management company that is a shareholder of the PFV, or a company set up by a shareholder of the PFV.

Law stated - 31 October 2024

## Foreign investors

### 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

The *chusik hoesa* (joint stock company) is the most common form of legal entity in Korea. This form of legal entity is typically appropriate for a large enterprise that will need substantial capital, as it is the only type of legal entity eligible to issue corporate bonds or list its shares on the Korea Stock Exchange.

Law stated - 31 October 2024

## Organisational formalities

### 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences

for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Any foreign investor (parent) who wishes to establish a company in Korea must complete the reporting requirements under the Foreign Investment Promotion Act (FIPA) or the Foreign Exchange Transactions Act (FETA), depending on the amount of investment.

If the Parent plans to make an investment of 100 million won or more in an entity, then the Parent must file a foreign investment report under FIPA with the Korea Trade-Investment Promotion Agency (KOTRA) or a 'foreign exchange bank' in Korea. If the parent plans to make an investment of less than 100 million won, then the parent must file a securities acquisition report under FETA with a foreign exchange bank. The reporting process in most cases is a matter of formality and the report is generally accepted and cleared in one or two business days.

After the reporting process has been completed, the procedure for the establishment of the new entity will involve the following:

- The parent must remit the initial capital to an interim holding account provided by a foreign exchange bank in Korea. Usually, for ease of administration, the foreign exchange bank will be the same as the one that handles the foreign investment reporting or the securities acquisition reporting, and the bank will provide wire transfer instructions.
- If the new entity is a *chusik hoesa*, it must have at least one director, unless its paid-in capital is 1 billion won or more in which case it must have at least three directors and one statutory auditor. If the entity is a *yuhan hoesa*, it must have at least one director. If the entity is a *yuhan chegim hoesa*, it must have at least one manager. There are no nationality or residence requirement for the directors, managers or statutory auditor. The directors and statutory auditor must be a natural person, and a director, officer or other employee of the company may not serve concurrently as the statutory auditor. The manager may be a natural person or legal person.
- The entity must have at least one representative director, if it is a *chusik hoesa* or *yuhan hoesa*, or at least one representative manager, if it is a *yuhan chegim hoesa*. The representative director or representative manager is the sole officer with inherent power to represent and bind the company. If the entity has one director or manager, such person is the representative director or representative manager.
- After completion of all of the above steps, the entity must register its establishment with the company registry office of the district court having jurisdiction over it, based on the address of the entity.

Each entity is required to pay a corporate registration tax of 0.48 per cent of the initial capital (based on the par value of shares issued upon establishment in case of a *chusik hoesa*) and, thereafter, upon each capital increase. If an entity is established in an overpopulated control area or a company increases its capital within five years of its establishment, a stepped-up capital registration tax rate of 1.44 per cent (ie, triple the normal rate) applies.

However, RECFs, Reits, CR-REITs and PFVs are not subject to such tripling of capital registration tax nor the stepped-up acquisition tax normally applied to real property located in overpopulated control areas. Land owned by a public REITs or a public fund for its

business use is not separately taxed for property tax purposes and is not subject to the comprehensive real estate tax. However, this exception does not apply to PFVs. The applicability of corporate income tax to each type of entity is as below:

RETF – not taxable;

- RECF – taxable in principle, but declared dividends may be deducted from income;
- REIT – taxable in principle, but declared dividends may be deducted from income;
- CR-REIT – taxable in principle, but declared dividends may be deducted from income; and
- PFV – taxable in principle, but declared dividends may be deducted from income (applicable through the fiscal year ending on or before 31 December 2025).

Law stated - 31 October 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

There are two main types of property ownership: sole ownership and co-ownership. The Civil Act categorises co-ownership into three types depending on the personal bond between the co-owners: shared, joint ownership, and total ownership. Shared ownership is co-ownership without a personal bond between the co-owners, joint ownership is ownership by co-owners who are members of an association for joint business management, and total ownership is co-ownership by an unincorporated quasi-corporate entity. Each unit in one building can be an object of separate ownership if it is structurally and operationally independent.

Arrangements for the occupancy and use of real estate include a lease on real estate, an easement on land, and a superficies on land. Lease agreements are used for residential and commercial properties. *Jeonse-kwon* is a type of leasehold interest unique to Korean law, which must be registered in the real property registry to become effective. *Jeonse-kwon*, properly registered, secures both the (i) leasehold interest, and (ii) the return of the lease deposit.

Law stated - 31 October 2024

### Pre-contract

**19** | What are the typical pre-contractual steps?

It is customary, in high-value transactions, to execute a form of non-binding agreement before signing a binding contract. This could be a letter of intent or a memorandum of understanding. The non-binding agreement typically outlines the key terms of the potential

transaction, such as price, property description, key deadlines, and contingencies. It serves as a framework for further negotiations but is not legally enforceable. However, if specific terms are explicitly stated as being binding (such as confidentiality or exclusivity), these provisions are enforceable. The customary exclusivity clause requires that the target property be taken off the market while the negotiation of a contract is ongoing.

Real estate brokers are commonly involved in transactions on behalf of sellers and purchasers. Real estate brokers must obtain a licence by passing a two-phased nation-administered exams. Brokerage commissions are negotiable but subject to a cap ranging from 0.4 per cent to 0.7 per cent of the transaction amount, depending on the type of properties, transaction amount and transaction type.

Law stated - 31 October 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

Typical provisions in a contract for the sale of real estate include:

- description of the property, including real estate register details and all encumbrances on the property;
- purchase price and payment schedule;
- covenants for closing and post-closing;
- provisions regarding the transfer of possession and proration of rights and benefits, including transfer of any lease agreements and other property-related agreements;
- representations and warranties;
- liabilities and indemnification;
- proration of rights and profits;
- conditions precedent to closing;
- closing actions, including deliverables and title transfer filing;
- termination and default interest; and
- miscellaneous provisions (eg, governing law, jurisdiction, etc).
- Representations and warranties for commercial real estate transactions typically include:
  - authorisation, enforceability;
  - title, no encumbrances;
  - government approval, no violation;
  - registration;
  - no litigation or dispute;
  - environmental, no hazardous materials; and
  - no expropriation and encroachment.

The down payment is typically 10 per cent of the purchase price and it can be held in an escrow account until closing in high-value transactions. A title search is typically done to verify the legal status of the property, ensuring there are no liens, encumbrances, or other issues that would prevent a clean transfer. This is usually carried out by the buyer's attorney or broker. The buyer usually bears the cost of the title search, though in some cases, the seller agrees to cover these costs.

The property tax year runs from 1 January to 31 December. Liabilities for taxes and utilities are typically prorated between the buyer and seller as of the closing date. Each party is responsible for their share of property taxes and utilities based on the portion of the year they owned the property. However, in the case of a residential property sale between individuals, the person who owns the property as of 1 June is customarily responsible for property taxes.

Generally, the risk of loss transfers to the buyer upon closing and the purchaser may terminate the contract in the event of any loss related to the property.

**Law stated - 31 October 2024**

## Environmental clean-up

- 21** | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

If soil contamination is found on the property, the current owner is responsible for addressing it by conducting a soil survey and remediating the contaminated soil pursuant to the Soil Environment Conservation Act. However, if the current owner was unaware of the contamination and not negligent at the time of acquiring the property, it is not responsible for the remediation. If the owner obtained a soil environmental assessment at the time of the purchase and verified that the level of contamination was below regulatory concern, the owner is presumed to have acted in good faith without negligence. The Supreme Court has ruled that if a landowner transfers contaminated property, it is liable to the new owner and any future owners in tort for the cost of cleanup or waste disposal.

**Law stated - 31 October 2024**

## Lease covenants and representation

- 22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations made by sellers of property regarding existing leases include:

- true and complete list of all lease agreements and rent roll;
- no tenants, subtenants or other occupants or users of the property other than those listed;
- no material default by the seller as landlord;
- the existence of any defaults under the lease;
- completion of all tenant improvements required under the lease;
- no cause for termination of the lease; and
- no disputes with tenants.

Covenants regarding lease agreements for the period between signing and closing typically include that the seller agrees not to enter into any new leases or amend existing leases without the consent of the buyer. The seller, particularly for commercial properties, often covenants to complete any outstanding tenant improvement work prior to closing and is, in certain high-value transactions, required to provide estoppel certificates from tenants as a condition to closing.

Law stated - 31 October 2024

### Leases and real estate security instruments

- 23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease is generally subordinate to a security instrument that is registered in the real estate registry.

However, as a leasehold interest can also be registered upon the tenant's request, if it is registered in the registry, a lease and security instrument are ranked according to the order in which they are registered in the registry.

In case the lease is superior to the security instrument, the tenant's rights under the lease will survive foreclosure and the property owner following foreclosure is bound by the terms of the existing lease. It is not customary for a lender to require subordination and non-disturbance agreements directly from a tenant.

In a ground lease, the tenant leases the land itself, often for an extended period and may have the right to construct buildings on the land. A ground lease for the purpose of owning a building, even if it is not registered, has the same effect as a registered lease when the tenant registers the building on the land.

Law stated - 31 October 2024

### Delivery of security deposits

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- 24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Security deposits are fairly common in leases, with the amounts typically tied to a percentage of the rent. Periodic rent resets or reviews are common in commercial leases, although the exact structure can vary depending on the lease agreement. Rent adjustment mechanisms include fixed rent increases, market rent review, index (such as consumer price index) linked adjustments and turnover rent.

In a real estate transfer transaction, the security deposits, instead of directly transferring, are usually credited to the buyer at closing by deducting the security deposits from the purchase price.

Law stated - 31 October 2024

### Due diligence

- 25** | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

In commercial building transactions, physical and legal due diligence is typically performed before executing a contract. An engineering service company inspects physical and environmental defects of the property, the results of which can be reflected in the purchase price and can also be a basis for deciding whether to sign a contract.

The buyer's lawyer carry out legal due diligence based on information provided by the seller and public information such as that contained in the real estate registry, the real estate ledger and the certificate of land use plan issued by the municipal government. Legal due diligence typically covers the transaction structure, title, encumbrances and leases, zoning, government permits and approvals and taxes. Title searches are conducted through the real estate registry which is a publicly accessible system that provides all information on the ownership, encumbrances, and rights associated with a property. To be lawful and proper, transfers of real estate must be registered in the real property registry. Title insurance is not common in Korea and thus in case of bad title the buyer should take steps to pursue a claim against the seller.

Korea provides statutory priority for registered instruments (ie, first in time, first in right priority); however, as an exception to this rule, taxes imposed on the property always have absolute priority over the registered security instruments, regardless of whether the statutory due date of such taxes precedes the date of the security instruments.

It is not customary to obtain government confirmation, a zoning report or a legal opinion regarding legal use and occupancy.

Law stated - 31 October 2024



## Structural and environmental reviews

- 26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

It is customary in Korea to conduct an engineering or environmental review as part of the due diligence process, especially for commercial properties. These reviews help the buyer assess the property's condition and identify any environmental or structural issues that could affect its value.

An engineering review involves evaluating the physical condition of the building and its structural integrity and mechanical systems. An environmental review assesses whether the property is contaminated or has any environmental risks. Environmental reviews are crucial because they help the buyer avoid liability for pre-existing environmental issues, which could lead to significant remediation costs.

It is customary to provide a commercial building buyer with representations and warranties regarding the property's structural and environmental conditions. Although environmental insurance is available, it is not common to purchase environmental insurance.

**Law stated - 31 October 2024**

## Review of leases

- 27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Leases are examined legally and on the business side in the process of the due diligence on the property. Lawyers typically review lease issues including lease term and renewal options, security deposits and rents, assignment and subletting, tenant improvements and maintenance obligations, tenant default clauses, and termination clauses. A property management agreement executed between the property owner and the management service company can also be reviewed during due diligence. The management agreement is generally subordinate to financing security instruments on the property.

**Law stated - 31 October 2024**

## Other agreements

- 28** | What other agreements does a lawyer customarily review?

All agreements involving any encumbrances (easements, restrictive covenants, finance instruments, etc) on the property are subject to due diligence. Service agreements related to the property (eg, asset management agreements, parking service agreements or facility management agreements) and insurance agreements are also reviewed by lawyers. Brokerage agreements are customarily not reviewed.

Law stated - 31 October 2024

## Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

A lawyer customarily prepares a checklist of deliverables that are required to be provided upon closing. These deliverables may vary depending on the specific projects. For instance, in the case of an acquisition of a commercial building, the typical deliverables include the following:

### Seller's deliverables

- title transfer information and documents including: (i) title deed information; (ii) seller's power of attorney; (iii) a short form sale and purchase agreement; and (iv) the certificate of seal impression of the seller's registered corporate seal;
- VAT tax invoice;
- each assumed lease agreement;
- government approvals relating to the property;
- all blueprints, drawings and any other documents related thereto relating to the property;
- all documents and instruments guaranteeing the repair of defects and/or entitling the beneficiary thereunder to bring repair, warranty or damage claims with respect to any part of the property and all documents and instruments necessary to assign and transfer to the purchaser any and all of seller's rights, titles and interests thereunder;
- all keys, books, records, manuals and any other documents and articles necessary for the design, construction, ownership, operation, repair, maintenance and/or management of the property;
- tax clearance certificates for the seller issued by the relevant national and local tax offices certifying that the seller has no outstanding tax liabilities in connection with the property; and
- a comprehensive closing statement outlining the financial details of the transaction, including purchase price adjustments, lease security deposit amounts and prorations at closing from both parties.

### Purchaser's deliverables

- closing payment;
- copy of certificate of real estate transaction report filed pursuant to the relevant law; and
-

certified copy of internal authorisation documents of the purchaser authorising the execution and/or performance of the agreement.

The usual timing between signing and closing depends on the specific project. A simple transaction for which no government approval is required can often be closed four to six weeks after signing, or even simultaneously with signing. In forward sales (ie, projects in which a building is sold that is still under development), the period between signing and closing can be several years.

Lenders customarily require a legal opinion from the borrower's lawyer confirming that the title is clear and the finance and security agreements have been legally completed. The borrower's representations and warranties (eg, no material changes to the property or no additional security provisions to a third party without the lender's prior consent). In most cases, closing and funding occur simultaneously so that the buyer transfers the purchase price and the seller delivers the title documents simultaneously.

Law stated - 31 October 2024

### Closing formalities

- 30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

For real estate purchase or lease transactions, the closing can be held at the real estate agent's office or the office of either party's lawyer. No in-person meeting is required. In the case of financing, closings are often done at the lender's office or at the office of the borrower's lawyer. At the meeting, the relevant parties and their respective legal counsel and a judicial scrivener confirm the various acquisition and debt financing closing documents. It is not necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction. However, the registrations of property transfers or security interests are required to be completed upon closing at the local governmental registry office. Registration fees and taxes must be paid at the time of the registration applications. For leases, the parties customarily agree on a formal handover of the property on the day when the lease term starts.

Law stated - 31 October 2024

### Contract breach

- 31** | What are the remedies for breach of a contract to sell or finance real estate?

In the case of breach of a real estate transfer agreement, the purchaser can typically seek specific performance to compel the seller in breach to complete the sale and transfer the title to the property. The seller may also seek specific performance to compel the

buyer in breach to complete the transaction by paying the purchase price or fulfilling other obligations. However, specific performance being sought by the seller is less common, as the seller often prefers financial compensation by acquiring the down payment after termination. Both the purchaser and seller have, basically, the right to seek monetary damages if the other party breaches the contract although their specifics depends on the indemnification provisions in the contract.

In the case of breach of a real estate financing agreement, each party typically has specific remedies provided in the loan agreement. The lender may foreclose on the property as the financing is secured by a mortgage, demand immediate repayment of the entire loan amount (acceleration clause) and pursue damages for unpaid interest and penalties. If the lender fails to provide the agreed-upon financing, the borrower may seek specific performance to compel the lender to disburse funds (though this is rare), and claim damages for any financial losses caused by the lender's breach, such as delays in closing.

Law stated - 31 October 2024

### Breach of lease terms

**32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Both tenants and landlords have specific remedies available when a party breaches the terms of the lease. The tenant may claim damages against the landlord in breach. For example, in the event the landlord fails to make necessary repairs and such failure adversely affects the tenant's business, the tenant may seek compensation for the cost of repairs, business interruptions, or other related costs and losses. In the event the tenant fails to pay rent, the landlord can make a claim for the unpaid rent and also deduct it from the security deposit. In addition to rent, the landlord can also claim interest on late payments. In case of a significant breach, the other party may terminate the lease prior to expiry of the lease.

The eviction of a defaulting tenant requires adherence to legal procedures. The landlord is required to file a lawsuit in court to obtain an eviction judgment. Upon the court's granting of an eviction judgment, the landlord must seek the court's assistance in enforcing the judgment. It may take a few months for the eviction to be carried out, depending on the circumstances and court schedule.

Both general contract law and special real estate laws apply to lease agreements in Korea. The Civil Act covers the general rules for contract formation, performance, and breach, including damages and termination, which applies to both residential and commercial leases. Both the Housing Lease Protection Act and the Commercial Building Lease Protection Act aim to protect the rights of tenants, but there are differences because their purpose and protections are different. The former is a law to promote the stability of housing, and thus it protect all tenants regardless of the deposit amount. In contrast, the latter governs leases for profit-making activities, providing stronger protections for tenants

with deposits below a certain threshold, while leases with higher deposits are regulated with greater emphasis on landlord's rights

Law stated - 31 October 2024

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

In South Korea, the primary forms of security interests in real estate include mortgage, collateral assignment (*yangdo-dambo*), and collateral trust. A mortgage allows the lender to hold a security interest in the property and, in the event of loan default, to enforce the security interest through a foreclosure auction to recover the debt owed. A collateral assignment involves the lender acquiring title to the property as collateral, granting the lender the right to obtain definitive ownership in the event of default. A collateral trust involves the entrusting of the property to a trustee (such as a bank or securities firm) for management as collateral and, in case of a default, the lender, as the primary beneficiary, can receive the proceeds from the sale or disposal of the property.

In Korea, the primary lenders for real estate secured loans include banks, specialised credit finance companies, pension funds and credit funds. Banks and pension funds typically participate in senior loans, which offer fixed returns, while other institutions may engage in mezzanine or subordinate loans that carry increased risk and variable returns. To operate a lending business in Korea, entities must be licensed by the financial regulators or otherwise permitted under law, and in case of credit funds, investors must be qualified institutional investors.

Law stated - 31 October 2024

### Leasehold financing

- 34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In Korea, using ground (or head) lease as collateral for borrowing is very rare, and even when such borrowing occurs, it usually involves a small amount on very restrictive conditions. Leasehold interest can be protected through registration, which allows tenants to secure their lease rights and claims for the return of deposits. However, long-term ground leases are rare and because long-term protection for ground leases are not well established, it is more common for landowners to offer the property itself as collateral for loans.

Law stated - 31 October 2024

## Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

Each type of security interest, a mortgage, collateral assignment (*yangdo-dambo*), and collateral trust can be created and perfected by filing the necessary documents, including the relevant security interest agreement, with the appropriate real estate registry office.

Law stated - 31 October 2024

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

In real estate secured lending, it is common for creditors to require the borrower to obtain an appraisal of the real estate from an independent appraiser. This practice is essential for the decision-making process of the creditors. Appraisers must be licensed by the regulators to conduct appraisals of real estate, and they must comply with certain appraisal standards announced by the Ministry of Land, Infrastructure and Transport.

Law stated - 31 October 2024

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

If a foreign lender continuously and repeatedly extends loans in Korea or to residents of Korea, this activity may be considered as engaging in a lending business under Korean law. To engage in lending as a business, the lender must either qualify as a financial institution licensed to provide loans or register as a lending business entity. However, if a foreign lender only provides loans only in a limited, one-off transaction or specific project, it is unlikely to be regarded as engaging in lending business in Korea.

A mortgage, collateral assignment (*yangdo-dambo*), and collateral trust all require registration, which necessitates the submission of certain application documents and the payment of associated costs and taxes to the public registration office. Similarly, when transferring a security interest in real estate, a transfer registration is required, along with the submission of relevant documents and the payment of fees and taxes. Additionally, a stamp duty may be imposed when entering into loan agreements in Korea.

Law stated - 31 October 2024

## Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates on real estate secured loans are usually agreed upon as fixed rates based on the prevailing market rates at the time of the loan. Additionally, a variable interest rate method is utilised, where the interest rate is calculated by adding a margin to a benchmark rate, such as the KOFR rate or the yields of financial bonds and certificates of deposit (CDs), adjusted on each interest payment date.

Under Korean law, the maximum allowable interest rate for loans is capped at 20 per cent per annum. When determining the interest rate, all payments made to the creditor, including fees and costs (excluding costs related to collateral registration and credit checks), must be included. Any agreement to pay interest exceeding this cap is considered to be null and void, and can result in criminal penalties. This interest rate restriction applies uniformly, regardless of whether the lending is conducted as a licensed business, although the level of sanctions or penalties may vary depending on the type of lenders involved.

Law stated - 31 October 2024

## Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

In the case of a mortgage, if a loan default occurs, the lender may apply for foreclosure with the competent court. This court procedure will lead to the seizure and sale of the property, from which the lender can receive priority payment based on its priority ranking at the time of the distribution of the sale proceeds.

For a collateral assignment (*yangdo-dambo*), in the event of a default, the lender can acquire definitive ownership of the property, allowing the lender to retain it or sell it to a third party and use the proceeds to satisfy their debt. In the case of a collateral trust, upon a default, the lender, as the primary beneficiary, may receive income generated from the use and disposal of the property according to the terms of the trust agreement.

Foreclosure auctions, which must be conducted through the courts, may take approximately six months to a year. During this process, the lender may also pursue enforcement actions against the borrower's general assets, make claims against guarantors, and take other actions. Unless specified otherwise in the relevant contract, the lender is not restricted in enforcing the security interests all at once or in whichever order it prefers. However, to pursue an enforcement action against the borrower's general assets that are not secured by a mortgage or similar security interest, the lender must first obtain a definitive court judgment or equivalent confirming the borrower's debt obligations.

Law stated - 31 October 2024

## Loan deficiency claims

- 40 | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

If the primary creditor is unable to recover the full amount of the debt through foreclosure, it may recover any shortfall from the general assets of the borrower or the guarantor, which are not secured by a mortgage or similar collateral, on a *pari passu* basis with other unsecured creditors. However, to pursue an enforcement action against these general assets, it is necessary to obtain a definitive court judgment or an equivalent document confirming the borrower's debt obligations. In this case, the shortfall amount can be collected without any restrictions as long as the debt remains outstanding. However, actual recovery may be limited by the financial condition of the borrower and the guarantor as well as any bankruptcy or insolvency proceedings involving either party.

Law stated - 31 October 2024

## Protection of collateral

- 41 | What actions can a lender take to protect its collateral until it has possession of the property?

In the case of a mortgage on real estate, when the creditor applies to the court to commence foreclosure, the sale of the property will be conducted under court supervision. For the creditor to acquire title to the property, the creditor must participate in the foreclosure process and purchase the property with the court's approval. Other than through this process, the creditor, as mortgagee, cannot directly exercise any ownership right over the property but may only seek to prevent any infringement upon the mortgage by the mortgagor or third parties. In the case of a collateral assignment (*yangdo-dambo*), the creditor retains legal title to the property and can exercise ownership rights against third parties, subject only to the terms of the collateral assignment agreement. In the case of a collateral trust, the trustee acquires legal title to the property and can manage, dispose of and distribute proceeds from the property in accordance with the collateral trust agreement. Thus, the creditor cannot directly exercise any ownership right over the secured property in this case.

To collect rent from mortgaged property, the creditor must either obtain a separate lien on the right to collect rent or seize the rent claim and also obtain the court's decision to do so during the following enforcement process. When a creditor acquires property through a collateral assignment (*yangdo-dambo*), it can collect rent from the tenant as the legal owner unless otherwise agreed in the collateral assignment agreement. In the case of a collateral trust, any rent proceeds may be distributed to the creditor as primary beneficiary according to the terms of the collateral trust agreement.



Law stated - 31 October 2024

## Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Under Korean law, in order to establish a security interest, the subject properties must be specifically identified and it is not possible to establish a blanket lien over all of the borrower's assets. However, unless the creditor has agreed to a non-recourse provision in the contract, the creditor may recover from the borrower's general assets that are not secured by a mortgage or similar collateral on a *pari passu* basis with other unsecured creditors, in addition to recovery through the enforcement of collateral.

Claims against a guarantor remain valid as long as the debt obligation of the borrower is outstanding, and there are no special restrictions on the scope or method of such claims compared to those against the borrower. If the guarantor has provided collateral, the creditor may enforce that collateral to receive priority payment or recover from the guarantor's general assets on a *pari passu* basis with other unsecured creditors.

Law stated - 31 October 2024

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

It is common for borrowers to establish bank accounts specified in finance agreements, with controls imposed on cash flow through restrictions on deposits and withdrawals related to these accounts. For example, there may be a proceeds account for receiving any proceeds or funds, an interest reserve account for securing interest payments due over the next three to six months, an account for receiving value-added tax refunds, an account for receiving insurance payouts and for expenditures on repairs within a specified limit, and a reserve account for returning the security deposit at the end of a lease. Finance agreements typically stipulate that these bank accounts maintain funds reserved for each designated purpose.

Law stated - 31 October 2024

## Credit enhancements

- 44** | What other types of credit enhancements are common? What about forms of guarantee?

It is common for borrowers to establish an interest reserve account to set aside funds for interest payments due over the next three to six months. When the borrower is a special purpose company or investment vehicle, the parent company or sponsor may be required to provide a guarantee or (less frequently) a letter of credit. While there are no specific legal restrictions on the qualifications of guarantors, finance agreements often impose requirements for guarantors to maintain certain financial standards. Guarantees typically provide cash payment for the outstanding debt, and in project financing, contractors are often required to provide a completion guarantee. Generally, guarantees are considered legally valid and enforceable. Letters of credit, while serving a similar purpose as guarantees, may take various forms including binding, non-binding or best effort arrangement.

Law stated - 31 October 2024

### Loan covenants

45 | What covenants are commonly required by the lender in loan documents?

Covenants typically required by creditors include the obligation to provide and maintain collateral or guarantees, prohibition on raising additional debt or providing further collateral, restriction on significant corporate actions, the order of payment from received funds (waterfall provision), compliance with specific financial standards, obligations for information sharing and reporting, and responsibilities related to the property (such as maintenance, insurance and environmental compliance).

Law stated - 31 October 2024

### Financial covenants

46 | What are typical financial covenants required by lenders?

Financial covenants typically required by creditors include loan-to-value (LTV) and debt service coverage ratio (DSCR). To verify compliance with these financial standards, borrowers are often required to submit a compliance certificate for the financial covenants (or specific covenant such as DSCR) to the creditor on each interest payment date. Additionally, it is customary for borrowers to provide their financial statements to the creditor on a regular basis. Regular appraisals and submission of valuation reports may also be required. These covenants are typically provided regardless of whether a loan default has occurred.

Law stated - 31 October 2024

### Secured movable (personal) property

47 |

What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Under Korean law, collateral for movable property or receivables is typically provided through the establishment of a pledge. A pledge is created and perfected when the parties agree to the pledge and deliver the collateral to the creditor (and no separate control agreement is needed). However, for certain types of movable property, such as automobiles and ships, which are specifically regulated by law, collateral must be provided in the form of a mortgage that needs registration, as opposed to a pledge.

Law stated - 31 October 2024

### Single purpose entity (SPE)

48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Creditors do not necessarily require borrowers to be a single purpose entity (SPE) in real estate financing. However, there are instances where establishing an SPE as a property company or a holding company may be suitable for financing the acquisition of certain type of properties, such as high-value assets. Under Korean law, SPEs are not subject to special regulation and are typically established in the form of a joint stock company or limited liability company. Korean law does recognise the concept of an independent director (or outside director), who is an external individual appointed to oversee the fair and transparent operation of the company's board of directors. However, the appointment of an independent director in an SPE seems to be quite rare.

Law stated - 31 October 2024

## UPDATE AND TRENDS

### International and national regulation

49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

The Korean government has implemented a variety of policies to curb rapidly rising real estate prices. For example, it has tightened regulations on mortgages and is continuing efforts to curb real estate speculation by adjusting tax policies.

The government is also actively promoting the development of smart cities that incorporate digital technologies as part of the Fourth Industrial Revolution. This will be implemented by building intelligent urban infrastructure based on artificial intelligence, big data, and internet-of-things technologies to maximise the efficiency of residential and workplace

environments. A zero-energy building (ZEB) is an eco-friendly building that minimises energy consumption by using renewable energy such as solar and wind power. The government is mandating ZEB for public buildings by 2025, with plans to expand it to the private sector in the near future.

The Korean government recently announced a new policy to revitalise real estate investment trusts (REIT) to further develop the real estate industry. This plan will be implemented through amendments to the Real Estate Investment Company Act and related regulations.

Previously, real estate development projects were often carried out through project financing vehicles, but by introducing a project REIT system, the government plans to ease regulations to enable the use of REITs to carry out development projects. Currently, REITs can only invest in assets listed in the Act, but the amendments to the Act will allow REITs to invest in various types of assets with the government's approval. In particular, investment conditions for healthcare, tech assets, and industrial complexes are expected to improve.

Currently, as REITs are required to distribute at least 90 per cent of their distributable profits to shareholders, they are unable to utilise a significant portion of their distributable profits to purchase additional assets. However, the amendment will allow them to retain funds for new investments by obtaining shareholders' consent through a special shareholder resolution.

Law stated - 31 October 2024



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# Spain

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The Spanish legal system is a civil law system. Generally, parties may conclude an oral agreement about an estate, which would be perfectly valid. However, it is highly advisable to conclude a written contract in a real estate context. Furthermore, with regard to the acquisition of real estate, the contract should be formalised in a public deed and registered at the Property Registry to protect the rights of the buyer against third parties. In general, laws are applicable at a national level with regard to real estate, although in some autonomous communities (eg, Catalonia) special regulations exist.

Law stated - 18 October 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Ownership and other specific rights in Spain are recorded at the competent property registry where the real estate is located. Each property registry is administrated by a registrar. Registration is, in many cases, merely declaratory, but not mandatory. Nonetheless, there are important exceptions. For instance, it is legally required that mortgages be registered to be legally valid. However, it is advisable for all rights to be registered to protect their position against third parties.

Law stated - 18 October 2024

### Registration and recording

#### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Only public deeds can be registered at the Spanish property registries. Such deeds must be signed before a notary, as electronic completion or signature is not possible. The fees to be paid vary depending on the value of the deed (eg, purchase price of the property) and are usually borne by the buyer, although the parties can agree otherwise. In the case of the first transfer of a property, Spanish VAT applies. Second and subsequent transfers trigger the Property Transfer Tax to be paid by the buyer. The seller, on the other hand, might be subject to capital gains tax.

Law stated - 18 October 2024

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Natural persons and corporate bodies – both private and administrative – may hold and exercise rights over real estate. Nonetheless, an express authorisation may be required in special zones of interest for national security reasons, and in coastal zones and islands where foreign property ownership can be restricted. However, for EU citizens these provisions mostly lapsed following Spain's accession to the European Union in 1986.

Moreover, transactions are considered foreign investments only if the amount involved exceeds €3,005,060.52. In such cases, a simple retroactive notice to the government is required to satisfy governmental formalities. On the other hand, there is a formal obligation to report any investments that originate in tax havens prior to carrying out the investment. Together with the current anti-money laundering legislation, a considerable amount of information is requested from foreign investors. The rules on investment are always linked to the place of origin of the investment, rather than to nationality. EU citizens are exceptions to this rule.

To be able to sign documents before a notary or open a bank account, a natural person must obtain a special identification number for foreigners (NIE), while a corporation must obtain a Spanish tax number (NIF).

Law stated - 18 October 2024

## Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

A non-resident investor in real estate assets located in Spain, the total value of which exceeds €3,005,060.52, must present a declaration (using a pre-established form) at the electronic headquarters of the Secretariat of State for Commerce and Registration of Investments.

However, if the investment or liquidation (total or partial) in such assets comes from a country or territory considered a tax haven, it is necessary to present this declaration independent of the invested or liquidated amount. Additionally, a prior declaration must be made to the Registry of Investments of foreign investments in such cases.

Law stated - 18 October 2024

## Legal liability

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What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Liability may arise owing to non-compliance with construction and urban development regulations (owner), lack of maintenance of the property (owner), erroneous use of the property (owner and lessee) or interference with the public domain such as infrastructures (owner and lessee). Liability regarding the construction and lack of maintenance has only one state-wide regulation.

Liability due to erroneous use has 17 regulations corresponding to autonomous communities, where the applicable regulation is that of the place where the property is located. Liability for interference with the public domain has a state-wide regulation and 17 autonomous community regulations, depending on which administration holds ownership over the affected public property.

Generally, infractions are categorised as minor, serious or very serious. The second and subsequent owners may be liable in the same way as the initial owners. The liability of lenders and subletters is ruled out.

Civil liability is covered with insurance policies for construction, home, activity, installations, etc.

Law stated - 18 October 2024

## Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

There is no possible prior protection from liability. It is only possible to cover the indemnifications and repairs necessary for the damages caused as a liable owner by taking out an insurance policy.

In cases in which the owner of a property does not carry out any activity therein, it must take out a homeowner's insurance policy that includes real estate insurance coverage. Accordingly, not only the damages to its own property are covered but also damages caused to properties belonging to third parties when the cause comes from its own property.

If the owner of the property is going to carry out an activity therein, it must take out a civil liability insurance policy. These policies may include cover for environmental damage.

Insurance policies may also cover judicial expenses and costs inherent to the judicial claim and guarantee, for example.

Law stated - 18 October 2024

## Choice of law

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- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Spanish law does not forbid choosing the law of another jurisdiction as the governing law for the acquisition of property located in Spain. However, the choice of Spanish law as the governing law is always advisable. The applicable conflict of law rules are Regulation 593/2008/EC and the Spanish Civil Code. Contractual choice of law provisions are enforceable, provided that the choice of law is valid.

Law stated - 18 October 2024

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

In accordance with the Spanish Law on Civil Procedure, the courts of first instance of the place in which the litigious object is located must process – in the first instance – the lawsuits in which actions are taken with respect to real actions related to real estate assets and related to leases and evictions. Usually, the parties also agree upon the courts of first instance of the place in which the litigious object is located for other claims related to real estate assets. Both the plaintiff and the defendant must appear at trial with a court representative and a lawyer qualified to exercise their profession vis-à-vis the courts or tribunals. Nevertheless, if the amount of the proceedings does not exceed €2,000, the participation of the court representative and the lawyer is not necessary. Courts and tribunals in Spain are obliged to assist one another in exercising jurisdictional competencies. It is the court or tribunal itself that contacts the court or tribunal outside its jurisdiction. It is not necessary for a party to be qualified to do business in Spain to enforce remedies under Spanish jurisdiction.

Law stated - 18 October 2024

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

In general, there are no differences with regard to ownership of real estate in Spain. With regard to residential leases, the Law on Urban Leases determines a set of regulations that cannot be altered to the detriment of the lessee, whereas commercial leases are governed by almost total freedom between the parties, with only a few mandatory regulations according to the Law on Urban Leases. With regard to the financing of residential property, consumer rights must be taken into account above all. Similar rules apply in the context

of the enforcement against residential properties, especially if the property constitutes the registered address of the debtor.

Law stated - 18 October 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Each Autonomous Community has its own urban development laws that are specified and enforced in each municipality by its city or town council. Municipalities are the administrative bodies competent to regulate urban planning of both cities and rural areas. They do so by way of general urban development plans (PUG), which contain the regulations for their zoning, expansion, regulation of uses and their compatibility with the environment and building regulations, as well as architectural, cultural, environmental, archaeological and infrastructure catalogues.

The PUG are general clauses with full effectiveness as regulations (laws) that recognise, concede and impose rights and obligations of mandatory fulfilment, under a penalty regime. Citizens (including companies) can develop the PUG, proposing changes and development regulations. Any action requires prior administrative authorisation. The PUG and other developmental regulations may be subject to administrative or judicial appeal due to errors in their preparation procedures or in their content.

Some specific areas requiring certain legal protection due to their physical characteristics (eg, coasts, mountains and motorways) are regulated by national and regional laws.

In the event of transfer of certain, special properties, there may be a pre-emption right in favour of the public administration. This may be the case, for example, in the sale of housing that is publicly subsidised or considered historical heritage, or the sale of protected natural areas.

Law stated - 18 October 2024

## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Compulsory expropriation is possible only when it is justified by a public utility and social interest and exercised by the public administration or private entities that act on behalf of the administration (such as the groupings of owners for urban planning development). However, a 'fair price' (compensation) must always be paid for the market value of the expropriated object. Furthermore, agreements may be reached before the Judicial Courts of Compulsory Expropriation. The economic compensation may be complemented, but

not substituted, by the relocation of the home or activity to another property of similar characteristics and market value, using criteria of proximity and commercial opportunity.

Law stated - 18 October 2024

## Forfeiture

13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

The confiscation of real estate assets is not possible even if they are being used to commit crime, given that the right to private property is a fundamental right established in the Spanish Constitution. There must always be payment of the price of their value, even in judicial proceedings in which the value is reached in a judicial auction.

However, the government can force premises or an industry to close if an illegal activity is being carried out there.

Law stated - 18 October 2024

## Bankruptcy and insolvency

14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Insolvency proceedings can be brought if a debtor cannot comply with its payable obligations.

There are two types of insolvency applications:

- a voluntary request: made by the person responsible for the company (in the case of companies); and
- a request made by a creditor.

The mercantile judge, if he or she considers that the necessary requirements are fulfilled, opens the insolvency proceedings and hands down a decision (court order). It is from the date of the court order that the company will be officially insolvent. All credits prior to that date shall be insolvency credits, with different rankings depending on what is established under law. Credits subsequent to the declaration of insolvency shall be credits against the insolvency estate and must be handled with preference over the insolvency credits.

The declaration of insolvency itself does not affect the contracts in force. The owner that has leased a property to an insolvent company is entitled to receive the rent. Accordingly, a tenant must continue to pay rent to an insolvent owner. Rental payments subsequent to the declaration of insolvency shall be credits against the insolvency estate. If the lessee or lessor wishes to terminate the lease agreement, it must address the judge in charge of the insolvency proceedings. The same rule applies in relation to financing contracts. However, mortgage loans are credits with special privilege over the asset covered in the mortgage.

In the same court order that declares the insolvency, an insolvency administrator shall be appointed as the person who will manage and supervise everything related to the insolvency. The insolvency administrator, among other things, prepares a report on the company's situation, which includes a list of creditors and an inventory of all the assets assigning a value to them.

Once insolvency has been declared, there are two main paths:

- if the company's intention is to continue its activity, to try to reach an arrangement with the creditors. If this is not approved, the company will be liquidated; or
- liquidation of the company. The insolvency administrator liquidates the assets of the company and, with the amount of the liquidation, pays the company's debts as far as possible.

The insolvency administrator has a protection mechanism for creditors called a clawback action, which implies that any actions that have caused harm to the equity of the company and were carried out in the two years preceding the declaration of the insolvency are declared null. Accordingly, those assets that may have been lost due to fraud may be recovered.

On 6 September 2022, the amended Spanish Insolvency Law was published, which has made significant changes to Spanish insolvency law. One of the main changes relates to the adjustment to European Directives as regards restructuring plans (pre-insolvency rights). These restructuring plans are entered into privately with creditors, but subsequently the court's approval may be requested, especially if the aim is to extend the effects of the restructuring plan to creditors that have not voted in favour of it.

Law stated - 18 October 2024

## INVESTMENT VEHICLES

### Investment entities

**15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

In general, there are no restrictions on the legal form for investment entities in Spain. Furthermore, investments can be carried out either via a national or resident entity or directly by foreign entities. Foreign entities may also create a representative office (without legal personality) in Spain.

The most common legal forms under Spanish law are:

- limited liability company;
- stock corporation;
- business partnership;
- limited partnership and limited partnership by shares; and
- branch.

There are no pass-through entities in Spain. However, a special taxation regime exists with regard to the Spanish real estate investment trusts (REITs or SOCIMIs) as a special type of Spanish stock corporation.

Corporations with limited liability (limited liability company, stock corporation and limited partnership by shares) shield their shareholders best, as their liability is reduced to the company's assets.

Law stated - 18 October 2024

## Foreign investors

### 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

Usually, foreign investors choose a limited liability company as their investment vehicle, as the costs for incorporation are relatively low (minimum share capital of €3,000) and the liability is limited to the company's assets.

Law stated - 18 October 2024

## Organisational formalities

### 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

All corporations with limited liability must be incorporated by means of a notarial deed that must be registered at the corresponding Mercantile Registry corresponding to the registered address of the company. Afterwards, the companies must fulfil the applicable regulations with regard to bookkeeping and prepare annual accounts that must be deposited with the Mercantile Registry. A direct real estate investment of a foreign entity must apply for a Spanish tax identification number (NIF) but does not have to fulfil reporting requirements. Furthermore, investors must always take the applicable money laundering regulations into account, as such rules are followed very strictly by Spanish authorities, banks, etc.

All Spanish corporations are subject to Spanish corporate income tax. Possible advantages depend on the general structure of the investment and the origin of the investor (eg, if double taxation treaties apply). Spanish REITs are subject to a lower corporate income tax rate but must fulfil special requirements with regard to incorporation (minimum share capital of €5 million) and purpose (acquisition and development of property of urban nature for rental purposes).

Law stated - 18 October 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Spanish law distinguishes between different types of holding rights over real estate:

- sole ownership;
- co-ownership; and
- condominium and time sharing (part-time easement).

Furthermore, there are the following charges:

- easements;
- administrative charges;
- covenants;
- liens;
- mortgages;
- usufructs (beneficial use);
- right of use and rights of residence;
- heritable building rights;
- leaseholds; and
- land easements.

Because of the principle of ownership by accession, rights to land and buildings on the land are not separable, with the exception of the heritable building right. In this case, ownership of the building and the land are separated. The beneficiary of a heritable building right is entitled to build on or beneath the land of the property owner in exchange for periodic rent. However, this arrangement is temporary, as the duration may not exceed 99 years. It is compulsory for formal validity that the heritable building right be recorded in a public deed and registered at the Property Registry.

**Law stated - 18 October 2024**

### Pre-contract

**19** | What are the typical pre-contractual steps?

Preliminary agreements are typically used for real estate transactions (eg, letters of intent (LOI), reservation agreements and purchase options). Furthermore, the parties often sign a private sales and purchase agreement pursuant to article 1454 of the Civil Code, which means that if an advance payment has been agreed upon, the contract may be terminated

by the buyer (thus losing the advance payment), or by the seller (in this case, the advance payment must be returned and doubled in value). Purchase option agreements usually include similar penalty clauses. With regard to the enforceability of an LOI, reference is made to the application of the rules on non-contractual liability under article 1902 of the Civil Code.

Law stated - 18 October 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

The specific provisions included in real estate sale contracts generally reflect the outcome of the due diligence process, from both the seller's and the buyer's perspectives. The negotiation of detailed representations and warranties is common. Otherwise, only the statutory warranties of the Civil Code apply, unless there is a waiver. Further, real estate contracts are freely negotiable between the parties (freedom of contract).

Law stated - 18 October 2024

## Environmental clean-up

### 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Environmental liability is of a personal nature and operates according to the principle of 'he who contaminates, pays'. Nevertheless, this liability is direct, joint and several, and subsidiary; thus, the owner of the property may be obliged to pay the penalty or the repair of the harm caused or both, and for the restoration of the damaged assets to their former condition. It is common for contracts to contain environmental warranties, but they do not survive following the end of the contract term. In the event of non-compliance, liability must be claimed through judicial channels.

Since 2022, by virtue of the law, the notarial deed formalising the transfer of an *in rem* right over property must include a declaration regarding potentially soil-polluting activities. In other words, the person responsible for such declaration must state in the deed whether or not any potentially soil-polluting activities have been carried out on the property. However, this does not apply to property under a horizontal division regime (ie, a regime under which owners have sole ownership over parts of a building) (eg, flats, parking spaces) and share ownership of several communal areas (eg, gardens, swimming pool, elevators, etc).

Law stated - 18 October 2024

## Lease covenants and representation

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- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations concern the main terms and conditions of the lease (the amount of rent, the expiration of the agreement and its extensions, the expenses and taxes assumed by the tenants, exclusivity rights, etc), the existence and amount of statutory deposits, bank guarantees and other cash deposits delivered by the tenants, the non-existence of essential defaults by the parties under the leases, the absence of existing encumbrances relating to the rent and the tenants' waiver of their statutory right of purchase in relation to the leased premises.

Typical covenants with regard to the period between the signing of a private contract and the closing by means of a notarial deed usually refer to the limitation on executing new leases or amending existing leases without the consent of the buyer, that new leases must meet certain terms and conditions, and that the landlord will finalise all pending works or repairs.

In Spain, brokerage agreements do not have any impact on the property or the buyer; this is why sellers' covenants usually do not refer to brokerage agreements. Estoppel certificates are not common in Spain. Therefore, Spanish lease agreements usually do not include obligations to issue such a certificate and they are also not required in due diligence processes.

Law stated - 18 October 2024

### Leases and real estate security instruments

- 23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Spanish law does not generally establish that a lease is superior in priority to other rights upon foreclosure. Therefore, lenders typically require in their agreements with borrowers' subordination and non-disturbance covenants from the borrowers, but not from the lessees of the borrower. Lenders usually require in the agreements with the borrowers that the guarantees that secure their claims have priority. Nevertheless, the priority of security instruments derives from their registration at the Property Registry, where the order in which they have been registered – their ranking – determines their priority upon foreclosure.

The Spanish Urban Lease Law in its current version establishes that in the event of a foreclosure sale during the first five years (or seven years if the lessor is a legal entity) of a lease agreement regarding the property or part of the same, the lease will continue until the end of the fifth (or seventh) year of the lease. The buyer is only obligated to continue

the lease longer than the first five (or respectively seven) years if the lease agreement has been registered with the property registry with a higher rank than the executed mortgage.

Nevertheless, the registration of lease agreements at a property registry is not very common, as it involves high costs and taxes and is usually only required by lessees in the case of very long-term leases (eg, for photovoltaic installations). On the other hand, lessees of commercial premises often request covenants from the lessor stating that if a mortgage is granted this shall contain the lender's obligation to maintain the lease agreement.

Law stated - 18 October 2024

## Delivery of security deposits

**24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

The Spanish Urban Lease Law, applicable to urban buildings, determines that the lessee must provide the lessor with a legal deposit equal to one month's rent for dwelling leases and two months' rent for commercial leases. The lessor, on the other hand, is usually obligated to deposit that legal security with the corresponding authority that each of the Spanish Autonomous Communities has established. In addition, it is common for the lessor to request further guarantees from the lessee, such as additional cash deposits, first-demand bank guarantees, comfort letters, etc. With regard to residential leases signed after 6 March 2019, the amount of such additional guarantees is limited to two months' rent if the term is less than five years (seven years in the case of companies).

In general, the parties agree on annual rent reviews according to the Spanish General Consumer Price Index or other official indices. In the retail and hotel sector, the rent is often established as a combination of a (minimum guaranteed) base rent and a turnover rent, depending on the sales and turnover generated. For long-term leases, the parties usually agree on a system to update the rent according to market prices starting from a certain point in the future.

According to the Spanish Housing Law of 24 May 2023 (Law 12/2023), the annual increase in the rent for habitual residence properties is limited to 3 per cent in 2024. From 2025, a new index, which is still to be created by the Spanish National Statistics Institute (*Instituto Nacional de Estadística* (INE)) before 2025, will apply. This new index is expected to be more stable and to be below the rate of inflation specified in the Spanish Consumer Price Index.

According to this legislation, the competent housing authorities may designate areas with residential property markets in areas under strain, ie, where there is a particular risk of shortage of affordable housing. However, since the designation of such areas ultimately falls within the competence of the Autonomous Communities, at this stage, the law only lays down the general framework conditions. For this reason, it remains to be seen whether the Autonomous Communities will make use of this possibility at all, as these solutions have created much controversy. To date, Catalonia is the only Autonomous Community that has declared the existence of such areas, in 140 municipalities.

For such areas, rental price limitations and extraordinary lease extensions would be possible:

- for new leases in areas under strain, the new law establishes, as a general rule, that the rent may not exceed that of the previous lease, albeit taking into account the annual review, and no costs may be passed on to the lessee that were not foreseen in the previous lease; some exceptions are established which, under certain conditions, make it possible to increase the rent by up to a maximum of 10 per cent, for example, when renovation works have been carried out in the last two years.
- If the lessor qualifies as a 'major lessor' (*gran tenedor*), or the property has not been leased in the last five years, the rent will be limited by the maximum price applicable under the relevant system of price indexes and the lessee may demand up to three extraordinary annual extensions. For these purposes, any natural or legal person owning more than 10 residential properties or a built area of more than 1,500 square metres for residential use will be considered a major lessor. In areas designated as having a residential market under strain, as described above, the Autonomous Communities may lower the threshold to be met to qualify as a major lessor to five properties (Catalonia has made use of this power).

Law stated - 18 October 2024

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

In the context of the acquisition of a property, the legal due diligence should at least cover the title of ownership and contractual relations with regard to the property, as well as the urban planning situation of the property. Furthermore, a technical due diligence is advisable. In general, the due diligence process is carried out before the signing of a contract. The typical method to confirm the title is to consult the property registry and to check the deed of transfer of the seller. On the one hand, the party who acquires in good faith from the registered owner of the property is protected by law; on the other hand, transfer deeds usually contain guarantees against bad titles.

With regard to the registration of securities the principle of 'first in time, greater in right' applies, which means that preference among rights registered depends on the date of registration of the title at the property registry.

It is customary to obtain a legal opinion regarding legal use and occupancy. Depending on each case, the legal opinion may include government confirmation or a zoning report.

Law stated - 18 October 2024

## Structural and environmental reviews

- 26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Prior to the sale and purchase agreement for medium or large properties, as well as for properties suspected of having incidences, it is common to carry out environmental due diligence. This due diligence is not common for lease agreements, except for ports or similar infrastructures. Following the results of the analysis, a reduction of the value may take place or corresponding representations and warranties. Furthermore, it is possible to take out environmental liability insurance policies.

Law stated - 18 October 2024

## Review of leases

- 27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lawyers review leases; however, the business side of the leases is usually excluded. The most significant lease issues to be pointed out to clients refer to the term of the contract, possible extensions and possibilities for unilateral and early termination, guarantees of the lessee, obligations for maintenance, and the tenants' waiver of their statutory rights of purchase of the leased premises as well as their rights to claim damages because of loss of customers due to the ending of the lease.

In Spain, property management agreements do not have any impact on the property or the buyer that has not entered directly into the agreement and are not superior in priority to other rights upon foreclosure. In agreements with borrowers, lenders usually require that the guarantees that secure their claims have priority.

Law stated - 18 October 2024

## Other agreements

- 28** | What other agreements does a lawyer customarily review?

A lawyer normally reviews any agreement that directly or indirectly affects the property or is signed therewith to analyse the potential legal risks as well as all legal requirements. These other agreements may refer to title documents (easements, restrictive covenants, etc), property management agreements, utility and other service contracts, third-party contracts (supplies, lift maintenance, fire protection system maintenance, cleaning, etc), subleases and by-laws of the community of owners, as well as minutes of the meetings of the community of owners, documents with regard to any legal disputes, documentation

or information relating to labour, social security, immigration and occupational hazard prevention matters, tax documents, insurance policies, etc.

Law stated - 18 October 2024

## Closing preparations

**29** | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The duration of a real estate transaction will vary depending on specific factors relating to the parties involved and any additional requests for documentation as a result of due diligence red flags or other findings that must be resolved before closing. If complex negotiations are required, the entire process may be significantly prolonged. As a general rule, however, the typical duration of a standard private sale transaction is between one and two months, whereas commercial sale transactions usually take between two and three months. In the case of company directors, the power of attorney of those appearing before a notary derives from the deed of appointment, and in the case of proxies of natural or legal persons, from the deed of power of attorney. In the case of companies, general powers of attorney must be registered at the Mercantile Registry. The seller in the public deed states that its powers of attorney are fully in force and have not been revoked. Given that the transfer of ownership occurs at the time of the granting of the public deed of sale, the payment of the purchase price – and, therefore, the funding of the transaction – must be made at the same time by a Spanish bank cheque or instant bank transfer.

Law stated - 18 October 2024

## Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Due to the security of legal business, the buyer has a vested interest in registering its right of ownership. As only public deeds can be registered at the property registry, the closing usually takes place at the notary's office by the granting of a public deed. All parties must be present or duly represented by power of attorney. The concept of an escrow account for the payment of the purchase price does not exist in Spain. However, depending on the circumstances, the notary might accept a deposit in his or her account.

Law stated - 18 October 2024

## Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

Unless the parties have agreed otherwise, the seller is obliged to deliver the real estate and facilitate its quiet possession. It is also liable for any hidden defects and compliance with representations and warranties agreed upon by the parties.

The consequences of a breach are as follows.

In the case of non-transfer of the property, the buyer is entitled to decide whether it wishes to demand compliance or withdraw from the contract. In either case, it is also entitled to claim damages, where applicable. In the case of hidden defects, the buyer is entitled to withdraw from the contract (and recover costs) or to reduce the purchase price proportionately. If the seller was aware of the hidden defects and the buyer decides to withdraw from the contract, then the latter is also entitled to claim damages. In the case of third-party claims against the buyer's property title that caused the loss of the property right, the buyer is entitled to reimbursement of the purchase price and all incurred expenses (eg, litigation costs, contract costs, damages and interest). There are also several disclosure obligations under specific regulations with regard to different areas of law, such as administrative, tax and environmental law.

Law stated - 18 October 2024

### Breach of lease terms

- 32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Non-compliance by either of the parties with their material obligations under the lease agreement may entitle the other party to ask for fulfilment of the contract or to terminate the lease, with the corresponding compensation for damages in both cases. In addition to the legally established causes for termination of the lease (in particular, under the Spanish Urban Lease Law), the parties may also agree on causes for early termination of the lease.

Furthermore, the parties usually agree on penalty clauses for early termination, which are considered as a substitute for losses and damages if the parties do not expressly agree otherwise. In the case of a residential lease, the penalty is in principle limited to one month's rent for each year remaining until the end of the contract.

Legal proceedings due to non-payment of rent and sums related to the rent (eg, expenses, supplies and taxes) are processed in a verbal proceeding, independent of the debt amount. Furthermore, other lease-related issues can be processed in a verbal proceeding if their value is lower than €6,000. The verbal proceeding is quicker than an ordinary proceeding, as the phase of challenging the claim in writing and the act prior to the hearing is eliminated. In the case of non-payment of rent or expiry of the lease term, the lessor can also claim eviction, requesting the termination of the lease and the recovery of the leased premises; this applies to commercial and residential leases. Regarding eviction due to non-payment, a special and summary (verbal) trial applies that further omits formalities to finish the proceedings quickly (approximately three months).

Law stated - 18 October 2024

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

The most important real estate security in Spain is the mortgage, as it provides the lender with a direct instrument to enforce its rights in the case of non-performance by means of foreclosure of the property or forced administration. However, lenders usually request additional securities, such as pledges over other assets of the debtor (bank accounts, receivables, shares) or personal guarantees.

In general, credit entities (both national and foreign) are typically the providers of real estate financing in Spain with regard to all types and stages of real estate investment. However, alternative forms of financing (eg, mezzanine) have increased.

In general, there are no restrictions on who may provide financing as long as the regulations and laws applicable to the respective providers (eg, banking regulations applicable to credit entities or supervision by the Bank of Spain) are fulfilled.

Law stated - 18 October 2024

### Leasehold financing

- 34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Spanish law does not generally establish that a lease is superior in priority to other rights upon foreclosure. The Spanish commercial lease is governed by almost total freedom between the parties; a minimum or maximum lease term is not legally regulated. There are no special regulations regarding subletting. Therefore, the guarantees required by lenders financing lessees will not be directly related to the premises but to the borrower's company and the business it develops (pledges over the shares, bank accounts or claims, chattel mortgages regarding equipment and machinery, etc).

Law stated - 18 October 2024

### Form of security

- 35** | What is the method of creating and perfecting a security interest in real estate?

Under Spanish law, a mortgage must be granted by means of a public notarial deed and must be registered at the property registry to be valid. With regard to other securities



(pledges, guarantees) lower formal requirements apply. However, to obtain an instrument that can be enforced directly in case of non-performance, such securities should be granted by means of a public deed.

Law stated - 18 October 2024

## Valuation

- 36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Third-party appraisals are generally required by lenders, in particular, if the loan is guaranteed by a mortgage, as the auction value established in the mortgage deed with regard to an eventual foreclosure cannot be lower than 75 per cent of the value determined by means of an official appraisal. However, in the context of loans granted to consumers that are secured by a mortgage obtaining an appraisal is legally mandatory. Appraisals usually follow the standards established by Spanish regulations; however, in the context of cross-border transactions, international standards, such as the Royal Institution of Chartered Surveyors, have become more common. Appraisers must be validated by the Bank of Spain and, therefore, must fulfil specific requirements with regard to their capital, purpose, insurance coverage, etc.

Law stated - 18 October 2024

## Legal requirements

- 37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

The ramifications may vary depending on whether the lender is resident within or outside the European Union. Generally, a lender from another jurisdiction must fulfil the requirements of its country of residence to offer loans in Spain and, depending on where it comes from, there may be additional ramifications. Anyone who wants to do business in Spain will need a Spanish tax identification number (referred to as 'NIE' for natural persons and 'NIF' for legal persons) and the business might be subject to local taxes, although this is determined on a case-by-case basis. The most common form of lien document is the mortgage loan. Embargoes are also a way of securing a debt, but only once recognised by a court. Mortgages are registered at the property registry corresponding to the property and the information about the existence of a mortgage is public. Taxes (in particular, stamp duty) become due when a mortgage is granted.

Law stated - 18 October 2024



## Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates on commercial and high-value property loans are commonly set with reference to the European Interbank Offered Rate (EURIBOR) or to the index set from the Spanish Central Bank (usually the same). EURIBOR can be calculated monthly, bi-annually, annually or every five years. It is a reference rate that is constructed from the average interest rate at which eurozone banks offer unsecured short-term lending on the inter-bank market. The maturities on loans used to calculate the EURIBOR often range from one week to one year. It is common for banks to add their own interest rate to the EURIBOR (eg, Euribor plus 1.25 per cent). Usually, when the EURIBOR is negative (which is currently the case), banks will not give negative interest rates; in their calculation, the EURIBOR will remain at zero if it is negative. There is no legally impermissible rate of interest, but exorbitance may be determined on a case-by-case basis, especially regarding loan agreements with consumers.

Law stated - 18 October 2024

## Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

In the case of debts secured by mortgages as the typical security over property in Spain, the mortgage is usually enforced by a judicial procedure, although extrajudicial foreclosure before a notary is also possible. In this context, the type of mortgage and the characteristics of the borrower must be taken into account: commercial or private loan, borrower as a natural or legal person, a mortgage over the main residence or another type of property, etc. The time frame depends mainly on the court, but in general, the lender must count on nine to 15 months. The lender must follow the legally established steps with regard to the chosen foreclosure procedure.

Law stated - 18 October 2024

## Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Should the amount recovered in the foreclosure be insufficient to pay the outstanding loan balance with the corresponding additions, then the lender will obtain a certification from the court stating the price recovered after the auction as well as the outstanding amounts for any concept with the special distinction of the principal pending, ordinary interest, default interest and costs of the proceeding. The lender has a time limit to enforce the deficiency judgment of five years of the payment becoming due. There is a limitation concerning the amount that the mortgage can cover, but there is no limitation on the amount or method of calculation of the deficiency.

Law stated - 18 October 2024

## Protection of collateral

41 | What actions can a lender take to protect its collateral until it has possession of the property?

The lender cannot take possession of the property until the auction price has been paid. However, the mortgage itself should be sufficient security, as it is closely linked to the property and will remain so until the mortgage is settled and finally cancelled. If the lender seeks to collect rent in the case of the borrower's default, a pledge over the rent receivables should be established in addition to the mortgage over the property. Within judicial enforcements, the lender may solicit the seizure of the rent and other borrower credit rights vis-à-vis third parties.

Law stated - 18 October 2024

## Recourse

42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents cannot provide recourse for all of the assets of the borrower. Nonetheless, the debtor's entire estate is liable by law. That said, the foreclosure of a mortgage has a privileged procedure that helps to save time and costs. In a bankruptcy proceeding, the amounts secured by the mortgage will be considered as a credit with special privileges and therefore preferential, but the outstanding amounts outside the limits will not be treated equally.

For the purposes of the creditor's arrangement and the restructuring plans, the special privilege will be limited to the reasonable value of the asset or right over which the security in question has been given, subject to the deductions laid down in this statute. In the case of real estate, reasonable value of the assets and rights of the debtor's estate will mean the value determined by an approved valuer. Once the reasonable value has been determined, in order to calculate the limit of the special privilege the insolvency manager must make the

necessary deductions: 10 per cent of the reasonable value of the asset or right over which the security in question has been given. In addition, the amount of the credits pending that enjoy special privileges must be deducted (prior guarantees).

The limits of personal recourse to guarantors depend on the agreement between the parties. It is possible to limit the recourse to certain actions; however, the guarantor may also agree on unlimited recourse.

Law stated - 18 October 2024

## Cash management and reserves

**43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

In the context of standard financing, the lender usually does not require cash management systems or reserves. However, the lender usually pledges the rental accounts, rental receivables and legal deposits or other guarantees to be able to enforce its rights quickly in the case of non-performance. In the context of a refinancing loan, cash traps or lockboxes are more common.

Law stated - 18 October 2024

## Credit enhancements

**44** | What other types of credit enhancements are common? What about forms of guarantee?

A typical credit enhancement in Spain are personal guarantees by the shareholders or the borrower's group companies if the financial capacity of these additional guarantors is considered sufficient by the lender. Such guarantees are usually designed as payment guarantees with regard to part or all of the debt. In this context, a first-demand guarantee granted in a public deed gives the best protection, as the guarantee can be enforced directly against the guarantor.

Law stated - 18 October 2024

## Loan covenants

**45** | What covenants are commonly required by the lender in loan documents?

Borrowers are usually required to comply with corporate covenants (change-of-control clauses, licences), contract-related covenants (subordination clauses, fulfilment or substitution of securities) and property-related covenants (insurance, environmental obligations, repairs and maintenance of the property, etc).

Law stated - 18 October 2024

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

The typical financial covenants are loan-to-value, interest coverage ratio and debt service coverage ratio. In this context, lenders generally ask for the annual accounts or – in the case of non-performance of the covenants – for further reporting documentation with regard to the borrower's financial situation. Lenders tend to request regular updates of appraisals (usually every few years or more frequently in the case of non-performance).

Law stated - 18 October 2024

## Secured movable (personal) property

### 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Movable assets (including receivables) can be collateralised by means of ordinary pledges that necessarily require the transfer of possession of the pledged good or by means of a chattel mortgage or a non-possessory pledge if the possession of the movable asset shall not be transferred to the lender. However, assets that can be collateralised by means of a chattel mortgage or a non-possessory pledge are limited by law. Furthermore, such securities must be formalised by means of a public deed. Ordinary or possessory pledges can be signed as private documents with a view to possible enforcement; however, formalisation in public deed is recommended. Generally, the security agreements contain control clauses.

Law stated - 18 October 2024

## Single purpose entity (SPE)

### 48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

In general, lenders do not require the borrower to be an SPE. However, in larger real estate transactions it is usually the investor that opts to carry out the investment by means of an SPE. No special requirements apply with regard to the creation and maintenance of SPEs except for the requirements for the incorporation of a limited liability corporation under Spanish law. There is no general concept of an independent director in Spain.

Law stated - 18 October 2024

## UPDATE AND TRENDS

### International and national regulation

- 49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

The most significant legislative reform carried out in Spain was the Spanish Housing Law of 24 May 2023 (Law 12/2023). As in other European countries, there is very intense debate about how to avoid higher rental prices in large, urban centres. This statute aims to increase the supply of affordable housing and relieve the pressure on the rental market.

In addition to the establishment of a public real estate portfolio, the Law also contains provisions affecting the private sector, which aim to improve access to affordable housing, and contains some regulations which modify the Spanish Urban Lease Law. We highlight below the most important aspects.

According to this law, the competent administrative bodies for housing may designate areas with residential markets under strain in those zones where there is a particular risk of a shortage of affordable housing. For such areas, rental price limitations and extraordinary lease extensions would be possible; the law also establishes certain special regulations for 'major lessors' (see Section 3.7. for more details in this regard). However, since the designation of such areas ultimately falls within the competence of the Autonomous Communities, at this point, the law only sets the general framework conditions. It therefore remains to be seen whether the Autonomous Communities will make use of this possibility at all, as these solutions have caused great controversy. To date, Catalonia is the only Autonomous Community to have declared the existence of areas under strain, in more than 140 municipalities.

Law 12/2023 also introduces certain amendments to the eviction, foreclosure and real estate auction proceedings foreseen in the Spanish Civil Procedure Law with respect to properties occupied as habitual residences by socially and financially vulnerable persons, which can delay such proceedings.

Finally, certain tax improvements are foreseen for natural persons receiving income from properties leased as residences, who do not carry out an economic activity in this regard.

Furthermore, changes are expected with regard to seasonal leases, which so far have escaped the regulations contained in the Urban Leases Act regarding rent review limits, extraordinary extensions of the lease term and other measures to protect tenants. It is also intended to create a specific regulation for other temporary contracts (tourist, rooms or watercraft), which must be registered and comply with the European Union Regulation (Regulation 2024/1028 of the European Parliament and of the Council of 11 April 2024).

The problem of tourist accommodation is also being addressed. There have been recent local and regional regulations that have restricted tourist rentals by limiting the granting of licences, and such limitations are expected to be tightened.

**Law stated - 18 October 2024**



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# Switzerland

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## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

Switzerland has a civil law system, with most of the law regulated by statute. Compared with those in other jurisdictions, Swiss statutes, in particular older ones, are often short in style and leave room for interpretation and jurisprudence. In general, Swiss law allows parties to sue for specific performance or damages. Injunctions may be granted if the plaintiff can substantiate by prima facie evidence that the defendant is in breach, or a breach is threatened, and the plaintiff would suffer a disadvantage from the breach that is not easily remediable.

Oral contracts are binding under Swiss law unless the law requires a specific form (such as for real estate contracts). As a general rule, courts are free to consider any form of evidence (eg, documents, witnesses, site visits, experts, interrogation of the parties).

Real estate transactions are mostly regulated by federal law, but many relevant topics, such as zoning and taxes, are also governed by local regulations (ie, cantonal law and communal law).

Law stated - 23 October 2023

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Switzerland has a land register, in which all rights in real property are registered. A bona fide purchaser of a property may rely on the fact that no other rights exist than those registered in the land register, with a few specific exemptions of legal liens, mostly for taxes or workmen's liens, which may exist independently of registration. This system makes title searches or title insurance, customary in other jurisdictions, unnecessary.

Law stated - 23 October 2023

### Registration and recording

#### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The acquisition of real estate (including building rights) requires notarisation of a purchase agreement (signing) and registration in the land register (closing). Ownership passes with registration in the land register.

Notaries in the canton where the property is located are exclusively competent to notarise sale and purchase agreements. In some German-speaking cantons, the notaries for real estate matters are state officials. In other cantons, notaries are private practitioners. In two cantons the parties may choose between private and state notaries.

To convey title, notary fees, land register fees and (in some cantons) transfer taxes accrue. These fees and taxes vary from canton to canton and may be quite substantial in some cases (up to 3.5 per cent, even for larger properties). Depending on the canton, the fees are paid by the buyer or split equally between the parties.

No particular form is required for leases; they are typically agreed upon in writing.

Law stated - 23 October 2023

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Swiss law restricts the acquisition of real estate that is not permanently used for commercial purposes (non-commercial property), such as residential or state-used property, unbuilt land or permanently vacant property (the Lex Koller). Foreign investors need a special permit to acquire non-commercial property. As permits are only available in a limited number of special cases, foreign investors are practically excluded from acquiring non-commercial property. The most relevant exemption in practice where permits are available is for foreigners to acquire a vacation home in certain tourist regions that expressly provide for such permits.

Legal entities with their corporate seat outside Switzerland are deemed to be foreign under the regulations, regardless of who controls them. Legal entities with their corporate seat in Switzerland are deemed to be foreign if foreign investors control them. The law takes a very economic view to determine whether a Swiss entity is foreign-controlled; namely, it looks through the entire holding and financing structure, but is strictly formal as soon as an entity with its corporate seat outside Switzerland is involved.

Swiss nationals are considered to be Swiss irrespective of their place of residence. EU nationals are not considered to be foreign if they have their actual and legal residence in Switzerland. Non-EU nationals must hold a residence permit C in Switzerland to be considered Swiss; they may, however, acquire a primary house at the place of their actual and legal residence beforehand.

Only property that is not permanently used for commercial purposes is subject to the legislation. Mixed property (eg, mixed residential and commercial property) may only be acquired if the residential use is clearly subordinate (eg, a caretaker's apartment in an office building) or if it is situated in a zone where the law prescribes a certain minimum residential use that is below 50 per cent.

Law stated - 23 October 2023

## Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange control issues limiting investment in Swiss real estate or the repatriation of profits. However, Swiss banks are subject to strict anti-money laundering rules, requiring them to trace the source of monies transferred to Switzerland. Also, repatriation of monies as dividends or liquidation proceeds from a Swiss company is subject to a withholding tax of 35 per cent, which non-resident shareholders may only partly or fully reclaim if a double taxation treaty so provides.

Law stated - 23 October 2023

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Swiss law has strict liability (in tort) of the owner of a building for damages resulting from deficiencies or insufficient maintenance of a property. Similarly, tenants may become liable for deficiencies or insufficient maintenance of tenant fittings. Lenders are typically not liable.

Law stated - 23 October 2023

## Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners typically take out insurance against building liability risk; insurance is, however, not mandatory. Tenants will typically seek coverage under a general private or business liability policy. Environmental risks are typically not separately insured.

Law stated - 23 October 2023

## Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Agreements on real property located in Switzerland must follow the formal requirements of Swiss law (ie, public notarisatation at the place of the property, the governing version

in the official language of the place of the property). Also, rights in rem on real property in Switzerland are mandatorily subject to Swiss law. In the absence of a choice of law provision, Swiss law also applies to the agreement itself. While a choice of law provision is theoretically enforceable, local notaries in practice often refuse to notarise agreements that are not subject to Swiss law.

For lease agreements, a foreign law may be chosen as governing law (subject to a few public order provisions that apply mandatorily).

Law stated - 23 October 2023

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Swiss courts have exclusive jurisdiction on rights in rem in real property in Switzerland. Filing a statement of claim with the relevant court starts proceedings. The court exclusively makes service of process. A party does not have to be qualified to do business in Switzerland to enforce remedies.

For lease disputes, the law provides for a special mediation authority that must be consulted to start legal proceedings and for special lease courts as courts of first instance. The mediation authority or court where the property is located has jurisdiction. A choice of arbitration is permissible.

Law stated - 23 October 2023

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Apart from the general restrictions on the acquisition of non-commercial real estate by foreigners (Lex Koller) and zoning laws, Swiss law barely distinguishes between commercial and residential property. Some differences exist in lease law – for example, the minimum notice period for termination is three months for residential and six months for commercial property, and the maximum period by which a lease may be extended by the court upon request by the tenant is respectively four and six years.

Law stated - 23 October 2023

## Planning and land use

- 11 |

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Zoning law is regulated by federal, cantonal and communal regulations, with detailed zoning being regulated at the community level. Building projects require a building application that is reviewed in a process that may take longer for larger projects, as well as the publication of the project and setting of building profiles so that neighbours and environmental organisations can appeal the building permit. The procedure differs from canton to canton.

Law stated - 23 October 2023

### Government appropriation of real estate

12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Condemnation of real estate is practically only relevant for infrastructure projects such as roads, railways and similar. Owners that are subject to condemnation receive compensation that is assessed in a judicial process if no agreement is reached. In condemnations based on federal law, the compensation is distributed among the lenders and other holders of rights in rem according to the priority of their rights in rank and the remainder to the owner.

Tenants may claim compensation if their lease agreement is terminated early or the use of the lease object during the lease term is impaired by the condemnation.

Law stated - 23 October 2023

### Forfeiture

13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

A court can only forfeit real estate in a criminal proceeding if the property was acquired through a criminal offence. The right to order forfeiture is limited to seven years, unless the statute of limitations for the offence is longer, in which case this longer deadline applies. No forfeiture may be ordered if a bona fide purchaser has acquired title in the property.

Law stated - 23 October 2023

### Bankruptcy and insolvency

14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Swiss law provides for involuntary and voluntary bankruptcy of Swiss legal entities. When enforcing its claim, a secured creditor may choose whether to sue for foreclosure of the security (resulting in the liquidation of the security) or for payment of the claim (resulting in bankruptcy). A lender secured by mortgage notes will typically choose the first. An unsecured creditor (eg, the lessor) will sue for bankruptcy. Both proceedings are started with an order to pay being issued to the debtor; the debtor has the possibility to object, which will lead to legal proceedings on the merits of the claim.

The directors of Swiss companies are obliged to file for voluntary bankruptcy or request a moratorium if the company is over-indebted (ie, the company's liabilities exceed its assets). Such a voluntary bankruptcy may also be started during a pending debt enforcement proceeding. A secured creditor's preferential right remains respected in the bankruptcy or moratorium. In practice, both a bankruptcy proceeding and a moratorium lead to the involuntary liquidation of the company; the company hardly ever survives.

Law stated - 23 October 2023

## INVESTMENT VEHICLES

### Investment entities

- 15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

In principle, any Swiss or foreign entity may acquire real estate in Switzerland. Typically, a Swiss company limited by shares (AG/SA) or limited liability company (GmbH/Sarl) is chosen to shield the investor from liability. While both types of entities are taxed on an individual basis in Switzerland, a GmbH/Sarl is sometimes preferred by US investors as it is regarded as a pass-through entity for US tax purposes.

Law stated - 23 October 2023

### Foreign investors

- 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors typically directly acquire real estate with a foreign entity or use an AG/SA or GmbH/Sarl. The direct acquisition has the advantage that no withholding tax applies to distributions. The use of a Swiss property company has the advantage of being more acceptable as a counterparty in Switzerland.

Law stated - 23 October 2023

### Organisational formalities

- 17 |

What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Swiss companies are formed through an incorporation meeting held in the presence of a notary public and registration in the commercial register. While the preparation of the articles of association and documentation for the meeting can be arranged within days, the payment of the minimal capital to a blocked account and the collection of proxies and signatures may require more time.

Foreign entities holding real estate in Switzerland are not subject to special registration or reporting requirements. They are in principle subject to the same duties as Swiss companies, which include the filing of ordinary tax returns and registration for VAT purposes, if applicable. The acquisition of real estate establishes a limited tax residence in Switzerland for income and capital tax purposes.

Law stated - 23 October 2023

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Most owned properties are held in full ownership (similar to freehold), in which case the owner has full title to the land and buildings. Other properties are held as a building right (similar to a land lease or leasehold); in this case, the landowner grants to the lessee the right to erect and maintain buildings on the land. Such building rights can be agreed upon for up to 100 years. At the end of the term, the buildings accrue to the landowner – depending on the agreement – with or without compensation. Building rights are transferable and are traded similarly to properties in full ownership.

Both full ownership properties and building right properties may be split into co-ownership or condominiums. In cases of co-ownership, each co-owner owns a proportional quota of the entire property. Each co-owner thus participates in the income of the entire property in proportion to his or her quota.

In the case of condominium property, each owner has the right to use certain rooms exclusively. Each owner thus profits from the use and income of his or her unit. Furthermore, each owner may use the common areas (entrance, stairs, etc).

Leased properties are used based on a lease agreement that is subject to the lease provisions of the Code of Obligations. Swiss lease law and courts are rather tenant-friendly. Commercial properties are usually leased based on a lease for a fixed term (often five to 10 years). Residential properties are typically leased based on indefinite leases that can be terminated by either party with a notice period of three months.

Law stated - 23 October 2023

## Pre-contract

### 19 | What are the typical pre-contractual steps?

In the residential property market, sellers typically request the buyer to sign a type of reservation agreement and pay a reservation fee in the range of 20,000 to 50,000 Swiss francs that is forfeited to the seller if no binding agreement is signed. In return, the seller typically takes the property off the market. As the sale and purchase agreements must be executed in the form of a public deed to be binding, it is questionable to what extent such reservation agreements are enforceable or whether the buyer may reclaim a reservation fee that he or she has paid.

For commercial properties, pre-contracts are not typical among Swiss institutional investors as they are unenforceable if not executed in the form of a public deed. Swiss investors typically prefer to negotiate the final agreement based on a formal offer (normally labelled as 'binding', although it is not binding) submitted by the buyer. When foreign investors are involved, we see term sheets, letters of intent and (non-binding) pre-agreements that are subject to contract, due diligence and other conditions. In such agreements, sellers sometimes grant exclusivity for a limited period of time.

Brokers are not regulated under Swiss law and do not require a special education or certificate. The quality of the brokers thus varies significantly. Brokers are typically engaged by the seller in Switzerland but are sometimes asked to seek their commission from the buyer.

Law stated - 23 October 2023

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

Contracts still widely follow local notary practice, are rather short and more or less standardised among institutional investors. The contract typically includes:

- description of the property (as taken from the land register);
- purchase price and payment details, often with part of the purchase price payable directly to financing banks for the repayment of existing mortgages or to tax authorities as a deposit for real estate gain taxes;
- the closing mechanism: among Swiss investors, sales are often signed and closed on the same day. A separate closing is chosen if the buyer must secure financing or in case of pre-emptive rights;
- payment of notary fees, land register fees and transfer taxes;
- apportionment accounts between seller and buyer for periodic income and duties such as lease income, insurance premiums, taxes, energy costs and service charges;



- transfer of certain agreements (service agreements, facility management, property management);
- VAT; and
- payment of real estate gains tax by the seller – often directly paid by the buyer to the tax authorities, as a deduction to the purchase price.

All warranties provided by law are regularly fully excluded. Instead, the parties agree on a limited set of representations and warranties. These typically include:

- no legal liens for taxes, workmen's liens and the like;
- no pending or threatened litigation regarding the property; and
- representations regarding environmental matters and leases.

Law stated - 23 October 2023

## Environmental clean-up

- 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Existing properties without known environmental issues are typically sold without any warranty regarding environmental pollution or with only a representation that the property is not registered in the register of contaminated sites and that the seller has no knowledge of any existing contamination.

For development projects or existing properties with known environmental issues, different solutions are seen: in some cases, the seller agrees to bear the costs of remediation; in other cases, the buyer agrees to bear the costs of remediation (in full or up to a certain level), but the purchase price is reduced to reflect the likely costs of remediation.

If nothing is agreed (and any warranty has been excluded), the owner of the property must pay clean-up costs (ie, the buyer if remediation takes place only after the closing). The seller may, however, become liable for the full or part of the remediation costs based on public law if he or she caused the pollution or if the pollution occurred during his or her time of ownership or occupancy.

Law stated - 23 October 2023

## Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

According to mandatory Swiss law, lease agreements are transferred by operation of law to the new owner in the case of a property sale. The new owner may, however, terminate the lease early as per the next statutory termination date in case of urgent need of the property for its own purposes. As the seller, as former lessor, must compensate the tenant with damages in the case of such early termination by the buyer, the buyer typically undertakes in the purchase agreement not to exercise its right to terminate early. Early termination may also be excluded by registering the lease in the land register prior to the sale.

The sale and purchase agreements typically contain representations that:

- the net rental income as per the rent roll is correct;
- no material written and oral side agreements exist;
- no terminations have been received or threatened in writing;
- no tenant has requested in writing a reduction in rent;
- no extraordinary arrears in rent exist;
- no disputes or litigation with tenants exist or have been threatened in writing; and
- all rental guarantees and deposits provided for in the lease agreements exist and will be transferred to the buyer upon closing.

Estoppel certificates are not used in Switzerland.

**Law stated - 23 October 2023**

## Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Lease agreements are transferred by operation of law to the new owner if the property is sold in the course of the foreclosure. The new owner may, however, terminate the lease early as per the next statutory termination date in case of urgent need of the property for own purposes, unless the lease has been registered in the land register. If the secured creditor cannot be fully satisfied from the proceeds of the public auction for the liquidation of a property because of a lease registered in the land register that has been registered after the mortgage was registered, the property is again auctioned without such registration – if the auction proceeds are higher this way, the property is sold without registration so that the new owner retains the right to terminate early.

**Law stated - 23 October 2023**

## Delivery of security deposits

**24** |

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Lease agreements in Switzerland do typically provide for security in an amount between one and three (residential leases) or three and 12 (commercial leases) monthly leases. The security is typically granted in the form of a security deposit or a bank guarantee. A security deposit must, by law, be paid to a special blocked bank account in the name of the tenant over which the parties can only dispose jointly; in the case of sale of the property, the deposit is 'transferred' by instructing the bank of the new owner or lessor. Guarantees (in the form of a bank guarantee or surety by a bank) must typically be reissued in the case of a sale.

Periodic rent resets or reviews are not common in Swiss leases, and Swiss law also restricts the amount by which the lessor may raise the rent. In leases with a minimum fixed duration of five years, it is, however, possible to agree on a predefined staggered rent or a periodic adjustment of the rent to the consumer price index (but not for both).

Law stated - 23 October 2023

## Due diligence

25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Because of the land register system, due diligence for the acquisition of the property is often relatively simple, which makes title searches or title insurance, customary in other jurisdictions, unnecessary.

Reports on zoning or opinions regarding compliance with building regulations are rarely seen for a property with existing buildings, but more common for development projects, unless a recent building permit exists.

Due diligence is conducted before executing a contract; due diligence after the signing is hardly seen in Switzerland.

Law stated - 23 October 2023

## Structural and environmental reviews

26 | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

As all warranties for the condition of existing buildings are typically excluded in sale and purchase agreements, institutional investors often seek reports on the building's condition (in particular, capex requirements).

Environmental reports are often limited to a phase 1 report but may go deeper in the case of known water or soil contamination or for development projects. Environmental insurance is not common in Switzerland.

Law stated - 23 October 2023

### Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Leases are typically reviewed by both the business and the lawyers, with the legal review focusing on the type of lease (tenant fittings, distribution of costs), early breaks, restrictions in use, lease assignment and sub-lease clauses, and change of control clauses.

Law stated - 23 October 2023

### Other agreements

28 | What other agreements does a lawyer customarily review?

The focus of legal due diligence lies on the land register documents, including the supporting documents that show the terms of servitudes and easements encumbering the property. Maintenance agreements, service agreements, insurance agreements and other ancillary agreements are normally only cursorily reviewed, as these agreements are often fairly standard.

Law stated - 23 October 2023

### Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

For the signing and closing of an acquisition, each party must provide power of attorney and evidence of its corporate existence (with an excerpt from the commercial register or, for entities from jurisdictions without a commercial register, certificate of incorporation and company secretary certificate). The seller's counsel further typically provides the annexes to the agreement (such as the rent roll) and confirmation by the tax authority about the real estate gains taxes resulting from the transaction and arranges for the transfer of the mortgage notes (duly endorsed in the case of registered mortgage notes). The buyer's

counsel arranges for the payment of the purchase price to the notary's account or the delivery of a payment undertaking by a Swiss bank.

The signing and closing of leases is less formal, as neither public notarisation nor registration is required. Leases are often signed by circulating execution copies by ordinary mail or courier. At the start of the lease, the parties or their representatives typically meet in person at the premises for the handover to document the condition of the premises in minutes signed by both parties – lawyers are usually not present at the handover. Most importantly, the lessor should insist that the rental security is granted prior to handing over the keys.

Financings are usually signed by exchanging execution copies by mail or email. Lawyers are often involved in the preparation of the security documents, in particular, if new mortgage notes need to be established and registered in the land register.

Law stated - 23 October 2023

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Registering the transfer in the land register closes a sale and purchase agreement. In cantons with private notaries, the notary who notarised the purchase agreement normally makes the registration; to secure the payment, the purchase price is typically paid to the notary and released once the transfer is registered. Mortgage notes that must be released by the seller's bank but are needed to secure the financing of the buyer's bank are also sent to the notary who holds them in escrow.

In cantons with state notaries, the parties often meet in person at the land register office. To secure the payment, the buyer presents a payment undertaking by a (typically Swiss) bank in which the bank guarantees to the seller that the payment of the purchase price is made immediately after registration. Mortgage notes are here often transferred directly between the banks – be it before the payment in reliance on a payment undertaking or after the payment based on a promise by the seller's bank to transfer the mortgage notes to the buyer's bank immediately after receipt of payment.

Law stated - 23 October 2023

### Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

Swiss law provides for specific performance. A buyer may thus sue the non-performing seller for transfer of ownership against payment of the purchase price and in addition for damages for late delivery. As an alternative, the buyer may terminate the agreement

and sue for damages. Similarly, a seller may sue the non-performing buyer for payment of the purchase price, including damages for late payment against the transfer of ownership. Alternatively, the seller may terminate the agreement, retain ownership of the property and sue for damages for non-performance. If the buyer paid a down payment, the seller may retain it if so agreed in the sale and purchase agreement.

Law stated - 23 October 2023

### Breach of lease terms

- 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Lease provisions in the Swiss Code of Obligations govern leases of real property. In general, early termination by the lessor is only possible if the tenant's breach makes it unacceptable for the lessor to continue the lease. In the case of non-payment of rent by the lessee, the lessor must set a deadline no less than 30 days for payment in writing and threaten to terminate if the outstanding amounts are not paid. If no payment is received within the deadline, the lessor may terminate with a notice period of 30 days. After valid termination, the lessor may start proceedings to evict the tenant.

If a termination is not possible, the parties may ask for specific performance (eg, the repair of defects of the leased property), damages or a reduction in rent.

Law stated - 23 October 2023

## FINANCING

### Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Mortgage notes registered on the property typically secure real estate financings. Mortgage notes grant the creditor a lien on the property in the amount specified in the mortgage notes. Mortgage notes are transferable and may be used as collateral for a subsequent lender after repayment. Mortgage notes are enforced in a formal enforcement proceeding led by the debt enforcement office at the place of the property. The enforcement takes time, certainly more than a year.

In addition, commercial real estate financings (especially by non-Swiss banks) are typically secured by an assignment of rents and other claims, the assignment or pledge of bank accounts, and, sometimes, a pledge of the share of the property company. Assigned claims may simply be collected by the bank to which they were assigned; the enforcement of a share pledge is more difficult.

Swiss banks have a predominant role in the financing of real estate in Switzerland. In recent years, a few pension funds have started to provide financing through mortgage brokers, and the first foreign banks have just recently announced their entry into the market. In addition, a few private institutions have been providing mezzanine financing.

Law stated - 23 October 2023

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The acquisition of a building right is typically financed in the same way as the acquisition of full ownership in land. Financing is available for the purchase price, but not for the recurring lease payments.

Lenders do not finance rental agreements. The financing of tenant fittings is typically made in the form of a loan for general business purposes, as it is not practically possible to pledge tenant fittings.

Law stated - 23 October 2023

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

Nowadays, real estate financing is almost exclusively secured through mortgage notes. Mortgage notes may be issued in the form of paper securities in bearer or registered form or as paperless mortgages registered in the land register only.

Law stated - 23 October 2023

### Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

The law does not require third-party real estate appraisals for the financing of real estate. Some lenders nevertheless request such appraisals in commercial financing transactions. In any case, capital adequacy regulations require banks to assess the value of the property at least by an internal valuation.

Some institutional investors, in particular Swiss investment funds, require an independent third-party appraisal for the acquisition of real estate; other investors include such

requirements in their internal regulations. Financing banks regularly request the disclosure of appraisals in such cases.

Law stated - 23 October 2023

## Legal requirements

- 37 | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Foreign lenders may in principle make loans secured by Swiss real estate without a special qualification to do business in Switzerland being required, provided that lenders do not have infrastructure or employees in Switzerland. However, foreign lenders may face certain tax disadvantages: borrowers of a loan by a non-Swiss-resident lender that is secured by Swiss real estate must withhold federal and cantonal income tax of roughly 13 to 33 per cent of the interest at source. The tax at source on interest income is reduced to zero under a number of double taxation treaties, including those with France, Germany, Luxembourg, the United Kingdom and the United States.

The creation of new mortgage notes leads to notary fees, land register fees and in some cantons even taxes. The fees are substantial in some cantons. Mortgage notes are thus usually not deleted in the land register but transferred to a new lender in case of a refinancing – in general, no fees accrue in this case.

Law stated - 23 October 2023

## Loan interest rates

- 38 | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are typically set as LIBOR or the Swiss Average Rate Overnight (SARON) plus a margin, nowadays often with the caveat that SARON may never be less than zero. Federal law does not have maximum interest rates that would apply to anything other than consumer credit loans, but the interest may be considered usurious in extreme cases. Some cantons have interest rate limits (eg, the maximum interest rate is 18 per cent in the canton of Zurich).

Law stated - 23 October 2023

## Loan default and enforcement

- 39 | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?



Outside the insolvency of the borrower, the lender will typically start debt enforcement proceedings for the foreclosure on the property, in which the borrower has several possibilities to object. In particular, the debt enforcement officer will set the borrower a final deadline of six months to pay prior to organising a public auction to liquidate the property. The enforcement of a security in the property thus takes time.

If claims have been assigned for security purposes, lenders will typically also notify third-party debtors (such as tenants, banks and insurance companies) of the assignment of claims so that the amounts are directly paid to the lender.

The debtor may in principle file for bankruptcy or request a moratorium at any time during the process. Such proceedings have effects on the proceedings for the liquidation of the property but do not affect the preferential right of the secured lender to the proceeds from the property.

Law stated - 23 October 2023

### Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Outside the bankruptcy of the borrower, the borrower is liable for the full amount of the loan plus interest and other permitted additions, and must compensate the lenders for any deficiency in the amount recovered through the foreclosure.

Law stated - 23 October 2023

### Protection of collateral

- 41** | What actions can a lender take to protect its collateral until it has possession of the property?

Outside an insolvency proceeding, in an ordinary debt enforcement proceeding with a view to foreclosure, the bailiff will register a transfer restriction in the land register and must take over the administration (property management) of the property. If rents have been assigned to the lender for security purposes, the lender may also notify the tenants so that the rents can be directly paid to the lender.

In a bankruptcy proceeding, the bankruptcy administration will take control of the debtor and thereby the property. Similarly, in a moratorium proceeding, the administrator will supervise the debtor, and the sale of fixed assets (including investment properties) is excluded without the consent of the court.

Law stated - 23 October 2023

## Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Claims from loan financings are ordinary personal claims against the borrower under Swiss law, so that recourse against the borrower is not limited. Non- or limited-recourse loans are unusual in Switzerland and must be specially agreed. In an insolvency situation, however, the lender will benefit from the proceeds of other than secured assets only *pari passu* with other non-preferred creditors.

Law stated - 23 October 2023

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Cash management systems are not usual in financing by Swiss banks, but foreign lenders sometimes require such systems based on the practice in their home country.

Law stated - 23 October 2023

## Credit enhancements

- 44** | What other types of credit enhancements are common? What about forms of guarantee?

Other credit enhancements such as guarantees are not common in Swiss real estate financings.

Law stated - 23 October 2023

## Loan covenants

- 45** | What covenants are commonly required by the lender in loan documents?

Loans by Swiss lenders are often rather lean and do not contain comprehensive covenants. Generally, the following are most common:

- no insolvency of the borrower,
- no foreclosure on secured property;

- no disposal of secured property;
- no change of use of the secured property;
- no assignment of rents;
- adequate insurance coverage;
- adequate maintenance of the property;
- no default in payment of principal or interest;
- financial reporting and other information requirements (in particular rent roll); and
- pari passu clause, negative pledge.

Law stated - 23 October 2023

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

Most Swiss real estate financing contains explicit (or at least implicit) loan-to-value covenants. Interest cover ratios are sometimes agreed in larger financings, as are financial reporting requirements (typically annually or semi-annually).

Law stated - 23 October 2023

## Secured movable (personal) property

### 47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

With the exception of shares, movable property (such as furniture, fixtures and equipment, and tenant fittings) is hardly ever used as security for real estate financings. Swiss law requires the lender to have possession and physical control over movable property for a pledge or security transfer to be valid; in most cases, this excludes the possibility for movable property to be taken as security.

The assignment of claims is common (in particular rents and insurance claims and (less commonly) bank accounts and warranty claims). Intellectual property or other rights are hardly ever used as security in real estate transactions. The assignment of claims requires a written agreement; notification of the debtor is not required (and thus not often made prior to an event of default), but has the effect that the debtor may only pay the assignee to be released.

Law stated - 23 October 2023

## Single purpose entity (SPE)

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- 48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders do usually not require that each borrower be an SPE, but SPEs are often chosen by investors to enable them to exit by way of a share deal. There is no special regulation of SPEs in Switzerland; the ordinary rules of company law apply.

Law stated - 23 October 2023

## UPDATE AND TRENDS

### International and national regulation

- 49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Swiss law allows the lessor to increase the rent in the case of an increase in the reference interest rate and/or the federal consumer price index in accordance with a certain formula. Due to higher interest rates, the reference interest rate was increased in June 2023 for the first time since over a decade. Switzerland also experienced higher inflation. Many lessors have as a consequence raised their rents. In particular, with respect to residential leases, public pressure is rising to moderate increases in residential rents. We expect a vivid political debate on residential rent levels during the coming years.

*This chapter was first published in November 2023. Be advised that some of the above content may no longer apply.*

Law stated - 23 October 2023



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# Taiwan

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

Taiwan operates under a civil law system where parties can seek injunctions to prevent an action. While courts can rule in equity subject to the agreement from both parties, equitable principles are uncommon in real estate transactions.

As the acquisition, creation, loss and alternation of real estate rights should be in writing to have a legal effect, real estate transactions are typically conducted in writing.

The laws applicable to real estate in Taiwan are national in scope, providing a consistent framework across the jurisdiction.

Law stated - 22 December 2023

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Under the Taiwan Civil Code, real estate rights, including ownership, mortgages and other rights in rem, must be registered to have legal effect. Registration ensures the validity and priority of registered interests and an absolute effect against third parties.

On the other hand, there is no registration system for leasehold interests in Taiwan. To guarantee interests under a lease agreement, it is common to include enforcement clauses and have the lease agreements notarised, as in the event of a breach of the notarised lease agreement with enforcement clauses, direct enforcement can be pursued without a cumbersome legal process. Also, when the real estate is transferred, the notarised lease agreement shall be honoured by the subsequent owner.

Law stated - 22 December 2023

### Registration and recording

#### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

In Taiwan, a comprehensive set of documents shall be submitted to the land registration office of the jurisdiction where the real estate is to register conveyances or real estate security interests.



The aforementioned registration could also be partially filed online via the electronic counter website managed by the Department of Land Administration. However, applicants should submit other required documents through physical mail.

Transfer of real estate is normally subject to (1) the land value increment tax, value-added tax and consolidated housing and land tax borne by the seller and (2) the deed tax and the stamp duty bore by the purchaser.

Law stated - 22 December 2023

### Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

According to the Taiwan Land Act, only foreigners whose home countries, under treaties or domestic laws, grant the same rights to Taiwan nationals are eligible to acquire real estate in Taiwan. Furthermore, pursuant to Operation Directions for Foreigners to Acquire Land Rights in the Republic of China and the explanation letter issued by the Ministry of Interior, a foreign company should have a registered branch or subsidiary in Taiwan to apply for real estate registration.

Furthermore, there are specific restrictions on the type of real estate available to foreign investors and such real estate may be subject to limitations on designated use.

Law stated - 22 December 2023

### Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Pursuant to Regulations Governing the Declaration of Foreign Exchange Receipts and Disbursements or Transactions, a non-resident in Taiwan who needs foreign exchange with a value equal to or over NT\$500,000 shall make a declaration through an authorised bank to the Central Bank of the Republic of China (Taiwan Central Bank'. Also, a non-resident whose single remittent amount of foreign exchange exceeds the equivalent of US\$100,000 and is related to legally or approved by the competent authorities to acquire real estate for self-use in Taiwan shall make relevant declarations to the Taiwan Central Bank.

Law stated - 22 December 2023

### Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

For an owner of the real estate, besides contractual liability, it is obliged to keep the leased property in a fit condition for the tenant. If a building or other structure on privately owned land causes harm, the owner of said building or structure is responsible for compensation.

As liability generally falls on the original tortfeasor, subsequent owners would not have to assume the liability. However, in environmental matters, while civil liability should be borne by the perpetrator, administrative liability can extend to subsequent owners as contamination may persist after a property changes hands. However, if pre-transfer liabilities linked to the previous owner arise, subsequent owners retain the right to seek compensation.

Tenants of the real estate are obliged to keep and manage the leased property with the care of a good administrator and to compensate the lessor for the incurred harm when breaching the duty of care.

Lenders generally have no obligation to the real estate.

Law stated - 22 December 2023

### Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners can protect themselves from liability by obtaining property insurance that covers various risks, such as fire, earthquakes and environmental pollution. Such insurance policies often include elements of third-party liability coverage, providing financial protection in case third parties suffer harm or property damage related to the insured property.

Law stated - 22 December 2023

### Choice of law

8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

For property rights of real estate, the governing law shall be the law of the location where the real estate is located.

For the governing law of a sale and purchase agreement, unless required by law, the governing law could be agreed upon by the contract parties. If there is no mutual agreement, the law most closely connected to the legal act applies. In real estate transactions, the law presumes that the law of the location where the real estate is located is most closely connected.

Law stated - 22 December 2023

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Exclusive jurisdiction for rights in rem, partition or demarcation lies with the district court where the property is located; for other real property matters, the action can be initiated in the district court where the property is situated.

When a claim involves multiple parties and is required to be jointly adjudicated, such as the partition of jointly owned property, all indispensable plaintiffs shall join together to initiate the action.

Service in a foreign country is done by competent authorities of the said country or Taiwan's ambassador or consul. If this is not possible, documents can be sent via registered mail with a request for receipt. In regions with judicial assistance agreements, service should follow the terms of the agreements.

Any legally capacitated person can be a party, including unincorporated associations with representatives.

Law stated - 22 December 2023

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

In Taiwan, the legal framework for real estate, encompassing ownership, tenancy and financing, is generally consistent across property types. Nevertheless, distinctions emerge in tenancy regulations, with specific protections designed for tenants of residential leases such as an upper limit on security deposits. Furthermore, there are divergent tax structures for properties owned by commercial entities compared to those owned by individuals. For example, the house tax for owner-occupied residences is slightly lower than that for houses used for business purposes.

Law stated - 22 December 2023

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

The Taiwan Urban Planning Law regulates land use control and zoning for urban regions. Urban plans must delineate residential, commercial and industrial districts. Other zones for designated purposes may also be demarcated as needed.

The Ministry of the Interior (MOI) and local governments are the competent authorities overseeing urban planning and zoning. The MOI and relevant special municipality governments may stipulate regulations tailored to local conditions.

To encourage land utilisation, interested parties can align with local zone development plans. They can formulate or modify detailed plans and submit applications to local governments. If a detailed plan is rejected, the interested party may appeal to the MOI or the county/city government.

Failure to comply with planning decisions or zoning requirements may result in fines imposed by the competent authority on the owner, user or manager of the land or building and sanctions of up to six months of imprisonment or detention.

Law stated - 22 December 2023

### Government appropriation of real estate

12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The legal regime for the compulsory purchase or condemnation of real estate in Taiwan is regulated by the Land Expropriation Act, which stipulates that:

- the landowner or the other rights holders shall receive cash compensation, from which tenants and lenders are excluded;
- prior to applying for expropriation, negotiation with landowners for the purchase or other means of obtaining the land shall first proceed. Expropriation can only be pursued if negotiations break down;
- compensation for expropriated land is based on its current market value; and
- payment for compensation is legally required for all expropriation.

Law stated - 22 December 2023

### Forfeiture

13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Generally, the government would not forfeit real estate without compensation. However, in cases where the court establishes that the property has been acquired unlawfully, such as through the falsification of documents to obtain real estate registration, or by fraudulently deceiving others to obtain money, which was then used to purchase real estate, the

government has the authority to forfeit or seize the assets and then return said assets directly to the rightful owner or auction said assets and return the proceeds to the victim.

Law stated - 22 December 2023

## Bankruptcy and insolvency

14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

If a debtor becomes insolvent and cannot repay its debts, its creditors or the debtor can apply to the court for the adjudication of bankruptcy against the debtor. The debtor will become bankrupt upon the court making a declaration of bankruptcy. After the debtor is declared bankrupt, its property at the time of the court declaration will automatically become part of the bankruptcy estate and the bankruptcy procedures will apply. Upon court declaration, a trustee, typically a CPA, lawyer or creditor would oversee the bankruptcy estate, and the debtor loses control over assets, which means the debtor cannot collect rent after the bankruptcy declaration.

Law stated - 22 December 2023

## INVESTMENT VEHICLES

### Investment entities

15 | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

In Taiwan, investment entities can take various forms, including a company limited by shares, a limited liability company or a partnership. Entities with limited liability or limited partnerships could provide a level of protection by shielding owners or shareholders from personal liability. However, general partners or managers of said entities may still have joint liability with the entities.

Additionally, Real Estate Investment Trusts (REITs) are present in Taiwan but are subject to specific regulations. Also, provided that certain requirements are met, REITs may be subject to pass-through taxation.

Law stated - 22 December 2023

### Foreign investors

16 | What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors frequently choose between subsidiaries or branches. Reasons for choosing between the two options often lie in the tax. After-tax profits from branches can be repatriated to the parent company at any time, while subsidiaries shall first complete

annual settlements and settle income taxes before remitting funds to the parent company. Although the tax rates for capital gains between the two have become increasingly similar, there are some differences in other incomes and financial settlement, which require careful calculation by tax experts.

Law stated - 22 December 2023

### Organisational formalities

- 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

To establish a company, foreign investors may file for foreign investment approval and the company incorporation. The specific steps include obtaining a Name and Business Items Reservation (Reservation), seeking approval for foreign investment, preparing for bank account and capital injection, filing for capital verification approval and applying for company registration and tax registration. After the incorporation of a company, said company becomes a Taiwan entity, which is not subject to the regulations applicable to foreigners when investing in real estate.

On the other hand, for the establishment of a branch office, the procedure includes obtaining a Reservation, applying for registration for a foreign company and Taiwan branch, and completing taxation registration.

A private legal entity purchasing a residential property must obtain prior approval from the competent authority. For the five years following the acquisition, the entity cannot transfer, assign or conduct registration of caution the property unless it falls under specific exceptions.

Branches, unlike subsidiaries, could repatriate their after-tax profits at any time. Although tax rates for capital gains between the two have become similar, differences are still present in other incomes and how they settle financially, which requires careful calculation by tax experts.

Law stated - 22 December 2023

## ACQUISITIONS AND LEASES

### Ownership and occupancy

- 18 | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

In Taiwan, occupancy interests can be classified into rights in rem and debt relationships. The former includes ownership, superficies, right of lien and right to farm. These rights are created by a contract and must be officially registered with the competent authority,

often facilitated by scriveners. The latter, including leasing and borrowing for use, do not necessitate registration with the authorities. However, to ensure the effectiveness of the lease and the landlord's right to enforcement under specific circumstances, the lease is commonly notarised. The predominant form of land ownership is freehold title.

When property possession is rooted in ownership, the associated rights are absolute. This implies that the property owner can assert rights against any individual occupying the premises without proper entitlement. If property possession is established through a lease or borrowing arrangement, the rights are considered contractual. In this case, the lessee or borrower can only assert rights against the other party involved in the contract and cannot claim to exclude infringement from other parties without contractual obligations. However, if the occupancy, provided that the occupancy shall be lawful, has been deprived of a possessor, the individual has the right to request the return of the possessed property.

Condominium regimes are recognised pursuant to the Condominium Administration Act, while cooperative ownership arrangements are uncommon in Taiwan. Also, master leases are common in scenarios such as the leasing of commercial buildings or department stores.

Leases over commercial property are typically for lengthy periods and might have escalation clauses. 'Turnover' rent instead of a fixed rent (or whichever is higher) is common in retail commercial properties.

Law stated - 22 December 2023

## Pre-contract

### 19 | What are the typical pre-contractual steps?

When engaging in the process of expressing interest in a real estate property, the prospective buyer commonly pays a negotiating fee to the broker, which is then conveyed to the seller to facilitate further discussions. However, a negotiating fee would be returned when the discussion does not further proceed. If both parties reach an agreement on the transaction, the negotiation fee could be converted into a deposit.

In instances involving exceptionally high-value properties, the buyer and seller may enter into a pre-contractual agreement. Except when the contract explicitly states its binding nature, the court would otherwise be inclined to interpret it as non-binding on the parties.

Real estate transactions are heavily mediated by brokers, who undergo training programmes and are required to obtain a real estate broking licence. When purchasing real estate, buyers typically engage in negotiations primarily with these brokers. Once a deal is done, the broker's commission is capped at 6 per cent of the transaction amount.

Law stated - 22 December 2023

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

Typical provisions in a real estate purchase contract include the description of the real estate, the date of handing over the property and registration of change of ownership.

The down payment term is a common feature in a commercial real estate purchase contract, typically specifying that the down payment must be made upon execution and held in escrow. Additionally, it is common for the contract to include provisions regarding the buyer's loan, serving to confirm the buyer's financial capability to fulfil the payment obligations.

In addition, sellers are typically obligated to warrant against any defects in the property, assuring that it is not occupied by a third party, rented or lent to others.

Also, the contract often stipulates the financial responsibilities associated with transferring ownership.

Law stated - 22 December 2023

### Environmental clean-up

- 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Generally, environmental liability can be categorised into civil liabilities and administrative liabilities. Both civil liability and administrative liability should be borne by the perpetrator, but administrative liability can extend to subsequent owners as contamination may persist after a property changes hands. The subsequent owner should be responsible for the environmental clean-up. However, if pre-transfer liabilities linked to the previous owner arise, subsequent owners retain the right to seek compensation.

It is common for the buyer to request the seller to represent and warrant that the real estate is clear of all forms of environmental liabilities. Additionally, relevant laws and regulations mandate the implementation of soil testing on the lands that are used for certain purposes or by specific industries to demonstrate such lands are free from pollution, and it often serves as a condition precedent to the transfer of ownership.

Law stated - 22 December 2023

### Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?



It is commonly required by the buyer that the seller specifies the existing leases on the property and their major terms and represents and warrants to not arbitrarily enter into a new lease or modify the terms of the existing lease.

Given that a change in ownership of the property does not result in the termination or nullification of any existing lease when the lease has a term of fewer than five years or is notarised, and such leases remain binding on the buyer under the same terms upon completion, the seller may not be required to establish covenants concerning property leases between the contract date and the closing date.

Typically, brokerage agreements fall within the scope of representations and covenants, as brokers are usually obligated to provide a real estate instruction that is typically attached to the purchase agreement, thereby becoming an integral part of said agreement. Thus, the representation and covenant clause may require such a document to be accurate. If there is any inconsistency between the real estate instruction and the actual condition during closing, the buyer may claim damages or a reduction in the purchase price.

Estoppel certificates from tenants are usually not required as a condition to the obligation of the buyer to close under a contract of sale.

Law stated - 22 December 2023

### Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

The lease and the security instrument generally operate independently, with the lease not necessarily being subordinate to a security instrument.

The priority between the lease and the security instrument is contingent upon their respective timing. If the lease predates the establishment of the mortgage, the lease holds precedence. In the event of foreclosure resulting from the borrower's failure to repay the loan, the lease shall survive, obligating the purchaser to assume the existing lease.

If there are existing leases on the real estate prior to financing, lenders would customarily require the borrower to resign the lease with the lease date set after the creation date of the mortgage so to give precedence to the mortgage.

There are no major differences between ground leases and commercial leases.

Law stated - 22 December 2023

### Delivery of security deposits

**24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

While there is currently no law or regulation ensuring the transfer of tenant security deposits to a buyer in Taiwan, customary practice dictates that the original owner shall transfer the security deposit to the buyer upon the completion of the transaction. In cases where the seller fails to transfer the security deposit or only transfers a portion of it, the tenant, upon the expiration of the lease, may seek its return from the original owner.

In general, lessors require lessees to provide a security deposit. While there is no limitation to the deposit amount for a commercial lease, under a residential lease, the deposit is typically capped at two months.

Most lease agreements do not incorporate terms related to periodic rent resets or reviews if the lease term is less than three years.

Law stated - 22 December 2023

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Due diligence is commonly conducted before the execution of the contract in large-scale transactions. During due diligence, architects and technicians would collaborate with lawyers to examine cadastral maps and construction plans to ensure consistency between the actual use of the site and the land zoning requirements.

Lawyers usually review contracts and relevant documents associated with the transaction and implement on-site due diligence to confirm there are no illegal buildings or other violations of use on the land. Legal due diligence also includes title searches, confirmation of mortgages or other rights created over the property, and existing financing over the real estate.

When conducting the title search, it is common for purchasers to request the seller to provide the ownership certificate. Additionally, title searches can be conducted by reviewing the land and building transcript, as these documents are publicly available. The use of title insurance or indemnity funds is not yet common in Taiwan, but in some circumstances, investors and buyers may require attorneys to issue legal opinion letters.

In Taiwan, the sequence of rights pertaining to real estate hinges on the order of registration. The individual who registers first gains statutory priority and their rights hold precedence over those registered later, irrespective of the timing of the agreement reached or the execution date of relative contracts.

It is not customary to obtain government confirmation or a zoning report regarding legal use and occupancy; however, permission from the competent authority may be necessary when acquiring specific types of land. Foreigners seeking to acquire real estate in Taiwan typically need to undergo a review process and obtain consent from the relevant competent authorities.

Law stated - 22 December 2023

## Structural and environmental reviews

- 26 | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

For large transactions, such as purchasing commercial buildings, the engineering due diligence would be implemented before the execution of the contract. During this process, qualified professionals, such as architects, mechanics and technicians, would assess the condition of the property. The architects typically inspect the safety of the structure, and the mechanics and technicians assess the foundation, roof, plumbing, electrical systems and potential issues like radioactivity or sea-sand problems.

If defects are identified during the inspection, the buyer may request representations and warranties from the seller, urge the seller to repair the defect or negotiate for a reduced price.

Conducting an environmental review is not standard practice for residential or commercial buildings. However, for industrial lands and factories that might pose risks of pollution, an environmental review might be implemented, and relevant laws and regulations mandate the implementation of soil testing to demonstrate that the land is free from pollution. Furthermore, while environmental insurance is available in Taiwan, it is uncommon for buyers to opt for such coverage.

Law stated - 22 December 2023

## Review of leases

- 27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

In Taiwan, the common practice for residential leases involves the use of standardised lease templates provided by authorities. As such templates are widely adopted, leaving little flexibility for customisation, many individuals forego seeking legal advice to review these agreements. As for commercial leases, since there are no standardised templates, the involved parties often seek legal assistance and have the lease drafted by attorneys.

For clients seeking legal guidance, it is advisable to carefully scrutinise whether the obligation to repair the leased property rests with the lessor or the lessee. This allocation of responsibility will often be reflected in the rent. Clients should also pay close attention to provisions related to utility bills and management fees. Other critical considerations involve the automatic renewal clause, which has the potential to render the lease indefinite, and the acceptability of early termination, along with the associated terms of liquidated damages. Besides this, tenants should be attentive to the contractual obligations outlining

the procedures and requirements for vacating and returning the leased property after the termination of the lease.

For commercial real estate, it is customary for the lender, when providing financing, to scrutinise the existing leases and the creation of mortgages to confirm whether the lease or the mortgage takes precedence. Lenders typically do not review the management agreement, as management agreements do not necessarily need to be subordinate to financing security instruments. Additionally, lenders conduct a comprehensive review to determine the loan-to-value ratio. This assessment helps evaluate lending risks and ensures that the property owner will have sufficient cash flow to meet future loan repayment obligations.

Law stated - 22 December 2023

## Other agreements

### 28 | What other agreements does a lawyer customarily review?

In addition to the sale and purchase contract, lawyers typically review the existing leases on the property, down payment escrow agreement, management agreement, financing agreement and any agreement as agreed upon by the parties regarding the transaction. Furthermore, the lawyer conducts a thorough examination of the land transcript or other title documents to verify the property owner and identify any existing mortgages or other encumbrances.

Law stated - 22 December 2023

## Closing preparations

### 29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

In real estate transactions, the closing process typically takes place after the completion of property transfer registration. On the closing date, a deliverable list is commonly compiled. Parties involved, along with relevant professionals, convene at the real estate site to carry out the handover process based on the deliverable list. The handover process generally involves inspecting the condition of the property, machinery and equipment. Utility bill settlements are also addressed on the closing date by the scriveners.

As for a lease, the deliverables customarily contain the keys or other access items to the property, the security deposit and the duly signed lease.

In addition to the contract signed by both parties, the deliverables for a financing contract also encompass the completion of documents related to the creation of a mortgage or the delivery of collateral.

To verify authorisation, it is customary to review relevant board resolutions of the company, the signature of the authorised person and the power of attorney (if any).

Prorations are customary in real estate transactions.

The typical time frame between the contract and closing is relatively short, usually less than three months.

Since the transfer of ownership will not occur until full payment is received, the financing bank typically disburses the funds to the seller before initiating the ownership transfer. In practice, this process is often orchestrated to occur on the same day for efficiency.

Law stated - 22 December 2023

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The use of counterparts clauses and exchange of scanned signature pages is increasingly common, especially with foreign counterparties, and obviates the need for the parties to execute the documents simultaneously in person. Handover of real estate usually takes place at the property sites. The involved parties, along with experts such as architects, technicians and mechanics, conduct inspections of the real estate to ensure that its condition aligns with the contents stated in the due diligence reports.

An exception to this is the ownership transfer registration procedure. Due to the formal and intricate documentation involved, it is common for both parties to engage the services of the same scrivener to facilitate the transfer of property ownership at the government agency.

The attendance of any government agency, representative or specially licensed agent is unnecessary for approval, verification or confirmation of the transactions. However, parties might be required to declare and pay the value-added tax and deed tax to the authorities before the transfer registration and obtain the certificate of tax payment. Additionally, a fee for real estate registration is required to be paid to the governmental land office by the parties.

Law stated - 22 December 2023

### Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

In the event of the seller's breach of the contract, the purchaser has the right to seek a court order to compel the seller to perform the sale and purchase agreement, which may involve obtaining an order for the delivery of the title. When the seller is no longer able to perform the obligations outlined in the contract, such as reselling the property to a third party, the purchaser is entitled to pursue a claim for damages and rescind the contract.

As for the purchaser's breach of contract, besides compelling the purchaser to make the payment of the purchase price, the seller may also retain the down payment as a remedy.

If the borrower in a financing agreement breaches the contract by delaying repayment of the principal and/or the accumulated interests, it may trigger an acceleration clause, causing the financing to become due earlier than originally agreed upon. Additionally, the lender may have the right to demand liquidated damages from the borrower as stipulated in the financing agreements. When the borrower is unable to repay the loan, the lender may file a petition for enforcement and seek repayment by selling the mortgaged property.

Law stated - 22 December 2023

### Breach of lease terms

- 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

In the event of any breach of contract of the lease, the most common remedy for the non-breaching party is to claim damages.

Under the circumstance that the lease contains an enforcement clause and is notarised, the landlord may file a petition for enforcement to evict the tenant and remove the tenant's personal belongings when the lease expires and may enforce the liquidated damages and rent payments without a protracted trial.

The remedy for commercial and residential leases is generally similar.

Law stated - 22 December 2023

## FINANCING

### Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

The most common type of security instruments used by lenders is the mortgage over the real estate as the lender would typically receive full repayment after the enforcement of the mortgage. The mortgage over the real estate does not constitute a defeasible conveyance of the real estate to the lender but would grant the lender a lien upon the real estate collateral.

Banks are the typical providers of real estate financing and they may fund at different stages of property. Typically, in the loan agreement, the lender would grant a certain amount of loan and set different drawdown requirements for different stages of property. The borrower

could only draw a portion of the loan when the corresponding drawdown requirements are met.

There are no restrictions on who may provide real estate financing. However, lending is subject to restrictions based on the percentage of the loan amount for general companies, banks and leasing companies.

Law stated - 22 December 2023

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Financing for ground (or head) leases is not common in Taiwan since banks are reluctant to provide financing.

Law stated - 22 December 2023

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

To establish a mortgage on the real estate, the land owner or the debtor may head to the Land Registration Office and apply for the 'mortgage setting registration' by him or herself or appoint an agent. The 'mortgage setting registration' would ensure that during the loan period, the bank holds the mortgage right to this collateral.

Law stated - 22 December 2023

### Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Some banks engage appraisers from real estate appraisal firms to evaluate the collateral, while others utilise internal appraisers within the bank for valuation.

In accordance with the Real Estate Appraiser Act, a Taiwan citizen, who has passed the examination for real estate appraiser and is issued with the Certificate of Real Estate Appraiser, could act as a real estate appraiser.

In legal regulations, it is required that transactions above a certain amount must undergo appraisal conducted by a qualified appraiser.

Law stated - 22 December 2023

## Legal requirements

- 37 | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

A foreign lender could make a loan in Taiwan. However, to have said loan secured by collateral, said foreign lender should have a branch or subsidiary in Taiwan to be registered as the security interest owner. As a Taiwan branch or subsidiary of a foreign lender would be classified as a 'Taiwan entity', it is subject to tax-related regulations.

Under Taiwan law, real estate security is valid only when said security is registered with the competent authority. After registration, the information of said security (including but not limited to the mortgagee and the security amount) would be stated on the land and building transcript of the said real estate. Real estate security is assignable but also subject to relevant tax obligations.

Law stated - 22 December 2023

## Loan interest rates

- 38 | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

The interest rates on commercial and high-value property loans are commonly set with reference to TIBOR (Taipei Interbank Offered Rate) plus a fixed margin based on the debtor's credibility.

In accordance with the Civil Code, there is a statutory upper limit of 16 per cent per annum for interest rate. Any agreement specifying an annual interest rate exceeding 16 per cent renders the excess portion of the agreement invalid. Fees and lender costs would not be included as interest for the calculation of the aforementioned statutory limit. Also, the penalties for legally impermissible rates are not different for different types of lenders.

Law stated - 22 December 2023

## Loan default and enforcement

- 39 | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

In Taiwan, the application for a court order to enforce the mortgaged property is considered a non-litigious matter. If the mortgage right is duly registered and the maturity date of the debt has been reached, the court should, on the application of the mortgagee, promptly



issue an order permitting the auction. However, the debtor may still dispute the existence of the debt and challenge it in court.

The enforcement of the mortgaged property will not be halted merely upon the debtor's declaration of objection or the filing of an objection lawsuit. The execution proceedings will only be suspended, corrected or withdrawn if the debtor's objection is deemed valid by the court.

In addition, the creditor may separately file a lawsuit against the debtor to demand repayment of the outstanding balance if the result of the enforcement is not sufficient for the full repayment.

Law stated - 22 December 2023

### Loan deficiency claims

- 40 | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

The court's decision on the enforcement of the mortgaged property does not determine the existence of the substantive legal relationship and lacks *res judicata* on the existence of the debt. Therefore, if the auction proceeds are insufficient to satisfy the debt secured by the mortgage, additional execution proceedings against the debtor's other assets shall be separately obtained.

Under the Taiwan Civil Code, the statute of limitation for a debt claim is 15 years. Therefore, the creditor shall file the claim for the outstanding balance within 15 years of the maturity date. Also, there are generally no limitations on the amount or method of calculation of the deficiency.

Law stated - 22 December 2023

### Protection of collateral

- 41 | What actions can a lender take to protect its collateral until it has possession of the property?

In accordance with the Taiwan Civil Code, after the creation of a mortgage, the real property owner may, on the same real property, create superficies or establish a lease relationship, but the mortgage will not be affected thereby. During the enforcement of the mortgage, if the mortgage's rights are affected by the superficies or the lease relationship, the court may remove such rights or terminate such lease relationships.

Also, the mortgagee could enter into a fluidity contract to obtain the title of the mortgaged property when the debtor fails to repay the loan when the maturity date of the debt has been reached. However, the fluidity contract shall be registered to have a legal effect against the third parties.

Law stated - 22 December 2023

## Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents only provide for recourse to the real property that is registered.

The significance of recourse in bankruptcy or insolvency filings lies in the priority of creditor claims. In the event of bankruptcy, secured creditors, whose loans are backed by collateral, generally have a higher priority in the distribution of assets compared to unsecured creditors.

Law stated - 22 December 2023

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Generally, financing banks would require a cash reserve for three to six months of interest to guarantee the interest payment.

Law stated - 22 December 2023

## Credit enhancements

- 44** | What other types of credit enhancements are common? What about forms of guarantee?

In Taiwan, typical credit enhancements include guarantee, promissory note, cash reserve, novation agreement and trust engagement, among which, the guarantee is the most commonly used.

A guarantee refers to a contract in which the guarantor and the creditor agree that, when the principal debtor fails to perform the obligation, the guarantor undertakes to fulfil the responsibility on behalf of the debtor.

Except when it is expressly specified in the loan agreement that the guarantee shall be jointly and severally liable to the creditor, the creditor must first request repayment from the principal debtor. Only after enforcement proceedings, if the creditor cannot or only partially recover the debt, can the creditor then demand the guarantor to assume the responsibility.

Law stated - 22 December 2023

## Loan covenants

45 | What covenants are commonly required by the lender in loan documents?

Covenants required under loan documents generally include:

- Drawdown requirement: The lender would set up different conditions for each loan disbursement and the borrower could only draw a portion of the loan when the corresponding drawdown requirements are met.
- Maintaining the value of the collateral: If there is any decrease in the value of the collateral or the collateral has been compromised, the borrower is obliged to provide other property to serve as collateral or make an early repayment.
- Lender approval: Certain types of corporate activities (such as the transfer of the main corporate assets) shall be subject to the lender's approval.
- Default penalty: Defaulting on instalment repayments often results in early maturity. The lender could require the debtor to repay the entire loan and enforce the collateral.

Law stated - 22 December 2023

## Financial covenants

46 | What are typical financial covenants required by lenders?

Typical financial covenants required by lenders include:

- maintaining the financial ratio: the lenders would set certain financial ratios (such as debt ratios and/or debt service coverage ratios); and
- financial reporting requirements: the borrower is often required to provide the CPA-certified financial report within a certain period to the lenders.

As for the appraisals, it is common to require ongoing appraisals (once per year) after the execution of the loan agreement.

Law stated - 22 December 2023

## Secured movable (personal) property

47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Generally, to set up a pledge on a movable property, the possession of said property shall be transferred to the creditor. However, certain types of movable property such as machinery and equipment could be applied with the Personal Property Secured Transactions Act, which allows the debtor to continually utilise said movable property.

A control agreement is not necessary to perfect a security interest. On the other hand, registration for the creation of a security interest under the Personal Property Secured Transactions Act is required to be effective against a bona fide third party.

Law stated - 22 December 2023

### Single purpose entity (SPE)

- 48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Generally speaking, lenders do not require each borrower to be a PE in Taiwan. Lenders may require borrowers to establish SPEs for certain transactions, especially in complex financing structures such as securitisations or project finance.

Due to the absence of mandatory regulations, the concept of an independent director for SPEs is not common in Taiwan.

Law stated - 22 December 2023

## UPDATE AND TRENDS

### International and national regulation

- 49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

According to the amendment to the Equalization of Land Rights Act effective in July 2023, a private legal entity is required to obtain a prior approval from the competent authority if it would like to purchase a residential property. Also, for the five years following such acquisition, said entity cannot transfer the property unless it falls under specific exceptions.

*This chapter was first published in December 2023. Be advised that some of the above content may no longer apply.*

Law stated - 22 December 2023



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# Thailand

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

Thailand adopts a civil law system in which laws are codified in statutes. While the courts can exercise some discretion to achieve equitable outcomes, Thailand does not have separate equity courts.

Before or during trial, it is possible for the parties to request the court to grant an injunction. Provisional seizure is also available.

Thai laws generally have a nationwide effect with regard to real estate.

Oral contracts are generally enforceable unless they are otherwise required by law to be made in a written form and be admissible in court. The only difference is the relative difficulty of proving the existence of an oral contract in court, but Thailand does not recognise the parol evidence rule.

Law stated - 3 October 2023

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Thailand has a nationwide real property registration system and transactions are generally required to be registered with a competent land office, otherwise it shall be deemed void. Ownership, leasehold (for more than three years) and security interests must be registered in principle.

These property interests must be recorded on a title deed. Registration of property interests can legally guarantee title and priority to the registered parties of the underlying immovable properties.

Law stated - 3 October 2023

### Registration and recording

#### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Generally, all registrations and recordings of real estate transactions must be executed at the competent land office where the target property is located. For land offices in certain provinces, registrations and recordings of rights and juristic acts related to the land which is issued with the land title deed can be performed at the land office where the property



is located and done electronically via the online system (but only for initially submitting an application and required documents). In addition, for land offices in certain provinces which are specifically designated, the registration and recordings for the same can be performed with another land office among specific provinces (ie, cross-province registration) and done electronically via the online system. Currently, it is available for certain provinces only (eg, Bangkok, Chiang Mai, Ubon Ratchathani provinces). In any case, note that the registrations and recordings of real estate transactions must still be physically completed at the land office.

The rules for registration are universally applicable nationwide. However, the practices and requirements of each land office may vary, as land office registrars may interpret the same regulations differently.

Certain types of transactions are subject to applicable official fees, taxes, and expenses. For example, transfer fees, withholding taxes (corporate or personal income taxes), specific business taxes (if any) and stamp duties are required for conveyance, while registration fees and stamp duties are required for registration of a lease or mortgage.

In a sale and purchase transaction, the seller and the buyer shall be bound to pay official fee equally, but this can be agreed otherwise by the parties. The seller normally bears the applicable taxes (specific business taxes, etc).

**Law stated - 3 October 2023**

### Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

A foreigner, either in the form of a corporation or an individual, as defined under Thai laws, is generally prohibited from owning land. However, there are certain exemptions and special permissions under some laws, such as the Investment Promotion Act of 1977, the Industrial Estate Authority of Thailand Act of 1979 and the Eastern Special Development Zone Act of 2018.

Nevertheless, foreigners can lease land and own construction on such land. They can also own a condominium unit, provided that the total aggregate unit space owned by them must not exceed 49 per cent of the total condominium space of the building.

**Law stated - 3 October 2023**

### Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

Other than the regulatory prior approval for certain transactions or reporting requirement at the time of outward remittance and mandatory conversion requirement to Thai baht for

inward remittance, generally, there are no material foreign exchange control issues relating to direct investment in Thai real property by a non-resident.

Law stated - 3 October 2023

## Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

In principle, an owner or tenant may face tortious liability for direct damage resulting from a wrongful act whether intentionally or negligently committed. Thus, an injured party may claim damages from the party who causes such damages.

Strict liability is imposed on the owner of a building where the damage is caused by defective construction or a lack of sufficient maintenance of the building. Compensation shall be made by the owner of the building. However, the possessor of the building can avoid potential liability by proving that he or she has taken proper care to prevent damage.

A real estate lender does not hold any specific legal liability unless the loan agreement provides otherwise.

Law stated - 3 October 2023

## Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Generally, the owner cannot avoid tortious liability incurred from damage that is caused by his or her building and construction. Thus, liability insurance is recommended to insure against third-party claims except for certain types of buildings as prescribed by the law where the liability insurance is compulsory (eg, high buildings, large buildings, extra-large buildings, public assembly buildings, and specific hotels). Environmental insurance can be found in Thailand, but it is rare due to the high cost of premiums and some limitations on coverage.

Law stated - 3 October 2023

## Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The Conflict of Laws Act of 1938 is applicable to transactions involving properties in two jurisdictions. The governing law on real estate is the law of the country in which the property is located. The provision to choose the law of another jurisdiction as the governing law is acceptable in general contracts. However, for contracts pertaining to real estate located in Thailand, Thai law is the sole choice of governing law and Thai courts will not accept any choice of law in matters concerning enforcement.

**Law stated - 3 October 2023**

## Jurisdiction

- 9** | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Real estate disputes are handled by the court of justice, which has the broadest and most common judicial authority. Civil cases, including real estate disputes (eg, claims against eviction, trespass, forced transfer of property, return of property, enforcement of mortgage and tort), can be commenced by plaintiff filing to the competent court of justice where the property is situated or to the court where the defendant is domiciled.

A real estate dispute involving a criminal case (eg, a claim against trespass, fraud, misappropriation and mischief) can be brought to the competent criminal court. An interested person can join the lawsuit as a joint plaintiff or a defendant during the court proceedings.

Delivery of pleading in Thailand may be made by the competent court to the defendant at the domicile or place of business or by the acceptance of the defendant. If the defendant is overseas, the plaintiff must proceed out-of-jurisdiction service by requesting the court to deliver a certified copy of the plaint and summons, in the official language of the destination country or English, to the defendant by international express mail, courier or through diplomatic channels, at the plaintiff's expense.

A party is not required to be qualified to do business in Thailand to enforce judicial remedies. However, a foreign judgment is not enforceable under Thai jurisdiction, as Thailand is not a party to any treaties or conventions on enforcement of foreign judgments, but it can be used as evidence in court proceedings.

**Law stated - 3 October 2023**

## Commercial versus residential property

- 10** | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

In principle, properties for commercial or residential purposes are not treated differently, except in some respects such as lease of properties for those purposes, etc.

Generally, lease of any property, whether for commercial or residential purposes, shall be subject to the Civil and Commercial Code, under which the lease term shall not exceed 30 years, etc.

Unlike a lease for residential purpose, a lease for commercial purpose can enjoy more benefits under the specific laws (eg, a lease term of up to 50 years subject to satisfaction of the requirements provided).

**Law stated - 3 October 2023**

## Planning and land use

- 11** | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

There are two main laws concerning town planning and land use.

The Building Control Act of 1979 regulates the requirements and conditions for any action in relation to buildings and constructions (eg, construction, modification and demolition). Those activities require prior approval from, or prior or post notification to the competent administrative officer. Non-compliance with the law may lead to severe fines and an imprisonment term or lead to rectification or demolition of the building. The penalty will double if the building is used for a commercial purpose.

The Town and City Planning Act of 2019 regulates the type of land usage in different areas. Each zoning regime is governed by separate regulations, which vary based on the particular province. Zoning areas will be periodically reviewed every five years.

Zoning decisions cannot be appealed upon its implementation. Thus, obtaining the written official confirmation from the competent authority to confirm compliance prior to the construction or acquisition of the land is common.

**Law stated - 3 October 2023**

## Government appropriation of real estate

- 12** | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Expropriation of immovable property regularly occurs for the public benefit, (eg, for public utilities, national defence, acquisition of natural resources, town and city planning or other public purposes as prescribed under the government plan). The Immoveable Property Expropriation Act of 2019 stipulates the requirements and the process of compulsory purchase of real estate and compensation.

Owners, tenants and sub-tenants of land and buildings are entitled to the compensation. Lenders, however, are generally not directly compensated.

Compensation for expropriation, on a case-by-case basis, shall be evaluated from various factors, including the value of the land, demolition costs, relocation costs, and other damages resulting from the owner leaving the expropriated land.

Law stated - 3 October 2023

## Forfeiture

13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

As a general principle of criminal law, any property which is involved in the commission of a criminal offence (eg, money laundering or drug dealing) can be forfeited by court order and generally sold by way of public auction.

In addition to criminal cases, if a foreigner illegally owns the land or a landowner subsequently becomes a foreigner, it is required to dispose of the land within a period of one year from the date of becoming a foreigner under the Land Code of Thailand.

Law stated - 3 October 2023

## Bankruptcy and insolvency

14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy cases are subject to the Bankruptcy Act of 1940 which applies a legal concept of involuntary bankruptcy (ie, only when commenced by a creditor filing a petition against a debtor). The case is within the jurisdiction of the Central Bankruptcy Court. In the case of court proceedings, an official receiver will be appointed. Although there is no automatic stay upon filing of an application for bankruptcy, upon such filing, the bankruptcy court will issue a court order staying execution against the assets of the bankrupted borrower on a case-by-case basis. Upon a seller's bankruptcy, the seller's fraudulent conveyance can be voided (even if it is implemented before bankruptcy) under certain statutory conditions.

Business reorganisation can be an alternative for corporate debtors. Debtors or creditors can commence business restructuring by filing a petition to the Central Bankruptcy Court. It allows a corporate debtor to continue business operations in accordance with the approved restructuring plan. There is an automatic stay upon the acceptance of filing of an application for business reorganisation.

Law stated - 3 October 2023

## INVESTMENT VEHICLES

### Investment entities

15 |

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

A private limited company is the most common form for foreign investors, although it is not a pass-through entity.

Alternatively, investment in real estate projects can be done through property funds and real estate investment trusts (REITs), of which the latter is more recent and popular. While a REIT is a pass-through entity, a property fund is not. Property funds, however, are exempted from the applicable taxes on land transfer transactions (ie, value added taxes, specific business taxes and stamp duties), while REITs are still subject to those taxes.

**Law stated - 3 October 2023**

## Foreign investors

**16** | What forms of entity do foreign investors customarily use in your jurisdiction?

Private limited company investment structures are commonly used by foreign investors.

**Law stated - 3 October 2023**

## Organisational formalities

**17** | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

A private limited company can be established by way of registration at the Department of Business Development. Formal requirements for incorporated entities include having at least two individual promoters (according to the recently amended law), remittance of registered capital (with at least 25 per cent paid-up) and preparation of constitutional documents (eg, memorandum of association, articles of association and list of objectives).

After its establishment, a private limited company must maintain at least two shareholders at all times. Any changes of matters of the company shall be subject to registration; otherwise, monetary penalties may be imposed against both the company and its authorised directors.

A foreigner within the definition of the Foreign Business Act of 1999, including a foreign-owned company, is subject to restrictions on operating businesses in Thailand and real property-related business is also generally subject to this restriction.

**Law stated - 3 October 2023**

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Legal ownership and occupancy interests in real estate that are well recognised under Thai law include the following:

- ownership: an absolute right granted to the owner of property to use and dispose it or to acquire its fruits or to recover it from any person not entitled to take it, and prevent such person from unlawful interference;
- servitude: commonly known as a 'right of a way' or 'easement', which is a property right granted to the dominant property on the servient property for access by foot or vehicle or use in any means; and
- right over leasehold asset: a right granted by the owner of real estate over a plot of land, a building on land or a condominium to create and register a transferrable right over the property of the owner for a maximum period of 30 years. The right is transferrable and can be inherited and pledged as a security. The right over the leasehold asset shall be registered with the competent land office.

Other than the above, other forms of occupancy interest include leaseholds, mortgages, joint ownership, possession, habitation, usufruct, superficies and charges.

**Law stated - 3 October 2023**

### Pre-contract

**19** | What are the typical pre-contractual steps?

At the pre-contractual stage of sale of real property of substantial value, there are the submission of reservation form, undertaking of comprehensive due diligence, or execution of the letter of intent between the parties by a potential buyer. The legal effects of pre-contractual documents depend on the intentions of the parties. The parties can reserve certain provisions in the agreement to have either non-binding effect for common understanding between the parties or to have legal and binding effect on the parties, which the court may enforce.

During the course of negotiation, it is not customary for the owner to take the property off the market.

Having a real estate broker is not necessary for the transaction, but they are sometimes involved. Real estate brokers in Thailand are not specifically regulated. Thus, it does not require any educational requirements, certification, caps on commission, disclosure obligations or professional conduct regulations in Thailand.

**Law stated - 3 October 2023**

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

A sale contract typically includes the following particulars:

- details of the property (eg, location and title owner);
- details of seller and buyer;
- purchase price and payment term;
- registration of transfer of property;
- taxes, fees and expense payment;
- representations and warranties of seller and buyer; and
- termination and breach of contract.

Typically, the down payment varies from 10 per cent to 20 per cent of the purchase price. In Thailand, it is not common to have an escrow arrangement. The buyer can verify the good title to property from the land title deed available at the competent land office at the buyer's expense.

Typical representations and warranties with respect to the title of property provided by the seller are legal ownership, transferability and confirmation on non-encumbrance on the property, due or outstanding taxes or payment for the property, pending or potential litigations or claims, and compliance with the relevant laws and regulations.

Law stated - 3 October 2023

## Environmental clean-up

### 21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

The Enhancement and Conservation of National Environmental Quality Act of 1992 prescribes a duty of care for a business operator (ie, owner or operator) and imposes strict liability on them. A business operator who is a source of pollution or contamination that causes death, bodily harm or health injury to any person, or causes damage to the property of any individual or the state shall be liable for the compensation or damages, including expenses incurred by government services, for pollution clean-up.

When purchasing commercial real property, buyers sometimes conduct an environmental land survey, and generally the cost of the survey will be borne by them. If any contamination is found as a result of the survey, generally the seller will be responsible for the clean-up of such contamination unless the transaction is on an as-is basis.

Clauses regarding long-term environmental liability and indemnity that survive the term of a contract are not common in Thailand.



If any environmental defect is discovered on the target real estate before the execution of a real estate sales contract, the buyer usually requires the seller's covenant to cure that environmental defect before or after the closing. Completion thereof shall be stipulated as one of the closing conditions, or by setting such covenant as a post-closing obligation of the seller.

For breach of the provisions, remedies will be contractual damages or request for termination of the contract of sale.

Law stated - 3 October 2023

### Lease covenants and representation

- 22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Representations and warranties from the seller usually include confirmation of any existing lease agreement, no current breach of lease agreement and completion of rent payment.

Typical covenants from the contract date to the closing include clauses on no material adverse change for the existing lease or no change of the lessor and the lessee.

Generally, representations and covenants do not cover brokerage agreements.

Lease representations and covenants generally do not survive after the completion of the sale.

Estoppel certificates are not customarily required for the purchase of property that contains a large number of tenants as a condition to confirm the status of each lease agreement prior to the sale.

Law stated - 3 October 2023

### Leases and real estate security instruments

- 23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Whether the lease will survive the enforcement of security interest (ie, mortgage) depends on the sequence of creation of the lease.

If the lease is created after the security interest, it may not generally be subordinated, as registration of lease cannot be made without having the consent of the mortgagee, and as

long as the consent of the mortgagee is provided, the lease will survive after enforcement of mortgage. If the lease is created prior to the security interest, the lease will remain in effect for its full legal term upon the enforcement of the security interest.

The lender may ask tenants to enter into subordination and non-disturbance agreement.

Unless otherwise stipulated in the lease agreement, the above analysis is applicable to either ground (head) leases or sub-commercial leases, as they are considered the same under Thai law.

Law stated - 3 October 2023

## Delivery of security deposits

- 24 | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

When ownership of real property is transferred to a buyer, all obligations under a perfected lease with respect to such real property (including the obligation to repay security deposits to existing tenants) are automatically transferred to the buyer. To ensure delivery of all security deposits, it is common for the buyer to offset the amount of such tenants' security deposits against the purchase price.

When entering into the lease agreement, a security deposit is commonly given to ensure the performance of obligations to the lessor. It can be made in any form of payment and it is customarily made in immediately available funds (eg, cash or cashier cheque), rather than letter of credit or bank guarantee.

It is common for residential and commercial leases to have a short term (usually not more than three years) to avoid the burden of registration and to have rent reviews at the end of each term.

Law stated - 3 October 2023

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

It is common to have lawyers perform a legal due diligence investigation, regardless of the size of transaction. Due diligence is generally completed prior to the execution of a contract.

As the priority of interests in real estate is statutorily created as a result of registration with the land office, most information is usually obtained from the competent land office and other relevant government authorities.

As a preventive measure in real estate transactions, representations and warranties and indemnification clauses will provide contractual protection to buyer. There is no practice to use title insurance, legal title opinion or indemnity funds.

It is not usual, but if necessary, a written official confirmation letter from the competent authorities regarding legal use and occupancy can sometimes be obtained to confirm compliance and avoid potential disputes regarding the target property after closing.

Law stated - 3 October 2023

### Structural and environmental reviews

**26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Unless it is a large-scale investment project, it is not common to have an engineering company review the legality of the structure, use and occupancy of relevant real estate. Representations and indemnities on technical perspectives (eg, engineering and environment) are customarily provided.

Environmental insurance is available, but not common in Thailand.

Law stated - 3 October 2023

### Review of leases

**27** | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

As long as it is an important agreement, a lease agreement is usually reviewed, not only from a business perspective, but also from a legal perspective by lawyers. One of the key legal issues to point out in particular under Thai law is how to keep a leasehold for more than 30 years for long-term projects.

Lenders generally do not allow a property management agreement to be prioritised to financing security instruments, but do not in practice require it to be subordinated to financing security instruments should it be deemed the ordinary course of business of the borrower.

Law stated - 3 October 2023

### Other agreements

**28** | What other agreements does a lawyer customarily review?

In commercial property transactions, in addition to the real property contract of sale itself, it is customary for lawyers to review a variety of other transaction-related documents, including:

- certified copy of title deed;
- official purchase and sale agreement;
- construction permit and an occupancy permit;
- property management agreements and other service contracts; and
- debt financing-related agreements, if applicable.

Law stated - 3 October 2023

## Closing preparations

**29** | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Actions taken at the closing include the preparation of the list of deliverables, based on the agreement contemplating the transaction. Usually, lawyers have the important role of organising the closing to run smoothly. This involves not only preparation of the documents and a dry run through the closing and checklist, but also coordination with the competent land office to cross-check the application to be registered on the closing date and to estimate the taxes, fees and expenses payable in advance.

The list of deliverables may include:

- confirmation of consideration payment;
- personal and organisational documents to verify authority and internal approval to enter into the transaction;
- original or copies of title documents;
- application to register the transaction at the competent land office; and
- confirmation letter from the relevant authorities, if applicable.

The time from the contract date to the closing date may be subject to the nature of the transaction, but it may take three to six months.

Thai parties usually use the signature of an authorised director with the company seal (if necessary) to execute documents, with confirmation of due corporate authorisation of the authorised director duly registered at the Department of Business Development.

Debt finance advancement is usually necessary for sourcing part of the real estate purchase price, and a lender or other debt finance provider always requires immediate perfection of the security interest over the purchased real estate upon advancement of the loan. The timing of the closing and funding should normally be simultaneous or very closely executed.

Law stated - 3 October 2023

## Closing formalities

- 30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

A closing meeting for the transfer is usually held at a law firm, the competent land office or one party's office, depending on the case. The closing shall be conducted by having either the parties themselves or their representatives under the power of attorney present to submit the application at the competent land office, as the registration is required to complete any property-related activities, including conveyance or creation of mortgage. Once the registration is successfully completed, the official fees and taxes shall be paid, recording of transaction will be made on the title document and an official receipt thereto will be issued as an evidence of registration.

Law stated - 3 October 2023

## Contract breach

- 31** | What are the remedies for breach of a contract to sell or finance real estate?

Regarding the execution of a real estate sale contract, the seller may request a down payment from the buyer as part of the payment obligation. However, in practice, the parties usually request a deposit to secure obligations under the contract. In general, the receiving party may forfeit the deposit if the giving party breaches the contract. On the other hand, the receiving party is generally obliged to return the deposit if the receiving party breaches the contract. In addition, if a party breaches the contract, the other party can terminate the contract and each party shall be restored to the original states. A non-defaulting party can enforce the contract in case of non-performance and claim damages against the defaulting party through the court proceedings.

Law stated - 3 October 2023

## Breach of lease terms

- 32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Remedies are provided for tenants and landlords upon the breach of lease agreement (eg, termination by the non-defaulting party and claiming damages).

When the lessee defaults, eviction cannot be enforced against the lessee unless a court order is given. An execution officer will be appointed to process the eviction and restore the possession of the leased property to the lessor.

There is no material difference between the proof of remedies of commercial and residential leases.

Law stated - 3 October 2023

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

A mortgage is commonly used to secure the performance of an obligation.

Property used in a real estate business can also be used as collateral under the Business Collateral Act of 2015. Security receivers under this law are limited to financial institutions and other entities specifically prescribed by law. Business collateral is similar to a mortgage.

There are two basic methods for enforcement of mortgage and collateral, whether by way of public auction or foreclosure of property. Considering the time-consuming process of foreclosure, a public auction is more common, but it still takes a long time to complete enforcement. As the parties cannot agree on enforcement otherwise, only those two measures are available to enforce security.

Real estate financing in Thailand is usually given by financial institutions. Generally, commercial banks are qualified to act as finance providers.

Law stated - 3 October 2023

### Leasehold financing

- 34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

A leasehold, particularly for a commercial or industrial purpose, can be mortgaged under the Lease of Immovable Property for Commercial and Industrial Purposes Act of 1999.

A leasehold can also be used as collateral under the Business Collateral Act of 2015, provided that the business collateral agreement is made in writing and registered at the Department of Business Development.

In addition, a right over leasehold assets under the Rights over the Leasehold Asset Act of 2019, which is similar to the leasehold right in some respects, can also be mortgaged, provided that such right can be established only for land or condominium, with a valid title deed. It must be registered with the competent land office.

Leasehold financing usually requires consent from the landowner so that the enforcement thereof may be executed more smoothly. There are no specific lease provisions required in a ground lease to make it financeable.

Law stated - 3 October 2023

## Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

One of the most typical methods to create a security interest over real estate is a mortgage. A mortgage must be in writing and registered at the competent land office.

As for collateral, under the Business Collateral Act of 2015, the execution, amendment, cancellation and revocation of business collateral agreements must be made in writing and registered at the Department of Business Development. Information about registered collateral is publicly available.

Law stated - 3 October 2023

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

An appraisal report may be requested by the lender. Currently, as regulations for real estate appraisals are still under consideration, such activity is not regulated under Thai law; meanwhile, an appraisal is a profession supervised by the private associations (ie, Thai Valuer Association or Valuer Association of Thailand) through the membership system where appraisers could voluntarily register themselves and agree to comply with the appraisal standard thereof. However, in practice, certain transactions may require appraisers to be certified by such private associations and, in addition, to be approved by the relevant authorities such as the Securities Exchange Commission, the Bank of Thailand or the Office of Insurance Commission.

Law stated - 3 October 2023

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

In principle, a loan made by foreign lenders to borrowers in Thailand may be subject to foreign business restrictions, and if such a loan is secured by collateral located in Thailand,

the loan is highly likely to be subject to foreign business restrictions. Therefore, making a loan secured by collateral in Thailand from another jurisdiction would be prohibited in principle unless a licence from the Ministry of Commerce is provided. However, it is difficult for offshore entities to obtain such a licence in practice.

Law stated - 3 October 2023

## Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

In Thailand, the Thai Baht Interest Rate Fixing (THBFIX), or minimum lending rate, was previously used to determine a floating rate loan's interest rate. However, it was discontinued at the end of June 2023. Existing loans using THBFIX shall be automatically subject to the Fallback Rate, which will be discontinued at the end of 2025. New loans are encouraged by the Bank of Thailand to use the Thai overnight repurchase rate (THOR).

In principle, under Thai law, the chargeable interest rate shall not exceed 15 per cent per annum. An agreement on interest exceeding the prescribed rate will be invalid and the lender will be subject to criminal liability under the Excessive Interest Rate Prohibition Act of 2017.

Regarding interest rates chargeable by financial institutions, the interest rate for loans can be set by themselves under the supervision of the Bank of Thailand. For transactions other than loans, the chargeable rate shall not exceed the maximum rate prescribed by the Bank of Thailand.

Law stated - 3 October 2023

## Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Enforcement of a debtor's obligations under a loan agreement can be made through judicial proceedings. Mortgage or business collateral can also be enforced through judicial proceedings. As the court judgment is a prerequisite for public auction, this process could take some time.

Law stated - 3 October 2023

## Loan deficiency claims

**40** |



Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Under Thai laws regarding mortgages, if the amount received from the foreclosure of the mortgaged property or from sale by public auction of the same is less than the outstanding loan balance, the lender cannot recover the deficiency from the borrower unless it explicitly agrees otherwise in the loan agreement. This principle is applicable in cases where the borrower or any third party assigns his or her property to secure the borrower's loan.

For enforcement of collateral under the Business Collateral Act of 2015, the lender can recover deficiency after the sale of collateral, provided that the claim for deficiency can be made only against the borrower. The lender, however, cannot recover deficiency after foreclosure.

Law stated - 3 October 2023

### Protection of collateral

41 | What actions can a lender take to protect its collateral until it has possession of the property?

A lender can request an injunction from the court to prevent the borrower from disposing of the mortgaged property.

Law stated - 3 October 2023

### Recourse

42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Where a security is provided to secure the debt, lenders can choose to bring a case against the borrower either to request repayment under the loan agreement or to enforce the security under the mortgage agreement. When choosing to claim for repayment, the lender will be able to recourse from all assets of the borrower, while, upon enforcement of a security, lenders can recourse only from such security. Recourse is not typically limited to the collateral.

Recourse from the borrower's asset is generally not prohibited in the bankruptcy proceedings unless it is deemed as fraudulent or the court has ordered otherwise. However, it is prohibited in a business reorganisation procedure unless the court's approval is granted.

Personal recourse against a guarantor is generally not limited only to an action of bankruptcy or sale or foreclosure of the mortgaged property.

Law stated - 3 October 2023

## Cash management and reserves

**43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

In Thailand, lenders, particularly commercial banks, usually require borrowers to open and use particular bank accounts for cash management control of borrowers. Commercial banks sometimes require certain amounts of reserves from borrowers to maintain their working capital.

Law stated - 3 October 2023

## Credit enhancements

**44** | What other types of credit enhancements are common? What about forms of guarantee?

It is common for a lender to obtain credit enhancements, even if mortgages and other security arrangements are taken. Letters of credit and guarantees are commonly used as enhancements in Thailand.

Law stated - 3 October 2023

## Loan covenants

**45** | What covenants are commonly required by the lender in loan documents?

In the case of a limited recourse loan, it is common to incorporate a set of covenants to protect the lender, while a recourse loan arrangement (typically for corporate loans) is much more limited in scope and number. Covenants commonly required include affirmative covenants, such as compliance with relevant laws, and negative covenants, such as restrictions imposed on the borrower in relation to merger and acquisition, disposal of assets, making payment and creation of additional encumbrance. Covenants in loan documents are not generally different depending on asset classes, but covenants for freehold and leasehold may be different.

Law stated - 3 October 2023

## Financial covenants

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**46** | What are typical financial covenants required by lenders?

Financial covenants that are typically required by lenders mostly concern the financial status of borrowers, such as maintenance of debt-service-coverage ratio, debt-to-equity ratio, registered capital (in the case of a corporate borrower) and the amount of debt not exceeding the specified amount or ratio. Lenders will usually require borrowers to report their financial status upon request or within a specified period.

Law stated - 3 October 2023

**Secured movable (personal) property****47** | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Typical forms of security interests in movable property are:

- pledges;
- business collaterals; and
- mortgages on specific types of movable property, such as machinery registered with the Department of Industrial Works, vessels, equipment and trade fixtures.

A 'pledge' is defined as a contract in which the pledgor delivers to the pledgee a movable property as security for the performance of obligation. The pledged property must be a movable property or the right represented by a written instrument and must be delivered into and kept in the possession of the pledgee or by a third person throughout the period of pledge. A pledge becomes valid and perfect upon the delivery of the pledged property into possession of the pledgee.

A mortgage does not require the delivery of the property to the mortgagee. A mortgage becomes valid and perfect upon registration at the competent land office.

Movable property that borrowers use in business operations (eg, machinery, goods, inventories or raw materials), can also be collateral under the Business Collateral Act of 2015. The method of creating and perfecting a collateral agreement for movable property is similar to that for immovable property.

Law stated - 3 October 2023

**Single purpose entity (SPE)****48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

In the case of a non-recourse loan, the lender will sometimes require that a borrower be an SPE. As fully non-recourse loans are not common in Thailand, it is not common that the lender will require the appointment of an independent director as well as the submission of a non-petition letter (as Thai bankruptcy law chooses an involuntary system).

Law stated - 3 October 2023

## UPDATE AND TRENDS

### International and national regulation

**49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Emerging trends and hot topics in Thailand include:

- cessation of the Thai Baht Interest Rate Fixing (THBFI) from 1 July 2023 onwards – the Fallback Rate, which will be discontinued at the end of 2025, will be used during the transition period and the Thai Overnight Repurchase Rate (THOR) shall be the substitution, which is encouraged by the Bank of Thailand;
- registration related to real property can be done at the land office in another designated province from where the real property is located by initially submitting an application and required documents via the online system - at present, there are only seven provinces where cross-province registration related to real property is allowed;
- continuation of the reduction of the land registration fee for transfer and mortgage of land and buildings for residential property transactions until the end of 2023;
- income tax exemption for the increased value resulting from the change of investment units to trust units until 31 December 2024 and VAT exemption for the transfer of assets from the property fund for public offerings to real estate investment trusts;
- continued reform of the land department's database from paper-based to electronically-based documents; and
- a 15 per cent reduction of tax for certain types of land and construction (eg, land and construction used for agriculture, residence and deserted and un-utilized land and construction).

*This chapter was first published in November 2023. Be advised that some of the above content may no longer apply.*

Law stated - 3 October 2023



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# United Arab Emirates

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

The United Arab Emirates uses a civil law system. The Constitution of the United Arab Emirates sets out the main rules of the political, legal and constitutional organisation of the United Arab Emirates.

Article 1 of the Constitution provides that the United Arab Emirates is a federal, independent and sovereign state consisting of the emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, Fujairah and Ras Al Khaimah.

The Constitution is flexible and allows each emirate to exercise authority in certain matters.

Article 116 provides that the emirates shall exercise all powers not assigned to the federation by the Constitution.

Article 122 provides that the emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the federation.

The emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain follow the federal judicial system.

However, at the local level, the Abu Dhabi Judicial Department in Abu Dhabi, the Dubai Courts in Dubai, and the Ras Al Khaimah Courts in Ras Al Khaimah (the RAK Courts) maintain their own independent judicial departments and hold jurisdiction in matters that are not assigned to the Federal Judiciary in accordance with the Constitution.

In the Emirate of Dubai, two legal systems apply with respect to real estate. The first is the regime that is applicable to land comprising 'onshore Dubai'. This is defined as all areas in the Emirate of Dubai excluding the free zone called the Dubai International Financial Centre (DIFC). The second is the regime applicable to the land comprising the DIFC.

Law stated - 21 November 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

In Dubai, all dispositions that create, transfer, change or extinguish real property rights, and all the final rulings validating these dispositions, must be registered (article 9 of Law 7 of 2006 (as amended by Law 7 of 2019)). In particular:

- a developer must register all dispositions of off-plan property in the Interim Register (*Oqood*), which is maintained by the Dubai Land Department (article 3 (1) of Law 13/2008, as amended by Law 9/2009, clarified by Decree 6/2010 and further amended by Law 19/2020);



- a disposition of a completed property must be registered in the Real Property Register, which is also maintained by the Dubai Land Department;
- a lease agreement must be registered with:
  - the Dubai Land Department if the lease is for a term of not less than 10 years and not more than 99 years (see Administrative Resolution 134 of 2013 and article 10 of Law 4/2019); or
  - on the *Ejari* system maintained by the Dubai Land Department, if the lease is for a term of fewer than 10 years; and
- all mortgages must be registered with the Dubai Land Department (article 7 of Law 14/2008).

Under the law, the relevant disposition shall not be deemed effective unless it is registered (article 9 of Law 7/2006 (as amended by Law 7 of 2019). See also article 3(1) of Law 13/2008, article 4 (2) of Law 33/2008 and article 7 of Law 14/2008. Therefore, a contract of sale, mortgage or lease is legally binding only if it is registered.

There is no state guarantee of title. The validity of information in the Property Register may be challenged on the grounds of fraud or forgery (article 7 of Law 7/2006). The Dubai Land Department can correct errors in the Property Register either at the request of a third party or on its own initiative (article 13 of Law 7/2006).

Law stated - 21 November 2024

## Registration and recording

### 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The registry in each emirate has its own rules governing how title is transferred. In Dubai, to register a transfer of title, the buyer and seller must both meet at a real estate registration trustee office in Dubai (such as Tamleek). At that meeting, several steps are completed, including the following:

- various original documents will be produced by the buyer and seller, including:
  - the title deed;
  - a no-objection certificate from the developer;
  - the mandatory Dubai Land Department Template Property Sales Contract between Buyer and Seller (Form F), which can and should be augmented (using a schedule, an attachment or incorporation by reference) by the parties entering into a separate sale and purchase contract or memorandum of understanding; and
  - the passport, visa or emirates identification of the seller and buyer (if an individual) or the corporate documents of the seller and buyer (if a company);
- the buyer and seller will sign the Dubai Land Department forms for the transfer of title;

- the buyer will pay the purchase price to the seller;
- the necessary payments will be made to the Dubai Land Department and the real estate registration trustee; and
- the Dubai Land Department will issue the buyer with a title deed for the property.

Registration cannot be completed by the parties electronically.

The registry in each emirate has its own rules governing the registration of lease agreements. As such, a lease must be concluded in writing to enable it to be registered and treated as valid under the law. In addition, in March 2017 the Dubai Land Department introduced mandatory unified *Ejari* tenancy contracts; leases based on templates that must be used in all leasing transactions required to be registered under the *Ejari* system by law that can be supplemented by additional terms and conditions, as required.

The registry in each emirate has its own rules governing the registration of mortgage agreements. In Dubai, the law requires that all mortgages be registered with the Dubai Land Department (article 7 of Law 14/2008).

Law stated - 21 November 2024

## Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There is no express prohibition in the Civil Code (Federal Law 5/1985) against foreign land ownership. However, each emirate can pass its own laws to regulate property ownership.

Under the onshore Dubai regime, the law and the current policy of the Dubai Land Department (DLD) provides as follows.

UAE nationals, Gulf Cooperation Council (GCC) nationals and companies fully owned by these individuals and public joint stock companies can own property anywhere in onshore Dubai (article 4 of Law 7/2006).

Non-UAE and non-GCC nationals can own only freehold, leasehold (up to 99 years) or usufruct (up to 99 years) in designated areas in onshore Dubai (Designated Areas), which are determined by the Ruler of the Emirate of Dubai by way of decrees and regulations issued from time to time. Some of the most popular of the Designated Areas are: the Palm Jumeriah, Downtown Dubai, Old Town, Burj Khalifa, Business Bay, Dubai Marina, Emirates Hills, Jumeirah Lakes Towers, Jumeirah Beach Residence, Zabeel first and Arabian Ranches (Regulation No. (3) of 2006 Determining Areas for Ownership by Non-UAE Nationals of Real Property in the Emirate of Dubai and its amendments (most recently updated by Resolution No. (6) of 2022)).

A foreign company can own only a freehold, leasehold (up to 99 years) or usufruct (up to 99 years) in the Designated Areas in onshore Dubai via establishing one of the following company vehicles in Dubai:

- a Jebel Ali Free Zone Authority Offshore Company;

- a Dubai Multi Commodities Centre company;
- a company incorporated in the Abu Dhabi Global Market free zone;
- a RAK International Corporate Centre offshore company;
- a DIFC company, partnership, foundation, real estate investment trust or real estate fund, subject to the approval of the DIFC Registrar of Companies (approval is given on a case-by-case basis); or
- an LLC..

Under the DIFC regime, all foreign nationals, foreign companies and GCC nationals have the right to acquire real estate anywhere in the DIFC without restriction on the type of legal vehicle used.

Generally, a separate special purpose vehicle (taking one of the forms described above) is used by foreign investors to purchase and develop a plot. These vehicles are primarily used because they ringfence liability to the specific special purpose vehicle.

Although Dubai is mainly a tax-free emirate, there are government restrictions on:

- foreign investment;
- areas where investment is permitted;
- corporate structures that can be used for investment; and
- licences required before investment can be made.

One entity can own a plot and also hold the development licence for the plot. The licence is deemed to include leasing rights. Alternatively, one entity can own the plot while another entity holds the licence. Various licences are available, and each has advantages and disadvantages. The decisive criteria are the plot's intended use and the applicant's nationality.

Real estate investment trusts (REITs) are not commonly used in the United Arab Emirates, as they are not permitted outside of the following frameworks:

- the Abu Dhabi Global Market (ADGM) REIT framework (the ADGM Fund Rules);
- the Dubai International Financial Centre's Investment Trust Law framework (the DIFC Investment Trust and REITs Rules Instrument); and
- the Emirates Securities and Commodities Authority's framework (Administrative Decision 6/R.T of 2019 Concerning Real Estate Investment Fund Controls).

However, on 22 July 2022, Dubai Decree No. 22/2022 came into force which approved a number of incentives that are to apply to property investment funds. It is hoped that these incentives will attract further investment in the Dubai real estate market. The privileges that are to be afforded to property investment funds are as follows:

- property investment funds will have the right to own property, or the right of usufruct or rental for a duration that does not exceed 99 years in areas where ownership is typically not allowed to UAE non-nationals in the specific areas identified by the newly established Committee of Property Investment Funds;
-

the Decree explicitly states that no Dubai Land Department registration fees shall be imposed upon the property investment fund on the disposition of shares by the shareholders of the property investment fund. This, as noted above, was one of the main factors in discouraging investors from utilising property investment funds as a method for investment; and

- Dubai Land Department registration fees applied for property purchased by the property investment fund have been reduced from the standard 4 per cent of the market value of the property to 2 per cent. Similarly, the applicable fee to register a usufruct right or long-term lease has also been reduced to a fee of 2 per cent of the market value of the property.

Law stated - 21 November 2024

### Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange controls restricting payments to foreign lenders. The UAE dirham is fully convertible and there are no restrictions on the movement of funds (denominated in dirhams, US dollars or otherwise) into or out of the United Arab Emirates. The dirham is pegged to the US dollar.

Law stated - 21 November 2024

### Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

### Obligations of a landlord

A landlord must repair any defect in the leased property that affects the lessee's use of the property. If the landlord fails to do so, the tenant may cancel the lease or obtain leave from the judge authorising it to repair and recover the costs from the landlord (article 767 of the Civil Code). In addition, in Dubai:

- the landlord must hand over the property to the tenant in a good condition (article 15 of Law 26/2007);
- unless the parties have agreed otherwise, the landlord is responsible for the property's maintenance works and for repairing any defect or damage that may affect the tenant's enjoyment of the property during the term of the lease (article 16 of Law 26/2007); and
-

if the landlord breaches its obligations, the tenant can file a complaint with the Rental Disputes Settlement Centre, which has exclusive jurisdiction of the matter.

### Obligations of the tenant

The leased property is regarded as being held in trust by the tenant and the tenant is liable for any diminution, damage or loss arising out of its default or wrongful act (article 776 of the Civil Code).

The tenant must exercise the care of a reasonable person in preserving the leased property (article 776 of the Civil Code).

In addition, in Dubai, on the expiry of the lease the tenant must return the property to the landlord in the condition that it was in at the beginning of the tenancy, subject to natural wear and tear (article 21 of Law 26/2007 and article 784 of the Civil Code). However, the Rental Disputes Settlement Centre, the judicial arm of the Dubai Land Department, recently considered what may be deducted from a security deposit and found that matters that fall to the landlord following the departure of a tenant may not be deducted from the security deposit. Should the tenant fail to comply with the terms of the agreement and/or the provisions provided for under the law, then the landlord should look to recover where possible directly from the tenant before using the security deposit.

There is no system of binding precedent in the United Arab Emirates.

### Environmental obligations

Federal Law No. 24 of 1999 on the Protection and Development of the Environment governs environmental clean-ups. Under this law, any person who intentionally or by way of negligence causes damage to the environment or to others is responsible for all the costs for treatment or removal of the damage and may be imprisoned and fined.

Law stated - 21 November 2024

### Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Typically, a landlord will maintain property all-risk insurance, and in a commercial context the landlord will require the tenant to maintain certain types of insurance during the term of the lease, such as:

- business interruption insurance;
- comprehensive public liability insurance;
- workmen's compensation and employers' liability insurance;
- contractor's all-risk insurance; or
-

product liability insurance (covering not only contents insurance but including any fixtures or fittings as may be added by the lessee).

- Typically for commercial leases lessees may also be required to get insurance to cover any damages or costs relating to the internal structure only which they are responsible for during the term of the lease; however, the lessor shall typically insure and cover the structural elements of the leased property (subject to the terms of the lease) ie, any outside structural element, such as roof space, and any internal or external communal space.

Law stated - 21 November 2024

## Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The laws of the United Arab Emirates prevail and govern over all matters concerning property located in the United Arab Emirates.

Law stated - 21 November 2024

## Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Pursuant to article 6 of Decree 26 of 2013 and Law 6 of 2019, the Rental Dispute Settlement Centre has exclusive jurisdiction over the following matters in Dubai:

- to determine all rent disputes that arise between landlords and tenants of property situated in the emirate of Dubai or in its free zones, including counterclaims arising therefrom, as well as to determine applications for interim or urgent relief filed by any of the parties to a lease contract;
- to determine appeals from the decisions and judgments that are subject to appeal in accordance with the provisions of this decree and the regulations and resolutions issued in pursuance thereof;
- to enforce the decisions and judgements issued by the Rental Dispute Settlement Centre; and
- to hear and determine all disputes and disagreements related to the rights and obligations stipulated in Law 6 of 2019 Concerning Ownership of Jointly Owned Real Property in the Emirate of Dubai.

Law stated - 21 November 2024

## Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The law applies equally to residential and commercial properties located in onshore Dubai. However, in onshore Dubai there has been discussion that a new rental law may be introduced that will replace the current one-size-fits-all rental regulation. However, there are other practical requirements that somewhat differentiate commercial leases from residential leases; notably, the term must be for at least one year and the company must hold a business licence in line with its business activity. Under the DIFC regime, there are different rules that apply to the leasing of residential and commercial property, as set out in DIFC Leasing Law 1 of 2020.

Law stated - 21 November 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Each emirate imposes its own planning controls in relation to real estate in its area. In Dubai, the Dubai Municipality is the principal authority regulating planning controls in Dubai (with Local Orders such as 33/1988, 2/1999 and 8/2003, with recent updates including Executive Council Resolution No. (18) of 2021 Forming the Supreme Urban Planning Committee in the Emirate of Dubai, and Law No. 16 of 2023 Concerning Urban Planning in the Emirate of Dubai and the Dubai Urban Plan 2040).

Additional controls can be imposed by the Real Estate Regulatory Agency, the relevant free zone authority and the master developer, which are regulated by:

- Law 13/2008 (as amended);
- Law 8/2007;
- Law 6/2019;
- rules and regulations of the relevant free zone;
- master community declarations; and
- building management regulations (the document prepared in accordance with Law 6 of 2019 and to be entered in the Jointly Owned Real Property Register).

The master developer's standard sale contract will also contain provisions relating to planning control.

For projects being completed by Dubai World Group entities, an organisation called Trakhees (which forms part of the Ports, Customs and Free Zone Corporation) is responsible for all planning, health and safety and commercial licensing activities.

In Dubai, there are no formal procedures for third parties to object to a planning application. However, the planning authorities can review and amend the regulations of the classification and use of lands in Dubai if a third-party application is filed on serious and effective grounds that justify an amendment (article 8 of Local Order 2/1999). Further, the planning authority officials have full discretion to investigate as they deem appropriate (article 11 of Local Order 2/1999).

In Dubai, a violating party may be subject to one or more of the following penalties, as set out in article 28 of Local Order 2/1999:

- a fine not exceeding 50,000 dirhams;
- disconnection of all the utilities in the building or the site;
- suspension of the issuance of new building permits or renewal of any building permit; or
- suspension of the professional or commercial licence of the engineer or contractor on a temporary or permanent basis.

In addition, and further to setting controls and restrictions on development and construction, the Dubai government issued a new law, Law No. 16/2023 on Urban Planning in the Emirate of Dubai (2023 Law) outlining the following key objectives applicable to private development zones and free Zones, including the DIFC, and all individuals and public and private entities that carry out development work in the Emirate:

- establishing an integrated and effective urban planning system in a manner that encourages investment and sustainable development, achieves prosperity and improves the quality of life and living conditions, and the security and safety of society in the Emirate;
- governance of the urban planning sector, defining the competencies of the relevant authorities, achieving ways of cooperation, coordination and integration between them in relation to urban planning, and communicating data and information amongst them;
- enhancing the efficiency of preparing and implementing plans, strategies and policies related to urban planning;
- organising and following up urban planning works, and ensuring their alignment with approved plans, strategies and policies;
- preserving the environment in all its elements, biodiversity and natural resources in the Emirate for the benefit of present and future generations; and
- contributing to the establishment of the environmental impact assessment system and the strategic environmental assessment in the Emirate.

A supreme committee for urban planning shall also be established pursuant to the 2023 Law, which shall help set general policy for urban planning in Dubai and define urban development objectives within the framework of approved goals and strategies. This aims to further strengthen the controls and check and balances in place in Dubai around planning and environmental effects.

**Law stated - 21 November 2024**



## Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Local and federal authorities can acquire real estate compulsorily if it is necessary for the public's benefit and just compensation is paid (article 1135 of the Civil Code). In addition, each emirate can pass its own laws to regulate compensation.

There is no formal notice period for expropriation.

Pursuant to article 1135 of the Civil Code, when assessing compensation, consideration is given not only to the value of what is expropriated, but also to loss of profit and other damage that may result from the expropriation.

In Dubai, the Lands Valuation Committee (with the approval of the director general of Dubai Municipality) decides on applications for compensation for persons affected by expropriation (Resolution 2/2003).

In the case of road expansion, compensation will be in the form of:

- cash, if the Lands Valuation Committee determines that the value of the compensation is 200,000 dirhams or less; or
- additional land, if the Lands Valuation Committee determines that the value of the compensation should be more than 200,000 dirhams (see Dubai Local Order 1/2014).

Further, Law No. 2 of 2022 Concerning Acquisition of Real Estate Property for Public Benefit in the Emirate of Dubai, provides that any private ownership is protected and not prejudiced, save that should private property be required for public benefit then such owner shall in return receive fair compensation. Such law applies to all real property, including in any special development zones and free zones, including DIFC.

Law stated - 21 November 2024

## Forfeiture

- 13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

The Civil Code governs forfeiture and seizure of real estate.

Law stated - 21 November 2024

## Bankruptcy and insolvency

- 14 | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

No company rescue or reorganisation procedures are available onshore in the United Arab Emirates outside the insolvency regime under Federal Decree Law 9 of 2016, as amended (the Bankruptcy Law). Previously the insolvency regime under the Bankruptcy Law provided for preventative composition procedure (PCP), restructuring schemes and bankruptcy. The Bankruptcy Law previously provided for a two-step insolvency procedure of:

- a PCP, which can only be initiated by a debtor in financial distress, provided they meet certain requirements, such as not being more than 30 days past due on any payment obligation; and
- an alternative to the PCP is an application for bankruptcy, which can be initiated by:
  - a debtor;
  - a creditor(s), provided that the debt (single or in aggregate for the creditors) is 100,000 dirhams or more;
  - the debtor's regulatory body;
  - the court; or
  - the public prosecutor.

Once a bankruptcy application was made, the court would appoint an expert to review the application and prepare a report (reviewing the debtor's debts, assets, financial prospects and the possibility of initiating a restructuring of the business and financial position of the debtor). Based on the court's examination expert's report, it would decide whether to reject the application, or proceed to bankruptcy or a restructuring scheme. If the court decided to proceed with a PCP or a restructuring scheme, then the court appointed a trustee to receive and examine the debt claims from the creditors and submit a draft PCP or restructuring scheme (as applicable) to the court. The draft scheme was required to contain details regarding (among other things) the possibility of the debtor's business to generate profits, and the terms and conditions relating to any settlement of the debtor's liabilities.

Once the draft scheme was approved by the court, it had to be submitted to the creditors. At least two-thirds of the unsecured creditors were required to approve the scheme or recommend amendments. If approved, the scheme would then be resubmitted to the court for final approval. If the scheme was a PCP scheme, then it should have been implemented within three years of receiving the final approval from the court; if it was a restructuring scheme, it should have been implemented within five years of receiving the final approval from the court. However, both the above implementation timeframes could be extended. In the event that the court approved the bankruptcy, the trustee would finalise the creditors debts and then liquidate the assets of the debtor, in order to repay the creditors (including preferential, secured and unsecured) in accordance with the Bankruptcy Law and the court's directions.

However, under the New Bankruptcy Law Federal Law Decree No. 51 of 2023 concerning Financial Restructuring and Bankruptcy (which took effect from 1 March 2024), preventative composition (PCP) will be replaced by preventative settlement, allowing for a more amicable approach to settling debts, such as rent, under a court-supervised process. The new law also allows for debtors, such as tenants, to have a moratorium period of up to three to six months should the tenants initiate the preventative settlement process,

thus allowing the tenant time and space to negotiate a repayment plan with the landlord under the court's supervision. This new law further aligns the UAE with global provisions on bankruptcy while again making the UAE an attractive global investment destination.

Law stated - 21 November 2024

## INVESTMENT VEHICLES

### Investment entities

**15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Generally, a separate special purpose limited liability vehicle is used to purchase and develop a plot. These vehicles are primarily used because they ringfence liability to the specific special purpose vehicle.

There are governmental restrictions on:

- foreign investment;
- areas where investment is permitted;
- corporate structures that can be used for investment; and
- licences required before investment can be made.

One entity can own a plot and also hold the plot's development licence. The licence is deemed to include leasing rights. Alternatively, one entity can own the plot while another entity holds the licence. Various licences are available and each has advantages and disadvantages. The decisive criteria are the plot's intended use and the applicant's nationality.

Real estate investment trusts (REITs) are not commonly used in the United Arab Emirates, as they are not permitted outside of the following frameworks:

- the Abu Dhabi Global Market (ADGM) REIT framework (the ADGM Fund Rules);
- the Dubai International Financial Centre Investment Trust Law framework (the DIFC Investment Trust and REITs Rules Instrument); and
- the Emirates Securities and Commodities Authority's framework (Administrative Decision 6/R.T of 2019 Concerning Real Estate Investment Fund Controls).

However, as noted above the privileges prescribed in Dubai Decree No. 22/2022 may increase the popularity of REITs as an investment vehicle.

The UAE recently issued Federal Decree-Law No.47 2022 as amended by Federal Decree-Law No.60 of 2023 (CT Laws) pursuant to which certain business activities and corporate entities are now subject to corporate tax.

Pursuant to the CT Laws, real estate investment income may be subject to corporate tax where such income derives from a licensed business or business activity and/or requires a licence from a licensing authority.

However, certain exemptions apply, and corporate tax does not apply in the following circumstances:

- Real estate investment income: where such income is received by a natural person, connected, either directly or indirectly, to the sale, lease, sub-lease, or rental of land or real estate property in the UAE.
- Where the profit or income relates to an individual person, in its own capacity, then the individual will not be subject to tax on its profit or gain from the sale of real estate.

Law stated - 21 November 2024

## Foreign investors

### 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

Generally, a separate special purpose limited liability vehicle is used to purchase or develop land in the designated areas in Dubai. These vehicles are primarily used because they ringfence liability to the specific special purpose vehicle.

In Dubai, a special purpose vehicle must take the form of one of the following company vehicles:

- an offshore company registered in the Jebel Ali Free Zone (JAFZA offshore company);
- a Dubai Multi Commodities Centre (DMCC) company;
- a company incorporated in the Abu Dhabi Global Market's (ADGM) free zones;
- a Ras Al Khaimah (RAK) International Corporate Centre offshore company;
- a DIFC company, partnership, foundation, real estate investment trust or real estate fund (however, the formation of such entities is subject to approval by the DIFC Registrar of Companies, which is granted on a case-by-case basis); or
- a limited liability company.

These forms of entity are required to be used in accordance with the current policies of the Dubai Land Department.

Law stated - 21 November 2024

## Organisational formalities

### 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The most common form of investment entity for foreigners is a JAFZA offshore company. To incorporate a JAFZA offshore company, the following documents must be submitted to JAFZA:

- an application form for registration of the offshore company;
- a covering letter requesting JAFZA to incorporate the offshore company;
- a letter from the registered agent confirming that it agrees to act as the registered agent for the offshore company;
- the offshore company's memorandum and articles of association in the form required by JAFZA;
- in the case of a corporate (non-individual) shareholder (if the corporate shareholder is outside the United Arab Emirates):
  - a certificate of registration or incorporation of the corporate shareholder (notarised and attested up to the level of a UAE embassy outside the United Arab Emirates);
  - a memorandum of association and articles of association of the corporate shareholder (notarised and attested up to the level of a UAE embassy outside the United Arab Emirates); and
  - a board resolution calling for the establishment of the offshore company as well as the authorisation of the individuals who will represent the applicant before JAFZA and sign on behalf of purposes of the incorporation;
- in the case of an individual shareholder:
  - a passport copy of the individual shareholder submitted to JAFZA;
  - a shareholders' resolution calling for the establishment of the offshore company as well as the authorisation of the individuals who will represent the applicant before JAFZA and sign on behalf of purposes of the incorporation;
  - specimen signatures of the manager and shareholder's appointed representatives; and
  - a copy of the manager's passport, and authorised signatories of the applicant, the secretary and the directors.

Typically, upon submission of the above-mentioned documents, the Registrar of Companies in JAFZA takes between 10 days and three weeks to register an offshore company. However, this is subject to the Criminal Investigations Department granting its approval within a reasonable time.

The time frames mentioned above are estimates. Further, the procedures, requirements and fees are also subject to change by JAFZA. It is not unusual for JAFZA to impose additional or different requirements based on its prevailing policies and guidelines or case by case basis, entirely at its discretion.

The ongoing formalities to maintain the JAFZA offshore company once registered are as follows:

- there must be a registered office at all times and it must be maintained by the offshore company in JAFZA or by the offshore company's registered agent in Dubai;

- there must be a registered agent at all times, either in JAFZA or in Dubai. The agent is subject to the approval of JAFZA and would need the approval of registration in the registry of registered agents that is handled by the Registrar of Companies in JAFZA; and
- payment of an annual licence renewal fee to JAFZA.

Dubai is no longer a tax free emirate following the issuance and implementation of the CT Law.

Prior to 1 June 2021, foreign or non-Gulf Cooperation Council national ownership of an onshore company in Dubai was restricted to 49 per cent, with the remaining 51 per cent required to be held by a UAE national. Since the enactment of Federal Decree Law No. 26 of 2020, this requirement is no longer in force; as such, international investors are now free to register their companies outside of free zones without splitting ownership with a UAE national, in respect of most types of onshore companies. This development will no doubt have a significant impact on company organisations throughout the United Arab Emirates.

Pursuant to the CT Laws, even freezone companies which undertake a licensed business activity including but not limited to receiving real estate investment income may be subject to corporate tax where such income derives from a licensed business or business activity and/or requires a licence from licensing authority. Therefore, real estate investors, individuals (who undertake a licensed business activity) and companies now need to ensure they are registered with the federal tax authority and ensure that they comply with the necessary submission of accounts or, if available, apply for an exemption.

Law stated - 21 November 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

- 18 | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

The Civil Code (Federal Law 5/1985) provides for various types of tenure, including:

- freehold: the right to use, enjoy and occupy land or property permanently;
- *musataha*: the right to build on land for a specified duration not exceeding 50 years (the holder of a *musataha* right is deemed to own all buildings on the land during the specified term); and
- usufruct: the right to use, enjoy and occupy land or property belonging to another person for a fixed term not exceeding 99 years (usufruct is similar to the concept of 'leasehold' under English law).

In Dubai, land can also be gifted by the ruler of Dubai to a UAE national at no cost for commercial, industrial or residential purposes. Granted land is not freehold land and is subject to various restrictions. Land granted by the government of Dubai to UAE nationals cannot be disposed of without special permission from the ruler of Dubai or as permitted under Decree No. 4 of 2010.

In both Dubai and Abu Dhabi, a 'volumetric' subdivision of land and buildings into designated components is permitted (see article 8 of the Dubai Direction for General Regulation (2010) and article 61 of Abu Dhabi Law 3/2015).

In Dubai, all dispositions that create, transfer, change or extinguish real property rights and all the final rulings validating these dispositions, must be registered (article 9 of Law 7/2006 (as amended by Law 7 of 2019)).

Law stated - 21 November 2024

## Pre-contract

### 19 | What are the typical pre-contractual steps?

The buyer and seller normally sign a brief memorandum of understanding or a reservation form confirming the fundamental aspects of the deal. Generally, this memorandum of understanding or reservation form is binding on the parties pending the signing of a sale contract.

It is strongly advisable to carry out due diligence before entering into a binding sale contract. As a minimum, the buyer should:

- require the seller to provide it with a copy of the title certificate, which has been attested by the Dubai Land Department;
- carry out a property inspection; and
- insist on representations and warranties in the contract as to title and property defects.

It is also prudent for the buyer to obtain the seller's consent to its examination of the Property Register, as this is not open to the general public. However, this practice is uncommon.

With regard to off-plan units, the buyer should check that:

- the real estate project is registered with the Real Estate Regulatory Agency (RERA);
- there is an escrow account for the real estate project;
- the percentage of completion of the real estate project and the expected date of completion;
- the developer is registered with RERA;
- the developer owns the land or there is a development agreement between the owner and the developer; and
- the developer has the required permits and approvals from the Dubai Land Department and RERA to sell units off-plan in that particular real estate project.

Real estate brokers must be licensed in Dubai and Abu Dhabi, and comply with the relevant professional and ethical standards set out in Dubai By-law 85/2006 and Abu Dhabi Law 3/2015.

A seller or a property developer must appoint a broker by written agreement.

There is no cap on a broker's commission, but it normally ranges from 2 to 5 per cent of the purchase price.

All companies operating in Dubai and Abu Dhabi that wish to market real estate inside or outside the country must first obtain a permit from the Department of Municipal Affairs in the case of Abu Dhabi and through the Trakheesi system in the case of Dubai (see Real Estate Regulatory Agency Circular No. 11-2016 and Abu Dhabi Law 3/2015).

Law stated - 21 November 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

A sale contract typically covers the following:

- a description of the property;
- the purchase price;
- the settlement date;
- apportionment of costs and liabilities;
- termination;
- dispute resolution; and
- jurisdiction.

However, the mandatory Dubai Land Department template Property Sales Contract between Buyer and Seller (form F) must be used. It can, and should, be supplemented by additional terms and conditions.

In both Dubai and Abu Dhabi, off-plan property developers must make specific disclosures to the buyer about the property, including in relation to service charges (see article 4 of the Direction for General Regulation Concerning Jointly Owned Properties (2010) and article 15 of Abu Dhabi Law 3/2015).

The developer in Dubai is deemed to have warranted the information in the disclosure statement. If, within two years of the date of the original transfer of the unit, any of that information is found to be inaccurate, the developer will be liable to the buyer for damages (article 5 of the Direction for General Regulation Concerning Jointly Owned Properties (2010)).

Aside from this, there are no statutory (or other) duties of disclosure imposed on sellers. However, any misrepresentation by the seller can result in both civil and criminal liability.

The seller typically contractually warrants that, among other things:

- the title is unencumbered and mortgage-free;
- it has full authority to sell;
- there are no outstanding debts and the service charge is fully paid up; and



- the property and development obligations have been met.

Environmental warranties are uncommon in the United Arab Emirates.

In Dubai, an off-plan property developer is deemed to have given the warranties set out in article 40 of Law 6 of 2019 to the buyer.

The Civil Code also contains certain implied provisions in land sale contracts (see Book Two – Contracts, Chapter I – Contracts Conferring Ownership).

The imposition of value-added tax began in the United Arab Emirates on 1 January 2018 at a standard rate of 5 per cent. The VAT treatment of real estate depends on whether it is a commercial or residential property. Supplies (including sales or leases) of commercial properties will be taxable at the standard VAT rate of 5 per cent. The VAT must be paid by the beneficiary of the property. Supplies of residential properties will generally be exempt from VAT. To ensure that real estate developers can recover VAT on the construction of residential properties, the first supply of residential properties within three years of their completion will be zero-rated. All other residential property supplies will be exempt from VAT.

No stamp duty is payable on the sale or purchase of real estate.

Law stated - 21 November 2024

## Environmental clean-up

- 21** | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Federal Law No. 24 of 1999 on the Protection and Development of the Environment governs environmental clean-ups in the United Arab Emirates. Under this law, any person who intentionally or through negligence causes damage to the environment or to others is responsible for all the costs of treatment or removal of such damage and may be imprisoned and fined.

Unless otherwise stipulated in the sale agreement, the buyer generally inherits liability for all matters relating to the property, which includes environmental liability.

However, environmental liability is not usually a consideration in the majority of real estate transactions in the United Arab Emirates.

Law stated - 21 November 2024

## Lease covenants and representation

- 22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from

tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Unless otherwise stipulated in the sale agreement, the buyer generally inherits liability for all matters relating to the real estate, even if they occurred before the date of purchase. This includes obligations under a lease agreement.

The title transfer does not affect a tenant's rights under the lease.

If a seller has given a warranty in the sale contract as to the lease, then the seller remains liable for breaches of it. If the matter cannot be resolved amicably the buyer must follow the dispute resolution procedure provided for in the contract (which is likely to be litigation or arbitration).

Law stated - 21 November 2024

### Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

The registration of a mortgage does not affect a tenant's rights under the lease.

A lease is superior in priority to a mortgage upon foreclosure.

Lenders do not typically require subordination and non-disturbance agreements from tenants.

Law stated - 21 November 2024

### Delivery of security deposits

**24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

To ensure delivery of tenant security deposits to the buyer at completion, a sale contract will typically provide the following:

- where a tenant has provided a security deposit to the seller by way of cash or a bank transfer, then the seller shall deliver to the buyer at completion a cheque in favour of the buyer for the amount of that cash security deposit; and
- where a tenant has provided a security deposit to the seller in the form of a post-dated cheque, the seller shall at completion:
-

deliver to the purchaser the original post-dated cheque endorsed in favour of the buyer by the seller; or

- cancel and then obtain new post-dated cheques from the tenant in favour of the buyer if they cannot be endorsed.

Security deposits are common under leases. In Dubai, a landlord may only obtain a security deposit to ensure maintenance of the property and must refund the deposit or remainder thereof to the tenant on the expiry of the lease (article 20 of Law 26/2007). The Rental Disputes Centre, the judicial arm of Dubai Land Department, recently considered what may be deducted from a security deposit and found that:

Painting and cleaning of the interior walls completely after the tenant's departure from the leased property shall be a lessor's liability. The cost of these works cannot be deducted from the tenant's security deposit, nor should he be charged.

However, there is no system of binding precedent in the United Arab Emirates.

Rental increases under leases are subject to the following relevant regulations:

Generally, parties can include rent review provisions in the lease. However, Decree No. 43 of 2013 regulates rent increases in residential and commercial leases in Dubai. An increase in the rent of a real estate unit is subject to the following statutory limits:

- No increase, if the rent is less than 10 per cent of the average standard rent.
- 5 per cent, if the rent is less than 11 per cent to 20 per cent of the average standard rent.
- 10 per cent, if the rent is less than 21 per cent to 30 per cent of the average standard rent.
- 15 per cent, if the rent is less than 31 per cent to 40 per cent of the average standard rent.
- 20 per cent, if the rent is less than 41 per cent to 50 per cent of the average standard rent.

The government calculates the average standard rent for each neighbourhood based on rental statistics.

Under DIFC regulations, the Leasing Law No. 1 of 2020 applies to all residential, retail and commercial leases in the DIFC, except for a lease:

- of premises used primarily for serviced apartments or hotel inventory leased as part of a hotel;
- entered into by the parties to a mortgage of the leased premises, under the terms of the mortgage.

For residential leases, a landlord must give the tenant written notice of a proposed rent increase, at least 90 days before the expiry of the residential lease. If the landlord fails to give this notice, the rent increase is invalid (DIFC Leasing Law No. 1 of 2020).

**Law stated - 21 November 2024**

## Due diligence

- 25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

It is strongly advisable to carry out due diligence before entering into a binding sale contract. As a minimum, the buyer should:

- require the seller to provide it with a copy of the title certificate, which the buyer should then verify online by using the [Dubai Land Department's Title Deed Verification Service](#);
- carry out a property inspection; and
- insist on representations and warranties in the contract as to title and property defects.

It is also prudent for the buyer to obtain the seller's consent to its examination of the Property Register, as this is not open to the general public. However, this practice is uncommon.

With regard to off-plan units, the buyer should check that:

- the real estate project is registered with RERA;
- there is an escrow account for the real estate project;
- the percentage of completion of the real estate project and the expected date of completion;
- the developer is registered with RERA;
- the developer owns the land or there is a development agreement between the owner and the developer; and
- the developer has the required permits and approvals from the Dubai Land Department and RERA to sell units off-plan in that particular real estate project.

Law stated - 21 November 2024

## Structural and environmental reviews

- 26 | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Environmental liability is not usually a consideration in the majority of real estate transactions in the United Arab Emirates. Federal Law No. 24 of 1999 on the Protection and Development of the Environment governs environmental clean-up in the United Arab

Emirates. Under this law, any person who intentionally or through negligence causes damage to the environment or to others is responsible for all the costs of treatment or removal of such damage and may be imprisoned and fined.

Depending on the value of the transaction an engineering review is undertaken. However, by law, an off-plan property developer must give the following warranties to the buyer (Law 6 of 2019):

- to repair and remedy any defects in the structural parts of the jointly owned real property for 10 years from the date of the completion certificate of the real property project developed by the developer; and
- to repair or replace defective installations in the jointly owned real property, including mechanical and electrical works, and sanitary and sewerage installations for one year from the date of handover of the unit to the owner.

Law stated - 21 November 2024

## Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Typically, leases are reviewed on the business side; however, lawyers may review to ensure the terms are in line with any updated local law, including but not limited to termination provisions.

Law stated - 21 November 2024

## Other agreements

28 | What other agreements does a lawyer customarily review?

These documents include but are not limited to:

- the title deed;
- the affection plan;
- a master community declaration and a jointly owned property declaration (now replaced by the building management regulation, pursuant to Law 6 of 2019 on the Ownership of Jointly Owned Real Property);
- any previous sale and purchase agreement which may have any ongoing obligations (especially in cases where the property being sold is still under construction and/or if there are post-handover payment instalments);
- a no-objection certificate from the developer authorising a sale; and
- if a company:
- a trade licence of the seller or buyer;

- articles of association of the seller or buyer;
- the board resolution or power of attorney authorising the sale; and
- certificate of good standing, certificate of incorporation or certificate of incumbency (if a free-zone company).

Law stated - 21 November 2024

### Closing preparations

**29** | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Various documents are reviewed and a 'dry run' of the transfer is often conducted with a real estate registration trustee (eg, Tamleek) if the transfer is of high value.

Further, since cheques are still used within the UAE to complete sales, lawyers should ensure they have checked and seen the necessary manager's cheques showing the purchase price in full.

Law stated - 21 November 2024

### Closing formalities

**30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

After the buyer and seller have signed the sale contract and completed any necessary interim steps to the transfer of title (eg, paying any outstanding service charges and obtaining a no-objection certificate from the developer of the property), the buyer and seller must go in person to a real estate registration trustee (eg, Tamleek). There is no requirement for the sale contract to be notarised. At the meeting, several steps are completed, including:

- the buyer and seller sign the Dubai Land Department forms for the transfer of title;
- the buyer pays the purchase price to the seller;
- the necessary payments are made to the Dubai Land Department and the real estate registration trustee; and
- the Dubai Land Department issues the buyer with a title deed for the property.

Should a company be purchasing a property then ahead of any completed sale transfer the company must be registered with the DLD. This provides that the company has the right to purchase and hold property.

Law stated - 21 November 2024

## Contract breach

**31** | What are the remedies for breach of a contract to sell or finance real estate?

If the matter cannot be resolved amicably, the buyer must follow the dispute resolution procedure provided for in the contract (which is likely to be litigation or arbitration).

Law stated - 21 November 2024

## Breach of lease terms

**32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

In Dubai, if the landlord or tenant breaches its obligations, the relevant party must file a complaint with the Rental Dispute Settlement Centre (the judicial arm of the Dubai Land Department), which has exclusive jurisdiction to determine the matter and grant a remedy.

Each emirate has its own rules governing termination of the lease and the tenant's eviction. In Dubai, the landlord may seek eviction of the tenant before the expiry of the term of the lease or on the expiry of the lease only in the specific circumstances as set out in article 25 of Law 33/2008.

Proceedings to terminate a lease and evict a tenant in Dubai must take place before the Rental Dispute Settlement Centre.

Law stated - 21 November 2024

## FINANCING

### Secured lending

**33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

There are three common types of mortgage over real estate onshore in the United Arab Emirates:

- a mortgage over land and buildings;
- a leasehold interest in real property; or
- a building constructed on leased land.

It is possible to register a charge or mortgage over a leasehold interest in real property located in one of the free zones in the United Arab Emirates, depending on the rules and

regulations of each free zone. It may also be necessary to register the charge or mortgage and the underlying lease with the real estate authority in the relevant emirate. Generally, the time of registration of the charge or mortgage determines priority among charge or mortgages over the same leasehold interest. Generally, a free zone mortgage or charge will only prevent the owner of the leasehold interest (ie, mortgagor) from transferring or further encumbering its leasehold interest and will not entitle the mortgagee to request the transfer of the leasehold interest. Transferring a leasehold interest would require a court order.

A 'mortgage' is defined in the Civil Code (Federal Law 5/1985, as amended) as a contract by which a creditor acquires the right to be satisfied from the proceeds of the sale of the mortgaged real estate in priority to unsecured creditors and other secured creditors of the debtor. To have effect, a mortgage must be registered. The time of registration of the mortgage determines priority among mortgages over the same real estate.

The mortgagor must be the owner of the mortgaged property. It is not essential that the mortgagor be the principal obligor of the debt that is secured by the mortgage; the mortgagor can be a guarantor of the debt.

As real estate can only be mortgaged to a company or a financial institution that has been duly licensed and registered by the Central Bank of the United Arab Emirates (see article 4 of Dubai Law No. 14 of 2008 (as amended) and Law 8 of 2018 and article 32 of Abu Dhabi Law No. 3 of 2015), financing is generally limited to these licensed banks and institutions or where these licensed banks and institutions are engaged as local security agents.

Financing can still be obtained from sources other than local licensed banks, such as real estate investment companies. However, this type of financing is normally based on a good business relationship and trust between the parties, as the lender will not have registered security over real estate owned by the borrower.

Law stated - 21 November 2024

## Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Generally, ground leases are granted in connection with infrastructure projects, where the ground lease will be in the form of a *musataha* (a 50-year concession arrangement), a concession agreement (akin to a ground lease of up to 99 years), or a usufruct agreement. The landowner (often a governmental entity) will not permit a mortgage over the land. A lender's ability to secure its funding will depend on which of the above concession arrangements is given, and the rules and regulations of the land department in the relevant emirate. For example, in Dubai it is possible to register a mortgage over a building (which will be deemed to be separate from the land for this purpose) constructed on land granted under a *musataha*. However, some of the northern emirates do not recognise a building constructed on land granted under a *musataha* as being separate for the land. Therefore, it will not be possible to have a separate mortgage over such buildings.



As a leasehold can only be mortgaged to a company or a financial institution that has been duly licensed and registered by the Central Bank of the United Arab Emirates (see article 4 of Dubai Law No. 14 of 2008 (as amended), Law 8 of 2018, and article 32 of Abu Dhabi Law No. 3 of 2015), financing is generally limited to these licensed banks and institutions or where these licensed banks and institutions are engaged as local security agents.

Financing can still be obtained from sources other than local licensed banks, such as real estate investment companies. However, this type of financing is normally based on a good business relationship and trust between the parties, as the lender will not have registered security over the leasehold interest owned by the borrower.

Law stated - 21 November 2024

## Form of security

### 35 | What is the method of creating and perfecting a security interest in real estate?

A mortgage is the most common form of security granted over real estate located onshore in the United Arab Emirates. Mortgages over real property must be both in writing and registered with the appropriate real estate authority in each emirate. The registered mortgage deeds are generally pre-printed documents prescribed by the relevant authorities. In the case of registering a charge or mortgage over leasehold interest over real property located in a free zone, although the specific procedure and requirements will depend on the relevant free zone's rules and regulations, generally this will require:

- a number of approvals or no-objection certificates from the landlord, the mortgagee and the free zone authority;
- registration with the appropriate real estate authority in the emirate (if necessary);
- a charge or mortgage agreement (this may be based on the relevant free zone's approved format); and
- payment of a registration fee.

Law stated - 21 November 2024

## Valuation

### 36 | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Third-party appraisals are generally required by lenders, particularly where the main security interest relates to real estate. It is also not uncommon for the lender to appoint its own experts to value the relevant property. It may also be necessary to have periodic appraisals to ensure that the borrower maintains the required financial covenants under the facility agreement (eg, loan-to-value or loan-to-security ratios).

In the case of the Emirate of Dubai, valuation companies must be licensed by the Real Estate Regulatory Agency in Dubai. The Dubai Land Department maintains a publicly available register of approved valuation companies on its website for no charge.

Law stated - 21 November 2024

## Legal requirements

- 37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Real estate can only be mortgaged to a company or a financial institution that has been duly licensed and registered by the Central Bank of the United Arab Emirates (see article 4 of Dubai Law No. 14 of 2008 (as amended), Law 8 of 2018 (as amended) and article 32 of Abu Dhabi Law No. 3 of 2015). In practice, however, foreign lenders providing financing to UAE borrowers normally appoint a local security agent to hold the UAE-located security on their behalf. However, this can be a time-consuming and expensive exercise for a foreign lender, particularly as most local banks will only consider acting as local security agent in connection with financings where they are a part of the syndicate of lenders or if the foreign lender is from the Gulf Cooperation Council.

Law stated - 21 November 2024

## Loan interest rates

- 38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Large (usually syndicated) financings are generally based on Loan Market Association documentation and will generally use a benchmark rate with reference to LIBOR (or EIBOR for UAE dirham facilities). We have not seen any significant use of the secured overnight financing rate (SOFR) yet. Instead, we note that the use of replacement benchmarks for the screen rate based on a designated, nominated or recommended replacement to the LIBOR screen rate identified by either the current administrator of the LIBOR screen rate or a nominating body, which can include any applicable central bank, regulator or other supervisory authority or a group of them, or any working group or committee sponsored or chaired by, or constituted at the request of, any of them.

According to article 76 of the Commercial Code, a creditor is entitled to receive interest on a commercial loan at the rate of interest stipulated in the contract. If this rate is not stated in the contract, it is calculated according to the current rate of interest in the market at the time of dealing, provided it does not exceed 12 per cent per annum.

The limitations for banks are that interest in excess of 12 per cent per annum, compound interest and interest in excess of principal are not enforced. However, these limitations are not usually followed by the Dubai courts, unlike other emirates.

Law stated - 21 November 2024

## Loan default and enforcement

- 39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Each emirate has its own rules as to the enforcement of mortgages. In Dubai and Abu Dhabi, to enforce a mortgage the creditor must obtain a court order allowing it to sell the property through public auction (see article 26 of Dubai Law 14/2008 (as amended) and article 53 of Abu Dhabi Law 3/2015). The creditor cannot sell the mortgaged property by any other means.

The registration serial number allocated by the relevant registry determines the rank of a mortgage for liquidation purposes. If more than one mortgage registration application is submitted simultaneously for the same property, all mortgages will be allocated an identical registration number and the creditors rank equally (see article 1425 of the Civil Code, article 17 of Dubai Law 14/2008 (as amended) and article 45 of Abu Dhabi Law 3/2015).

Law stated - 21 November 2024

## Loan deficiency claims

- 40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

If the sale proceeds are insufficient to discharge the debt secured by the mortgage, the mortgagor remains liable for the remaining unpaid debt.

Personal and corporate guarantees are commonly used in the United Arab Emirates. Guarantees must be in writing and specify the amount secured by the guarantee.

Law stated - 21 November 2024

## Protection of collateral

- 41** | What actions can a lender take to protect its collateral until it has possession of the property?

In relation to real estate security interest, UAE law does not recognise the common law concept of 'self-help' for secured parties. In Dubai and Abu Dhabi, a mortgagee must obtain a court order allowing it to sell the property through public auction (see article 26 of Dubai

Law 14/2008 and article 53 of Abu Dhabi Law 3/2015). A mortgagee cannot sell or deal with the mortgaged property by any other means.

Law stated - 21 November 2024

## Recourse

- 42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Recourse is typically limited to the specific collateral over which the security has been granted. In the United Arab Emirates, there is no general charge over all assets of a company and each type of security interest (eg, pledge over movables, mortgage over real property, accounts pledge, assignment of receivables, etc) must comply with its own legal requirements, including any applicable registrations. The concept of floating charge is not recognised in the United Arab Emirates. However, it may be possible to have a security interest movable assets akin to a floating charge if the security interest can be registered in the EIRC security register in accordance with the provisions of Federal Law No. 4 of 2020 on Guaranteeing Rights Related to Movables (the Mortgage Law).

In the event of bankruptcy of the debtor, any assets that are subject to a valid security interest will be sold to satisfy the specific security obligation (less and costs associated with the sale of such asset). The court may (at its sole discretion) terminate any agreement to which the debtor is a party (including any security agreement), provided this is in the best interests of the creditors as a whole. Generally, where a security interest is terminated the court may replace it with an alternative security interest of similar value. There is no guidance on how the court would determine the value of the terminated and replacement security interest.

Law stated - 21 November 2024

## Cash management and reserves

- 43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Lock box banking is not typically required by lenders in the United Arab Emirates.

Law stated - 21 November 2024

## Credit enhancements

- 44** | What other types of credit enhancements are common? What about forms of guarantee?

Personal and corporate guarantees are commonly used in the United Arab Emirates. Guarantees must be in writing and specify the amount secured by the guarantee. In the case of guarantees for larger financings, it is not uncommon for the guarantors to maintain certain financial covenants (eg, minimum net worth).

Generally, you can call on a guarantee once the relevant conditions have been satisfied. Otherwise, a guarantee can be enforced through the court.

Law stated - 21 November 2024

## Loan covenants

**45** | What covenants are commonly required by the lender in loan documents?

A borrower typically covenants to do the following:

- observe and perform all of his or her obligations under the mortgage, and not sell, lease, transfer or otherwise dispose of the mortgaged property;
- act on instructions given by the mortgagee and not remove the mortgage from registration;
- promptly provide to the mortgagee any information relating to the mortgaged property; and
- ensure that the mortgaged property is kept in good repair and condition.

Law stated - 21 November 2024

## Financial covenants

**46** | What are typical financial covenants required by lenders?

Common financial covenant conditions are based on borrower or obligors' net worth, working capital, leverage, loan-to-value ratio, interest coverage and cash flow. They can also include restrictions on issuing debt, further encumbering assets, disposal or acquisition of substantial assets, paying dividends and investing, or impose actions such as the acceleration of debt payments if the specified condition is binding.

Law stated - 21 November 2024

## Secured movable (personal) property

**47** | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

To have a valid pledge over movable assets under UAE law, the pledgee must have possession (actual or constructive) over the pledged assets. However, the Mortgage Law has updated the framework for registering security interest over movable assets located in the United Arab Emirates. The Mortgage Law provides for the registration of a security interest over a broad category of movable assets (this differs from a pledge, which requires a deed of possession and other existing forms of mortgages), including account pledges, assignment of receivables, etc, without the need to take possession (as required under the earlier UAE law). The security interest can be perfected through registration in an electronic security register (the Security Register).

Law stated - 21 November 2024

### Single purpose entity (SPE)

- 48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Other than in the case of non-recourse project financing or aircraft or vessel financing, it is not common for a lender to require a special purpose vehicle to be set up to hold certain of the borrower's assets and to take security over the shares of that special purpose vehicle. Rather, direct security over the assets is preferred.

Law stated - 21 November 2024

## UPDATE AND TRENDS

### International and national regulation

- 49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

The ongoing crisis taking place in Ukraine has seen a substantial number of eastern European investors relocate to Dubai. As such, the Dubai Real Estate market has seen a marked increase in investment.

As noted above, the recent Dubai Decree No. 22/2022 and the privileges now afforded to approved property investment funds in Dubai are a significant progression development and an indication that property investment funds may now begin to have a greater impact on Dubai's real estate market.

Law stated - 21 November 2024



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# USA - New York

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## UPDATE AND TRENDS

- International and national regulation

## GENERAL

### Legal system

#### 1 | How would you explain your jurisdiction's legal system to an investor?

Like every US state except Louisiana, New York is generally a common law jurisdiction with statutes governing specific subjects, as well as related regulations and case law precedents. Injunctions are available to prevent a party from acting but are subject to strict standards and typically difficult to obtain (New York Civil Practice Law and Rules, section 6301). Injunctions are most often granted to prevent irreparable injury; if the party seeking the injunction is likely to win on the merits; or once a matter is fully adjudicated (ie, when an injunction is issued as a final judgment). New York courts may rule in equity under certain circumstances.

Parol evidence may be admissible when necessary to discern an ambiguity in a written contract. Oral contracts are enforceable, although most contracts involving real property in New York must be in writing, including leases for more than one year, conveyances or deeds (New York General Obligations Law, section 5-703). While certain laws that affect New York real estate are national in scope – including, among others, the Fair Housing Act, the Americans with Disabilities Act and certain federal environmental laws – most vary by state and may also vary by county and by municipality.

Law stated - 18 November 2024

### Land records

#### 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

New York has a system for recording interests in land, which is promulgated by the [New York Real Property Law](#) and operates on a county-by-county basis. Recordings are generally made in the county where the property in question is located and requirements vary by county.

Fee and leasehold interests, among others, can be recorded. Leasehold interests are typically only recorded when they:

- contain an option to purchase a fee interest;
- are for a long term; or
- cover a material amount of space (or an entire property).

Not all interests are required to be recorded, but unrecorded interests will be void against a subsequent bona fide purchaser of a property for valuable consideration who does not have notice of such an unrecorded interest. Buyers of New York real estate typically purchase title insurance to protect against unknown or competing interests in their property.

Law stated - 18 November 2024

### Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

Execution of a deed is necessary to vest a fee title in a grantee in New York. The conveyance must be in writing, signed by the grantor or the grantor's lawful agent and grant a fee or leasehold interest. The grantor or its authorised agent must sign a deed for it to be valid. Additionally, deeds must be acknowledged, or otherwise proved by the grantor before recording, to be effective against subsequent purchasers and encumbrances (New York Real Property Law, section 243).

New York imposes [taxes on the recording of mortgages](#) at a rate of 50 cents per US\$100 of debt secured. Some counties and metropolitan areas, notably New York City, have significant additional mortgage recording taxes. A state [real estate transfer tax](#) is paid by the grantee at a rate of US\$2 for each US\$500 of consideration, with additional taxes levied in New York City and certain other counties for residential and commercial property priced above certain value thresholds.

Law stated - 18 November 2024

### Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

There are no requirements that a foreign entity must register to do business in New York or obtain a special licence merely to own or lease real estate in New York. However, if an entity does not register in New York, that entity may not bring a lawsuit in New York courts. Some landlords may require increased security deposits or a letter of credit as additional security if the tenant is not a local entity. Foreign investors should pay careful attention to US federal and New York state tax laws (such as section 1312 of the New York Business Corporation Law) in structuring New York real estate investments. Many foreign investors create a US special purpose entity to hold or manage their New York real estate investments.

Certain foreign real estate transactions could be subject to review by the [Committee on Foreign Investment in the United States](#), a US federal inter-agency committee that reviews real estate investments by foreign persons and their effect on US national security.

Law stated - 18 November 2024

### Exchange control

- 5 |

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange control issues or restrictions on repatriation of capital in New York. However, New York and US federal tax laws will impact any [real estate investment and any disposition of real estate by a foreign investor](#). Foreign investors will attract federal tax liability under the [Foreign Investment in Real Property Tax Act](#) from gross rental income, with non-US nationals generally subject to:

- a 30 per cent tax (minus deductions such as mortgage interest and business expenses); and
- for disposition of real estate assets, a 15 per cent tax on realisation of capital gains.

Foreign investors should pay careful attention to US federal and New York state tax laws in structuring New York real estate investments.

Law stated - 18 November 2024

## Legal liability

6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Liability is generally restricted to:

- breaches of any contracts involving the property, owner or tenant;
- tort claims involving the property, owner or tenant; and
- statutory claims by either state, county or other governmental agencies, often involving health, safety, zoning or building code enforcement.

Strict criminal liability will be imposed for some environmental and health and safety laws, such as leakage of petroleum products or deficient fire safety equipment in multiple dwellings. An example of tort liability, colloquially known as the Scaffold Law, imposes a strict liability standard on owners and contractors of multi-family or commercial buildings for damages caused while using equipment such as scaffolding, ladders or hoists while working on, demolishing or cleaning buildings.

Liability to foreclosing lenders will depend on whether the underlying loan's lender has recourse to the borrower. Such recourse, unless otherwise stated, is typical. Many lenders require, as a condition of the loan, for borrower-affiliated guarantors to assume certain obligations in the event of liability relating to the property. This is often the case for environmental issues, construction project failure, bad boy guarantees (in the event of bad acts by the borrower or certain other parties) or failure to pay taxes. See, for example, section 181 of the [New York Navigation Law](#), and sections 240 and 241 of the [New York Labor Law](#).

Law stated - 18 November 2024

## Protection against liability

7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners in New York can protect themselves from liability by acquiring property through legally distinct entities, such as limited liability companies (LLCs) and limited partnerships or corporations, and through careful ownership structuring (New York Limited Liability Company Law, section 203; New York Business Corporation Law, section 628). Owners will typically hold the fee or leasehold interest in a single purpose entity created with the limited purpose of holding the owner's interest. Owners can also acquire different types of insurance to protect themselves against claims (eg, title insurance, environmental insurance, and representations and warranties insurance), as well as various endorsements to title insurance policies such as non-imputation endorsements, which insure an entity against imputation by operation of law of the knowledge of its partner, officer, director or employee regarding unrecorded items affecting title.

Law stated - 18 November 2024

## Choice of law

8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

The governing law of a transaction is typically chosen by the parties. Absent a choice of law provision, a court will generally apply the law of the forum state. If multiple jurisdictions are involved and the substantive law of each state differs, a court will apply choice of law analysis. Factors considered in a modern contractual conflict of law analysis include:

- the place of contracting;
- the place of negotiation;
- the place of performance;
- the location of the contract's subject matter; and
- domicile, residence, nationality, place of business and place of incorporation of the parties.

Contractual choice of law provisions naming New York are enforceable in transactions with a value of at least US\$250,000, provided that it is not a contract for personal services or labour (New York Labor Law, section 5-1401).

Law stated - 18 November 2024

## Jurisdiction

9 |

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The New York state civil court system contains several levels of courts: Courts of Original Instance, Intermediate Appellate Courts and the Appellate Divisions of the Supreme Court, with the Court of Appeals as the highest court in the state. The trial court with jurisdiction over real estate disputes is the Supreme Court, as it is designated for civil matters involving claims with higher dollar amounts. There are four federal district courts in New York: the Northern, Southern, Eastern and Western Districts. For a federal court to have jurisdiction over a real estate dispute, the parties must have diversity of citizenship and there must be more than US\$75,000 at issue. Required parties (parties in which in their absence the court cannot accord complete relief among the existing parties) must be joined to the claim before it can proceed.

In New York, to serve a party that resides outside of New York, the paperwork may be delivered to that party by a process server via first-class post or the serving party may hire a process server that resides in the state in which the defendant resides for them to hand-deliver a copy of the summons and complaint.

A foreign entity (corporation, LLC, non-profit, partnership, etc.) must have obtained authority to conduct business in New York to affirmatively access New York state courts. If the entity is not qualified to do business in New York, the action is subject to dismissal in court. See Rule 19 of the Federal Rules of Civil Procedure, section 1312 of the New York Business Corporation Law and section 1001 of the New York Civil Practice Law and Rules.

Law stated - 18 November 2024

## Commercial versus residential property

10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

New York laws regarding property ownership are similar for commercial and residential properties. New York imposes a real estate transfer tax on sales of real property or interests when the sale is for greater than US\$500. If the seller is not a resident of New York, they must pay taxes on the personal gain or loss from the sale or transfer of those properties and fill out the accompanying tax forms (New York Real Property Actions and Proceedings Law, sections 1303 and 1304). New York has [several laws that protect individual consumers and tenants](#), particularly in the areas of foreclosure, disclosure, equal opportunity, evictions, rent stabilisations and control, as well as [more recent laws enacted in light of the covid-19 pandemic](#).

Law stated - 18 November 2024

## Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Land use, zoning, construction and development are generally governed by New York county, city and municipal zoning and building codes, rules and regulations. Procedures to obtain permits and variances will differ between counties and between municipalities within counties. Specifically, if the local zoning authority in charge affirms that the intended development complies with the local zoning regulations, the developer may begin their work as of right.

Often, however, newer and larger projects that do not satisfy existing zoning codes must first submit proposals to obtain variances, discretionary approvals or apply for re-zoning, particularly in heavily developed or regulated localities. Every locale has its own process for obtaining such approvals. New York City has the most robust process in the form of the Uniform Land Use Review Procedure, which involves several stages of review.

After a developer applies for a variance, approval or re-zoning, the local zoning authority will either approve or deny the application. In the event of a denial, decisions may be appealed to a local Zoning Board of Appeal (or, in the case of New York City, the Board of Standards and Appeals) within a short amount of time, typically between 30 and 60 days (or, in the case of New York City, a maximum of 30 days).

When zoning non-compliance exists, the first step is generally to informally contact the offending party. If the violation persists, enforcement can either take the form of a civil or criminal penalty. The consequences of failure to comply with zoning requirements may include (in addition to fines and other charges):

- revocation or suspension of related permits;
- denial of future permits until compliance;
- stop work orders;
- forced removal of offending improvements; and
- cease-and-desist orders.

Law stated - 18 November 2024

### Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

New York law (as well as municipal law, all grounded in the US Constitution) provides for taking by eminent domain and condemnation. When real property is taken, owners must receive just compensation, except when the taking constitutes an exception, which varies based on applicable law. Often, during this process, owners will engage in consensual negotiations with the condemning governmental body to ease the process, and maximise

compensation and other benefits. Particularly, in circumstances where wrongdoing has occurred, civil and criminal forfeiture rules can apply.

Law stated - 18 November 2024

## Forfeiture

**13** | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Under New York state law, real estate is only subject to forfeiture without compensation in connection with certain illegal activities. Specifically, real property may be seized if it qualifies as 'proceeds' or is an 'instrumentality' of a felonious crime. Most of these felonies are related to controlled substances, including (but not limited to):

- criminal possession of a controlled substance in the first or second degrees;
- criminal sale of a controlled substance in the first or second degrees; or
- operating as a major trafficker.

See article 13-1 of Chapter 8 of the New York Civil Practice Law and Rules, article 480 of the New York Penal Law, and the New York Organized Crime Control Act.

Law stated - 18 November 2024

## Bankruptcy and insolvency

**14** | Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy is generally governed by US federal law. Title 11 of the United States Code is the federal Bankruptcy Code, which covers both voluntary and involuntary bankruptcy proceedings. A bankruptcy proceeding may involve liquidation (Chapter 7) or restructuring (Chapters 11 and 13) of the debtor, or both.

Law stated - 18 November 2024

## INVESTMENT VEHICLES

### Investment entities

**15** | What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

In New York, investment entities can take any form. The most typical forms of investment entities are corporations, limited liability companies (LLCs), general partnerships, limited partnerships (LPs) and limited liability partnerships (LLPs). Tax pass-through entities are



LLCs, S-corporations, partnerships and LPs, while other entity forms are taxed on both the entity and personal levels (including real estate investment trusts). Entities that are typically treated as tax pass-through entities can also elect to be taxed as corporations (which may be the case when foreign investors sit above the US entities). The types of entities that provide liability shields are corporations, LLCs, LPs (with respect to the limited partners only) and LLPs (on a partial basis).

Law stated - 18 November 2024

## Foreign investors

### 16 | What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors will tailor their entities to their personal tax needs, which will vary by individual and by country of origin. Most typical will be use of a domestic C-corporation or other entity (eg, partnership or LLC) that has elected to be taxed as a corporation to minimise tax consequences associated with the Foreign Investment in Real Property Tax Act (FIRPTA). This election is due to these entities' pass-through tax structure. FIRPTA requires foreign investors to withhold 15 per cent of the sales price and deposit it directly with the Internal Revenue Service, meaning that foreign investors have additional taxes when investing in real estate unless the real estate is for a personal residence and costs less than US\$300,000. Therefore, selecting an entity that is taxed at the corporate level is crucial for foreign real estate investors to offset the FIRPTA tax penalty.

Law stated - 18 November 2024

## Organisational formalities

### 17 | What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Most organisations require filing a specific form with, and paying an associated fee to, the New York Department of State. Each entity must adopt a governing agreement or by-laws and contain specific words in their names indicating their organisational form. New LPs and LLCs must publicise their existence. Corporations and LLCs require their own tax filings and associated annual filing fees. Although entities can be formed in New York, it is generally considered best practice for various reasons to form US entities in Delaware where possible and then, if needed, have those entities qualify to do business in New York.

Foreign entities require a separate application for authority that asks identifying information of the foreign entity. Foreign corporations must file a statement of activities containing tax information or obtain consent from the New York Department of Finance to operate before the application for authority is accepted. Failing to comply may lead to injunctions against the foreign entity conducting business and a revocation of its business licence. Failure to

comply with a certificate of authority attracts a penalty of up to US\$500 for the first day and US\$200 for each subsequent day, not to exceed US\$10,000 (New York Codes, Rules and Regulations, Title 20, section 540.6). The person failing to file may be subject to a US\$200 penalty or criminal violations under article 9A of the New York Tax Law.

Foreign entities, if engaged in a trade or business within the United States, are generally subject to US federal, state and local taxes on their net income and may be subject to a branch profits tax, which may be reduced or eliminated by a double tax treaty. Foreign entities that are not engaged in a trade or business within the United States are generally subject to a 30 per cent withholding tax on any US source income, which may be reduced or eliminated by a double tax treaty. A foreign investor can generally reduce the US tax consequences and filing obligations by using a domestic C-corporation or other entity (eg, partnership or LLC) that has elected to be treated as a corporation for US tax purposes to invest in US real estate. FIRPTA requires that a portion of real estate transfer proceeds be withheld to cover potential taxes on the asset's gains, withholding 21 per cent for foreign corporations or trusts rather than 15 per cent for other non-resident sellers. Forming a domestic entity is recommended for property sales.

Law stated - 18 November 2024

## ACQUISITIONS AND LEASES

### Ownership and occupancy

**18** | Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Real estate interests are typically comprised of fee interests and leasehold interests. A fee interest is an ownership interest that gives full and permanent title to the property owner, including the right to control the property by allowing for the sale, assignment, subordination and collateralisation of the property. A leasehold interest gives the holder the right to access and occupy the property for a period of time, along with various other customary rights, often requiring prior landlord consent for certain actions, as well as obligations required by the landlord pursuant to a negotiated lease agreement.

New York recognises real property interests of:

- sole ownership;
- tenancy in common;
- joint tenancy;
- joint tenancy with right of survivorship;
- tenancy by entirety;
- condominium ownership; and
- cooperative ownership as interests in real estate.

Condominium ownership is a fee ownership of individual units divided from a larger building (most often a multi-family residential property) and an undivided interest in that property's common elements.

Cooperative ownership is the ownership of one or more shares of stock in a corporation owning real estate, generally entitling the buyer to a long-term proprietary lease of the portion of the real estate occupied by that buyer, with maintenance charges assessed per share. Condominium and cooperative ownership regimes are widely used in New York for both residential and commercial properties.

Space leases for various types of properties (multi-family, industrial, retail, etc) are each similar in structure, but may differ in rent calculation, additional charges assessed (eg, operating expenses and taxes) and in services provided by landlord to tenant. Master leases allowing for a single tenant who sublets to other tenants are common. Ground leases for long periods (treated similarly to fee interests in many ways), incentivising lessees to improve real estate for long-term use, are also common.

Easements (ie, agreed limited use rights without ownership or tenancy) can have many forms and uses, and generally give beneficiaries specific property rights in land that is not owned by those beneficiaries. Easements can be temporary or perpetual and can be expressly contracted or implied through pre-existing use, necessity or prescription. Easements by pre-existing use, according to [Beretz v Diehl](#), require:

- initial unity of title followed by subsequent separation of title;
- continuous use long and obvious enough to manifest an intent for that use to be permanent; and
- that use is necessary for the benefit and enjoyment of the retained property.

Easements by necessity, according to [Walt Whitman Rd Assocs v Whitman Capital LLC](#), require the use to be 'indispensable to the reasonable use for the adjacent property'. Prescriptive easements, according to [Masucci v DeLuca](#), require the beneficiary's hostile, open, notorious, continuous and uninterrupted use for 10 years. A prescriptive easement is comparable to the concept of adverse possession and has a similar test.

Easements in gross involve one property and grant access to specific entities such as utilities. In contrast, appurtenant easements involve two neighbouring properties and run with those properties, running with those properties and thus surviving changes in ownership. Easements can be terminated through abandonment, merger, necessity, demolition, recording acts, condemnation, adverse possession and release. Restrictive covenants burden a property from a certain use or development and may be contracted or enforced through zoning.

Law stated - 18 November 2024

## Pre-contract

19 | What are the typical pre-contractual steps?

In a commercial context, it is typical and advisable, but not necessary, to negotiate non-binding offer letters, letters of intent or term sheets for the acquisition or lease of a property before the parties proceed to prepare a binding contract. Courts may bind parties to [term sheets](#), letters of intent and offer letters where it is unclear that the parties intended not to be bound. However, courts will generally respect clear language stating that the parties in fact intend not to be bound. Merger clauses are useful to disclaim prior or extra-contractual agreements and bar parties from relying upon such agreements, and are typically included in definitive contracts.

The parties may agree on a specified period of exclusivity during contract negotiations, but in many cases, particularly in New York City and in residential property transactions among individuals, properties remain on the market during negotiations until a contract of sale is fully executed by the parties. Parties often transact off market with or without a broker. Brokers are regulated by New York law and must be licensed in New York under [section 440 of the New York Real Property Law](#). New York real estate brokers currently must be at least 20 years old, have at least two years of experience as a licensed real estate salesperson or three years in real estate generally, meet an experience point system, complete a course and pass a licensing examination.

Law stated - 18 November 2024

## Contract of sale

### 20 | What are typical provisions in a contract of sale?

Real estate sale contracts typically include:

- a clear description of the property being sold;
- purchase price and purchase price adjustments;
- prorations, if any, and deposits to be made;
- representations and warranties of both parties;
- title matters benefiting or burdening the property;
- operating covenants of the seller;
- due diligence periods, if applicable;
- rights of title and survey review and objection;
- closing deliveries, including deeds and other conveyance documents;
- closing cost allocations;
- risk allocations in the event of casualty or condemnation; and
- remedies for defaults.

If a due diligence period is contemplated, the contract will provide for a mechanism for the buyer to review the recorded exception documents and other related matters located on title as well as a survey locating such items and to make objections. The buyer may also have the right to access the property to conduct non-invasive environmental, structural

and other investigations. Invasive investigations are also typical but are subject to detailed negotiation.

Typical representations and warranties for real property sales include statements regarding:

- good standing, authority and consent to buy and sell, respectively;
- good and marketable title to the property;
- pending litigation involving the property;
- bankruptcy;
- options or rights of first refusal;
- material contracts binding the property;
- leases or licences of property;
- conflicts with other contracts;
- whether seller is a foreign person, trust or corporation;
- that there are no anti-terrorism law violations (or other typical know-your-customer provisions);
- whether parties are acting under the federal Employee Retirement Income Security Act;
- insurance policies;
- pending tax proceedings; and
- violations of law (including environmental law).

Survival of representations and warranties as well as anti-sandbagging clauses may also be included.

Liability for taxes, utilities and other property expenses can be allocated through specific negotiations but are typically bifurcated based on the parties' period of ownership. Tax years vary based on the property's county (in New York County, the tax year starts on 1 July each year). Sellers typically bear risk of loss until closing occurs both with and without contract specifications unless the purchaser acquires possession of the property prior to closing, is otherwise at fault or the loss is unrelated to property damage.

Law stated - 18 November 2024

## Environmental clean-up

- 21** | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

If no risk is otherwise apportioned among the parties, buyers will bear hazardous waste clean-up costs regardless of their responsibility for the waste, although they may sue responsible parties such as sellers and brokers who fail to disclose

reasonably discoverable environmental contamination for reimbursement. New York enforces unambiguous environmental indemnification agreements between private parties, but a minority of states do not, so parties should be aware of choice of law provisions. Survival provisions defining or extending the periods of indemnity or representations are common, but not ubiquitous. Even under long-term survival provisions, buyers cannot be wilfully ignorant of an environmental concern and receive indemnity, creating an implied limitation to the period of indemnity.

Sellers often covenant to provide buyers with environmental audits or assessments before closing, at the seller's cost. Mortgagors may similarly covenant that all construction or development permits obtained and anticipated uses comply with environmental law. Tenants may covenant to comply with environmental matters during their occupation of the property.

Although not typical, sellers may and do indemnify purchasers for acts occurring prior to sale, but sellers will typically cap their indemnification exposure to specific events or limited to specific amounts. Buyers may negotiate clauses allowing rescission if an assessment reveals contamination before closing or deducting clean-up costs from purchase prices. Indemnification clauses frequently require buyers to enable sellers to meet their obligations and provide immediate notification of contaminations to the seller as a condition to indemnification. Buyers may also seek monetary expectation or (if shortly after closing) rescission in court for misrepresentations or the seller's responsibility for environmental law violations.

Law stated - 18 November 2024

## Lease covenants and representation

**22** | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Property sellers with existing leases affecting the subject property typically include a description of the applicable leases along with a representation that:

- such a list is complete in all material respects;
- correct copies of all such leases have been or will be provided to the purchaser;
- no defaults exist under any lease (except as otherwise disclosed), all leases are in full force and effect, and all leases are written and not oral;
- the seller has the exclusive right of possession of all portions of the property subject only to the rights of tenants thereunder;
- the seller has no knowledge of any claims of adverse possession;
- there are no commissions due or coming due in the future to any broker or other third party;

- all fixtures attached now and later are landlord's property; and
- existing tenants will continue to comply with:
  - the terms of their leases;
  - the landlord's right to perform existing tenant's covenants at the tenant's expense;
  - subletting rights;
  - rights of first offer;
  - assignment and subletting procedures;
  - assignment and sublease profit sharing;
  - existing defaults;
  - closing certifications of rent rolls and financial contracts;
- brokerage fee allocations (usually paid by the seller, but may be allocated with respect to future events, such as lease extensions and renewals);
- completed or future improvements as individually negotiated; and
- whether current operating contracts are taken as is or otherwise.

During the contract period prior to closing, the seller generally covenants:

- to operate the property in the ordinary course and in substantially the same manner as prior to the contract period;
- not to cancel, modify or extend any lease or operating agreement (of a certain agreed upon value) without the buyer's consent;
- not to sell or create a lien on any part of the property; and
- not to enter new leases or service contracts without the buyer's consent.

Pre-closing covenants generally survive closing for an agreed-upon period. As a closing condition, the seller typically agrees to deliver completed estoppel certificates from tenants on either a pre-approved form or in a condition acceptable to the buyer.

Law stated - 18 November 2024

## Leases and real estate security instruments

**23** | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Leases are customarily made subordinate to all ground leases affecting the property as well as to all present and future mortgages and assignment of leases and rents affecting the property. Most leases contain a self-operative subordination clause as well as a tenant obligation to deliver any instrument required by the landlord under the lease or any other applicable lease, or the holder of any mortgage or any of their applicable

successors-in-interest to evidence such subordination. If a lease is superior in priority to a security instrument, the lender may not have the right to take possession of the leased property during a foreclosure, and the tenant in possession cannot be dispossessed by foreclosure and may continue to possess the premises until lease expiration. Lenders commonly require subordination and non-disturbance agreements from tenants to ensure that the security instrument takes priority over the lease in the event of a foreclosure – and in exchange, a compliant tenant may retain possession of its demised space.

Fee mortgages may be subordinated to ground leases to ensure that in the event of an uncured default, the leasehold mortgage lender has the right to foreclose on the leasehold interest, take and readily enforce a leasehold mortgage, preserve the ground lease and its value, and exercise certain other considerations such as maintaining control of any casualty and condemnation proceeds. Because ground leases contain long terms and are treated similarly to fee interests, a ground lease subordination and non-disturbance agreement typically focuses on the parties' rights and obligations regarding the ground lease and any mortgage or other lien against the property by the tenant subordinating its leasehold interest to the lender's mortgage.

Law stated - 18 November 2024

### Delivery of security deposits

**24** | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Security deposits are a standard practice in New York commercial leasing. Security deposits typically consist of a cash or letter of credit component, or both. The security deposit, along with the payment of the first month's rent, is typically due at or shortly after lease execution. Landlords may also allow for the posting of a cash security deposit in lieu of a letter of credit until the letter of credit is delivered and the cash is returned to the tenant. Security deposit amounts may increase or decrease during the lease term.

In the context of a real estate purchase, the seller will typically deliver to the buyer, as a part of its due diligence requests, a list of all security deposits being held by the landlord for existing tenants. The buyer will typically require tenant-executed estoppel certificates delivered by the seller at or prior to closing, confirming the amount and form of the security deposits being held, and will require that all security deposits be delivered to the buyer at or prior to closing. The seller typically delivers cash security deposits to the buyer via a wire transfer through their underlying bank account or by a credit to the purchase price shown on the settlement statement issued by the escrow agent charged with holding all funds and distributing them at closing in accordance with the relevant escrow provisions of the purchase agreement or stand-alone escrow agreement. Letters of credit are either reissued as a replacement letter of credit or physically delivered to the buyer at or prior to closing of purchase. Because of the administrative burden of letter of credit transfers, the delivery to the buyer may become a post-closing seller obligation.

Most commercial leases contain annual rent escalations based on the prevailing market escalation rate. Some leases contain periodic rent review or reset clauses to ensure that



the rent remains consistent with market rates. In some cases, a rent review or reset clause may require an adjustment to the security deposit, while in other cases the security deposit will remain unchanged. Another common mechanism is a reduction (burndown) of the cash security deposit or the letter of credit amount. More common on larger leases, the burndown provision provides for a reduction in the amount of the security deposit as the remaining term on the leases is reduced over time, provided that the tenant is not otherwise in default under the lease.

Law stated - 18 November 2024

## Due diligence

**25** | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Due diligence requirements will vary depending upon various factors (including buyer budgets, availability of information and available time). A buyer will typically make thorough tours of a property and conduct diligence relating to property-specific documents, including:

- existing title insurance policies;
- surveys;
- architectural plans;
- leases;
- brokerage agreements;
- maintenance contracts;
- casualty and liability insurance policies;
- existing notices of legal violations;
- rent rolls;
- tenant-by-tenant operating expenses;
- income and expense and operating statements;
- historical leasing information;
- historical capital expenditures;
- rental arrearage reports;
- budgets;
- tax appeals;
- utility bills; and
- environmental reports.

A buyer may also negotiate access rights to conduct additional physical, non-invasive studies, tests or inspections of the property after the parties are under contract but before closing (or pursuant to a separate access agreement), including:

- zoning and land use investigations;
- non-invasive soil, groundwater and vapor inspections; and
- non-invasive engineering and geotechnical inspections of the land.

Invasive testing may be negotiated if the non-invasive reports indicate a need for further information. Sellers are typically reluctant to permit invasive testing.

A lender in connection with the financing of an acquisition may, in addition to the above, also consider reviewing the borrower's or any guarantor's financial statements, organisational documents, good standing certificates regarding the borrower and, if applicable, each guarantor as well as appraisals of the real property. Lenders may also order their own environmental or engineering reports, or both, regarding a property.

A common title search is a 40-year search regarding previously recorded deeds, liens, judgments, encumbrances and other claims of ownership, and is a common tool for buyers to discover and attempt to cure title defects. Moreover, buyers may obtain title insurance to protect themselves against any title defects. Buyers may at times be able to negotiate for an indemnity to survive for a period of time after closing or for the seller to provide an escrow holdback of a portion of the purchase price in connection with title defects or breached seller representations. Priority amongst parties is subject to a race-notice statute, meaning that the first to record a title instrument without notice of competing claims will maintain priority over other, potentially prior, interests. Additionally, the buyer may be asked to have a zoning report or opinion prepared to address such permitted use as well as documents from the relevant local jurisdiction confirming such use. See section 291 of the New York Real Property Law.

Law stated - 18 November 2024

## Structural and environmental reviews

**26** | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

It is customary to arrange for both an engineering review and an environmental review, often performed by separate service providers. A Phase I Environmental Site Assessment is conducted by an environmental inspector to discern whether any hazardous substances were reported or located on the site. A Phase II Environmental Site Assessment may be necessary if it is determined that further investigation is required involving potential environmental issues. Additionally, an engineering report may be conducted to address any structural deficiencies, including roofs, utilities, drainage and mechanical systems. A buyer could ask the seller to provide certain representations or an indemnity regarding compliance with environmental or site-specific issues, or may request that an escrow or purchase price holdback be established to mitigate cost risks with respect to any discovered violations or deficiencies. However, most sellers will reject such requests (or

agree to make only very limited statements) and instead insist that the buyer conduct its own due diligence to gain comfort regarding potential risks. Notably, environmental insurance may be available.

Law stated - 18 November 2024

## Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Whether lawyers review leases and management agreements is determined on a transaction-by-transaction basis and generally governed by the purchaser's budget. It is common for lawyers to review leases. It is less common for lawyers to review management agreements because they are typically terminated at acquisition closing. Management agreements are typically required to be subordinate to financing security instruments.

Depending on cost, lawyers may be asked only to review the material leases in connection with the transaction, which may be identified or otherwise determined based on factors such as rent amount, square footage or location. Typically, lease reviews will focus on:

- economic terms;
- initial alteration work to be performed by the landlord;
- a tenant improvement allowance and related construction items if the tenant is performing the initial buildout;
- ongoing services and covenants of the landlord;
- operating expenses, utilities and taxes;
- extension and renewal options;
- expansion options;
- purchase options;
- rights of first offer and refusal;
- guaranties;
- security deposits;
- holdover penalties;
- insurance requirements;
- casualty and condemnation;
- assignment and subletting restrictions;
- available remedies; and
- mortgagee protection provisions.

Law stated - 18 November 2024

## Other agreements

### 28 | What other agreements does a lawyer customarily review?

The documents reviewed by a lawyer will vary based on the type of transaction. However, in connection with the purchase and sale of commercial real estate, lawyers will typically review brokerage agreements, letters of intent, purchase and sale agreements, title and survey documents, loan documents, operating agreements, material third-party service contracts and other material agreements affecting the property, including, if applicable, condominium documents and reciprocal easement agreements.

Law stated - 18 November 2024

## Closing preparations

### 29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

To prepare for a closing of an acquisition, leasing or financing, lawyers for each party to the transaction will work to ensure that:

- the operative documents are finalised, executed and fully compiled;
- all signature pages are in the possession of the receiving party or the escrow agent;
- all necessary funds have been received (either directly by the landlord in the case of a lease or by the escrow agent in the case of an acquisition or financing); and
- all other required documentation, which will vary based on the type of transaction (but may include organisational documents, authorisations and consents, opinions, third-party reports, title insurance policies, assignments and guaranties, among others) have been finalised and delivered prior to or at the time of closing.

To verify authorisation to close a transaction, a lender in the case of a financing or the escrow agent in the case of an acquisition may require the representatives from each party who are duly authorised to enter into the transaction (or their attorney as agent) to confirm in writing that the documents are in final form, the closing funds may be distributed and the transaction may be consummated. Prorations to the final settlement statement including adjustments for prepaid taxes, third-party fees, commissions and offsets, among others, are prepared at closing and reviewed and signed off on by the applicable parties. The timing between the signing of the contract and closing will vary based on each transaction (ranging from a sign-and-close, in which the signing and closing occur simultaneously, to long executory periods necessary to account for the completion of all conditions precedent to closing). Though the parties may agree to endeavour to close the transaction on a date certain, if this date becomes mutually unrealistic for various reasons, amendments or other modifications will be made to the operative agreement to account for any such delays.

Law stated - 18 November 2024

## Closing formalities

- 30** | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The closing of the transfer is typically conducted via escrow by an independent third-party escrow agent who will hold and distribute all funds and fully compiled execution documents at closing, at the parties' direction. The parties will typically deliver all required counterpart signatures to the escrow agent along with a detailed escrow instructions letter via courier prior to closing. Copies of signature pages are typically acceptable other than for documents that require notarisation or those that are being recorded in the public records. Any document that will be recorded in the public records that is not being filed electronically must typically be an original wet ink signature pursuant to the guidelines of the applicable county recording office. Closings may also be consummated in-person, but this practice became increasingly less common prior to the covid-19 pandemic and is even more uncommon in its aftermath. If the closing is done in person, a representative from each party should be in attendance. If any local, state or federal government agency is a party to or otherwise has an interest in the transaction, there may be additional closing requirements, but this will occur on a case-by-case and agency-by-agency basis.

Law stated - 18 November 2024

## Contract breach

- 31** | What are the remedies for breach of a contract to sell or finance real estate?

Both parties are entitled to obtain remedies when the other party breaches the contract. If a seller is unable to sell the property in good faith, a buyer is limited to recovering its payment and reasonable expenses associated with attorney's fees, title searches and other out-of-pocket costs and damages. Alternatively, if the seller wilfully breaches the contract, a buyer may be entitled to recover their benefit from the bargain, which is calculated at the difference between the market value of the property and the contract price, in addition to other damages.

A buyer may also obtain specific performance of the seller's contractual obligation. To obtain specific performance, it should be expressly and clearly agreed upon by the parties in their contract. Notably, however, specific performance is an equitable remedy and will be considered on a case-by-case basis. If the buyer does not proceed with purchasing the property, a seller may claim damages, but contracts will typically limit the seller's remedy to retaining the buyer's earnest money deposit as liquidated damages. In most cases, the parties' contract negotiations will result in the expansion or narrowing of remedies on a case-by-case basis.

Law stated - 18 November 2024

## Breach of lease terms

- 32** | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Termination, acceleration of rent, eviction and ejectment are typical remedies for a breach of a lease. The landlord also has the option to draw down a security deposit. Lease remedies are generally specified in the lease agreement itself. Tenants can only claim damages if the landlord has breached the terms of the lease. Often, leases provide for limitation of tenants' remedies to claim damages against a landlord. In New York, a landlord can file for eviction in landlord-tenant court in accordance with the rules and procedures of such a court or can file an ejectment action in state court under the theory of general contract law. If there is an individual or corporate parent guarantor who guaranties the underlying lease obligations, the landlord can file a breach of contract claim against such guarantor in State court as well. In certain jurisdictions, including New York, the landlord has the duty to mitigate tenant damages by using commercially reasonable efforts to ready the premises for occupancy and show the space to prospective tenants. Self-help is a remedy that is available to landlords in some jurisdictions, although this has largely fallen out of favour.

Remedies available for residential leases are much more extensive and favourable to tenants. In residential leases, the remedies available to landlords are generally limited by state laws and may include eviction, recovery of unpaid rent and the ability to make repairs and charge the tenant for those repairs if the tenant breaches the lease agreement.

See sections 227-e and 701 of the New York Real Property Law.

Law stated - 18 November 2024

## FINANCING

### Secured lending

- 33** | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

New York utilises both a deed of trust and a mortgage form. However, a mortgage is the most common security instrument used to create a lien on real property to secure indebtedness. Deeds of trust are rarely used in New York. Mortgages grant liens on real estate and New York operates under a lien theory of mortgage, which grants the lender a lien, while the borrower retains legal and equitable title. Enforcement is through New York statutory law (foreclosure) for both types of security instruments.

Lenders in New York are of varied types and natures. There is no restriction on who can be a lender, but lenders are typically required to be licensed. The most typical types of loans are

acquisition loans, construction loans, bridge loans and permanent loans. Acquisition loans are used to finance the acquisition of unimproved or improved real property. Construction loans are utilised to develop or significantly renovate real property and have short-term maturities. Bridge loans are short-term loans used in connection with an acquisition or to pay off construction loans when a permanent loan cannot be obtained immediately. Permanent loans are longer-term loans that are obtained for stabilised properties.

See section 254 of the New York Real Property Law and section 340 of the New York Banking Law.

Law stated - 18 November 2024

### Leasehold financing

**34** | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

Financing is available for ground leases in New York. To qualify for leasehold financing, the lease will typically have a remaining term of at least 35 years. For a ground lease to be financeable, it should contain a standard set of leasehold mortgagee protective provisions (eg, notification to lender of tenant defaults and other events, lender rights to cure tenant defaults, control of casualty insurance and condemnation proceeds, lender's right to a new lease with the landlord upon tenant default). Lenders will also require an estoppel certificate from the landlord (confirming, among other things, the lease document, the lease's economic terms and the absence of defaults), and potentially a subordination, non-disturbance and attornment agreement. Lenders typically should verify that either the ground lease or a memorandum thereof (ie, a short summary of the certain lease terms) has been recorded in the land records of the county where the property is located, providing notice to third parties of the ground lease. Lenders may also require that any mortgages on the landlord's interest in a ground leased property are subordinated to the ground lease itself.

Law stated - 18 November 2024

### Form of security

**35** | What is the method of creating and perfecting a security interest in real estate?

A security interest in real estate is created and perfected by recording a mortgage or deed of trust against that real estate in the office of the clerk of the county in which such real estate is located. Additionally, liens against certain personal property that has been incorporated into the real estate itself may be created. Such personal property is referred to as a 'fixture'. Such a lien on fixtures will be created using a security agreement, describing the fixtures and recording a notice (a fixture filing) in the office of the clerk of the county in which such real estate is located. Lenders will often incorporate the security agreement and fixture filing into the mortgage itself.

See section 291 of the New York Real Property Law, and sections 9-501 and 9-502 of the New York Uniform Commercial Code.

Law stated - 18 November 2024

## Valuation

**36** | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Nearly all lenders in New York will require the delivery and review of a third-party real estate appraisal before originating a loan. This requirement will apply regardless of whether the lender is statutorily required to obtain that appraisal. New York requires appraisers to be certified by the state for all mortgage loans over US\$250,000. There is no requirement for who is to order the appraisal, but loan officers are heavily restricted in contacting appraisers.

New York commercial real estate appraisers typically base their appraisals on three different valuation approaches: the cost approach; the direct sales comparison approach; and the income capitalisation approach. To calculate a value, appraisers utilise factors such as:

- the land value;
- the replacement (or reproduction) cost of the improvements;
- the accrued depreciation;
- the value by the sales of comparable properties and rentals;
- expenses, interest rates, capitalisation rates and vacancy rates;
- existing land use regulations;
- neighbourhood trends;
- physical adaptability of the property; and
- probable supply and demand as evidenced by current market conditions.

Most appraisers acceptable to lenders will hold an MAI membership designation.

See section 590-B of the New York Banking Law and Title 3, section 80.7 of the New York Codes, Rules and Regulations.

Law stated - 18 November 2024

## Legal requirements

**37** | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?



Foreign banking corporations that do not maintain offices in New York can issue loans in New York that are secured by mortgages or deeds of trust on New York real property without any specific permissions, approvals or licences. New York has a mortgage recording tax for the registration and recording of real property liens with the tax payable at the state level, as well as a separate tax payable in certain counties.

Mere assignment of a mortgage by a lender does not trigger additional taxes. A foreign lending entity may also wish to qualify to do business in New York to avoid a borrower's claim that the lender's failure to qualify to do business in New York prevents that lender from commencing foreclosure action in New York.

See section 200 of the New York Banking Law and section 1401(e) of the New York Tax Law.

Law stated - 18 November 2024

### Loan interest rates

**38** | How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

If the interest rate for a commercial or high-value property loan is fixed for the loan term, the lender will commonly utilise US Treasury (swap) rates as a benchmark in addition to a spread (expressed in basis points) on top of the benchmark to create the all-in interest rate. If the interest rate for a loan will float during the loan term, the lender will commonly utilise the one-month secured overnight financing rate.

New York's general usury ceiling is 16 per cent per year. The criminal usury rate in New York is a rate in excess of 25 per cent per year. The usury limitations vary based on type of property and transaction. The exceptions to the general usury laws include, among other things:

- loans of US\$250,000 or more, except when secured primarily by a mortgage on a one- or two-family residence;
- loans to corporate borrowers, except when the corporation was formed to own a one- or two-family residence;
- federally pre-empted first residential mortgage loans made by a federally regulated lender; and
- junior mortgage loans made by New York chartered banks, trust companies or mortgage brokers.

These exceptions do not apply to criminal usury. The criminal usury rate ceiling of 25 per cent and the criminal penalties for exceeding it do not apply to loans of US\$2.5 million or more. New York's civil and criminal usury statutes include origination fees, points and other discounts, and all other amounts paid or payable, directly or indirectly, by any person to or for the account of the lender in consideration for making the loan or forbearance, except for

categories of fees and charges set forth in the applicable New York codes and regulations, which are:

- sections 5-501(1), 5-501(6)(a) and 5-521 of the New York General Obligations Law;
- sections 14-a(1), 14-a(7), 103(4-a) and 590-a(1) of the New York Banking Law;
- sections 190.40 and 190.42 of the New York Penal Law; and
- Title 3, sections 4.2 and 4.3 of the New York Codes, Rules and Regulations.

Law stated - 18 November 2024

## Loan default and enforcement

**39** | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Foreclosures in New York are judicial, which means that the lender must foreclose by commencing an action in the New York state court system. Foreclosure begins with the lender filing a summons and complaint with the court (and serving that summons and complaint on the borrower), and filing notice of a pending claim in the public real estate records against the underlying property. In the event of a loan default, lenders have the choice under New York's election of remedies statute to either:

- enforce the note or guaranty and obtain a money judgment; or
- pursue an action in equity to foreclose on the mortgage.

New York's one-action rule bars lenders from bringing simultaneous actions to recover on the same mortgage debt once a foreclosure has commenced (New York Real Property Actions and Proceedings Law, section 1301). A borrower has the right of redemption, allowing it to redeem the real property up until the foreclosure sale has occurred (New York Real Property Actions and Proceedings Law, section 1301(3)).

Law stated - 18 November 2024

## Loan deficiency claims

**40** | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Lenders must seek a deficiency judgment within 90 days of consummation of a foreclosure sale. The lender makes a request for a deficiency judgment at the same time it files a motion for an order confirming the sale. The deficiency is limited by the property's fair market value, which the court determines. The deficiency judgment amount is the borrower's total debt less the market value as determined by the court or the sale price of the property, whichever

is higher. The lender may obtain a deficiency judgment only if the debtor is personally served the summons or the debtor enters an appearance in the foreclosure action. See New York Real Property Actions and Proceedings Law, section 1371.

Law stated - 18 November 2024

## Protection of collateral

**41** | What actions can a lender take to protect its collateral until it has possession of the property?

Temporary receivership is an option that a lender may take to protect its collateral. Upon motion of a judgment creditor, the court may appoint a receiver who may be authorised to administer or collect rents, or improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest, or to do any other acts designed to satisfy the judgment. If a receiver has been appointed, a court making an order directing payment or delivery of property shall direct that payment or delivery to be made to the receiver rather than to a sheriff. A receiver is an officer of the court and will not solely represent the interests of the lender. Moreover, a junior lender taking possession of property before foreclosure may be exposed to liability from senior lienholders. Also, a receiver appointed by a New York state court does not have the authority to oversee out-of-state assets and cannot sell the property. See section 5228 of the New York Civil Practice Law and Rules.

Law stated - 18 November 2024

## Recourse

**42** | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents may provide recourse to all of the borrower's assets under New York law. However, commercial borrowers will typically try to limit recourse to the underlying collateral in the event of a foreclosure action, commonly referred to as a non-recourse loan. Alternatively, a single-purpose entity borrower will be formed that owns only the loan collateral. A guarantor's recourse liability is typically governed by the guaranty agreement. Personal recourse to a guarantor will typically be limited to certain non-recourse carveouts, such as fraud, bankruptcy, non-payment of taxes and other bad acts. However, in certain circumstances, the guarantor may subject themselves to additional recourse such as environmental liability as well as principal or interest (or both) repayment. For example, in construction loans, it is common for a guarantor to agree to a completion guaranty with respect to the property, obligating the guarantor to cause construction to be completed if the borrower defaults. See section 1371 of the New York Real Property Actions and Proceedings Law.

Law stated - 18 November 2024

## Cash management and reserves

**43** | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

A cash management system is standard for commercial loans. Cash management systems ensure that the lender can obtain and control a property's rental income in all circumstances, as opposed to a mere assignment of leases and rents, which a lender would also receive in any event. Lenders typically take [reserves](#) for a variety of purposes, but the amount and replenishment requirements will depend on a number of factors, including the size of the loan, the loan-to-value ratio, the credit of the borrower and the quality of the collateral. Reserves are typically required for payment of interest (where the property is not cash flowing or in a construction loan scenario), taxes, insurance, capital maintenance and future tenant improvements.

Law stated - 18 November 2024

## Credit enhancements

**44** | What other types of credit enhancements are common? What about forms of guarantee?

Depending on the creditworthiness of a borrower, interest reserves and cash collateral are typical credit enhancement forms. Lenders may also institute reserves for:

- real estate taxes;
- insurance premiums;
- tenant improvement and leasing commission costs;
- capital expenditure costs; and
- furniture, fixtures and equipment with respect to hotel property loans.

Lenders may also require collateral (eg, mortgage on other properties owned by the borrower's organisation or other types of hard collateral) if the borrower's credit is questioned. Lenders may require that guarantors covenant to maintain specific net worth and liquidity amounts in the guaranty agreement.

Completion guaranties are considered customary for construction loans. Payment guaranties are substantially less common, being used mostly in circumstances where there is more risk associated with the borrower. Most lenders require guarantors to execute a non-recourse carveout guaranty for bad acts of the borrower, the guarantor and their affiliates. Such guaranties have been upheld numerous times. Enforcement of guaranties and indemnities typically begin with a demand on the guarantor made by the beneficiary. If the guarantor fails to immediately comply, enforcement would take place by bringing a

lawsuit in New York state or US federal courts in accordance with the terms of the guaranty agreement.

Law stated - 18 November 2024

## Loan covenants

### 45 | What covenants are commonly required by the lender in loan documents?

Lenders commonly require borrower covenants regarding:

- legal existence and good standing;
- compliance with laws and zoning requirements affecting the property;
- continued maintenance and use of the property;
- that the borrower will not commit waste;
- payment of taxes on the property;
- maintaining required insurance policies;
- properly managing and maintaining the property;
- giving prompt notice of litigation or default;
- agreeing to cooperate with the lender in any related judicial proceedings;
- performance under the loan agreement;
- reporting on financial metrics of the borrower or guarantor, or both;
- restrictions on leasing and other agreements;
- restrictions on further encumbrances;
- restrictions on changing the property's zoning or other legal characteristics;
- compliance with applicable laws and regulations; and
- restrictions on altering the property or performing construction.

Different asset classes may require additional covenants on a case-by-case basis (eg, hotel and resort properties will have several additional covenants around the property's ongoing operations and construction loans will have far more detailed criteria for performance of construction).

Law stated - 18 November 2024

## Financial covenants

### 46 | What are typical financial covenants required by lenders?

Common financial covenants include a cash management system and termination or replacement of the property manager. Typically, one or both of these covenants may be triggered by a low debt service coverage ratio, low debt yield or other financial triggers

(typically agreed to on a case-by-case basis). However, a failure to satisfy these covenants is not always an immediate event of default in itself. Such covenants can often be cured by improving the applicable financial metric. Financial reporting requirements are a separate covenant for which failure to satisfy could result in an event of default or a monetary penalty. It is unusual to require ongoing appraisals, but the lender typically reserves the right to request updated appraisals from the borrower periodically in line with market standards or after an event of default has occurred.

Law stated - 18 November 2024

### Secured movable (personal) property

**47** | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

The New York Uniform Commercial Code allows the creation and attachment of liens against personal property generally by a security agreement. An authenticated security agreement, which clearly states the intent to create a lien on the collateral, will create an effective security interest in most types of personal property if value has been given and the agreement reasonably describes the collateral. Perfection generally requires filing a New York Uniform Commercial Code financing statement with the New York Secretary of State for most types of personal property, although fixtures require a fixture filing in the real property records at the county level to be perfected. Additionally, certain other types of personal property, such as investment property for example, must be perfected by taking physical control of the collateral.

See sections 9–201, 9–108, 9–310, 9–502 and 9–314 of the New York Uniform Commercial Code.

Law stated - 18 November 2024

### Single purpose entity (SPE)

**48** | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

It is typical for lenders in New York to require the borrower entity to be a single purpose entity (SPE). SPEs are typically created by forming an entity (most often a limited liability company) in Delaware. SPE covenants are typically found both in the loan documents and the borrower's operating agreement, and the lawyer will work to ensure that the covenants are consistent in both documents. Independent directors are also commonly required for New York commercial real estate loans because they ensure that any bankruptcy-related decisions require the vote of an independent party and could prevent an insolvent parent company from forcing an otherwise solvent SPE into bankruptcy proceedings. Such use

of independent directors to ensure bankruptcy remoteness is widely used and was upheld by the Southern District of New York in *In re: General Growth Properties*.

Law stated - 18 November 2024

## UPDATE AND TRENDS

### International and national regulation

**49** | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

- [Corporate Transparency Act \(CTA\)](#) adoption and enforcement
- [C-PACE](#) financing continuing adoption
- [NYC](#) zoning overhaul
- [Housing](#) shortage and affordability challenges
- [Hybrid](#) work and office Space reconfiguration

#### Corporate Transparency Act (CTA) adoption and enforcement

Enhanced ownership reporting obligations mandated by the federal Corporate Transparency Act (CTA) went into effect on 1 January 2024 for newly formed entities, and go into effect on 1 January 2025 for entities in existence as of 1 January 2024. The CTA obligates many domestic and international entities to submit a report to the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), detailing ultimate individual beneficial owners who possess significant ownership stakes, or who have or exercise considerable control. The report must also include identification information for up to two individuals who helped establish the entity. As of late 2024, the implementation of the CTA has become a significant consideration for real estate entities, especially in New York City. Many LLCs and other corporate structures have begun adjusting to the new reporting requirements that disclose beneficial ownership to FinCEN. New York's LLC Transparency Act, passed in 2024, requires additional public disclosure beginning on 1 January 2026, going further than federal regulations. This has already influenced the structuring of real estate deals, particularly those involving foreign or institutional investors. In 2025, the full impact will continue to unfold, particularly as penalties for noncompliance are enforced.

#### C-PACE financing continuing adoption

Commercial Property Assessed Clean Energy (C-PACE) financing programmes incentivise private capital providers to invest in energy efficiency and resiliency upgrades to commercial and multifamily properties and, in light of the recent commercial real estate market downturn and rising interest rate environment, continue to grow in popularity. New York state has enacted legislation (General Municipal Law, article 5-L) authorising municipal corporations to create a sustainable energy loan programme to provide C-PACE financing to property owners, and New York City has authorised a similar C-PACE



programme as part of the Climate Mobilization Act (Local Law 26 of 2019). C-PACE financing covers 100 per cent of the cost of 'green' improvements such as carbon neutral energy systems (solar, geothermal and heat pumps) and energy-efficient lighting and heating systems, and also HVAC (heating, ventilation and air conditioning) improvements, external membrane (curtainwall, windows, doors and glazing), elevators, roof work and storm resiliency improvements. C-PACE can be used to finance ongoing construction and/or renovations or retroactively finance completed improvements, usually with a three-year lookback period. C-PACE financing bridges demand between borrowers and the capital markets for cost-effective 'green' financing. The adoption of C-PACE financing has continued to rise in New York City through 2024, particularly as more building owners aim to comply with the city's climate goals. New regulations tied to the Climate Mobilization Act and Local Law 97 have increased demand for financing options that support energy-efficient upgrades. In 2025, the use of C-PACE financing is expected to grow further as more municipalities in New York expand their programmes and property owners seek retroactive financing for completed improvements.

### **NYC zoning overhaul**

New York City's Mayor Eric Adams seeks a number of significant changes to New York City's zoning laws as part of his proposed 'City of Yes for Housing Opportunity' initiative, with aims of creating an additional 100,000 homes for residents of New York City. The plan would allow for the creation of homes instead of parking spots, create additional affordable and supportive homes, eliminate exclusionary zoning practices and enable conversions of certain empty office properties to residential use. In 2024, New York City made significant strides toward enacting these zoning reforms. As of late 2024, the changes are in their final stages of public review. If fully implemented by the City Planning Commission and City Council in 2025, these reforms will allow more affordable housing developments, ease the conversion of office buildings to residential use, and modify outdated requirements such as mandatory parking minimums. While the full effects will take time and the actual reform terms are not finalised at the time of writing, the groundwork for substantial changes to NYC's housing landscape is being laid.

### **Housing shortage and affordability challenges**

Despite Mayor Adams' zoning reform efforts summarised in subsection III above, housing prices remain high, and the supply of affordable units continues to lag behind demand. The zoning reforms will play a crucial role in 2025 if they are finalised and passed, potentially opening up more opportunities for housing development, though immediate impacts are likely to take time. It also remains to be seen whether the recent scandals and criminal allegations against Mayor Adams will serve to derail his administration's initiatives.

### **Hybrid work and office space reconfiguration**

The covid-19 pandemic changed the commercial real estate industry in certain ways that endure, four years on. Throughout 2024, hybrid work models have solidified their permanence, leaving a lasting impact on New York City's office market. Vacancy rates remain high in certain submarkets as companies downsize or move to smaller, more flexible office spaces. A trend that gained some momentum in 2024 was the conversion



of underutilised office buildings into residential or mixed-use properties, especially in Manhattan. Although this is a time- and labour-intensive process, with plenty of red tape to navigate, the transition has already begun, with several projects either underway or in the planning phases.

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