Cross-Border Real Estate Practice Committee

Section of International Law

“Real Estate Review - 2010”
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Note from the editor

The ABA Cross-Border Real Estate Practice Committee is delighted to launch the first edition of “Real Estate Review - 2010”, which includes comprehensive reports on the legal developments and latest market news related to real estate in jurisdictions such as Argentina, Austria, India, Spain and Sweden during 2010.

This publication is intended as a useful material for cross-border legal practitioners and people involved in real estate business.

I gratefully acknowledge the efforts of all the contributors for their interest and commitment and welcome additional material for countries not already included. If you would like to contribute, please contact me at laura.lavia@bomchil.com.

I hope you will all enjoy reading it.

Laura Lavia Haidempergher
Editor

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Part I - Legal Developments | Laws and Regulations

In February 2010, resolution concerning the value of the properties in the City of Buenos Aires was passed (Resolution Nº 67/10 of the AGIP –the tax authority in the City of Buenos Aires-).

Such resolution sets forth a Real Property Reference Value (“VIR”) composed by the value of the land, the neighborhood where it is located and the type of building and materials used. In this sense, according to the new regulation, all real estate transactions that are executed before notary public and subject to stamp tax must take the VIR as the price to calculate the stamp tax.

This new regulation has a significant impact on real estate transactions since in most cases the VIR exceeds the real value of the property, thus, obliging the parties to pay a higher tax.

Part II - Market News

The real estate market and the construction market during 2010

Between January and March 2010, real estate transactions in Argentina showed a 75.3 per cent increase, compared to the same period of 2009. On the other hand, the construction market showed a 13.7 per cent increase during March 2010, compared to the same period of 2009.

Even though in August 2010 the real estate market showed a fall in the number of deeds executed, compared to July of the same year, during September 2010 the offer of new apartments increased, and so did the sales. In this sense, the last November registered 6,000 sales (a level not reached since 1998).

More than 50 per cent of the sales were concentrated in small and medium properties valued between USD 65,000 and USD 150,000 (in late November the more expensive properties took more participation in the market). These kind of
properties are mostly acquired as investment in order to obtain rent from them; it is a tendency that has become very strong during 2010 and it is likely to continue in 2011.

In Argentina, the main real estate investors are owners of apartments assigned to the rental market; this kind of investment provides a monthly rent to the owner. Furthermore, many units that were built to be sold were later incorporated to the rental market for that reason.

As a consequence, the real estate market and the construction market appear to be recovering, in particular compared to 2008 and 2009, years in which they reflected a reduction. In 2010, 88,227 transfer deeds were executed, showing a 16 per cent increase compared to the previous year, where the number of transfer deeds was 75,950. However, there are still some difficulties for investors, i.e. inflation, lack of credits, financial crisis and high taxes.

Projects and developments

During 2010 many local and foreign investors progressed with projects both in Buenos Aires, and in the major cities of Argentina, such as Rosario and Córdoba.

Local investor Eduardo Costantini is leading the “Puertos del Lago” project under the “ciudad pueblo” concept. It consists of 1,371 hectares in which he has already invested USD 50 millions and is expecting to invest another USD 50 millions. The planned facilities include shopping malls, schools, a medical centre and sport clubs.

There are also four projects being developed in Puerto Madero neighborhood. Two of them are in hands of the Sutton’s group and consists of the Alvear Art Hotel and the Alvear Hotel & Residences. They are expected to be finished by late 2011 with an investment of more than USD 100 millions. The investor Starwood is progressing with the third project and is leading the St. Regis Hotel & Residence in the parcel of land bought by Ragsha group. The last one is in hands of a Mexican investor, Vidante group, that is leading the Mansions of the World project in dike one of Puerto Madero.

An interesting project that is progressing is the Technologic District, a project of the government to promote the concentration of mainly information-technology and telecommunication companies in a specific area. In this sense, the Clarin Group is opening new offices in the Technologic District; the investment arises to 16 millions approximately, which includes buying and refurbish the building. Banco Ciudad (the bank of the City of Buenos Aires) is also moving its central office and investing USD 162,4 millions to built an ecologic building. This investment will be financed with the earnings of the company.

After eight years expecting municipal approval, the ALRIO project in Vicente Lopéz, (North of Buenos Aires Province), was finally presented in the fifth edition of the SIM (the Real State Room). It consists of residences, offices, a shopping
mall and cultural centre in which the investor Ribera Desarrollos is planning to allocate USD 800 millions.

But there are also some investors interested in the city of Rosario. The Swiss investor Projecto is developing the first ecologic building of the city. The firm is expecting to invest more than USD 3 millions but it is subject to the approval of the local government. Also, local investor Fernandez Prieto is leading the Maui residence towers in the Puerto Norte neighborhood, with a preliminary investment of USD 50 millions and a cost of USD 2,200 the m$^2$.

Other two projects which are being developed in Rosario are a twenty three floor residence tower run by the local recognized clothing brand Cardon, and the reopening of a traditional restaurant in the city combined with offices and a parking lot lead by investors Micropark and Fundar.

“Terruño Escondido” is a project leaded by Alta Patagonia Wine Estate S.A. in the city of Senillosa, 35 km away from Neuquen. It consists of a private neighbourhood with vineyards which its wine production belongs exclusively to the owners of the lots.

Finally, in Córdoba, Euromayor issued marketable bonds within a global plan based on AR$ 150 million, in order to finance the projects that it is leading which includes more than 6.000 plots and 2.500 apartments, housing and offices.

**Perspectives for 2011**

The real estate market is the investors’ favorite. It is expected that they will still be interested in apartments as their preferred properties. This is due to the fact that property seems to be the safest place to invest since the inflation grows constantly (a new small apartment by January 2010 was valued on sixty minimum salaries, by December 2010 it costed sixty six), and the construction market showed a 10 per cent increase during 2010. Furthermore, the value of the properties and costs of construction are expected to increase during 2011.

2011 seems to be a favorable year for the real estate market even though the inflation is a big issue; the US dollar is expected to remain stable and, therefore, the real estate market once again the ultimate shelter for the savings. The smaller apartments will continue to be the preferred properties for the buyers, following the trend in constructing smaller and less luxurious buildings in order to make them affordable to the middle class. In general, residence buildings projects are mostly financed by the developers due to the lack of financial credits.

Analysts predict that the construction and the real estate market will continue increasing during 2011. Since it is an electoral year, public works are expected to increase a 40 per cent. In the private sector, the real estate will remain as the most suitable and secure alternative since the US dollar and the euro as a way to preserve savings, had been left apart.
In this sense, 64,800 transfer deeds are expected to be granted during 2011; this will reflect an increase of 6 per cent compared to 2010. Since the presidential elections will take place next October, it is a complex year for Argentina, but the real estate market stays confident that there will be no abrupt economic changes.

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Part I - Legal Developments | Laws and Regulations

Real Estate Agents’ Commission

The most significant new regulation in 2010 is an amendment to the Regulation on Real Estate Agents.

In Austria, estate agents are entitled to a statutory commission if they facilitate the conclusion of a contract on the sale or lease of real property. This commission is usually agreed between the parties in a written brokerage agreement. If no such agreement was concluded, then the estate agent can claim the maximum amount as laid down in a regulation by the minister of economics. A new regulation, which entered into force on September 1 2010, significantly reduces these limits:

Lease Agreements

The maximum commission for lease agreements is determined on the basis of a multiple of the gross monthly rent (i.e., the rent plus operating costs). The estate agent may claim a commission from both the landlord and the tenant.

Maximum amount for residential leases

GMR = Gross Monthly Rent

<table>
<thead>
<tr>
<th>Duration of the Lease</th>
<th>Commission payable by</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Tenant</td>
</tr>
<tr>
<td>Open-end lease or fixed term of more than three years</td>
<td>2 x GMR</td>
</tr>
<tr>
<td>Fixed term of up to three years</td>
<td>1 x GMR</td>
</tr>
</tbody>
</table>

Maximum amount in residential leases where estate agent is property manager

<table>
<thead>
<tr>
<th>Duration of the Lease</th>
<th>Commission payable by</th>
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<tbody>
<tr>
<td></td>
<td>Tenant</td>
</tr>
<tr>
<td>Open-end lease or fixed term of more than three years</td>
<td>1 x GMR</td>
</tr>
</tbody>
</table>
Duration of the Lease | Commission payable by
<table>
<thead>
<tr>
<th>Tenant</th>
<th>Landlord</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fixed term of between two and three years</td>
<td>0.5 x GMR</td>
</tr>
<tr>
<td>Fixed term of up to two years</td>
<td>0.5 x GMR</td>
</tr>
</tbody>
</table>

Maximum amount in commercial leases

Duration of the Lease | Commission payable by
<table>
<thead>
<tr>
<th>Tenant</th>
<th>Landlord</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open-end lease or fixed term of more than three years</td>
<td>3 x GMR</td>
</tr>
<tr>
<td>Fixed term of between two and three years</td>
<td>2 x GMR</td>
</tr>
<tr>
<td>Fixed term of less than two years</td>
<td>1 x GMR</td>
</tr>
</tbody>
</table>

Renewal option

The parties can agree that the estate agent is entitled to a bonus if one party exercises a renewal option. The bonus may not lead to a higher commission than the maximum amount that would have been in place if the parties had agreed on the total lease in the first place; and in any event, the bonus may not exceed half of one month's gross rent.

Purchase Agreements

The regulation also applies to the commission for the purchase of property, condominiums, buildings and businesses. In this case, the maximum commission depends on the value, which includes the purchase price and certain non-cash obligations assumed by the purchaser. The estate agent may claim its commission both from the buyer and the seller.

Purchase Price | Commission payable by
<table>
<thead>
<tr>
<th>Buyer</th>
<th>Seller</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to €36,336.42</td>
<td>4%</td>
</tr>
<tr>
<td>More than €36,336.42</td>
<td>3%</td>
</tr>
</tbody>
</table>

Increase of limit

As outlined above, the estate agent is entitled to claim commission from both parties to the transaction (ie, from the landlord and the tenant or from the seller and the buyer). If the estate agent does not use up the maximum amount from one party, then the limit for the commission payable by the other party is increased by the shortfall.
For example, the landlord instructs the estate agent to find a tenant for a five-year commercial lease and agrees on a commission of 0.5 times the monthly rent. In this case the estate agent can claim 5.5 times the monthly rent from the tenant.

This does not apply to the commission payable by the tenant in residential leases. Residential tenants never pay more than the maximum commission applicable to them, irrespective of the commission payable by the other party.

Advertisement

When advertising a property, the estate agent must provide certain details, such as a breakdown of the monthly cost connected with the leased property.

Comment

The new regulation will have significant impact on the mass markets, in particular on lower-end residential leases. In more upscale transactions it is important for both sides to have a good agreement in place. Prospective landlords or sellers should not only negotiate their own commission, but also limit the estate agent’s right to claim commission from the prospective buyer or tenant in order not to hamper a transaction by reason of the estate agent’s excessive claims. Property management companies or construction companies acting as estate agents affiliated company in order to safeguard their full commission.

Court Decisions

Flexible VAT Clauses Permitted

Austrian Value added tax (VAT) regulations allow landlords either to charge 20% VAT on commercial leases or treat them as VAT exempt. In the latter case, VAT on any costs related to this particular lease becomes non-deductible. Thus, VAT on, for example, repair work becomes a cost factor for the landlord. (By contrast, residential leases are always subject to 10 % VAT; landlords cannot opt not to pay VAT).

In commercial leases the parties usually agree to charge VAT on rent, if the tenant is entitled to claim VAT input tax deductions so VAT is not a cost factor for the tenant. However, certain tenants, such as banks, insurers and doctors, are not entitled to claim input tax deductions. For those tenants, the rent effectively becomes 20% cheaper if the landlord chooses not to charge VAT on the rent.

A recent court decision concerned a private association which was not entitled to claim input tax deductions. This association agreed with the landlord on a clever clause from which both should have benefited. The landlord agreed not to charge VAT on the rent, which effectively reduced the rent for the tenant. In turn, the tenant agreed to reimburse to the landlord any costs that the landlord encumbered, as VAT on costs related to the lease became non-deductible.
The court of first instance and the Appeal Court held this clause not to be permissible, mainly because the loss of input tax depended on the repair work (and other costs) incurred by the landlord. Thus, the total cost for the tenant was not foreseeable and could have been influenced only by the landlord. Further, the clause may have violated rent thresholds as set out in the Austrian Rent Act.

The Supreme Court allowed the clause, subject to certain restrictions. In particular, those costs that were to be reimbursed by the tenant should not have exceeded the total saving for the tenant resulting from the option not to charge VAT within a one-year observation period. In other words: The tenant should also benefit from this clause.

Comment

This decision is a good sign for landlords and tenants. The lower courts refused to allow such a clause, arguing that, in effect, the tenant would end up paying part of the repair costs which, pursuant to the Rent Act, must be borne by the landlord. This is a good example of a case where too much tenant protection is detrimental to the tenant. As a consequence, no landlord would have been prepared to agree on such a clause, because the VAT on repair costs would then effectively become a cost factor for the landlord. By contrast, the Supreme Court was prepared to look beyond this argument and recognised that such a clause can be to the benefit of the tenant if it is set in proper context. Nevertheless, the court did not declare such clauses are permissible in all cases.

When drafting such a clause, the contract should state in detail which costs (and their maximum amounts) can be attributed to the tenant.

Shopping Centre Agreements

Austrian tenancy law distinguishes between the rent of business space ("Miete") on the one hand and the lease of a business ("Unternehmenspacht") on the other hand. This distinction is crucial, as the Rent Act applies only to the former. If the Rent Act applies, the landlord can terminate the agreement only for good cause (eg, if the tenant defaults on rent payments). Moreover, in certain cases mandatory rent thresholds apply and there are statutory regulations for the respective maintenance and repair duties.

If the agreement is qualified as the lease of a business, then the landlord can freely terminate the lease on the conditions as agreed between the parties. In turn, high vacancy rates in shopping centers may entitle the tenant to reduce the rent or prematurely terminate the lease agreement, and the landlord may be liable for the tenant's debts at the end of the lease.

There is no general rule whether shopping center agreement merely concerns the rent of retail space (which would render the agreement within the scope of the rent act) or the lease of a business. Therefore, each agreement has to be
analyzed on a case by case basis, applying the criteria laid down by the Supreme Court in a number of judgments.

In a recent decision, the court decided that the agreement constituted a rent agreement on the following grounds:

- The shopping centre was not yet built when the agreement was concluded;
- The landlord had committed to handing over the unfinished carcass structure. The tenant had to provide all fittings and fixtures; and
- The tenant had committed to handing back empty premises (rather than an ongoing business) at the end of the agreement.

On the other hand, the court deemed the following criteria - which would normally qualify an agreement as a lease of a business - as less important:

- the contractual duty to operate the business on the premises; and
- turnover-based rent.

The court held that the facts that the landlord also provided the infrastructure for the shopping mall, including parking spaces, and that the agreements between the contracting parties were legally qualified, should be considered "neutral".

Even though the court stressed that shopping centre agreements must be judged on a case-by-case basis, in four consecutive cases now the court has rendered a judgment in favor of a rent agreement. Therefore, in the absence of special circumstances, it is likely that the court will generally consider lease agreements in shopping centers to be rent agreements.

**Excessive Rent Agreements – unlawful return of equity?**

In a recent decision the Supreme Court applied the rules of unlawful return of equity to a Rent Agreement. The decision has significance on M&A transactions involving property.

The case at hand concerned a lease agreement concluded between a company and its majority shareholder. The parties agreed on rent payments of approximately three times the market rent. The landlord then sold its share in the company to a trust, which subsequently also sold the shares to a third party.

The company then realised that it was overpaying on its rent payments and ceased to pay the full rent. The landlord filed an action for unpaid rent, arguing that it is no longer shareholder of the company and therefore unlawful return of equity principles do not apply. Also, under Austrian tenancy laws, commercial
tenants must give notice of excessive rent when first taking on the property. Thereafter, the right to challenge the rent is lapsed.

The court decided in favour of the company. When applying the principles of unlawful return of equity, the shareholders at the time when the Agreement was concluded are relevant. If, at that time, the conclusion of the Agreement constitutes an unlawful return of equity, then the Agreement is null and void insofar as this principle is breached, irrespective of any later change in shareholders.

This decision highlights that unlawful return of equity principles need to be considered in any M&A transaction. When buying property, in particular with respect to older Lease Agreements, it is of paramount importance to establish the shareholders of the tenant at the time when the lease agreement was concluded. If it turns out that the landlord held shares in the tenant when the Agreement was concluded, then it has to be established whether the rent at that time was above market rent. In particular with regard to older lease agreements this can be a difficult task.

**Part II - Market News**

**Overall**

Austria’s economy showed a stable 2.0% increase in GDP, outperforming the EU-15 average of 1.8%. Although the outlook for 2011 and beyond is not overoptimistic, analysts do not expect a double dip recession for 2011 or 2012.

The property market shows clear signs of recovery. Investment increased by approximately 20% to €1.6 billion as compared €1.3 billion in 2009. The investors are mainly domestic and German open end funds. Yields are slightly dropping.

The limited amount of available office space in the city centers has meant that lease prices have been stable or gone up slightly. Vacancies remain stable.

A major market impetus is generated by the construction of a new central railway station for Vienna, allowing for large office and retail projects at centrally located sites.

**Retail**

Since the end of 2009, demand for retail space, especially in Vienna, remained strong – primarily in Vienna’s “Golden U” (Kärntner Strasse - Graben - Kohlmarkt), Mariahilferstr., and the up-market areas of Linz (Landstr), Graz (Herrengasse/Hauptplatz,), Salzburg (Getreidegasse) and Innsbruck (Gold Roof
and Maria-Theresien-Strasse.). By contrast, demand for retail space in shopping centers has been declining.

In terms of retail space, supply and demand are both decreasing while rent is stable. Approximately 170,000m2 of new space became available this year while vacancy remained at around 5%.

**Industrial Real Estate**

Due to the economic crisis, there has been a slump in demand for industrial properties – especially older ones. However, demand has started to return as the economy recovers and companies are expanding more than in previous years. Because of the substantial investments required to bring pre-1990s properties to modern structural and technical requirements, they are often saleable only for the cost of the land they sit on (minus the cost of demolition).

**Residential Real Estate**

The Viennese housing market has survived the global crash relatively unscathed. Relative to similar rental markets, premium apartments in Vienna remain mid-range. Overall, however, full recovery of this market is not expected until 2011. Demand remains high for apartments with rents up to €2,500 but drops off significantly for rates beyond that. Increases are also becoming visible for smaller inner-city flats (for rents up to €1,200). In terms of home purchases, demand for homes up to €500,000 has strengthened, whereas homes in excess of this amount remain rarely requested.

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**About the author**

Martin Foerster focuses on all aspects of commercial property law. He is author of various publications in this field and lecturer at the University of Applied Sciences Vienna. In 2010, Martin Foerster co-organized the joint ABA/IBA real estate conference in Vienna.

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Twenty years of a controversy-filled existence, a multitude of judicial pronouncements, several rounds of consultative dialogues later, the Coastal Regulation Zone Notification, 1991 ("CRZ 1991") has finally given way to the new Coastal Regulation Zone Notification, 2011 ("CRZ 2011"), which has been notified by the Ministry of Environment and Forests ("MOEF") under the Environment Protection Act, 1986 (the "Act") in early January this year.

The main objective behind this revision has been bringing uniformity in laws applicable to all coastal areas, promoting sustainable development of slums in the coastal stretches, while ensuring livelihood to fishing communities in these areas.

Some of the key features covered under CRZ 2011 are:

1. It retains the classification of the Coastal Regulation Zone ("CRZ") as set out in CRZ 1991, i.e. CRZ I (ecological sensitive), CRZ II (built-up area), CRZ III (Rural area). The only change is the inclusion of CRZ-IV, which covers the water areas upto the territorial waters and the tidal influenced water bodies.


3. Special provisions have been incorporated for the fishing communities living along the coastal areas in Maharashtra, Goa, Kerala, Sunderban and other ecologically sensitive areas.

4. A clear procedure for obtaining CRZ clearance has been put in place.

5. It sets out the method and the time frame within which actions shall be taken against any violations.
6. For promoting transparency and accountability in the redevelopment of slums and dilapidated structures in Mumbai, the Right to Information Act, 2005 has been made applicable to all redevelopment or reconstruction projects;

CRZ 2011 has, taking into consideration the interest of the fishing communities, the slum dwellers residing over the coastal stretches and communities living in old and dilapidated buildings, introduced the following new provisions to address issues faced by them:

1. Water area up to 12 nautical miles and the tidal influenced water bodies have been included under the CRZ areas;

2. At several coastal stretches of the country, the fishermen and their dwelling units are in danger due to erosion which is occurring primarily due to manmade activities. The development of such manmade foreshore activities shall be regulated after identifying and demarcating the coast as falling in the high eroding category, the medium eroding category, or the stable sites category.

3. While preparing the Coastal Zone Management Plans (“CZMP”) the infrastructures essential for the fishing communities must be clearly demarcated, and fishing zones in the water bodies and the fish breeding areas shall also be clearly marked.

4. The Coastal Zone Management Authorities are required to invite comments on the draft CZMP from stakeholders. This will ensure that for the first time, local communities will have a say in the preparation of the CZMP.

5. Infrastructural facilities for the local fishing communities have been allowed to be constructed in the CRZ-III area.

6. In CRZ-III areas where 200 metres is otherwise a No Development Zone (“NDZ”), to meet the demands of dwelling units of traditional coastal communities including fisher-folk, the NDZ has been reduced to 100 metres.

7. The concerned state government may implement slum redevelopment schemes directly or through its agencies in the CRZ- II areas provided that the such redevelopment schemes shall be undertaken directly or through joint ventures or through public private partnerships or other similar models ensuring that the stake of the concerned state government or its entities only if not less than 51% of saleable built up area in such projects is given to the concerned state government or its agencies free of cost;
8. Redevelopment and reconstruction of old, dilapidated and unsafe buildings in CRZ-II areas by the owners of the buildings or private developers is permissible;

9. The green lung, open spaces, playgrounds of Greater Mumbai shall be classified as areas under CRZ III i.e. a “NDZ”. Only construction of civic amenities and facilities for recreational sports shall be permitted under CRZ III if the floor space index is upto 15%. Residential and commercial use of such spaces is prohibited; and

10. Reconstruction and repair of the dwelling units belonging to local communities in CRZ – II areas shall be permitted by the competent authorities on a priority basis.

The key differences from the CRZ 1991 Norms are:

1. Special Economic Zone projects in CRZ area will no longer be allowed.

2. The provisions pertaining to the regulation of Andaman & Nicobar islands and Lakshadweep have been dropped and in view of the specific geographical issues, environmental sensitivity and to meet the needs of the islanders, a separate notification has been issued.

3. The provisions restricting the expansion of housing for the rural communities in CRZ-III area have been dropped.

By bringing in the new norms, the MOEF has tried to ensure a better balance between the faster economic growth and environmental conservation.

**Violations to be made accountable**

Quick on the heels of the CRZ 2011 Norms, the MOEF has also issued Directions under section 5 of the Act regarding identification of violations under CRZ 1991 and directing all state governments to “identify the violations of Coastal Regulation Zone Notification, 1991 and the approved Coastal Zone Management Plan thereunder within their respective jurisdiction in a period of four months” from the receipt of this Direction and initiate action under the Act.

Further, the details of the identified violations and action taken would be updated by all State\Union Territories\Coastal Zone Management Authorities on their respective websites every fortnight.

The Directions categorically state that CRZ 2011 does not automatically condone violations committed under CRZ 1991.
Recent Judicial Pronouncements:


In a recent judgement, the Supreme Court has held that Coastal Zone Management Plan (“CZMP”) prepared by the coastal state (or for that matter by the state coastal zone management authority) and duly approved by the MOEF is the relevant plan for identification and classification of CRZ areas. The plan prepared by National Institute of Oceanography (“NIO”), cannot be said to have superseded CZMP.

In the instant case, Chemplast Sanmar Limited (“Chemplast”) had sought approval for importing Vinyl Chloride Monomer (“VCM”) for their plant use by installing a Marine Terminal Facility (“MTF”) near the seashore at Chitrapettai village for transportation of VCM. The proposal was granted clearance by all the relevant authorities, including that of the MOEF. However, an application made to Executive Engineer seeking permission to carry sea water and raw materials through pipelines below the river bed was rejected by the Executive Engineer on the ground that VCM may cause pollution and is hazardous in nature. The Madras High Court set aside the Executive Engineer’s order. A Special Leave to Appeal was then filed before the Supreme Court challenging the Madras High Court order. The petitioner contended that 100 meters from the High Tide Line (“HTL”) on both sides of Uppanar river are CRZ-III areas, as per NIO plan, where handling of hazardous substance is prohibited and VCM is hazardous substance notified under the notification of MOEF issued on November 27, 1989 and handling of a substance includes transfer, as per Section 2(d) of the Environment Protection Act, 1986. Further, it was contended that CZMP had become obsolete and must make way for NIO plan. The Court observed that CZMP was prepared for identification and classification of the CRZ area in accordance with the guidelines laid down in CRZ 1991 and hence would prevail over NIO plan and held that the project has been commissioned after obtaining the necessary approvals and also since an investment of Rs.6 billion has been made, it would not be in the interest of justice to interfere or stall operations of the Respondent, i.e. Chemplast, and Chemplast could continue its activity of importing VCM for its plant use.

Mr. Balasaheb Arjun Torbole and Ors. Vs. The Administrator and the Divisional Commissioner, Konkan Division and Ors. (2010) 112BOMLR4224.

In a judgment pronounced by the Bombay High Court, it has been held that where the slum and the municipal land are adjacent properties, they would be eligible for combined redevelopment under Development Control Regulations for Greater Mumbai, 1991 and one scheme can be sanctioned taking into consideration both the private and public land as a whole.

In this case, a sanction given to a scheme by Slum Rehabilitation Authority (“SRA”) on certain plots of lands in Mumbai was challenged. The Court observed that where the slum and municipal land are adjacent properties, they would be eligible for combined redevelopment to promote flexibility of design and to raise
resources. It further observed that the consent of 70% of the slum dwellers in a slum or a pavement, “in a viable stretch at one place” has to be considered for approval. The private land and the municipal land are contiguous and one scheme can be sanctioned taking into consideration both the private and public land as a whole since 70% of the slum dwellers had consented to the scheme. The sanction granted by the SRA was found not to suffer from any illegality.

Carlos Noronha and Antonio Rodrigues Vs. Union of India (UOI), Ministry of Environment and Forest, through its Secretary and Ors. Writ Petition No. 519 of 2007

In a recent decision by the Goa bench of the Bombay High Court, it has been held that a town designated as a census town as per the census hand book issued under the Census Act, 1948 cannot ipso-facto become a lawfully designated urban area for the purpose of classification under the CRZ 1991.

The petition filed in this case challenged a decision by the Union of India dated 3rd December, 2001 whereby certain coastal area in the state of Goa (“Affected Area”) was reclassified from CRZ-III areas into CRZ-II by the Goa Coastal Zone Management Authority (“GCZMA”) i.e. a lawfully designated urban area. The petitioner contended that the re-classification of the Affected Area was sought in order to sub-serve the interests of the builders’ lobby, at the cost of ecology and environmental degradation and the decision of re-classification was without application of mind and against the purpose for which CRZ 1991 was issued.

The Court observed that at the time of re-classification, the coastal authorities failed to take note that the Affected Area was re-classified as a lawfully designated urban area under the census. The authorities should have considered the spirit of a census town and looked into whether in the given case, the a census town could be designated as a legally designated urban area

The bench directed the National Coastal Zone Management Authority and Union of India to re-consider their decision of approving re-classification, in light of the observation made by the Court in this order.

Part II - Market News

Airport at Navi Mumbai - A sigh of relief

After a prolonged battle between the MOEF on one side and Ministry of Civil Aviation (“MOCA”) and CIDCO on the other side, a consensus was reached and the greenfield airport project at Navi Mumbai (satellite twin of Mumbai) (“Project”) got its final nod subject to certain conditions and restrictions to be adhered to by the MOCA and CIDCO while undertaking the Project. These conditions and restrictions were recommended by the Expert Appraisal Committee (“EAC”) appointed by the MOEF.
This Project assumes paramount significance considering the mounting level of air traffic congestion at the Mumbai International airport which is currently the only international airport in Maharashtra. CIDCO’s proposal for the Project was initially rejected by the MOEF on the ground that the Project was not a permissible activity under the CRZ 1991 Norms. Thereafter, the MOCA and CIDCO approached the Government of India for seeking an amendment in the CRZ 1991 Norms to make the Project a permissible activity, which amendment was finally issued on May 15th, 2009. The MOEF has thereafter on 6th January, 2011 issued the CRZ 2011 Norms that supersede the CRZ 1991 Norms. The CRZ 2011 Norms also specifically mentions the Greenfield airport at Navi Mumbai as a permissible activity.

The CRZ 2011 Norms along with CIDCO’s acceptance of recommendations suggested by the EAC have come as sigh of relief. By 2013, the construction of the Navi Mumbai airport which will have two parallel runways is likely to be completed. This airport is expected to have a capacity to cater to larger number of air commuters annually thus easing off the pressure of the current international airport at Mumbai.

**Adarsh society scam**

In 2010, the Indian media exposed a housing scam revealing the various violations of CRZ norms at various phases of construction in the Adarsh Co-operative Housing Society Limited ("Adarsh Society") located at Colaba, Mumbai. Doubts were raised on the manner in which clearances were obtained for the construction of the building of the Adarsh Society and the allocation of apartments in the building to various bureaucrats, politicians and army personnel as the land on which the Society was constructed was originally meant to accommodate Kargil war heroes and/or their widows.

Several inquiries have been ordered by the army and the Government to probe into the irregularities including under the Environment Protection Rules. Under the CRZ 1991 Norms prior approval of the Ministry of Economic affairs, the State Government authority and other agencies were required for undertaking construction activities in a CRZ area and in the course of the probe, it was exposed that no such clearances were obtained by the Adarsh Society.

The following three options were available to the MOEF

1. Removal of the entire structure since it is unauthorized and no clearance whatsoever under the CRZ 1991 Norms was obtained.

2. Removal of that part of the structure in excess of the Floor Space Index that would have been allowed had the requisite permission been sought from the appropriate authority.

3. Recommending government takeover of the building for a public use to be determined later.
The MOEF, however, ordered in favour of option 1, directing to remove the entire structure since it is unauthorized and no clearance whatsoever under CRZ 1991 Norms was obtained.

MOEF rejected the option 2 since this would tantamount to regularizing or condoning an egregious violation of the CRZ 1991 Norms.

Option 3 was rejected because:

(i) even though the final use may be in the public interest, it would still tantamount to regularizing a violation of the CRZ 1991 Norms; and

(ii) there would be substantial discretionary powers that would vest with the State or Central Government in case of takeover.

MOEF added that the CRZ 2011 Norms published on January 7th, 2011 makes no difference to projects like those of Adarsh Society and action against the Adarsh Society would be continued and pursued as the violation was done when the CRZ 1991 Norms was extant and the action by MOEF was initiated under the CRZ 1991 Norms.

Market Evolution:

Right To Information ("RTI") application gets two contradictory responses

A RTI application filed by a local Member of Legislative Assembly of Maharashtra has evoked two contradictory responses with respect to the SRA project situate at Nariman Point, Mumbai. The point of contention was whether CRZ clearance has been accorded for undertaking a project under the SRA scheme on a plot of land at Nariman Point by a private developer for rehabilitation of an adjoining slum colony.

One response says that all necessary permissions have been accorded whereas the other response counters this by stating that no CRZ permission has been granted for the project at Nariman Point, Mumbai. The developer of the project has time and again claimed that all CRZ clearances have been taken for the SRA building.

Progress at a slow pace

Amongst the other Bills awaiting debate in the Parliament, the Land Acquisition (Amendment) Bill, 2010 ("Bill"), proposing to amend the Land Acquisition Act, 1894 ("LA Act") has been put into a cold storage.

Presently, land acquisition in India is governed by the LA Act, an archaic colonial era law passed more than a century ago. The LA Act grants the government a right to acquire private land without the consent of the land owners for “public
purpose” (such as development of towns and village sites, building of schools, hospitals and housing and state run corporations) or for a company. The land owners get the market value of the land as determined by the government as per stipulated norms, as compensation. The compensation is rarely close to what a privately negotiated sale will result in. This has led to conflict over issues of compensation, rehabilitation of displaced people and the type of land that is being acquired. In an effort to address these issues, the government has framed the Bill.

Following are some of the important provisions of the Bill:

1. It proposes the following three categories of projects for which the government can acquire 100% land: a) establishment of installations pertaining to national security b) infrastructure and facilities designated as “social infrastructure,” such as health, education and c) space research.

2. It proposes to re-define “public purpose” to allow land acquisition only for defence purposes, infrastructure projects, or any project useful to the general public where 70% of the land had already been purchased from willing sellers through the free market.

3. It proposes to prohibit land acquisition by companies unless they have already purchased 70% of the required land.

4. It proposes to make it mandatory for the government to conduct a social impact assessment if land acquisition result in displacement of 400 families in the plains or 200 families in the hills or tribal areas. The compensation is to be extended to tribals and individuals with tenancy rights under state laws.

5. The compensation is based on many factors such as market rates, the intended use of the land, and the value of standing crop, etc. A Land Acquisition Compensation Disputes Settlement Authority is to be established to adjudicate disputes.

The year ahead

The year 2010 ended on a mixed note, where on one hand scams like Adarsh society scam came to light and the Bill got stalled for the third time in a row and on the other hand the Navi Mumbai Airport finally received its go-ahead and the much awaited environmental clearances.

Despite of the disappointments in the past, the year 2011 has already given us a reason to rejoice and restore our faith in the Government as the much awaited new norms on CRZ i.e. CRZ 2011 has finally been given effect and a deadline has been set to make violators under CRZ 1991 accountable. This is just the beginning.
The Government has many promises to keep and looks like it has already set the ball rolling. This year, we may finally get a reason to applaud for them for the efforts towards bringing in new reforms to cater to all communities and at the same time ensuring sustainable development.

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About the author

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Express eviction proceedings

Although the law amending the Urban Lease Act and the Civil Proceedings Act was enacted during 2009 (Law 19/2009, dated November 23), it came into force at the end of December 2009 and, therefore, has applied to eviction proceedings during 2010.

The amendments aimed to speed up eviction proceedings (as a consequence of this the reform was called the “express eviction”) and to increase the landlord’s legal and economic certainty, the absence of which seemed to be one of the main causes of the stagnant lease market for residential premises in Spain.

The most significant changes relate to (i) a significant reduction of the procedural deadlines [established by the law for certain steps of the proceedings (for instance, the landlord’s obligation to require the tenant to comply with its obligations before filing claims and the tenant’s grace period to comply within a certain term before the landlord’s entitlement to start the proceedings); (ii) simplification of certain procedural obligations (determination of the tenant’s domicile for the purposes of notices of claim); (iii) the confirmation of the possibility to claim in the same proceedings, future rents until the vacation of the premises; and (iv) when an enforcement of the eviction order is required, that it will be sufficient to ask the Court for execution without the need of a particular enforcement claim.

The popularly known as “express eviction proceedings” not only applies to those cases in which there is a delay in the payment of the rent, but also to those in which the term of the lease has expired and the tenant has not vacated the property.

The amendments carried out in the Urban Lease Act refer to the possibility of the landlords terminating the lease and recovering possession of the premises if they need these for their own use or for their children’s or spouse’s use in the event of
divorce or nullity of the marriage. The reason for this change is to make the landlords’ obligations under the Urban Lease Act to grant leases of premises used as primary residential purposes for a minimum period of five years more flexible.

**Notary’s obligation to identify the actual owner of the property**

Although not only applicable to the real estate sector, certain special measures enacted by the Spanish Parliament in 2010 to prevent money laundering and the financing of terrorism, have had a great impact in all real estate transactions.

Under Act 10/2010, dated April 28, 2010, all transactions that may be related to money laundering or the financing of terrorist activities must be carefully examined, particularly if (i) the transaction has an unusually complex structure, (ii) there seems to be signs of simulation or fraud, or (iii) it has no apparent lawful purpose.

This special obligation falls mainly on notary publics, but also on financial entities, real estate promoters, auditors, lawyers, and other professionals working on real estate transactions.

More specifically, notary publics must identify the “actual titleholder” in all documents granted before them, since they legally cannot authorize any documents unless the identification has been carried out. It consists of establishing whether the parties act in their name before entering into the transaction. In the event of companies, the identification takes place by means of a declaration of the company’s legal representative before the notary public, stating the person that holds more than 25% of the company’s share capital, identifying the name, nationality and tax identification number.

**Compulsory issuance of a professional board certification (“visado colegial”)**

Before enactment of Royal Decree 1000/2010, dated August 5, 2010, all construction projects required a certificate from the Architect Association setting forth its compliance with the legal and administrative requirements. To reduce the cost of such projects and as an attempt to enhance the real estate market, the Spanish government issued this Royal Decree, which substantially reduces the scope for applying this requirement.

**2010 tax reforms**

During 2010, the Spanish government approved certain amendments that considerably affected the Spanish real estate market.

In July 2010, the Spanish government increased the Value Added Tax (VAT) rates to 18% for the general rate (from 16%) and to 8% for the reduced rates
(from 7%). The VAT rate accrued on purchases of dwelling premises is now 1% higher (from 7% to 8%). This is also the case with other real estate acquisitions (i.e., commercial premises, offices), which will apply the 18% VAT rate instead of 16%.

Additionally, Royal Decree 6/2010 of April 9, 2010, approved a reduced VAT rate on home refurbishment. Refurbishments must fulfill certain requirements to apply for the reduced VAT: the majority of the construction works should correspond to the building structure and the amount invested should be 25% higher than the acquisition price or market value. This change is important because it reduces the tax rate on building refurbishments from 18% to 8% if the requirements are met.

Another significant change approved in 2010 that came into force in 2011 relates to the tax credit for investment in primary dwelling premises (15% tax credit on acquisition costs up to €9,040). The Budget Act 2011 has abolished this regime for all taxpayers whose annual taxable base exceeds €24,108.20.

Court decisions:

**Non-retroactive application of statute limitation of two years under the Construction Regulation Act:** The Spanish Supreme Court, in a decision dated March 22, 2010, put an end to the doctrinal discussion and clarifies the different decisions adopted by the lower courts relating to the retroactive application of the statute of limitation of two years stated under section 18.1 of the Construction Regulation Act to those claims based on section 1.591 of the Spanish Civil Code. The Supreme Court denies the retroactive application of such limitation based on the following arguments: (i) the regime contained in the Construction Regulation Act and the ruin regime established in the Spanish Civil Code are different and incompatible, (ii) the transition regime in the Construction Regulation Act excludes any retroactive effect, and (iii) a retroactive application would entail legal insecurity.

**Clarification of the tax base of wind-farm projects:** The Spanish Supreme Court’s decision of May 14, 2010 resolved what had been a controversial issue for the doctrine and the jurisprudence: the inclusion or not in the tax base of the municipal tax on construction, installations and works of the cost of machinery and equipment of wind-farm projects. The Supreme Court confirms that such elements shall be considered as part of the tax base if they are considered inseparable technical elements of the works and are part of the project for which the works license has been filed.

**Bottom clauses in mortgage credit/loan facilities entered into with consumers:** The Court of Seville’s decision of September 30, 2010, (followed by another from the Court of León) was the first Spanish Court decision that declared that the bottom clauses, (i.e., clauses by which the financial entities impose minimum interest rates on creditors, to ensure protection against interest rate fluctuations), included in credit or loan agreements entered into by financial
entities with consumers, are abusive. The Court argued that such clauses are to be deemed general conditions and, therefore, are subject to the control of “abusiveness.” Furthermore, the Court considers that such clauses are void because of the lack of reciprocity in comparison with the “cap clauses,” which are aimed to protect creditors’ interests against interest rate fluctuations, included in loan or facility agreements, resulting, therefore, in an unfair and unbalanced situation for both parties. Although the decision is not final, since it has been appealed, it has had a large public impact and has had several replicas of claims in different Courts that are expected to be decided during 2011.

Part II - Market News

Spain’s economy entered into a recession in the second quarter of 2008. GDP fell by 3.7% in 2009 and by another 0.2% in 2010, making Spain the last major economy within the EU to emerge from the global recession. The government’s efforts to boost the economy through stimulus spending, extended unemployment benefits and labor market reforms did not prevent a sharp increase in the unemployment rate, which rose from about 8% in 2007 to 20% in 2010. The Spanish public deficit amounted to 9.2% of GDP in 2010 (which showed an improvement in comparison to the 2009 figures).

With the aim of improving trust within the financial sector, at the end of 2010, the government thoroughly restructured the savings bank sector, highly exposed to construction and real estate risks. The government has significantly reduced investment in public works to control the budget deficit, and the construction sector has showed concern about the impact this may have on the recovery of business. Figures from the European Statistics Office Eurostat show production in the construction sector dropped 36.5% from July 2009 to July 2010.

Generally, the Spanish 2010 real market improved in comparison to 2009. Although prices have been falling since the start of the crisis, distressed-asset transactions have not proliferated.

Residential real estate

2010 real estate figures on prices and transactions showed hesitant signs of recovery in comparison with 2009. There was a slight increase in sales twice in 2010: before VAT was increased in July 2010, and before the end of the year, coinciding with the abolition of deductions for investment in primary dwelling premises. The market recovery is hardened by the dry up of finance for both property development and private investors. Furthermore, Spanish banks have been dealing with a wave of repossessions of dwelling premises that are being marketed with discounts by the financial entities groups.
Retail

Demand for retail space in shopping centers decreased and prices generally dropped. Since the start of the crisis, there has been a decline in rental agreements, even in prime locations.

Industrial

Due to the crisis, demand for industrial property diminished as a consequence of companies cutting their expenses. The announcement of the reduction in the number of bonuses granted to the photovoltaic industry–finally enacted during 2010–slowed down new investments in this market.

Offices

2010 did not replicate 2009’s downward decline, and stagnation has been the general trend.

Hotels

During 2010, the Spanish hotel industry slightly recovered its performance levels. However, this did not lead more transactions. Only a few transactions in the form of sale and leaseback, or sale and management back, were reported during 2010.

About the authors

Gerard Hernández Colet has participated in numerous international transactions and has extensive experience in the real estate and construction sectors, as well as in international mergers and acquisitions. He is particularly experienced in financing, buying, selling and managing shopping centers and tourist resorts; establishing and expanding international distribution companies in Spain; and, on a corporate level, acquiring, merging, reorganizing and developing joint ventures of real estate and energy companies and groups.

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Recent Developments in Swedish Real Property Law

The Swedish legal environment regarding the transfer of real property is characterized by a high degree of transparency, mainly in the form of detailed and reliable public records on each property, and very limited formalities in relation to contracts and public registration. Although the property market has been adversely affected by the financial crisis of 2008, this impact has been less severe than in many parts of Europe and a slow recovery has been made during 2010. A number of important changes in legislation dealing with real property have also been enacted during 2010.

Restrictions on Transfer

Swedish law imposes few restrictions on the ownership and transfer of real property. There are no restrictions on foreign ownership. However, until the Spring of 2010 there were two important laws which restricted the acquisition of real property.

The first legislation was the Preemption Act (Lagen om kommunal förköpsrätt), which allowed Swedish municipalities preemption rights when real property situated within its boundaries was subject to a purchase. As of 30 April 2010, however, this law no longer applies.

The second was the Act on Acquisition of Property Taxed as Apartment Blocks (Lagen om förvärv av hyresfastigheter m.m.) which was intended to protect tenants from irresponsible landlords. To this end, the Act imposed an obligation to notify any transfer of this type of property to the municipality in which the real property was situated. The municipality then had the choice to either take no action or to refer the matter to the Regional Rent Tribunal (Hyresnämnden) for approval. This legislation ceased on 28 February, 2010.

Stamp Duty

The sale and purchase of real property in Sweden is subject to a governmental stamp duty. Although both parties to the transaction are jointly liable for the duty
under law, it is customary for the parties to agree that the costs shall be borne by the purchaser. Until 1 January 2010, the stamp duty amounts to 3%, if the purchaser is a legal entity or 1.5% if it is an individual, on the value of the real property. The value of the real property in this regard is deemed to correspond to the highest of the purchase price and the registered taxable value (Sw. taxeringsvärde). From 1 January 2011, however, the stamp duty for legal entities is increased to 4.25%. The new rate applies to transfers made from 1 January 2011.

There is still no stamp duty payable on the sale of shares in a company which owns real property or in case of a merger between two companies.

Rent for Residential Apartments

Until 1 January 2011, the general rent level for residential buildings was determined based on the rent charged by municipal-owned residential companies. This has changed from 1 January 2011, when in principle the open market will decide. The change in legislation includes provisions aimed at safeguarding the tenants from an immediate and sharp increase in the rent levels. Thus, the tenant may apply at the Regional Rent Tribunal (Hyresnämnden) for a temporary reduction of the rent.

Planning and construction of buildings

On 2 May, 2011 a new Planning and Construction Act enters into force. The new legislation is an attempt to simplify and making the planning and construction process more effective. It is also, however, intended to increase public control over the erection of buildings and similar structures.

Some of the more important changes include the following:

- Circumstances that may affect the environment and climate must be analyzed and taken into consideration during planning and construction.

- Municipalities must decide on an application for building permit within ten weeks from a complete submitted application. The law will allow the municipality to prolong this period of time only once, with a further ten weeks, if there is justifiable cause.

- Accessibility for disabled will be one factor to take into consideration when assessing an application for building permits.

- A decision regarding building permits can enter into legal force, which has not been the case previously.

- A citizen will be entitled to request a reply within four months from the request made to a municipality whether it intends to adopt a zoning plan for a particular area within the municipality.
The procedure for adopting zoning plans is simplified and where there have previously been a need to obtain different approvals from municipal bodies in relation to environmental matters and zoning regulations, respectively, these bodies must now coordinate their respective handling of the matters and make a joint decision.

About the author

Anders Forkman is a partner with Vinge in Sweden since 2001 and a member of the Swedish Bar Association. His practice includes real estate, corporate law and M&A, with clients among Swedish and international property companies, property developers and investment funds, as well as other financial institutions and governmental authorities.

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