CROSS-BORDER REAL ESTATE PRACTICE
WHAT IT IS AND WHAT YOU NEED TO KNOW
By Terry A. Selzer

Cross-border real estate practice sounds more exciting than just doing real estate, but what actually is it? Basically it involves a party from one country buying or leasing property in another country. A lawyer in such a transaction could represent a buyer, tenant, seller, landlord, bank, real estate broker, developer, architect, engineer, title insurance company, government entity, or other stakeholder. The buyer could be an individual, investment fund, asset-management company, or other entity. The property could be an existing building or land for development. Transactions may involve an individual seeking a vacation home in another country, a multinational corporation interested in acquiring land for establishing a factory or distribution center in a new jurisdiction, or a real estate investment fund seeking to acquire property in a country with higher yields than its own.

Cross-border real estate transactions can be fairly simple and straightforward, such as those involving one property with no legal restrictions preventing a foreign buyer from purchasing the property. The only differences may be the legal processes the foreign buyer is used to and language and cultural variations.

On the other hand, a cross-border real estate transaction may be extremely complicated, requiring the establishment of local companies, or for tax reasons a company in a third jurisdiction, and multiple agreements between multiple parties in multiple jurisdictions. The transaction may be done as a share deal rather than an asset deal. In a large project in Gdansk, Poland, for example, my firm completed several acquisitions of land for a Danish company as a share deal because under a local master plan an administrative land tax was imposed on all sales of land made within five years of the implementation of the plan. The foreign investor may enter into a joint venture with a local partner. The sales price may include share swaps or swaps of land plots. Additional

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Location, Location, Location

You know what real estate agents say: “Location, location, location.” If that maxim is true, then the world is our oyster, as members of the ABA Section of International Law cross international borders every day, in terms of both our presence and the international law we practice and develop.

For example, in August the Section held its annual Leadership Retreat in Berkeley, California, with over 120 attendees devoted to developing the Section’s excellence in international law, followed by the ABA Annual Meeting in San Francisco. Not to stay long in one location, later in August I was a guest speaker in Seoul, South Korea, (along with ABA President Steve Zack) at the Annual Korean Bar Association Meeting. In September, the Section again made its presence known in Moscow for our second annual Cross-Border Litigation Program (again with President Zack), followed by the Section Officers’ Conference in Chicago.

The grand finale to the fall schedule of events was at the ultimate location in Paris, France, for the Section’s Fall Meeting, which attracted close to 1,000 attendees from over 60 countries. The Fall Meeting was a resounding success not only because of its exciting programming and social events, but also because it reflected the truly international composition of our membership and our interests.

As many of you may have noticed, one of the Section’s strategic goals (www.abanet.org/intlaw/intproj) is to reach out to our growing national and international membership, identify cutting-edge areas of international law, and offer forums for members to exchange views and discuss international law. We are truly a cross-border Section with cross-border issues!

This issue of ILN is a great example of how we do this: Our relatively new Cross-Border Real Estate Practice Committee has shown itself to be at the forefront of breaking news and complex issues that have arisen as the financial crisis has taken its toll on real estate deals. This new committee and its cochairs, Duarte Athayde from Portugal and Terry Seizer from Denmark, deserve special thanks for their hard work, which made this one of our best up-and-coming committees.

This ILN is devoted to cross-border real estate investments and transactions from the perspectives of different countries and cultures. With articles on foreign investment in real estate and other sectors in Sweden, India, and Russia, one on cross-border loan foreclosures in Mexico, and one on investing in vineyard estates in Argentina, it is hard to imagine a more international perspective.

As part of our ever-expanding outreach, we partner often with sister organizations to offer our members new programming in venues worldwide. For example, in May 2011, the Section will cosponsor an International Association of Young Lawyers real estate program in Milan, Italy: Trends, Challenges, and Keys to Success for Retailers During and After Distressed Times. If you would like to contribute your expertise in this area as a speaker, please let me know by email. Visit our website to register and for information (www.abanet.org/intlaw).

As always, I encourage you to be in touch with your comments or questions. Remember, “Location, location, location!”
Cross-Border Real Estate Transactions

By Catherine M. Doll, Deputy Editor

In this issue of ILN, we focus for the first time on the challenging and fascinating subject of cross-border real estate transactions. We bring to you articles covering Argentina, India, Mexico, Russia, and Sweden. We hope you enjoy them!

The necessity of addressing the problems of cross-border real estate transactions has been looming on the horizon for quite some time. The international nature of the world makes it paramount for attorneys to be familiar with the issues that can arise in cross-border real estate transactions, business and consumer alike, and to appreciate the challenges they may face when working in multiple jurisdictions and unfamiliar cultures.

Partly in response to this necessity, this past year the ABA formed a new committee, the Cross-Border Real Estate Practice Committee, with a goal of advancing the law in areas "relating to the regulation of inbound real estate investment; financing, mortgages, and security issues; harmonization of title registration and transfer requirements; title insurance issues; and other matters of substantive real estate law." More about the committee can be found on the Section's website at www.abanet.org/intlaw.

Despite its recent beginnings, committee members have contributed substantiality to the current issue. In our cover story, Terry Selzer, cochair of the committee, analyzes issues that may arise in cross-border real estate transactions, drawing upon his extensive experience in multijurisdictional transactions. The author poses a series of questions one must ask to successfully navigate in different legal and cultural environments.

In the next article, Anna Gray and Kenneth Gray introduce us to the three contract types one can choose from when investing in real estate in Russia and highlight the pros and cons of each type. Benjamin Rosen takes us to the other side of the globe and examines the challenges of foreclosing on cross-border loans in Mexico. The author points out that although in theory Mexican law appears clear on the foreclosure process, the reality of foreclosing in Mexico is much more complicated. Marcela Knaup brings us the fascinating world of investing in "vineyard estates" in Argentina and also familiarizes us with the wine real estate market of Argentina.

By contrast, Anil Jariat and Amruta Kelkar examine the problems of foreign direct investment in real estate and slum redevelopment projects in India. The authors offer an overview of the law dealing with foreign direct investment and acknowledge that the real estate market in India is still underdeveloped. To conclude we bring to you an article by Anders Forkman, who discusses the process of transfer of real property in Sweden.

Of special note is the submission from Michael Marriott, a 3L at UC Davis King Hall School of Law. This piece explores whether the International Criminal Court’s jurisdiction can be expanded to become a universal jurisdiction.

As always, we welcome your articles, casenotes, and suggestions for upcoming issues. We hope you enjoy this issue of ILN, and we look forward to seeing you at upcoming ABA events.

Catherine M. Doll (cmdoll@debevoise.com) is a partner at Debevoise & Plimpton in New York City.
In Memoriam: Section Loses Two Prominent Members

One of the pleasures of Section involvement is interaction with accomplished lawyers who have made a difference. The Section has lost two such members. Former Section Chair Whitney R. Harris died of cancer in April at 97 after a long and brilliant legal career. Former New York State Bar Association President Steven C. Krane died of a heart attack in August at 53, cutting much too short an already outstanding record of accomplishment. Both men led exemplary lives and left lasting legacies with the Section and in the law.

Whitney R. Harris
Whitney Harris, who served as Section chair (1953–54) and as the ABA’s first executive director (1954–55), was a giant in the world of international law. Whitney was a member of the US legal team that prosecuted the top Nazi war criminals at Nuremberg after World War II (Ben Ferencz is now the sole surviving American former prosecutor). Whitney took the lead in prosecuting Ernst Kaltenbrunner, the senior surviving leader of the Nazi security police, assisted Justice Robert Jackson in the cross-examination of Hermann Goering, and interviewed Rudolf Hoess, commanding officer of Auschwitz, who confessed that 2.5 million people had been killed at Auschwitz (Hoess’s confession can be viewed in the Holocaust Museum in Washington, D.C.).

Whitney authored several books, most notably Tyranny on Trial, the first comprehensive treatment of the Nuremberg trials; it reviews the extensive evidentiary record that led to the convictions of 19 of the top 22 Nazis and highlights the role Nuremberg played in preserving the historical record of the atrocities promulgated by Hitler’s regime—of continuing importance given the prominence of certain Holocaust deniers. Whitney chaired the former Nuremberg prosecutors committee at the Rome Conference that created the International Criminal Court (ICC) and was a leading proponent of US accession to the ICC. Whitney spoke frequently and eloquently of Nuremberg and the importance of the ICC including at our Section’s commemoration of the 60th Anniversary of Nuremberg five years ago.

Whitney graduated from law school in 1933 and practiced law until joining the navy after Pearl Harbor (serving as a captain in intelligence). His 50 years of legal experience included service in private practice, as corporate counsel, and as a law professor. His generous philanthropy included the Whitney R. Harris World Law Institute at Washington University in St. Louis and the Whitney R. Harris World Ecology Center at the University of Missouri St. Louis.

Steven C. Krane
Steve Krane, the youngest president of the New York State Bar Association (NYSBA), was a partner and general counsel of Proskauer in New York. As NYSBA president, Steve solicited and coordinated the efforts of many lawyers providing legal assistance to families of those killed or injured in the terrorist attacks on September 11, 2001. Steve served in the ABA House of Delegates for nine years and joined the ABA Board of Governors last year. A world-recognized expert on legal ethics and professional responsibility, he was a lawyer’s lawyer who specialized in representing lawyers and law firms.

Steve was a former chair of the ABA’s Standing Committee on Ethics and Professional Responsibility, and was cochair of the Section’s Task Force on Outsourcing of Legal Services. Steve frequently quoted Winston Churchill: “We make our living by what we get. We make a life by what we give.” Steve was a brilliant lawyer, a wonderful family man, and a marvelous friend and companion with an outsized personality and many fascinating interests.
SECTION NEWS

In 2010, the ABA Section of International Law sponsored a student writing competition to encourage law student interest and participation in the practice of international law. Entrants were asked to write on the theme of "The Scope and Application of Universal Jurisdiction."

The two first-place winners were Eric Langland of Tulane University School of Law, New Orleans, Louisiana, for "Decade of Descent: The Ever-Shrinking Scope and Application of Universal Jurisdiction" and Michael K. Marriott of the University of California, Davis, King Hall School of Law, Davis, California, for "Potential for Future Growth of the International Criminal Court—Possible Expansion Toward Universal Jurisdiction," which appears below. Langland's essay appeared in the summer 2010 issue of International Law News. Both essays can be read on the Section's Student Headquarters website, www.abanet.org/intlaw/students/home.html.

Potential for Future Growth of the International Criminal Court
Possible Expansion Toward Universal Jurisdiction

By Michael K. Marriott

Having an intact legal system to prosecute serious criminal offenses is a luxury taken for granted in many parts of the developed world. While comprehensive domestic legal systems are preferable to the far more complex international legal systems, an unfortunate reality of the contemporary world is that there are no domestic legal systems in places where many of the most abhorrent and large-scale violent crimes occur. The International Criminal Court (ICC) was created to meet the need to prosecute these offenses. Limited in its jurisdiction on a variety of levels, the ICC's current docket includes some of the worst atrocities to take place in recent years. This paper provides a brief background on the ICC, describing the limits of the ICC's jurisdiction, and providing an overview of the cases currently on the ICC's docket. This framework sets the stage for an analysis suggesting how the ICC can work within the limitations of customary international law and remain true to its purpose as a court of last resort, while expanding its jurisdiction to make a meaningful step toward the exercise of universal jurisdiction.

A Brief History on the Formation of the ICC
The roots of the movement that ultimately led to the formation of the ICC can be traced back to 1948. Following the Nuremberg and Tokyo trials in the aftermath of the Second World War, the United Nations General Assembly first realized the need for an international court to adjudicate the type of atrocities that occurred during the war. The idea for such a court was discussed sporadically by the UN. Shortly thereafter, in the 1950s, the International Commission began work on potential statutes to form such a court. This work was ultimately short lived, as the state of global politics during the height of the Cold War made the international cooperation necessary for the institution of such a court a political impossibility.

The idea for an international court made its way back onto the world stage in the late 1980s when the then minister of Trinidad and Tobago, Arthur Napoleon Raymond Robinson, revived the idea as a possible means of dealing with the thriving international drug trade. Robinson's idea gained credence when the international community had to rely on ad hoc tribunals to try war crimes committed in Rwanda and the former Yugoslavia, thus highlighting the need for a permanent international court. This idea became a reality in July 1998 when the UN General Assembly overwhelmingly adopted the Rome Statute establishing the ICC. The Rome Statute became binding in April 2002, once it was ratified by the required 60 countries, and it came into legal force on July 1 of the same year. Unfortunately for Robinson, to this day the court lacks jurisdiction over the drug trade.

Limits on the Scope of Jurisdiction
While the scope of the ICC's jurisdiction is far-reaching, it is by no means universal. In general the court is designed to be used only as a last resort where a state is either unwilling or unable to conduct genuine proceedings under domestic law. Beyond being a court of last resort, the scope of jurisdiction of the ICC is further limited in a

Michael K. Marriott (mkmarrriott@ucdavis.edu) is a third-year student at the University of California, Davis School of Law.

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number of ways. These limitations fall into the three categories of temporal jurisdiction, jurisdiction of states, and jurisdiction of crimes.

**Temporal Jurisdiction**
The ICC is limited temporally by Article 11 of the Rome Statute, regarding “Jurisdiction ratione temporis.” Article 11 provides that the court’s jurisdiction is limited to crimes committed after the statute entered into force on July 1, 2002, for state parties that had ratified by that time. For state parties that ratified after the statute was already in force, temporal jurisdiction is limited to crimes that transpired after the state’s ratification date.

**Expanding the list of crimes under the ICC’s purview would be a substantial move toward universal jurisdiction.**

**Current Docket**
Although the court is restricted in the ways described above, it nonetheless has a number of cases currently on its docket. The court’s current caseload involves the prosecution of leaders of some widely publicized criminal offenses falling under the court’s Article 5 jurisdiction of crimes. These include crimes occurring during situations in Uganda, the Democratic Republic of the Congo, Sudan, and the Central African Republic.

**Uganda**
The ongoing ICC case in Uganda, Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, is focused on the prosecution of what were once the top five members of the Lord's Resistance Army. This case was reduced to the top four members as a result of the death of one of the original defendants, Raska Lukwia, who the pre-trial chamber decided to remove from the case. The currently named defendants include the alleged Commander-in-Chief Joseph Kony, the alleged Vice-Chairman and Second-in-Command Vincent Otti, the alleged Deputy Army Commander Okot Odhiambo, and the alleged Brigade Commander of the Sinia Brigade Dominic Ongwen.

**The Democratic Republic of the Congo**
The ongoing case regarding the Democratic Republic of the Congo was originally referred to the prosecutor of the ICC, Luis Moreno Ocampo, by the president of the Democratic Republic of Congo (DRC) regarding crimes committed within the territory of the state. Charges were filed following an investigation by the Office of the Prosecutor into the jurisdiction and admissibility requirements of the Rome Statute. The case was ultimately broken up into three separate cases: Prosecutor v. Thomas Lubanga Dyilo, Prosecutor v. Bosco Ntaganda, and Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.

Lubanga Dyilo is currently in trial as of January 26, 2009. Thomas Lubanga Dyilo is the alleged founder of the Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la libération du Congo (FPLC) and the alleged former commander-in-chief of the FPLC. Specifically, Lubanga Dyilo is allegedly responsible for war crimes including the enlistment and conscription of children less than 15 years of age.

Ntaganda is at the pre-trial stage, as Bosco Ntaganda remains at large. Ntaganda is the alleged deputy chief of the general staff of the FPLC and the alleged chief of staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu in the DRC. Similar to Lubanga Dyilo, Ntaganda is accused of conscripting and using children under 15 years of age in combat.

Katanga began trial on November 24, 2009. Germain
Katanga is an alleged commander of the Force de résistance patriotique en Ituri (FRPI), and Mathieu Ngudjolo Chui is the alleged former leader of the Front des nationalistes et intégrationnistes (FNI). The defendants are alleged to have jointly committed a number of both war crimes and crimes against humanity.

**Darfur, Sudan**

The ongoing cases regarding Darfur, Sudan, were referred to Prosecutor Ocampo by the UN Security Council pursuant to Security Council resolution 1593 (2005). Charges were then filed following an investigation by the Office of the Prosecutor considering issues of jurisdiction, admissibility, and interests of justice. The case was subsequently divided into three separate cases.

**Prosecutor v. Ahmad Muhammad Harun** (Ahmad Harun) and **Ali Muhammad Ali Abd-Al-Rahman** (Ali Kushayb) remain in the pre-trial stage as both defendants remain at large. Ahmad Harun is the former minister of state for the interior of the government of Sudan, as well as the minister of state for humanitarian affairs of Sudan, and Ali Kushayb is the alleged leader of the Janjaweed Militia. The defendants are alleged to have acted together, as part of a counter-insurgency campaign, in carrying out a number of attacks on civilian populations devoid of any rebel activities and not taking part in the hostilities.

**Prosecutor v. Omar Hassan Ahmad Al Bashir** remains in the pre-trial stage as al Bashir remains at large. Al Bashir is the president of the Republic of Sudan and is accused of seven criminal counts on the basis of his individual criminal responsibility including five counts of crimes against humanity and two counts of war crimes.

In **Prosecutor v. Bahr Idriss Abu Garda**, the defendant voluntarily appeared for a confirmation hearing from October 19–29, 2009, and he is not currently in custody. Abu Garda is the chairman and general coordinator of military operations of the United Resistance Front, and is criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes: murder, directing attacks against a peacekeeping mission, and pillaging.

**The Central African Republic**

The final case in the ICCs current docket relates to the situation in the Central African Republic, and it was referred to the court by the Republic’s sitting government. After reviewing information provided by the government in its referral, as well as from nongovernmental organizations (NGOs), international organizations, and other highly knowledgeable sources, the Office of the Prosecutor ultimately filed charges in the case of **Prosecutor v. Jean-Pierre Bemba Gombo**.

A confirmation of charges hearing was held from January 12–15, 2009, with the decision on the confirmation of charges announced on January 15. Bemba Gombo is the alleged president and commander-in-chief of the **Mouvement de libération du Congo**, and is being charged with two counts of crimes against humanity and three counts of war crimes.

**Potential for Expansion Toward Universal Jurisdiction**

While the jurisdiction of the ICC is limited in the ways described in “Limits on the Scope of Jurisdiction” above, it has proved a useful mechanism in the prosecution of offenses appearing under Article 5 of the Rome Statute, as described in “Current Docket” above. Nonetheless, considering the extent of jurisdictional limitations, there is significant potential for the court to grow. Whether the court will ever exercise universal jurisdiction is yet to be seen, but at the recent Review Conference held in Kampala, Uganda, from May 31 to June 11, 2010, ICC state parties, observer states, international organizations, NGOs, and other participants discussed proposed amendments to the Rome Statute.

**Potential Growth Areas for ICC Jurisdiction**

If the court is to move in the direction of expanding toward universal jurisdiction, this expansion will need to occur in the two areas of jurisdiction of crimes and jurisdiction of states. These two areas are addressed in the “Jurisdiction of States” and “Jurisdictions of Crimes” subsections above and come from the Rome Statute Article 12 preconditions for the exercise of jurisdiction. Due to the fact that there is no way to backdate the entry into force of the statute, it is not possible to modify the current temporal jurisdiction limitation described in “Temporal Jurisdiction” subsection above.

**Review Conference**

In regard to modifying and expanding the Rome Statute, Article 123 provides that there is to be a Review Conference seven years after the statute comes into force. While Article 123 leaves open the possibility of review of any amendments to the statute, it specifically lists Article 5 crimes as an item to be reviewed. As urged by Trinidad and Tobago at the formation of the original Rome Statute, the crimes of terrorism and drug trafficking will be considered for addition to the current Article 5 crimes.

**Potential for Expanding the List of Crimes**

Expanding the list of crimes falling under the purview of the ICC would not, by itself, create universal jurisdiction for the court, but it would nonetheless be a substantial move in that direction. One way to greatly expand the crimes falling under the purview of the court would be to supplement the Article 5 crimes with the domestic...
criminal law of the state party in question. Under Article 12 preconditions to the exercise of jurisdiction, the court exercises its jurisdiction over individuals through a particular state. This exercise occurs where the court gains jurisdiction over an individual defendant because the defendant committed a crime on the territory of a state party, the individual defendant is a national of a state party, or through the declared acceptance of the ICC by a state that is not a party to the Rome Statute. As the court's jurisdiction to prosecute an individual defendant attaches only through a state, it is theoretically possible for the court to identify a state whose domestic law can be applied in situations where a defendant violated a domestic law, though not an Article 5 offense, but the state is either unwilling or unable to conduct genuine proceedings under domestic law in domestic courts. Under such a framework, the ICC would greatly expand the crimes under its jurisdiction while remaining true to its purpose as a court of last resort.

Potential for Expanding the Jurisdiction of States
Moving beyond the court's potential expansion in the field of jurisdiction of crimes, in order to have universal jurisdiction, or at least make a meaningful move in that direction, the court must also expand its jurisdiction of states. As the court can only exercise jurisdiction over states that are either parties to the Rome Statute or those that officially lodge a declaration of acceptance of jurisdiction, expanding its jurisdiction of states is a much more difficult problem than expanding its jurisdiction of crimes.

Given the reality of the limitations, the court can theoretically expand its jurisdiction by expanding the Article 12 preconditions to the exercise of jurisdiction to include a category for state parties to the Rome Statute that are affected by a crime, Article 5 or otherwise, committed by a prospective defendant. The idea would be to give standing to state parties that suffer the international adverse effects implicit in the commission of large-scale crimes in a globalized world. An example would be to extend jurisdiction when an individual in a state that is not a party to the statute commits such large-scale and violent crimes that it causes refugees to spill into a neighboring country that is a state party. This suggestion strives to respect the customary international law concept of state sovereignty, while simultaneously working to expand the jurisdiction of the ICC in regard to states. It does so by operating under the basic premise of Article 12 preconditions to the exercise of jurisdiction permitting the court to exercise its jurisdiction, specifically under Article 12(2)(a), when the conduct in question occurred within the territory of a state party. Jurisdiction is permissible whether or not the person accused of the crime(s) is a national of a state party. As the court currently has jurisdiction over individuals who are not nationals of a state party, this suggestion merely expands the court's jurisdiction from crimes whose commissions occur within the territory of a state party, to crimes whose effects occur within the territory of a state party.

Limits of the Proposal
This proposal is limited in that it extends ICC jurisdiction in an indirect fashion and only where a state party is adversely affected by a crime committed within the national boundaries of a non-state party by a defendant who is not a national of a state party. Nonetheless, it would be a step in the direction of expanding the court's jurisdiction of states toward universal jurisdiction while simultaneously respecting the fundamental principles of state sovereignty.

Conclusion
Having examined the current jurisdictional limitations of the ICC, this paper balanced the intricacies of customary international law and the court's stated purpose to operate only as a court of last resort with the aim to expand the court's jurisdiction to provide universal prosecution for the most serious human rights abuses the world over. While the suggestions regarding the expansion of the court's jurisdiction in regard to crimes and states are admittedly limited, they are merely designed to operate as a foundation from which the Review Conference can work toward the goal of creating a more comprehensive system for the prosecution of international criminal offenses.
NEW! FROM THE SECTION OF INTERNATIONAL LAW

BOOK REVIEW

Guide to Foreign Law Firms, Fifth Edition

Nothing is more challenging to the international lawyer than the emergency telephone call involving a matter in a foreign jurisdiction where the attorney has no prior experience and no contacts. This compact guide, first published in 1988 and now in the fifth edition for 2010, includes basic contact information for law firms in countries ranging from Albania to Zimbabwe, with more than 100 other countries in between, including Belarus, Brazil, Cameroon, Croatia, Kazakhstan, Mauritius, Netherlands Antilles, Qatar, South Africa, Switzerland, Uganda, Venezuela, and Zambia. This practical reference lists one or more firms in each country (and in Canada a more extensive listing in each of 10 Canadian provinces). For each firm, the name, address, and website address as well as number of lawyers, areas of practice, and contact partners are listed.

The guide is based on the recommendations and personal experiences of members of the ABA Section of International Law. For the first time, the guide includes not only local law firms, but also some local offices of multinational firms. The Guide to Foreign Law Firms, Fifth Edition, is not an extensive compilation of all firms in any particular country and, far from being encyclopedic or unwieldy, is a useful tool for today’s busy international lawyer.

WORLD BAR NEWS

Israel Bar Association

By Nancy Kaymar Stafford

The Israel Bar Association was established under the Bar Association Law of 1961. This law allowed lawyers in Israel to incorporate and ensure the standard and integrity of the legal profession. The functions of the association are to (1) register, supervise, and hold examinations for legal interns, (2) license new lawyers and issue licenses to practice law in Israel, and (3) take disciplinary measures against lawyers and legal interns. Membership in the bar is mandatory for any lawyer who wishes to practice in Israel. On July 10, 2007, Adv. Geitron was elected president of the bar and will serve for a term of four years.

Year founded: 1961
Number of members: More than 35,000, with approximately 40% women. Israel has one of the highest ratios of lawyers to general population in the world.
Qualification for admittance: Requirements for membership in the Israel Bar Association are available at www.israelbar.org.il/uploadFiles/basic20requirements.pdf and include residency in Israel, proficiency in Hebrew, and two years of “articles” (tutelage).
Contact information: Linda Shafir, General Director
Location: 10 Daniel Frish St., Tel Aviv, Israel 64731
Telephone: +972-3-6918691
Fax: +972-3-6918696
Website: www.israelbar.org.il Here one can find information on legislative involvement, bar institutions, professional ethics, international relations, and pro bono programs as well as recent articles.
agreements to the purchase agreement may be required. In the project in Gdansk, to be able to develop the acquired land, we also negotiated a public-private partnership with the city of Gdansk for the development of infrastructure.

Agreements that may be translated should use clear, concise, and simple words to avoid misunderstandings.

There are several important things that anyone conducting cross-border real estate transactions needs to know. Here is a brief overview of some of the most important issues.

Understanding Property and Financial Statements
There are no formal legal requirements that a lawyer conducting cross-border real estate transactions must have, but a good working knowledge of real estate and what makes a property good for investment definitely helps. People purchasing real estate may or may not have such knowledge, so it is crucial to properly represent clients in a real estate transaction. It is helpful if a cross-border real estate lawyer can explain a floor plan, elevation, construction documents, and a site plan to clients.

One needs to know what makes a good building. Its location, quality of design, and construction are key elements. Whether it’s a green field (land that has not been developed) or a brown field (former industrial property) location being considered for development, one must determine whether there is enough space for the proposed development, if the proposed development is permitted under the local master plan, what other developments are planned in the area, and whether new infrastructure will be required. If infrastructure is needed, a key issue will be whether the government or development funds will cover part or all of the cost, or whether the private investor will be required to pay. If the land is polluted, who will be responsible for the clean-up must be determined. In some jurisdictions there may be incentives for establishing a business in certain locations.

In addition to understanding what makes a property and location good, one must be able to read and understand a financial statement and calculations of Net Operating Income, Yields, Deferred Tax, and Net Equity Value. All operating costs, including external maintenance and property management costs, should be included when calculating Yields. Also, all liabilities, including Deferred Tax, should be deducted when calculating the Net Equity Value of the property.

Strategy, Cross-Border Taxes, and Restrictions
Prior to a property purchase, it is important to understand the client’s strategy for making the purchase as well as the exit plan. There can be different tax implications depending on whether the client is planning to renovate the building, develop a new building to be sold to a third party, or develop property for use by its own business. The length of time the client intends to hold the property before selling it is another factor to consider. The client may plan to manage the assets and earn income from the rental of space in the building. Tax implications differ if income earned from the property or the proceeds of the sale of the property are transferred out of the country or are retained or reinvested in the country.

Different local and cross-border tax issues need to be considered in determining the best strategy and exit plan to follow. Tax treaties between countries are not all the same. Under some tax treaties there can be a difference between whether an investor is transferring income produced by the property or removing the proceeds of a sale of investment property to another country. Depending on the double taxation treaties between the countries involved, dividends or interest payments sent out of the country may be subject to withholding taxes. One should investigate to be sure that management and professional adviser fees are compliant with transfer pricing rules.

Terry A. Selzer (tas@cpflaw.eu), head of cross-border transactions at Stampe, Hauwe & Hasselriis in Copenhagen, Denmark, is cochair of the Section’s Cross-Border Real Estate Practice Committee.
REAL ESTATE TRANSACTIONS

It may be advantageous to set up special-purpose vehicles (SPVs) in the jurisdiction where the property is located, or in a third-country jurisdiction, to purchase the property. Particularly in the current market conditions there needs to be sufficient capitalization to establish any SPV.

With a foreign purchaser there is a need to determine if there are any restrictions on purchasing the property or buying the shares of a local company. Many countries have restrictions concerning foreign investment or ownership of certain types of property, such as agriculture, lands near military locations, or businesses that are considered vital to the national security. The World Bank Group’s Investing Across Borders project has just completed a survey in 87 economies around the world of restrictions on direct foreign investment. Their 2010 report indicates the restrictions and ease of investment in those jurisdictions (ibid.worldbank.org).

Due Diligence
Thorough due diligence is required prior to making a cross-border acquisition. A lawyer must explain to the client the need for legal, tax, environmental, and commercial due diligence. First, it is important to understand that what is considered normal to investigate and report on during due diligence in one country may vary greatly in another. In the United States and United Kingdom it is customary for lawyers representing a buyer, or tenant, to send detailed lists of questions and requests for the seller or landlord to make specific representations and warranties. In some countries such detailed demands will be seen as unreasonable. Further, some of the warranties given may not be enforceable in some countries. It may also be difficult for a prospective buyer to obtain certain documents or information about public planning that may affect the property.

A key question to be determined is whether there is clear title to the property. If there are liens or encumbrances on the land, they may have to be cleared to close the transaction. The kind of title can be different than what your client is used to. For example, in Poland there may be title of ownership or of perpetual usufruct. “Perpetual usufruct” is a right granted by the state treasury or local municipality that allows an entity to use the land for a specific term (40–99 years, but it can be renewed) for a specific use, and an annual fee is paid to the owner. In Russia there can be one title to the land and a separate title to the buildings on the land.

Immediately prior to the closing, certification that the selling entity has made all required taxes and social benefits payments must be obtained from different government agencies. Investigate to see if the seller has any liabilities or claims against it that could lead to liens being registered against the property before the conclusion of the transaction. The local master plan must be examined to be sure it permits the intended use or development of the property. If the local master plan needs to be amended to permit the proposed development, it is important to understand how difficult it is to change, or obtain an exception from, the plan. In certain countries restitution claims can be raised by heirs of pre–World War II owners. If the existing building has tenants, then lease and service agreements must be examined to see what rights tenants may have to prevent termination of existing lease agreements.

Market conditions of the area where the property is located need to be understood. They may be different than the market conditions the buyer is used to in its own jurisdiction. It is important to discover whether the

Analyzing a Property
The answers to the following questions will help in analyzing a property and its location.

- Is the location easily accessible by foot, car, or public transportation?
- Can a person easily find the entrance to the building?
- If it is a commercial building, can a vehicle easily access loading docks?
- If it is a high-rise building, are there sufficient elevators, and how long must one wait to take one?
- If it is a hotel, are the "back of the house" facilities efficiently spaced in the building?
- If it is a residential building, are services such as supermarkets, retail, hospitals, schools, and transportation convenient to the premises?
- How do the neighboring buildings and infrastructure measure up?
- Are there zoning restrictions on the use of the building?
- Do you like the look of the building?
- Are you comfortable exploring the building?
- Is the building well maintained? Is it efficient to maintain?
- Are there any environmental problems?
- Do the demographics of the area support the planned investment?
demographics of the area are favorable for the proposed business and how much competition there is.

**Different Legal Processes and Practices**

A lawyer handling a cross-border transaction must be aware of the differences in legal processes and practices between the two countries and be able to explain those differences to their client. The United States (with the exception of the state of Louisiana) and the United Kingdom follow common law. Much of Europe and many other countries follow a civil code. This results in differences in the drafting of property sales agreements. In the United States and United Kingdom more details may be specified in the agreement, whereas in many civil code countries it is not necessary to include as many issues in the agreement as they are covered by the civil code. For example, some countries have statutory limitations on the length of a commercial lease that cannot be altered by agreement of the parties. One must check whether local law permits agreeing to terms in a property sales or lease agreement different from statutory provisions.

While obtaining title insurance is quite common in the United States, there are countries where it is seldom used or is difficult to obtain. In Denmark, given the safety of its registration system, it is uncommon to use title insurance. On the other hand, in Russia it is difficult to obtain title insurance. In some countries, due to delays in registration of title, one should obtain gap insurance to cover the period from closing until registration. In Poland, due to delays in the registration of title in certain municipalities, it can be advantageous to enter into a preliminary sales agreement in the form of a notarial deed and register it.

In many civil code countries, transfer of property may only be done with a notarial deed. In such cases the closing must be held before a notary, and the entire sales agreement may have to be read, possibly with translation, before the notary and the parties. In Russia banks do not use escrow accounts, and many acquisitions of property are done through SPVs in off-shore locations.

**Cross-Cultural Differences, Language, and Currency**

A lawyer handling a cross-border transaction needs to be aware of cultural differences and the problems that can occur in translating agreements and reports from one language to another. This requires spending time in the jurisdiction where the property is located and learning legal and cultural differences. The more one knows about the cross-border differences between the parties, the better one will be able to assist the client in negotiating the transaction. Be aware of whether under the local practice the decision maker normally negotiates an agreement or delegates the task to a junior. When dealing with government authorities, many department heads may be required to sign off on a transaction before it can be agreed upon. This can be a time-consuming process.

When agreements will be translated into one or more languages, be careful to select clear, concise, and simple words to avoid misunderstandings between the parties. Realize that a direct translation of some words may have different legal implications, even for seemingly simple words such as the English word “warranty.”

Currency exchange rates can change dramatically. When conducting cross-border transactions, one must know in which currency the property will be bought and sold and, if lease agreements are involved, in which currency rents will be paid.

**Compliance**

An important role for a lawyer in a cross-border transaction is to ensure that there is proper compliance with corporate governance, investment prospectus, investors’ expectations, and transaction documents. This is especially important when trying to work out deals involving distressed property whose value has plummeted as a result of the financial crisis. Failure to comply with such codes or guidelines could result in some stakeholders challenging the new transaction.

With multinational corporations and investment funds involved in a cross-border transaction, it is advisable that counsel representing the parent client review the due diligence and transaction documents to ensure they comply with corporate governance rules. Problems can arise if counsel only reports to the management of the foreign subsidiary or affiliate. Often local counsel may be unaware of the parent client’s rules of representation and compliance requirements.

Cross-border real estate practice during good market conditions is an exciting and rewarding practice allowing one to use legal, creative, negotiating, and cross-cultural skills. In bad market conditions it is more challenging, requiring lawyers to develop creative solutions to problems. To do so, a lawyer must be able to maintain an overall view of the situation so that the solution to the most obvious problem doesn’t result in creating new problems.
INVESTING IN REAL ESTATE IN RUSSIA
WHERE TO BEGIN

By Anna Gray and Kenneth Edward Gray Jr.

The amount of foreign investment in Russia in 2009 was significantly lower than in 2008, decreasing 21%, or US$21,842 million, according to the Federal Service of State Statistics of Russia. In 2010, there are some positive indicators that the amount of foreign investment started to grow, but foreign investment in real estate remains relatively low, accounting for only 7%, or US$922 million, of the gross amount of foreign investment in the Russian economy.

The hardships and potential failures faced by foreign investors in Russian real estate result, to a degree, from the complexity of laws in this area, as well as from the restrictive nature of these laws. There are three main types of contracts a foreign investor willing to invest in Russian real estate might consider using: an investment contract, a contract of participation in shared construction, and a contract of simple partnership. It would generally be necessary for a valid investment plan to conform to one of these three legal structures. Each of them is designed to be used in a specific situation. And each has its upsides and downsides, as indicated in the following discussion.

Investment Contract
In the context of a real estate investment, this type of contract would be appropriate in two situations. First, this structure could be suitable when the investing party wants to use real estate for fund-raising purposes while maintaining a relatively passive role in development. Second, it may also be best suited to situations when the investing party wants to use real estate for commercial development. The law prescribes the participation of four main parties in investment activities: investors, investees, contractors, and users of the objects of capital investment. A party involved in investment activity can combine the functions of two or more parties; however, the investment contract itself is concluded only between an investor and an investee. Relations between other parties of investment activities can be regulated by other types of contracts.

Investors can make capital investment in real estate in Russia using their own or borrowed funds.

An investee is an individual or corporation authorized by an investor to serve in such capacity who is engaged in the completion of an investment project. Investees do not have the right to intervene into entrepreneurial activities of other parties unless otherwise stated in the contract.

Contractors are individuals or corporations performing work under a contractual agreement concluded with an investee. Contractors must have any special licenses that the law requires for the types of works under the contract.

Users of the objects of capital investment can be individuals or corporations (domestic and foreign), state and municipal authorities, foreign states, and international organizations, for whom objects of the investment activity are being created.

The main obligation of parties of investment activities is to use the funds allocated for capital investment only for their intended purpose. Other obligations have more of a general nature, such as to carry out investment activities according to Russian laws and international treaties, as well as established standards, norms, and rules. Investors have a prescribed set of rights, some of which are

- to determine the size and areas of investment
- to possess, use, and manage objects of investment
- to transfer their rights for capital investment to other entities under the contract

Parties to investment activity bear liability according to legislation of the Russian Federation and terms of the contract concluded among them. In practice this means that their liability comes under the general terms applied.
to the parties to entrepreneurial activity by civil legislation, if not otherwise provided under the terms of an investment contract. Thus, the main advantage of an investment contract is that its terms can govern in place of applicable regulations of entrepreneurial activity, as long as they do not contradict legislation of the Russian Federation.

An additional advantage of the investment contract can become available if the investment project is a “priority investment project” under Russian law. A priority investment project is an investment project, included on a special list approved by the Russian government, in which foreign investment totals at least 1 billion rubles (approximately US$32.4 million at time of writing) or an investment project in which the minimum amount of foreign charter capital in a corporation with foreign investors is at least 100 million rubles.

An investment contract’s main advantage is that its terms can govern in place of applicable regulations of entrepreneurial activity, if not contradictory to Russian Federation legislation.

For such investment projects, new laws and rules (in particular, new higher custom fees and federal taxes) that worsen the position of a foreign investor funding the project may become effective during the period of a project. If this happens, these new laws and rules do not apply during the payback period of the project, but not longer than for seven years. For this exemption to apply, however, the goods subject to custom fees and taxes must be used by an investor for the purposes of finishing an investment project, and the investor must fall within one of two categories of foreign investors: (1) an investor company with foreign investment funding a priority investment project or (2) an investor company where foreign investor(s) own more than 25% in the capital.

A foreign investment company can acquire the right to conclude a land lease agreement on a tender or auction. Federal authorities, for the purpose of regulating investment activity in the form of capital investment, provide the parties to such activity with favorable conditions on the use of land and other natural resources, if doing so does not contradict the laws of Russia.

There are also downsides to an investment contract structure. For example, normally a branch office of a foreign investment company, or of a commercial company founded in Russia where foreign investor(s) have at least 10% of the capital, which carries out the function of a main company, receives the same legal protection, guarantees, and benefits as a foreign investor. However, subsidiaries and affiliates of foreign investment companies do not enjoy such privileges. In addition, there are particular downsides for the investors working on priority investment projects. Should such investors fail to fulfill their obligations on finishing a priority investment project, they lose all their benefits and must return the amount they saved as a result of receiving the benefits.

Additional features of the investment company structure can be worth keeping in mind. For example, an investment project for which financing (in full or in part) is planned at the expense of the funds of the federal budget, budgets of the subjects of the Russian Federation, or municipal budgets is subject to audit for effectiveness of the budget funds’ use. The estimated cost of such investment projects is subject to verification. Other restrictions also apply to projects using funds from the federal budget. On a different note, property insurance for risk of loss, insufficiency, or damage to the property and risk of civil liability as well as business risk can be procured by a foreign investment company, if not otherwise provided by Russian laws.

Contract of Participation in Shared Construction
This type of contract is concluded between a developer (a corporation performing construction, alone or together with any other companies involved in the construction process) and a participant in shared construction (an individual acquiring rights to the premises in the building being constructed). It is suitable for those who wish to deal with individual customers acquiring real estate for their housing needs while maintaining an active role in the process of real estate development. A developer must hold property ownership or a lease for land, either of which must be duly registered and provided for in a deed or lease agreement.

A developer receives the right to start collecting the funds of participants in shared construction only after receiving a construction permit, publishing, distributing, or
submitting the project declaration (containing information on the developer and object of construction to-be), and state registration of the property rights to the land purposed for construction or of the lease agreement for such land.

To receive a construction permit, a developer must submit a number of documents to the competent authorities. For construction, reconstruction, and overhaul of an object of capital construction, these would include, for example:

- an application for a construction permit
- title documents for the land
- an urban development plan for the land
- a large number of other technical documents

For individual housing construction, the set of required documentation includes many of the most important of these items but excludes some of the more detailed and administratively restrictive technical documents.

A contract of participation in shared construction must be concluded between a developer and a participant in shared construction in writing, is subject to state registration, and comes into force at the moment of registration. There are a number of significant terms of this type of contract, in the absence of which the contract cannot be considered valid:

- a definition of the specific object of the shared construction, which is to be given to the participant upon completion
- the timeframe for giving such object to the participant
- the contract price, timeframe, and procedure for payment
- the warranty period for the object of shared construction (which cannot be fewer than five years)

Potential developers should note that Russian law imposes significant restrictions and liabilities on them. For example, penalties can be imposed on any developer that started collecting the funds of participants without having the right to fulfill its statutory and contractual obligations. Any such developer must immediately return to participants any funds paid by them to the developer. In addition, such developer must pay double the interest for use of the other participant's funds on the amount of funds paid by the participants. Over and above payment of these penalties, the developer must compensate for damages caused to the participants. There is also potentially substantial administrative liability for any such developer.

With regard to certain type of participants (individuals acquiring living premises for their personal needs), consumer protection laws are in effect. For instance, one such applicable safeguard establishes that, if a provider of works or services fails to provide such works or services within the time agreed upon between the provider and a customer, the customer can either set up a new time or charge the provider for each day of delay. Such daily charges can involve a penalty in the amount of 3% of the cost of work or service, up to the full cost of such work or service.

A contract of participation in shared construction is between a developer and a participant in shared construction (an individual acquiring rights in the building being constructed).

Potential developers should also be aware that they must bear the risk of accidental ruin or accidental damage to the object of shared construction before they transfer it to the participant. Developers can procure an insurance contract for entrepreneurial risks and later a property insurance contract for the building constructed. In addition, in case of a participant's death, the rights and obligations of such participant stated in the contract pass to the participant's heirs, and the developer cannot refuse such heirs from entering the contract.

**Contract of Simple Partnership**
A contract of simple partnership, or contract on joint activity, is concluded between two or more persons (partners), who combine their investments and act together without founding a corporation. If a contract of simple partnership is concluded only for business purposes, its parties must be sole proprietors, commercial organizations, or both.

A contract of simple partnership is usually concluded if there is a small number of partners in nonresidential construction, where payment can be made in-kind (by property), or if all partners share a common purpose and the
construction will be for the partners' own use. The contract of simple partnership has worked well in the joint construction of commercial real estate and in the area of construction investment. It can generally be suitable for those investors who wish to create real estate for their own purposes without necessarily transferring property rights to someone else.

The contract of simple partnership has worked well in the joint construction of commercial real estate and in the area of construction investment.

Investments of the partners are considered equal in amount, unless otherwise established by the contract between them. Monetary valuation of the investments is by agreement between the partners. Investments include everything that a partner contributes to the common cause—monetary assets, property, professional knowledge, skills and abilities, business reputation, and business connections.

The procedure for using the assets of the partnership is determined by the contract. Property, contributed to the partnership, which was owned by any of the partners prior to contribution, belongs to the partners in the form of joint ownership in common (joint ownership where each of the partners has a certain share). The same rules apply toward products, fruits of the enterprise, and incomes obtained as a result of joint activity of the partners. If a property belonged to the partners under a right other than ownership, it is used in the interests of all partners and is common property of the partners.

In the course of managing the affairs of the partnership each partner has the right to act on the partnership's behalf, unless otherwise stated in the contract between the partners. To perform each transaction in the course of joint management of affairs, consent of all the partners is required.

Profits received from the joint activity of the partners are distributed proportionally according to the value of the partners' investments.

The procedure for compensating expenses and losses related to the joint activity of the partners is determined by the agreement between them; if there is no agreement in this regard, each of the partners is responsible pro rata for the value of the partner's investment in the activity. If the joint activity of the partners is of a non-entrepreneurial nature, each partner is responsible for the joint contractual obligations with all of this partner's assets, in proportion to the value of this partner's investment in the activity; if joint obligations arise from the contract, the partners are liable for them jointly and severally. If the partners are engaged in entrepreneurial activities, they are jointly and severally liable for all joint obligations.

A Good Foundation
Real estate has always been a treasured possession. Some types can also be a very good form of investment. The three types of contracts that can be used in real estate transactions in Russia each serve a very specific purpose. The features of each contract discussed above can give one an idea of what type to choose and thus the right legal framework for one's project. However, choosing this framework is only the first step on the long way to completing the real estate project. In the course of completion there will be many practical issues to be resolved: acquiring land for a real estate project, dealing with Russian officials, choosing the right contractors, and many others. Knowing one's rights, obligations, and benefits is a good start for this process; and no good house is built without a good foundation.
FORECLOSING ON CROSS-BORDER LOANS IN MEXICO

By Benjamin C. Rosen

One of the main issues confronting the financial sector worldwide as a result of the economic and real estate market troubles is how to deal with developers and homeowners alike who, due to unfavorable financial and market conditions, are unable to timely repay loans.

This issue is particularly acute with respect to foreclosing on cross-border loans in Mexico. A cross-border loan may be defined as either (a) a loan that originates in one country and is disbursed in another or (b) a loan that is executed under the laws of (or the lender is domiciled in) one country but secured by collateral located in another.

To Foreclose or Not to Foreclose

Financial institutions and private lenders who have made cross-border loans in Mexico are faced with the following options when confronted with a delinquent borrower:

1. grant the borrower either a forbearance or a deferment
2. restructure the loan, so that, for example, interest and/or principal payment obligations are reduced, the term is extended, balloon payments are deferred, and/or the lender takes an equity interest in the project/property
3. threaten foreclosure or file for foreclosure then negotiate a settlement through which the borrower is given some sort of consideration for voluntarily “handing over the keys”
4. foreclose

Because of the well-known difficulties in foreclosing on loans and repossessing property in Mexico, and, in general, the perception that the Mexican judicial system is slow, unpredictable, and vulnerable to corruption, most lenders are opting for restructuring the loan, deferment, forbearance, or settlement.

Nevertheless, when confronted with a defaulting borrower in Mexico, it is advisable for lenders to look at all four options mentioned above and to weigh the pros and cons of each based on the specific circumstances. Indeed, the first step might be to grant a temporary forbearance, but if that does not work, then perhaps the parties will restructure the loan. And, only if both these attempts fail, might the lender decide to foreclose; and even then, he may end up settling by, for example, paying the debtor an agreed sum in exchange for voluntarily relinquishing his rights to the collateral.

In any case, before deciding on whether or at what point to foreclose, lenders are advised to consult with qualified Mexican legal counsel who can help them better understand (1) the type of Mexican security interest granted and the lender’s right to foreclose under Mexican law, (2) the likelihood of success, (3) the estimated time to obtain a final binding judgment and to enforce the judgment, and (4) the estimated costs involved.

The Foreclosure Process

Once the creditor ultimately decides to pursue foreclosure against a debtor in default, the first step will usually begin with a demand letter.

The Demand Letter

Mexican legal requirements for demanding payment under a promissory note or other debt instrument are much more formalistic than in the United States, and to ensure the demand letter will hold up in court, it will likely be necessary to grant local counsel a formal power of attorney to serve the demand letter personally and in the presence of a Mexican notary public or officer of the court. This formal demand letter is referred to under Mexican law as an interpelacion. Although a demand letter usually will not be necessary if foreclosure is sought under a guaranty trust, it is often advisable to serve one regardless in case the matter ultimately ends up in court.

Mortgage vs. Guaranty Trust

If the demand letter does not work, then the next step will depend on what type of security instrument is in place. The two most common ways of securing a loan with real

Benjamin C. Rosen (brosen@rosenlaw.com.mx) specializes in real estate law and cross-border transactions in San Jose del Cabo, Mexico.
property in Mexico are the mortgage and the guaranty trust. A mortgage is an agreement whereby the debtor or a third-party obligor grants the creditor the right to collect an amount due via real property put up as collateral, which right may be exercised if the debtor breaches its obligations pursuant to the credit agreement or note. Mortgage agreements must be executed before a Mexican notary public and recorded in the public registry of property in Mexico. Once recorded, the “world is on notice” that the subject collateral has been encumbered to secure the payment of the debt referenced in the mortgage instrument.

Borrowers wishing to stall or avoid administrative foreclosure often employ “legal maneuvers” that can result in delays in the foreclosure process.

On the other hand, a guaranty trust is an agreement whereby a debtor or third-party obligor (trustor/fideicomitente) transfers title to collateral to a Mexican trust institution (trustee/fiduciario) for the benefit of the creditor (beneficiary/fideicomisario). That is, instead of the debtor conserving title to the collateral and encumbering it in favor of the creditor, the trustee holds the temporary title to the property to secure the debtor’s compliance of the debtor’s obligations. Almost all trustees in Mexico are banks, and they must be authorized as such by the Mexican Banking and Securities Commission.

**Foreclosing under a Guaranty Trust**

Guaranty trust agreements contemplate an administrative foreclosure process. This process is carried out by the trustee without the intervention of a judge and therefore is designed to be significantly more streamlined than foreclosing on a mortgage, which requires filing a lawsuit and obtaining a judgment. Every trust institution will have its own administrative foreclosure template to be included in the trust agreement. Nevertheless, lenders can negotiate the specific terms with the borrower, subject to approval of the trustee. For purposes of analysis, we have included below an example template, which establishes the following administrative foreclosure process:

1. The First (Guaranty) Beneficiary/Creditor (“Creditor”) notifies the Trustee in writing, (a) indicating that Trustor/Debtor (“Debtor”) has defaulted on one or more of the obligations guaranteed by the Trust, (b) specifying the events and causes of default, and (c) requesting the sale of the properties to satisfy the debt.

2. The Trustee, upon receipt of the notice, shall within two working days thereafter proceed to notify the Trustor/Borrower that (a) he is in default and (b) he has ten working days to:
   a. Submit the documents evidencing he has fully paid and/or complied with the guaranteed obligations;
   b. Present any document evidencing an extension; or
   c. Pay the total debt due.

3. If the Trustor/Borrower does not comply with the foregoing, the Trustee will initiate the foreclosure process by proceeding to sell the properties under the following terms:
   a. The initial sale price of the properties will be the commercial value determined by an expert appraiser selected by the First Beneficiary/Creditor;
   b. The Trustee will then, based on instructions from the First Beneficiary, either: (a) hire a realtor selected by the First Beneficiary to broker the sale of the properties at the appraised value; or (b) hold a public auction to sell the properties in the manner described below;
   c. If the First Beneficiary chooses to hire a realtor, the realtor will promote the sale of the collateral for at least 90 days. If the properties are not sold at the appraised value during this time, the First Beneficiary may instruct the Trustee and/or the realtor (as the case may be) to: (i) continue promoting the sale for up to four additional 90 day-periods, in each instance decreasing the appraised amount by 10%; and/or (ii) proceed with the auction;
   d. If the First Beneficiary elects to hold an auction (either from the outset or subsequently if selling through a realtor was unsuccessful), the auction shall stipulate a floor price of 80% of the appraised value;
   e. Should the properties not sell in the first auction,
a second auction shall be held, at a price equal to 20% less than the price of the first auction;

f. Should the properties not sell in the second auction, a third auction shall be held, at a price equal to 20% less than the price of the second auction;

g. Should the properties not sell in the third auction, the Trustee shall act upon the First Beneficiary's [unilateral] instructions (which instructions could include, e.g., a request to transfer the property definitively to the First Beneficiary or its assign in lieu of payment of the debt).

Despite the relatively quick and straightforward process, "legal maneuvers" of recalcitrant borrowers can result in unforeseen delays and risks in the foreclosure process. One of the tactics most commonly employed by borrowers wishing to stall or avoid administrative foreclosure involves filing a lawsuit to enjoin the trustee from transferring title without a court order. Although in theory this should not be possible because the trust will stipulate that a court order is not necessary, in practice, trustees are very risk averse, so as soon as they are sued, tend to "freeze up" and refuse to do anything further without a court order, thereby rendering the administrative foreclosure process inoperative. The legal argument of the borrower in these cases is often that the trustee transferring the property to a third party without the judge's intervention is tantamount to depriving the borrower of property rights without due process of law and is therefore unconstitutional.

These arguments, however, are not always successful and usually require that the trustee has committed some sort of error in following the administrative foreclosure process outlined in the trust agreement or the trust agreement does not obligate the trustee to notify the borrower of the default and give him an opportunity to respond by showing he is not in default.

Moreover, borrowers considering "crossing the line" and refusing to abide by the agreement can be subject to a claim for damages, attorney's fees, and costs for filing a frivolous lawsuit or acting in bad faith. Indeed, although employing the tactics above (or others) will surely result in prolonging the foreclosure process, in almost all cases it will not change the ultimate outcome (all the borrower is doing is delaying the inevitable and incurring expenses in the meantime). In the end, then, borrowers choosing to fight foreclosure are doing so only with the goal of improving their negotiating position with the creditor, often with an eye toward forcing the lender to consider restructuring the debt or granting an extension or forbearance.

Despite the practical risks associated with foreclosing, if the borrower is willing to proceed in good faith and abide by the terms of the guaranty trust agreement, then indeed the process should be a quick and expeditious one. Accordingly, guaranty trusts have become quite the norm, particularly for cross-border lenders.

Six months to three years is a reasonable time-frame to achieve foreclosure under a guaranty trust, depending on whether and how much the borrower fights and how effectively the process is managed by the trustee and creditor.

**Foreclosure of a Mortgage**

If the creditor has a mortgage and the debtor defaults, then to foreclose (assuming the mortgage has been properly granted before a notary public and recorded before the

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public registry of property in Mexico) the creditor must file a Special Mortgage Proceeding (Juicio Especial Hipotecario). Once the creditor obtains a judgment, the collateral will be sold at a judicial auction pursuant to the procedure established in the applicable civil procedure code.

The special mortgage foreclosure proceeding (from filing until judicial sale is final) may take between one and five years to complete, depending on the actions or legal maneuvers employed by the borrower’s counsel.

**The Pledge: An Additional Layer of Security.** In addition to guaranty trusts and mortgages, many lenders are mandating that borrowers pledge their shares in the borrowing entity and/or the receivables/rents deriving from the collateral. The pledge may be the creditor, a third party, or the same trustee holding the collateral under the guaranty trust. If the later approach is taken, in the event of a default, not only can the creditor proceed to administratively foreclose on the real property collateral but also can instruct the trustee to deliver the shares of the debtor company, thereby giving the creditor control over the debtor and preventing the previous decision makers from challenging process.

In theory the pledge guaranty offers the creditor significant additional security, but in practice sometimes the creditor is faced with similar enforcement problems as those mentioned above (i.e., the borrower sues to enjoin the trustee from handing over the shares).

**Eviction and Amparo.** After the collateral has been sold or awarded to the judgment creditor—either pursuant to the terms of the guaranty trust or the mortgage—the party who was awarded title might still have to sue to evict a third party such as a lessee or laborers in possession.

Under the Mexican Constitution and federal amparo law, a private party may bring two types of amparo suits to enjoin an official state act (or omission):

1. an amparo appeal of a decision of a lower court (similar to a habeas corpus proceeding but not limited to cases in which the appellant is incarcerated or otherwise restrained of his liberty), which may be brought only after all other judicial or administrative remedies have been exhausted, called an amparo directo
2. a claim brought at the federal trial court level to enjoin the activity of an individual or body acting under color of law claimed to have violated the plaintiff’s individual rights (akin to a civil rights claim to enjoin state action), called an amparo indirecto.

Furthermore, in some instances, the debtor who has lost his property will file an amparo indirecto to stay the enforcement of the new owner’s title that arose out of the foreclosure process. That is, oftentimes debtors will lose the property either administratively (guaranty trust) or judicially (foreclosure trial, followed by judicial auction), and then still fight the case via an amparo, which may be filed to enjoin any state action alleged to violate a party’s civil rights. For example, in the case of the guaranty trust, the debtor may claim that the administrative foreclosure violated his right to due process, thereby forcing the creditor to pursue judicial foreclosure notwithstanding the trust agreement. On the other hand, in the case of a mortgage where a default judgment has been rendered based on the defendant’s failure to appear, the debtor may allege that he was not properly served, thereby nullifying the trial and requiring the creditor to begin the process anew. In both instances, the amparo is typically filed when the creditor/new owner attempts to take possession.

**Minimize Risks and Unknowns**

Based on the foregoing, one can conclude that in theory Mexican law affords a relatively clear and expeditious foreclosure process, both under guaranty trust agreements and special mortgage foreclosure proceedings. However, in practice a significant gap often exists between foreclosing in theory and in reality. Accordingly, the time and expense involved in foreclosure in Mexico will vary significantly from case to case and from debtor to debtor.

To help minimize the risks and unknowns associated with foreclosure in Mexico, it is advisable to retain qualified Mexican legal counsel with experience not only in preparing cross-border loan documents, security instruments, and guaranties, but also in enforcing them. Once the debtor has defaulted, consider all options before proceeding to foreclose, including restructuring the loan, granting the borrower a deferment or forbearance, or negotiating a settlement through which the borrower is given some sort of consideration for voluntarily “handing over the keys.” If foreclosure is inevitable, have a clearly mapped out legal strategy well in advance, taking into consideration possible moves by opposing counsel.
INVESTING IN VINEYARD ESTATES IN ARGENTINA

By Marcela B. Knaup

Around 1995 Argentina began to produce export-quality wines made from Malbec, a grape not widely known, and the world began to take notice. Later the global financial crisis combined with the QPR (quality-price ratio) of these wines made them highly attractive to wine aficionados and novices alike. Recently, a booming wine industry and a stable real estate market have opened the door to a new business that merges both wine and real estate: vineyard estates.

Now individuals who want to further their Argentinean wine experience buy land in Argentina and make wines under their own label. Vineyard estates appeal to people that yearn for their own Argentinean wine without having to commit to the responsibilities of being a grape grower. Owner involvement can vary according to the desired degree of participation in the winemaking process. Those who wish to engage in management of their vineyards and wine making can do so, and others who only want to enjoy wine allocations made from vineyards growing outside their homes can do so as well. There are two main forms of investment: managed vineyard estates and vineyard estates in wine country clubs.

Managed Vineyard Estates
A managed vineyard estate is basically a small vineyard (3 to 10 acres) that is part of a subdivision of vineyards with common management. These estates are most suitable for investors who need a relatively small allocation of high-quality wine for business purposes. They make it possible for investors to own vineyards in a foreign country without being directly involved in the process of planting and monitoring. These small vineyards become productive by sharing water resources, irrigation, costs of vineyard management, and winery set up and operations.

Another appealing feature is that they allow owners to be actively involved in the process of grape growing and wine making if they wish. The vineyards can be planted, monitored, and harvested following their owners' requests. After the harvest, management can handle vinifying the grapes at an on-premise facility and assisting with labeling and shipping. Owners can also choose to be involved only in certain parts of the process, such as blending or label design, or not to be involved at all. Wine can simply be readied for pickup or shipment at the owners' requests.

Estates in Wine Country Clubs
Wine country clubs and wine resorts are growing at a fast pace in the wine lands not only of Argentina (for example, Mendoza, Salta, Patagonia) but also of Uruguay. These investments are aimed mostly at a particular lifestyle, but nothing prevents owners from commercializing their grapes or their wines. Country clubs in general do not offer the possibility of being actively involved in the process of grape growing; some of them only give a wine allocation to land-owners. They also offer a piece of land within the country club for an investor to build a house. This is a distinctive feature: generally around the world, and especially in places with strict land-use laws like Napa Valley, wine country clubs do not include a place to build a house. Some of them do not even allow ownership of the vineyards.

Given the affordability of premium land in Argentina, no expense is spared on amenities. Buyers will find typical wine country club services ranging from spas, restaurants, winery access, and special tasting rooms, to 18-hole golf courses, polo fields, tennis centers, health clubs, and 5-star hotels. These developments are in prime locations. Some are set in the desert, and others have views of the Andes. Many are built following sustainable and biodynamic practices. Some clubs allow owners to rent their houses for tourism. Overall, there are many options to accommodate different needs.

To attract prospects, they offer special features such as the participation of celebrated winemakers like Alberto Antonini, Michel Rolland, Pablo Gimenez Rili, Santiago Achával, or even Rob Lawson, the man behind Napa Valley cult wines Colgin, Staglin, and Bryant Family. No matter

Marcela B. Knaup (marcela@vinoadvising.com) is a lawyer licensed in California and Argentina specialized in international transactions and wine law.
how interesting these wine and real estate businesses may seem, one might ask why an investor would buy property in a high-risk country like Argentina. Simply put, it is less risky than other investments in the country.

**Real Estate Market**
Because access to credit is extremely limited, the Argentinean real estate market is considered a cash market. Argentines lack confidence in their government. Taxes are affordable, but prices are set in US dollars to avoid the instability of the Argentinean peso. Governmental measures like the dollar-Argentinean peso parity, and its subsequent reversal, as well as the famous “Corralito” in 2001 (when Argentines were not allowed access to their money), persuaded people not to leave their savings in banks. Inflation and general economic instability followed, and Argentines turned to real estate as a safe haven they call “brick investments.”

The Wine Industry
The main reason to invest in Argentinean wine is evident: Quality is constantly improving and demand is growing worldwide. The Argentinean Institute of Viticulture estimates that the demand for Malbec will rise 15% or more annually. In fact, new investment will only cover 4% of the demand, so there is a real need for additional capital.

The “Wine Real Estate” Market
Vineyard estates are particularly interesting due to the presence of quality soil for viticulture at highly competitive prices. In Argentina, the price per hectare (approximately 2.47 acres) of premium land in Mendoza (Lujan de Cuyo) averages US$30,000 to US$40,000 depending mostly on water accessibility. Other wine regions like the Calchaquí Valley in Salta or Alto Valle de Río Negro in Patagonia offer even less expensive opportunities. Planting a vineyard has an average cost of US$17,500 per hectare in Mendoza.

Comparable properties in Napa Valley, Bordeaux, or Tuscany can cost 10 times more. For example, Napa land values, the highest among US wine regions, are based on wine appellation, or a property’s geographical boundary, and soil quality. Average prices are US$150,000 to US$200,000 an acre for a vineyard planted with red varieties such as cabernet sauvignon and US$115,000 an acre for white grapes such as chardonnay. The most desirable sites in Rutherford and Oakville can fetch US$250,000 an acre. Although investing in Argentina is risky, the relatively safe real estate market and booming wine industry make this type of vineyard investment attractive, whether for commercial or private purposes.

**Hidden Costs of Foreign Ownership**
Foreign land ownership in Argentina is only restricted for national security purposes, such as limits on owning land near national boundaries. There are no travel restrictions for citizens of most countries. Passport holders from the United States are not required to obtain a visa to travel in Argentina for business or vacation purposes, and foreign investors are generally welcomed.

Political uncertainty has existed since the first military coup in 1930, but Argentina has been a democracy since 1983 and there have been no recent violations of human rights. Aside from the risks of ever-present economic instability, the main hidden costs for foreign investors derive from the laws governing banks and the labor force. In Argentina employees are protected by labor laws and
powerful unions that shield them. For an employer, firing an employee is very expensive and winning a labor trial is almost impossible. In most cases the courts will protect a particular employee rather than a company.

These risks, however, do not affect vineyard estate investors. Because transactions are either conducted in cash or financed by developers or through foreign banks, no local bank involvement is needed to invest in real estate. Investors do not need to hire a workforce directly and therefore do not have to deal with employees or potential labor disputes. Real estate investment therefore avoids both of these frequently unanticipated areas of expense. Accordingly, unforeseen risks of owning a small vineyard or a property in a wine country club are minimal.

Legal Framework
Although a full study of the legal framework for vineyard estates is beyond the scope of this article, a few points should be highlighted. Land-use laws in Argentina’s wine regions are lax, and urban planning is inadequate. Consequently, the citizens of Mendoza’s wine country are concerned about urban sprawl. They are seeing old land that was historically used for agriculture converted into industrial and urban areas. In May 2009 the Province of Mendoza took an important step toward protecting the soil and encouraging sustainability by enacting a new Land Use Law, n. 8051. Because vineyard estates are a mix of agriculture and urban development, they mesh well with the precepts of the new law and should allow the province to develop while retaining its global standing as fertile wine country.

Vineyard estates currently lack specific regulation. Wine resorts, country clubs, and other forms of private residential properties are subject only to the general real estate law (Derechos Reales). According to art. 75, inc. 12 of the Argentine Constitution, it is within the competence of the Congress to legislate this area. So far, the national legislature has not made use of this authority to enact specifically applicable legislation.

To fill the void, some provinces like Buenos Aires have enacted their own laws through use of their power to police urban affairs. Yet no such specific provincial laws have been adopted in Mendoza, even if that is where most of these new developments are located. Developers therefore use hybrid contractual forms based on the law governing societies (corporations) and associations, agricultural law, and horizontal property laws. Although contracts regarding country clubs and similar urban development forms are protected in Argentina by the Consumer Defense Law 24.240, art. 1, it is important to review proposed titles (deeds) and contracts before entering into any such legally complex arrangement.

Attractive Investments
Vineyard estates in Argentina cater to people who want a lifestyle that includes making their own wine without the hassle and risk of owning a winery, or they at least want a chance to develop a personal label. Favorable exchange rates coupled with the ability to commercialize wine production and even rent one’s property for tourism make these vineyard estates attractive foreign investment opportunities. The unique benefit such an investment affords, however, is the full experience of growing, producing, and enjoying a wine from its origin to the finished bottle.

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FOREIGN DIRECT INVESTMENT IN INDIAN REAL ESTATE AND SLUM REDEVELOPMENT PROJECTS

By Anil Jarial and Amruta Kelkar

Before economic liberalization in India, any form of foreign investment in the country was prohibited—whether in a company, a partnership, a proprietary concern, or any other unincorporated entity, such as a trust engaged in the real estate business. Until then only non-resident Indians (NRIs) and persons of Indian origin (PIOs) were permitted to invest, in a restrictive manner, in the real estate sector. The term “real estate business” is used to mean dealing in land and immovable property to earn a profit or income therefrom. Only with the 2005 passing of Entry 23 (Transfer of Issue of Security by a Person Resident Outside India) of the Foreign Exchange Management Act, Schedule 1, Annexure B was foreign direct investment (FDI) permitted in the real estate sector in its true sense by the Reserve Bank of India.

Entry 23 governs certain factors affecting FDI in India’s real estate sector:

1. Minimum area to be developed under each project
2. Minimum capitalization norms that must be fulfilled (“capital” means equity shares, preference shares, convertible preference shares, and convertible debentures and includes only paid-up capital and not any premium received)
3. Time period when funds may be brought into India
4. Time period within which project must be completed
5. Restrictions on sale of undeveloped plots of land
6. Lock-in period for repatriation of original investment

FDI in Indian real estate has helped make the sector more organized. This sector has also seen increased professionalism and the creation of a healthy and competitive market environment for both domestic and foreign players. However, foreign investors face a number of problems while investing in Indian real estate. Because of the many approvals required, it is not possible for the foreign investor to undertake real estate projects without an Indian joint-venture partner—even though 100% FDI is permitted. One reason for this is that India’s real estate markets are far less structured and developed than those of Western countries. Time and again successful ventures prove to be those where the foreign investor supplies the capital while the onus of completing the real estate development project lies with the Indian joint-venture partner.

Another rationale behind engaging an Indian joint-venture partner is the fact that Entry 23 requires the area developed to be equal to or greater than 100 acres. In urban areas it is next to impossible to find such large plots of land. In rural areas, where large plots of lands are available, they are either fragmented (and tracing the validity of the owner’s title is an expensive and time-consuming process) or they are agricultural and need to be converted into nonagricultural land (in itself a long and tedious process).

Foreign investors also need to worry about essential infrastructure—electricity, water, and roads may not come through on schedule. Given the language used regarding lock-in of FDI, the market had taken a view that, while foreign investors in Indian real estate could not sell their stake to resident Indians, they could sell their stake to another foreign investor before the expiry of the lock-in period prescribed, which is three years from the time of the original investment. However, it has now been purportedly clarified that even the latter cannot be done. It is still unclear whether the minimum lock-in period is applicable only to the minimum capitalization amount brought into India, or whether it is applicable to both the minimum capitalization amount and to the funds brought into India in excess of the minimum capitalization amount.

A plain reading of the provisions of Entry 23 do not allow for a clear interpretation of whether the lock-in period for the repatriation of original investment kicks in from the time the entire investment is made or from the time the

Anil Jarial (a.jarial@jclex.com) is a partner and Amruta Kelkar (a.kelkar@jclex.com) is an associate at Juris Corp in Mumbai.
minimum capitalization amount is transferred to India. Further, it is not clear whether the time period stipulated for bringing the funds into India (six months) applies to the whole amount of FDI or to the minimum capitalization amount alone. The provisions also stipulate that the funds must be brought in within six months of commencement of business by the company, but it is not clear what happens when FDI is made in an existing operational company. The meaning of “commencement of business” is not clear in the case of a private company when no certificate of commencement of business is issued by the Registrar of Companies. Finally, it is unclear whether foreign investment can be made in real estate projects after they have commenced.

Regarding slum rehabilitation projects, it is advisable to understand the concept and implementation of slum rehabilitation projects before investing. Foreign investors must comply with the conditions applicable to FDI in the real estate business, along with the requirements established by slum rehabilitation legislation.

Slum rehabilitation is primarily prevalent in Mumbai and Gujarat. The Slum Rehabilitation Authority (SRA) usually, on being satisfied that certain conditions are met, declares the area to be a “Slum Rehabilitation Area.” The Development Control Regulations make a provision allowing for additional floor-area ratio for the redevelopment of a slum. Those inhabitants whose names and structures appear in the electoral roll prepared with reference to the stipulated cut-off date or a date prior thereto and who are actual occupants of the hutments become eligible for the slum rehabilitation scheme. To take benefit of the slum rehabilitation scheme, 70% or more of the eligible hutment dwellers are required to show their willingness to join the scheme.

A proposal for a slum rehabilitation scheme can be made before the SRA by either the slum dwellers or the cooperative housing society formed by them or the developer appointed by such society or the owner/s of the land sought to be redeveloped. The Office of Collector (Encroachment) (Slum Improvement) reviews such a proposal. The proposal is to be accompanied by an application, in accordance with Annexure I and certificate of the collector (encroachment), Annexure II, a list of slum dwellers, and thereafter Annexure III, the financial capability of the developer. After finding the proposal satisfactory, the SRA will issue a Letter of Intent (LOI), Intimation of Approval (IOA), and Commence Certificate (CC).

To invest in slum rehabilitation projects, the investor must bear in mind the following issues:

1. Any slum dweller can challenge the issuance of an LOI, IOA, and CC before the High Power Committee and also by way of Writ Petition in the High Court challenging the validity and legality of the rules, regulations, and policy circulars/directives issued under the statutory provisions or the vires of the statutory provision. The orders passed by the High Power Committee are often also challenged by way of Writ Petitions (and this is something a foreign investor should have covered in a due diligence review).

2. For implementation of the scheme, vacant and peaceful possession of the respective huts is required. If possession is not granted, the competent authority may direct the eviction of the occupant. Any person aggrieved by the order may appeal to the administrator and divisional commissioner, Konkan Division, Mumbai within a period of 30 days.

3. The slum dwellers whose names do not appear in the list of Annexure II may file an application before the competent authority (SRA) to get their names included in the list.

4. There can be a series of court cases for redevelopment and for implementation of slum rehabilitation schemes between cooperative housing societies, developers with regard to submission of their proposal, and support of the cooperative housing society. Again, a foreign investor should have a comprehensive assessment and search carried out.

5. The slum rehabilitation scheme can be implemented on a plot of land belonging to the government or even privately owned. If the plot of land is privately owned, the foreign investor should, through due diligence, ascertain whether the consent of the owner has been obtained.

LOOKING FOR MORE RESOURCES ON CROSS-BORDER REAL ESTATE TRANSACTIONS? SEE PAGE 29
A PRACTITIONER’S GUIDE TO REAL PROPERTY TRANSACTIONS IN SWEDEN

By Anders Forkman

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.

Records and Registration
The basis for the Swedish system of land registration is the property unit. All land in Sweden is divided into property units, and each unit is given a specific name. Collaborating with the municipality in which the property is situated makes it possible to identify each property unit.

Information on the property units is registered with the Swedish Land Register (Fastighetsregistret), a nationwide and computerized register available to the public. The Land Register is split into five areas: (1) a general section with maps and documentation regarding the formation of the property; to the extent available, (2) a section on the extent of properties, mortgages, and other encumbrances, (3) a section with addresses of each property unit, (4) a section on buildings and other constructions on the property, and (5) a section relating to taxation of the property.

The Land Register is maintained by the National Land Survey of Sweden (Lantmäteriet) and its content can be quite exhaustive. Not only are the boundaries of the property units and their ownership registered, but the Land Register also contains information on the property's address, area, mortgages, easements, tax assessment value, purchase price of the latest transfer of the property, and certain ongoing or past procedures relating to the property, such as amalgamations, re-allocations, and similar procedures.

Although a buyer of real property is under an obligation to register his ownership with the Land Register within three months of the transfer, failure to do so will not render the contract invalid. But even if a valid contract in itself will afford the buyer with a reasonable degree of legal protection of his title, registration is a requirement in certain other respects, such as when applying for mortgages.

Application for registration of title is uncomplicated and made at one of several Land Register Offices, each with jurisdiction over a specific geographic area. The application is associated with a small administrative fee. There is, however, stamp duty levied on the transfer of real property as detailed below.

Another important aspect of registration is that the contract by which the title passes must be filed with the application and thus becomes public. For this reason, among others, it is common to have two contractual documents, one being the purchase contract with all terms and conditions of the sale and the second being a much simplified Bill of Sale, signed when all conditions are fulfilled and containing only the information required by law (basically the names of the seller and the buyer, the name of the property, a declaration of transfer, the purchase price, and the date on which transfer of title will take place).

Encumbrances such as leases and easements can also be registered, thereby securing them protection against a new owner of the property.

The information contained in the Land Register is generally very reliable, albeit that registration of title does not guarantee that the registered owner holds valid ownership. Consequently, the concept of title insurance so common in certain other jurisdictions is in all practicality unknown in Sweden.

Sale of Real Property
With respect to formalities, the contract of sale must be in writing, but there is no need for notarization or other registration procedures. Both the seller and the buyer must sign the contract, but it is valid even if not attested to by witnesses (albeit a witnessed contract is a prerequisite for the new owner to get his title registered). If the contract specifies a price that is lower (or higher) than the price agreed upon between the parties (for example, in a side letter), only the price mentioned in the contract will be

Anders Forkman (anders.forkman@vinge.se) is a partner at Vinge in Malmö, Sweden, practicing in real estate, corporate law, and M&A, and a member of the Swedish Bar Association.
valid and enforceable between the parties.

As described above, there is a widespread practice in Sweden (but not a requirement) to use two different documents in a sale of real property. The first document is a complete contract containing all terms and conditions for the sale. The second document, the Bill of Sale (Sw. köpebrev), contains only the terms and conditions necessary to fulfill the formal requirements set out in law. In addition, the Bill of Sale often includes confirmation that the purchase price has been paid.

It is usually the Bill of Sale that is submitted to the public recording authority by the buyer for the purpose of receiving a Certificate of Registration of Title and for being registered as the owner of the real property in the Land Register. This has to do both with the fact that the document becomes public and that the parties to the transaction might not want all terms and conditions of the sale to become public, but also that the buyer will only be registered as full owner in the Land Register if and when the sale is final and unconditional. A contract where the sale is conditional will therefore not be accepted as the basis for registration of title, unless the parties confirm that all conditions have been fulfilled.

Note that an option to sell or buy real property is not considered enforceable under Swedish law. It is, however, in principle possible to agree on liquidated damages in the event that one of the parties fails to enter into a transfer agreement at a later stage. Further, a transfer of title may only be made conditional for a period of two years, unless the condition is attributable to full payment of the purchase price (in addition to certain other conditions).

Stamp Duty for Sale of Real Property
In connection with the sale and purchase of real property, there is stamp duty payable at a rate of 3% (this is likely to increase to 4.25% on January 1, 2011, due to a proposed change in the law) if the purchaser is a legal entity (1.5% if an individual) on the value of the real property. The value of the real property in this regard is deemed to correspond to the higher of the purchase price and the taxable value (Sw. taxeringstvärde). However, there is no stamp duty payable on the sale of shares in a company that owns real property or in the case of a merger between two companies. For this and other reasons mainly relating to taxation, real property is commonly “parked” in a corporate entity, and any subsequent transfer of the property is indirect—made through acquisition of the shares or other ownership of the corporate entity.

Transactions by which land is transferred from one property unit to another through measures taken by the National Land Survey, such as parceling of land or amalgamation, are not subject to stamp duty. For this reason it is not uncommon for parties to seek transaction structures that involve several steps: First a smaller property unit is purchased and stamp duty paid on its value and then a larger, adjacent property unit is transferred by way of amalgamation into the smaller property unit without stamp duty.

If there is no suitable smaller property unit, the seller might even create one by way of parceling from a larger property unit as a pre-transaction restructuring. It should be kept in mind, however, that for the National Land Survey to decide on measures relating to the amalgamation, parceling, or similar measures, these shall have as their objective to create efficient and well-functioning property units in the long term. If a proposed measure is perceived as nothing more than a sale in disguise or not suitable from a long-term property perspective, the National Land Survey might refuse to carry out the measure as requested.

Stamp duty deferral may be granted in conjunction with an acquisition of real property within a corporate group, provided the following two conditions are fulfilled:

1. The parent company in the group is a Swedish limited liability company, a Swedish economic association, a Swedish savings bank, or a Swedish mutual insurance company.
2. The transferor is not included in a group other than the group in which the acquirer is included (it is only in exceptional cases that a company is included in more than one group).

The deferral lapses and stamp duty is payable in any of the following three cases:

1. The acquirer conveys the property to a third party
2. The group relationship between the transferor and the acquirer ceases
3. The transferor or the acquirer is dissolved through liquidation or insolvent liquidation.

Restrictions on Transfer
There are no restrictions on foreign ownership of Swedish real property, and due to recent changes in legislation there are also very few restrictions imposed regarding the transfer of real property. Those restrictions that did
apply until the spring of 2010 related to the Preemption Act (Förköpslagen), which allowed Swedish municipalities preemption rights when real property situated within its boundaries was subject to a purchase, and the Act on Acquisition of Property Taxed as Apartment Blocks (Lagen om förvär av hyresfastighet m.m.), which imposed an obligation to notify the transfer to the municipality in which the real property was situated and a possible referral to the Regional Rent Tribunal (Hyresnämnden) for approval. Certain restrictions continue to apply in relation to the acquisition of land intended for agriculture.

Liabilities
The Swedish Land Code (Jordbalken) includes provisions on certain categories of encumbrances that are so closely associated with the property that they continue to be valid and enforceable against a new owner of the property. Among the most important ones are mortgages (although the underlying credits for which they serve as security are not assigned except if expressly agreed), certain easements, and leases in general.

The Swedish Environmental Code (Miljöbalken) is primarily based on the "polluter pays principle," but it also contains provisions for the subsidiary liability of property owners, as is the case in many jurisdictions.

Statute of Limitations
According to the Swedish Statute of Limitations (1981:130), no claim may be brought later than 10 years from when the debt arose, unless the period of limitation has been previously interrupted. It should be noted that the due date of the payment is irrelevant in this respect; it is the time of the origin of the contractual obligation to make the payment from which the 10-year limitation period starts to run.

If the 10-year period is interrupted in accordance with the Swedish Statute of Limitations, a new 10-year period starts to run from the date of the interruption. A lawful interruption of the limitation period occurs, for example, if the debtor makes an amortization payment or pays interest or in any other respect acknowledges the claim. Interruption is also achieved if, for example, the creditor sends a written reminder of the debt to the debtor.

The period of limitation in respect of taxes is five years from the end of the year during which the tax was due for payment.

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**Alfa Fellowship Program**

Alfa-Bank, CDS International, and Oxford University are pleased to announce a call for applications for the Alfa Fellowship Program's 2011-12 Fellows. Now entering its seventh year, the Alfa Fellowship Program is a professional-level exchange designed to foster a new generation of American and British leaders with meaningful professional experience in Russia.

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Eligible candidates must have a graduate degree and professional experience in business, economics, journalism, law, government, or public policy. Russian language proficiency is preferred, though not required. The Fellowship includes monthly stipends, US/UK and Moscow-based language training, related travel costs, housing, and insurance.

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**Promoting Understanding of Russia**

Applications must be received no later than December 1, 2010.

Program information and applications can be found at: www.cdsintl.org/alfa

For more information, please contact: CDS International Alfa Fellowship Program 440 Park Avenue South 2nd Floor New York, NY 10016 T: 212.497.3510 F: 212.497.3653 E: alfa@cdsintl.org www.cdsintl.org
NEW ABA RESOURCE
FOR ACQUIRING CROSS-BORDER REAL ESTATE

The ABA Section of International Law's Cross-Border Real Estate Practice Committee is pleased to introduce its new web page portal providing legal essentials to aid in the acquisition of real estate in various jurisdictions. Currently in its initial stage, the project consists of brief, concise summaries of the real estate legislation in each of several jurisdictions using the format of frequently asked questions on matters of concern to international real estate investors.

Summaries for Argentina, Austria, Denmark, India, Mexico, Nigeria, and Spain are available on the committee’s web page at www.abanet.org/dch/committee.cfm?com=1C651002. Summaries for Portugal and Sweden are also being prepared and should be available shortly. We wish to take this opportunity to urge readers with real estate experience to complete the summaries available with new jurisdictions. Following is an excerpt of the Spain summary available online:

When acquiring real estate in Spain an investor should know that both asset and share deals are commonly used. Freehold, condominium, leasehold and other types of property ownership are possible. The land registry provides property title and rights in rem evidence (registration being common practice) but certain charges can be valid against any purchaser even when not registered. As a general rule, foreign ownership is not restricted (investors form “tax havens” being subject to specific provisions). Normally a purchaser is bound by existing lease agreements. As a general rule for residential and commercial leases, tenants benefit from a pre-emptive right in case of transfer of the leased real estate. Lease eviction procedures take normally between 4 and 9 months. Under certain circumstances mandatory pollution rules might affect the owner (even when he was not the polluter). It is advisable for an acquirer to include representations and warranties (rather than rely on Civil Code rules). Zoning plans provide for land qualification and use that might restrict development. Certain licenses and permits are required to build and operate on real estate. Any person can object to the granting of these licenses and permits and challenge them in court. A private contract is enough to transfer real estate, but normal practice is to grant a public deed (before a notary) and completion requires hand-over of the real estate to the acquirer. Taxes, expenses and current circumstances of the Spanish real estate market are also briefly included in the Committee's web page summary.

Although real estate law has traditionally been considered “local law,” with distinct characteristics of its own in each jurisdiction, “globalization” has also had its impact on this area of the law. Investors and operators are increasingly international, or rather transnational, in that they invest and operate in different jurisdictions. Although it is true that they encounter the peculiarities of each jurisdiction, it is also true that they act in accordance with certain concerns and worries which are similar regardless of the jurisdiction where the transaction is performed. The summaries available on the committee’s web page provide useful overviews of international real estate investors’ concerns in a growing array of jurisdictions.
CITIES ABROAD

A Lawyer's Survival Guide to Minsk

By Nina Knyazeva and Anders Egen Reitz

Modern Belarus is a midsized land-locked country with approximately 10 million residents. Minsk is its capital and, with about 2 million inhabitants, is a clean and cozy city, free from traffic jams common in large cities.

During the last couple years Minsk has developed significantly and has become a true European city.

Practical Information

Russian and Belarusian are the official state languages, with Russian the more commonly used of the two.

The Belarusian ruble (BYR) is the official currency. The city has a well-developed banking system allowing one to exchange currency 24/7 as well as to make purchases via credit and debit cards.

Meetings are usually scheduled on weekdays between 9 a.m. and 6 p.m., but most commercial lawyers often work longer hours and are flexible with scheduling meetings after hours.

The stores are typically open 9 a.m.–7 p.m., but large department stores and shopping centers are usually open until 9 p.m. If you want to go to a restaurant or bar for a late dinner, it should not be a problem. Most restaurants stay open until midnight or 2 a.m.

Transportation

Because of its size, travelers have few problems getting around Minsk either by public (preferably metro or taxi) or private transport. Travel by taxi from one end of the city to the other should cost no more than US$20. The political, business, cultural, and commercial life of the city is primarily located downtown.

The best way of getting to Minsk-2 (the international airport) is by taxi, which costs US$30–$50 and takes 30–45 minutes.

Shopping

The main shopping centers are Sotitza, GUM, TSUM, and Nyamiga. Stores in Trositske Predmestie and on Prospekt Nezavisimosti sell typical souvenir items like linen, straw, glass, and wooden products.

Dining

Minsk offers more than 400 restaurants, bars, cafes, and the like. The cuisine varies from Cuban to Asian and includes Mediterranean and traditional Belarusian kitchen.

Accommodations

It is expensive to stay in Minsk so it's not always easy to find something suitable in terms of prices, service, and location. We recommend the Crowne Plaza and Hotel Europe (5-star hotels) and the Victoria Hořel and the Minsk Hotel (4-star hotels).

Sightseeing

If you are fortunate to have nice weather while visiting Minsk, you can wander around downtown by foot, stroll through the numerous parks and botanical gardens, old town—Trositske Predmestie, and walk along the main avenue, Independence Avenue—Prospekt Nezavisimosti) to visit the small cafes and shops.

Ballet Theater is one of the best-known ballet troupes within the post-Soviet Union territory. Belarusian opera performances (classical and modern) are staged in different languages, depending on the country of origin.

The Christian “Red Brick” church, on the principal square of Minsk, a symbol of the capital, was constructed at the beginning of the 20th century. Built with the support of nobleman Edward Vojinovitch, it was named in honor of Holy Simeon and Elena, in memory of his children who died at an early age.

One recent Minsk architectural attraction, the National Library, offers its visitors a spectacular view of the city at the height of 236 feet. Open to the public Monday–Friday from 10 a.m.–9 p.m. Weekend hours vary.

It is also rather easy to find tours to different cultural centers and historical monuments, located within a 30 miles of the city, such as Dududki, Khatyn, Stalin's Lane, and many others.

SURVIVAL GUIDES ON THE WEB

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