



Real Estate Investment in Spain

THE LEGAL PERSPECTIVE

Introduction

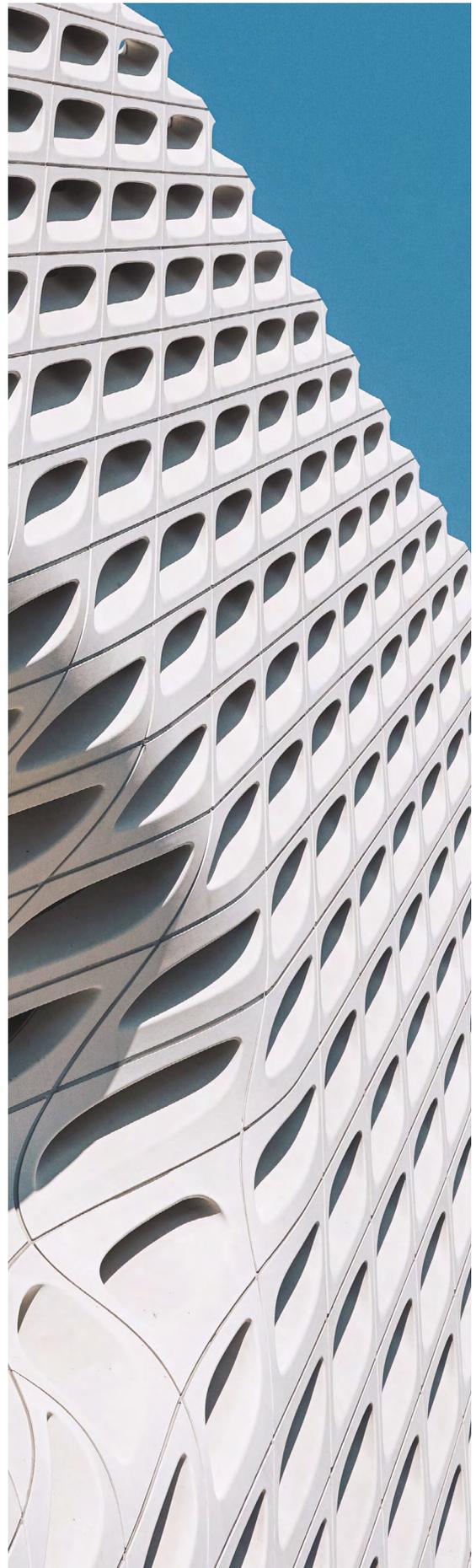
Spain has been considered as a country of interest by real estate investors for at least two decades, and for good reason. It is a well-developed country with every flavor of attractive property located throughout its territory: residential, retail, offices, logistics, industrial, student and senior housing, healthcare facilities, schools and infrastructure. Both income-producing assets and land awaiting development are available for the investor in a jurisdiction with a stable legal regime, more than 40 million consumers, educated workers and a great climate.

After a vertiginous boom during the early 2000s, the Spanish real estate market came to a screeching halt in 2008 when the global crisis hit. For five years, international investors and banks steered well clear of Mediterranean assets in general (and Spanish assets in particular) while the real estate bubble deflated to a more realistic price level.

Fortunately, an inflection point happened in 2012-2013 when the slow improvement of the economic situation on the global scale and

the amendment of the Spanish legislation to finally introduce attractive real estate investment vehicles (SOCIMIs) allowed Spanish operators to start fundraising and incorporating listed vehicles to invest in real estate. At the same time, international investors also started showing an interest again in prime assets in the Spanish market. 2015 saw levels of transactional work rivalling the pre-crisis years, banks have finally gotten back to granting acquisition and construction finance for real estate projects, and new retail and residential developments are in the pipeline in a number of regions.

If this is the first time you have thought about investing in Spain, this guide will be useful to you as a quick introduction to the legal regime and market practices. However, bear in mind that this is just an introduction! Every property has its quirks, and it is important to take a proper look at it before you buy. We would be happy to help you make your first investment a success.



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1. Ownership of real estate

1.1 Full ownership

The following full ownership rights are recognized under Spanish law:

- absolute freehold (*propiedad en pleno dominio*), which is the right to fully and exclusively enjoy and dispose of a property;
- co-ownership (*propiedad en proindiviso*), which is the right to a share in the full ownership of a property; and
- time sharing (*derecho de aprovechamiento por turnos*), which is the right to use a specified and furnished property for a certain period of time during each year (no less than a week) for a term of between 3 and 50 years.

1.2 Limited rights similar to ownership

The following limited rights, which have similar effects to ownership are recognized under Spanish law:

- a leasehold (*derecho de superficie*), which is the right to build and maintain a building on (or under) land owned by a third party for a specific period of time. During the period of the leasehold the leasehold owner (*superficiario*) may transfer, encumber or lease its right as if it were a freehold owner. However, upon expiry of the leasehold, the freehold of land and buildings shall revert to the owner of the land and any third party right granted on the leasehold shall expire;

- a beneficial interest (*derecho de usufructo*), which is the right to use a property owned by a third party for a specific period of time in the same way as an owner would, including the right to lease and collect interest or rent, transfer the beneficial interest or even encumber it, provided that the original use is maintained; and
- an administrative concession (*concesión administrativa*), which is similar to a leasehold, but granted on land belonging to a public authority for a limited period of time, often in exchange for the payment of regular amounts (*canon administrativo*). The concession entails not only the right but the obligation to build and manage the property until the end of the concession period.

1.3 Condominium

Condominium (*propiedad horizontal*) consists of a freehold ownership on a property which shares certain common areas with neighboring properties. These common areas are held in a sort of co-ownership that is inseparable from the freehold on the individual properties.

This is the typical ownership regime in multi-story buildings, where access to each individual property requires access or use of the common areas such as stairways, lifts, halls or courtyards.

While each owner may freely use, transfer or encumber its own property, any decision pertaining to the common areas is subject to the agreement of the co-owners, which is governed by the law and by the rules of the condominium in question.

1.4 Restrictions on ownership by foreigners

Generally speaking, there are no legal restrictions on foreign ownership of Spanish property. However:

- the General Office for Trade and Investments (*Dirección General de Comercio e Inversiones*) must be notified of all foreign investments in real estate if they are valued at more than EUR3,005,060.52 or originate from a tax haven; and
- military authorization will be required for foreign investment by non-EU citizens who purchase property in areas close to the border or rural areas of the following territories:
 - the Spanish islands; and
 - Spanish peninsular territory: Cartagena, Galicia, Strait of Gibraltar, The Bay of Cádiz and the borders with Portugal, France and the Spanish territories in the north of Africa.

For these territories, certain quotas of total foreign investment have been established and may not be surpassed, whether or not the individual investor owns other properties in the area.

2. Sale and purchase

2.1 Formal requirements

In Spain there is a principle of freedom of agreement between parties providing they do not contravene any law or moral code, or pose a threat to public order. It is not mandatory for a sale and purchase agreement to be made in writing, although a written contract is highly recommended for evidential purposes and should ideally be signed in front of a public notary and registered with the Land Registry.

In practice, the parties will usually sign a preliminary private sale agreement (*contrato privado*), which should at least include the main clauses of the transfer and the agreement to formalize the transfer in a public deed (*escritura pública*) at a later date. Part of the price (typically around 10%) is often paid upon signature of the private sale agreement, while the rest will be paid when the public deed is granted.

The private sale agreement is sometimes preceded or replaced by a reservation agreement (*contrato de arras*) where the purchaser undertakes to purchase and the seller undertakes to sell within a certain period of time. A good faith deposit (*arras*) (up to 10% of the price) is delivered at this time by the purchaser, to be considered as price paid in advance and deducted from the balance due at the time the public deed is granted. The amount of this deposit also serves as a guarantee of fulfilment and a penalty for breach of the purchase undertaking, so that the purchaser will lose the amount to the seller if it decides to withdraw from the transaction before completing

it, while if the seller is the one to walk away, it will have to pay the purchaser twice the amount of the deposit sum (i.e. it will return the original deposit and pay the same amount again as a penalty for breach).

The transfer of property requires not only granting valid transfer of title but also delivery of the property to the purchaser, which usually occurs symbolically by delivering the keys to the property or, if so agreed, by merely granting the corresponding public deed.

2.2 Registration

Once granted, it is particularly important that the public deed transferring title should be filed for registration at the relevant Land Registry. Registration is not compulsory for the valid transfer of title, but any bona fide third party is entitled to rely on the information registered at the Land Registry, and so will be protected if it acquires a property from the registered owner and registers its acquisition, even if it later turns out that the registered seller was no longer the actual owner of the property. Registration usually takes around three to eight weeks.

2.3 Asset deals

Direct investment through an asset deal is the most common way of acquiring property in Spain and is carried out by following the formal requirements mentioned above.

Under the Spanish Civil Code, the seller of a property is liable for:

1. the non-existence of third party preferential rights on the property that may result in the purchaser being deprived

of all or part of the property (*saneamiento por evicción*); and

2. any hidden defects in the property (*saneamiento por vicios ocultos*).

2.3.1 PREFERENTIAL THIRD PARTY RIGHTS

Any claim that might result in deprivation of property must be reported to the seller, who is entitled to be a party to the proceedings. If the seller is not notified and therefore not given the chance to take part in the proceedings, there will be no liability. Liability only arises once there is a final ruling that deprives the purchaser of all or part of the property and will entail the seller having to repay the purchaser for:

- (i) the price of the property at the time of the deprivation (not at the time of the original purchase); plus
- (ii) income derived from the property, if the purchaser had to deliver it to the third party; plus
- (iii) legal expenses related to the deprivation and seller liability lawsuits; plus
- (iv) expenses related to the original purchase, if they were paid by the purchaser; and
- (v) damages, interest and reimbursement of expenses voluntarily incurred by the purchaser in connection with the property, if the sale was carried out by the seller in bad faith.

The parties are free to waive or amend this liability regime (although the waiver will be void if

the seller was acting in bad faith), in which case the seller will only be obliged to reimburse the value of the property at the time of the deprivation of property.

2.3.2 HIDDEN DEFECTS

This refers to defects that render the property unfit for the intended use or which diminish the possible use in such a way that the purchaser would have not completed the transaction if it had known of the defect. There is no liability for defects that are manifest or apparent to the naked eye, or for defects which are not apparent but which should have been known by the purchaser when the purchaser is an expert in the field. The seller is liable even for defects which were unknown to it, unless otherwise agreed by the parties.

As a result, if the seller was aware of the defects that caused the liability it would be liable to repay the price and expenses associated with the transfer as well as damages to the purchaser. When the seller was unaware of the defects, there would be no obligation to pay damages.

While the parties may freely amend or waive the legal liability regime and agree specific liability events, it is important that the purchaser carries out a certain amount of legal, technical and, if applicable, environmental due diligence before completing the purchase, especially when the purchaser is a professional real estate investor.

Legal due diligence should cover, at least, the following aspects:

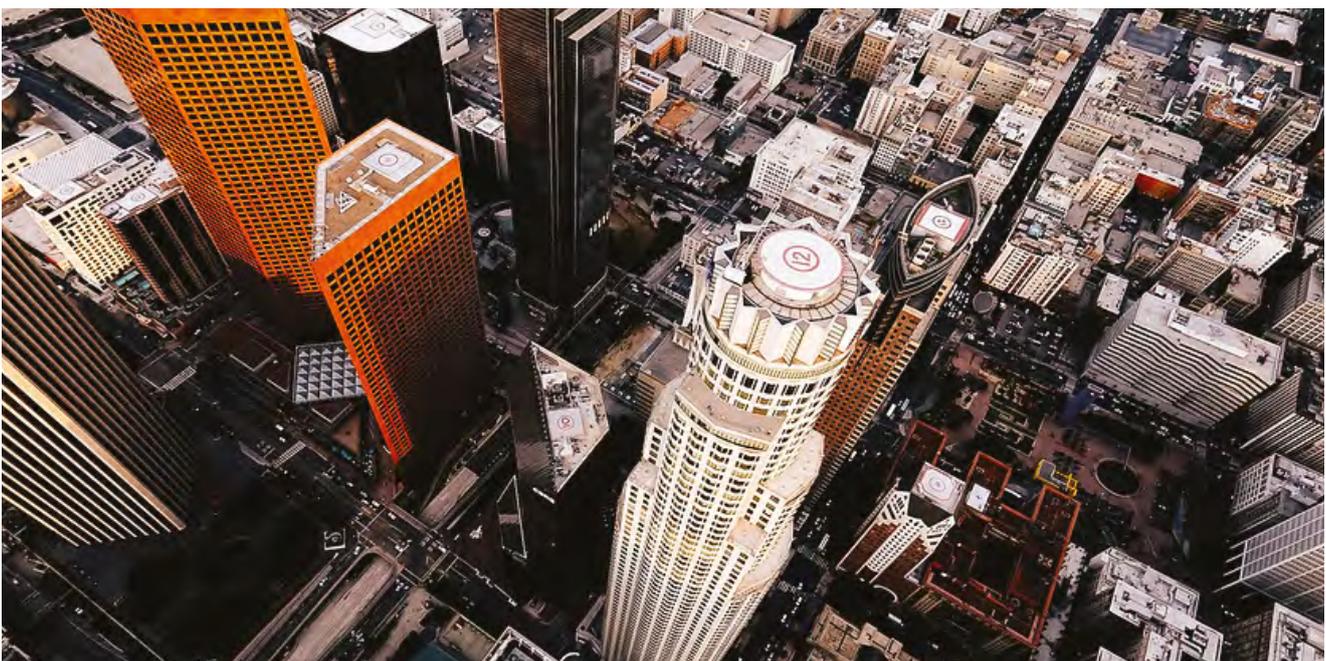
- (i) title and encumbrances;
- (ii) leases and other third-party rights;
- (iii) existing financing, if any (when the purchaser means to subrogate in the borrower's position);
- (iv) licenses and zoning aspects;
- (v) payment of taxes affecting the property;
- (vi) condominium issues; and
- (vii) litigation, if applicable.

Under the Spanish Civil Code, the seller pays the notarial fees relating to the public deed that formalizes the transfer, while the purchaser is responsible for those relating to the issuance of copies of the deed (this means that, in practice, the seller would pay around 90% of the notarial fee and the buyer pays the remaining 10%). However, it is common practice for the purchaser to pay all notarial fees. Since notarial fees can be negotiated with the notary, the party that will pay the fees is generally the one to choose the notary.

2.4 Share deals

Acquisition of property may also take place indirectly through the purchase of shares in the company that owns the relevant property.

The formal requirements for the acquisition of shares depend on the type of company and the type of shares. Shares in the capital of a Spanish limited liability company (*sociedad limitada*) must be transferred by means of a public deed and the transfer reported to the company so that the new shareholder can be registered in



the company's shareholder book. On the other hand, shares in a public limited company (*sociedad anónima*) may require a public deed (if the shares are not issued as physical titles, or if they are issued as bearer shares (*acciones al portador*)), endorsement of physical share certificates (when the shares are represented as nominative shares (*acciones nominativas*)), or transfer via a securities broker and recording in the relevant electronic system (when the shares are issued as electronic shares (*anotaciones en cuenta*)).

In any event, it is advisable to have a proper written agreement with a complete set of representations and warranties covering the state of the property, the state of the business (if any) with which the property is associated and the state of the target company.

In share deals it is just as important as in asset deals that the purchaser carry out due diligence. In this case, due diligence will no longer be limited to the property but also to the company, in particular as regards corporate matters, tax compliance, employment issues, intellectual property, and contracts with clients and suppliers. Commercial and financial due diligence on the company should also be undertaken, as well as technical and environmental due diligence on the property.

It is particularly important to check for third-party rights in connection with the shares to

be transferred, as limited liability company shareholders have legal pre-emption and preferential purchase rights. Transfers may be further restricted by the company by-laws, and joint venture companies often have complex share transfer regimes built into their joint venture agreements including drag-along or tag-along clauses, put and call options, etc.

2.5 Public auctions

Acquiring a property via public auction is becoming more frequent, as in the last few years auctions have multiplied in the context of both mortgage enforcement proceedings and insolvency proceedings. These auctions are carried out by a notary or, more often, by a court.

Public auctions are a necessary tool in enforcement because Spanish law forbids the creditor to appropriate the collateral directly unless it consists of cash. A secured creditor, however, has the right to match the bid or take ownership of the auctioned property at a fixed value if no bidders come forward or the maximum bid falls short of the minimum auction value agreed by the parties in the mortgage.

It should be noted that other third parties such as tenants or co-owners may also have preferential rights to match the best bid in an auction when they hold legal pre-emption rights (see section 3.4 for further details on pre-emption rights).

The main disadvantage of purchasing a property at auction is that there is often only limited information available on the property and no possibility to carry out comprehensive due diligence prior to the purchase. It is important, therefore, to check the Land Registry for information on third-party rights that may have been recorded prior to the event giving rise to the auction (e.g. prior ranking mortgages), since such third-party rights will remain encumbering the property after the auction and until such time as the relevant debts are paid. Such encumbrances will tend to drive the auction prices down, as the new owner will generally attempt to have the encumbrances removed by paying off the relevant creditors.

It should be noted that acquiring a property encumbered by a prior ranking mortgage will not automatically result in the new owner becoming the borrower or debtor of the debt secured by such mortgage. Subrogation into the debtor's position requires consent from the creditor and, if not granted, the new owner would become a third-party guarantor (through the mortgage) of the existing borrower.

3. Encumbrances

3.1 Mortgages as encumbrances

Mortgages are the most common type of security encumbrance on a property. A mortgage must be created by means of a public deed (*escritura pública*) granted in front of a public notary, and must be registered at the Land Registry in order to be validly constituted.

Only the creditor registered as mortgagee may enforce a mortgage.

A mortgage depends upon the existence of an underlying claim, and may only be enforced as long as a repayment obligation for the secured claim still exists. The mortgage can only be assigned to a third party together with the underlying claim.

The different types of underlying claim give rise to several types of mortgage which have slightly different rules under Spanish Mortgage Law (*Ley Hipotecaria*):

- ordinary mortgage (*hipoteca ordinaria*): this is created to secure a debt with a fixed amount (such as a loan);
- credit account mortgage (*hipoteca de máximo*): This type of mortgage is regulated in article 153 of Spanish Mortgage Law. The debt corresponds to the amount marked in the bookkeeping account of the lender and borrower, and so there is a specific procedure to fix the actual amount of the claim. This type of mortgage is often used to secure credit facilities (where the amount that will actually be drawn is not known from the beginning). The amount secured by this type

of mortgage will be considered as a cap;

- floating mortgage (*hipoteca flotante*): regulated by article 153. bis of Spanish Mortgage Law. This mortgage secures a basket of different debts, whether existing or future, which may vary over time and therefore are not defined in detail as in the other types of mortgage. This mortgage may only be granted in favor of financial entities, tax authorities or social security authorities and is often used to secure derivatives, or facilities with diverse tranches;
- securities mortgage (*hipoteca cambiaria*): This type of mortgage is regulated by article 154 of Spanish Mortgage Law, and is meant specifically to secure bearer securities or securities transferable through endorsement notes; and
- reverse mortgage (*hipoteca inversa*): this type of mortgage is reserved for residential properties mortgaged by senior or disabled citizens in favor of financial or insurance entities, in exchange for a loan that is disbursed in the form of an annuity; the debt becomes due and payable (by the heirs) upon the death of the mortgagor.

3.2 Charges and earmarks

When an area is first developed, depending on the system of development chosen by the relevant public authorities, owners of plots included in the development will have the legal obligation to contribute financially to the construction of the necessary

infrastructure to transform the land into an urban area (e.g. roads, sewage, water and electricity supply lines, etc.). Such measures lead to the imposition of charges which are payable by the owners, but which are attached to the plots. Plots are subject to a legal endorsement for payment of these charges.

Additionally, a property is charged and legally earmarked to the payment of (i) certain taxes associated with the property, such as real estate tax (IBI), stamp duty (AJD), transfer tax (ITP) or inheritance tax (*Impuesto de Sucesiones*) incurred by acts related to the property (transfers, inheritance, mortgages, etc.); and (ii) service charges owed to the condominium in which the property is included.

3.3 Easements

Properties may be encumbered in favor of a neighboring property or a third party by establishing rights of way, certain rights of use, prevention of construction, allowance of construction, etc. Such rights or easements (*servidumbres reales*) are widely used to create rights of way, rights to erect and maintain electrical or other supply lines, and to prevent or control development on certain land. Easements must be registered at the Land Registry to be enforceable against bona fide third parties.

3.4 Pre-emption rights

Public authorities have a right of pre-emption in relation to properties of historical, architectural or environmental significance.

Most pre-emption rights are regulated by the Spanish Civil Code. Neighboring landowners have a pre-emption right over rural land of less than one hectare, and co-owners of jointly owned land have a pre-emption right over the other owners' shares.

Additionally, under the Urban Leases Act, tenants have a mandatory first refusal and pre-emption right in respect of the property they lease; however, these rights can be waived contractually. This pre-emption right does not need to be registered (see more on this right in Section 6.8 below).

Additionally, an owner may grant contractual pre-emption rights over a property to any third party. Such rights are only enforceable against bona fide third parties when registered at the Land Registry.

3.5 Purchase option

A purchase option is defined as a unilateral agreement under which one party (grantor) grants the other (beneficiary) the discretionary right to purchase a property. Granting

the option may be subject to the payment of a premium by the beneficiary. The premium is often (but not always) later applied to the purchase price, but in the case of non-exercise of the purchase option, the premium remains in possession of the grantor.

Purchase options must be registered at the Land Registry to be enforceable against bona fide third parties (otherwise they are only binding on the signatory parties). However, in order to be registered, the purchase option must comply with the following requirements: (i) express agreement between the parties to have it registered; (ii) specified strike price for the property's acquisition, and if relevant, premium amount for granting the option; and (iii) an end date for the option, which may not exceed four years. Options granted for more than four years will be valid between the parties, but will not be registered by the Land Registry.

Purchase options are sometimes agreed in connection with leases as an addition to the legal pre-emption

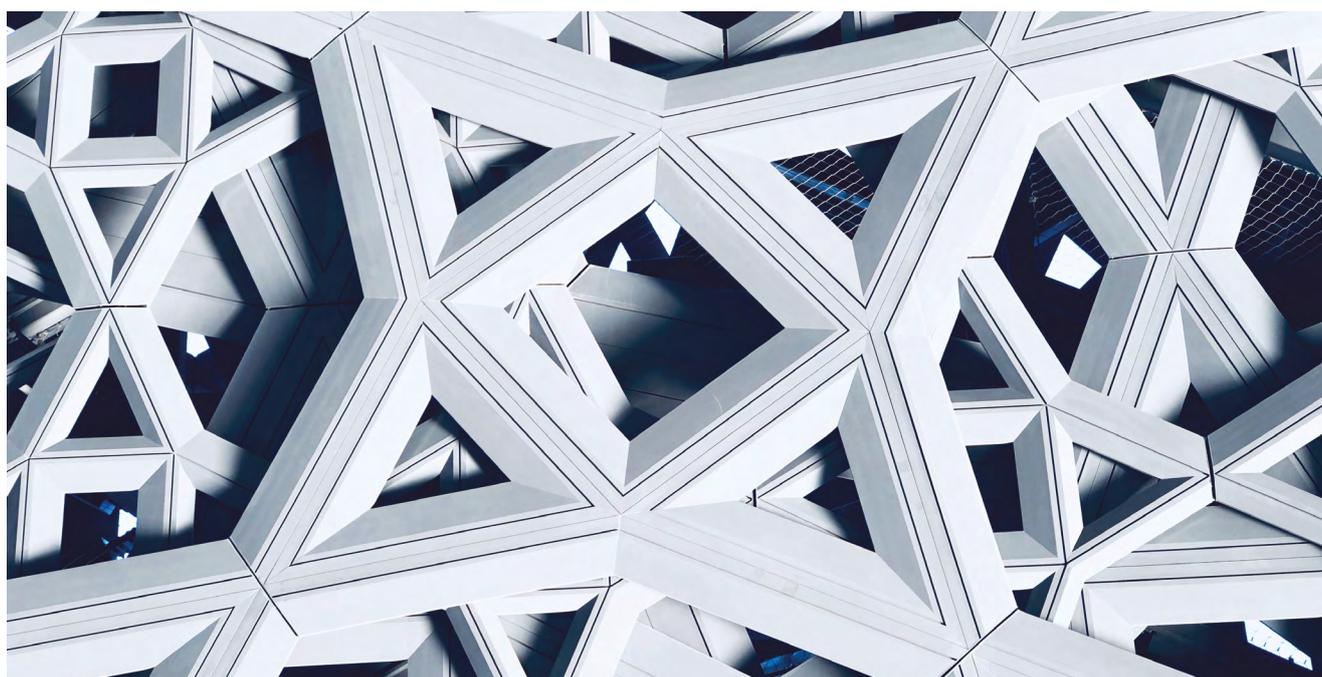
right. This is especially the case for leases of certain types of social housing units. In such cases, a part of the rent paid in relation to the lease may be applied to the purchase price as well.

3.6 Others

A right of use (*derecho de uso*) entitles its holder to receive, out of the fruits of another person's property, whatever may be needed to satisfy the holder's own needs, as well as the needs of the holder's family.

On the other hand, the right of habitation (*derecho de habitación*) entitles its holder to occupy, in another person's house, the apartments necessary for the holder and members of their family.

These rights are regulated by agreement between the parties and by the Spanish Civil Code. They exist as personal and unalienable, meaning that these rights may not be leased nor transferred to another person by any title whatsoever.



4. Permits

Permits required for real estate properties are governed by local regulations approved by every city council and vary depending on the activity to be carried out and the location of the property. Typically, a building will require the following:

- A building permit (*licencia de obras*) is required to develop a project or significantly alter an existing property. The building permit may not be granted or be conditional on certain requirements or restrictions if the planning regulations restrict the type of construction allowed in that area (effective footprint, maximum number of floors, buildable surface, etc.).
- A first occupancy permit (*licencia de primera ocupación*) is delivered at the end of building works. Its granting implies that the works carried out match those authorized in the building permit, and its issuance allows the effective occupation of the premises.
- A *cédula de habitabilidad* is required in some regions (notably Catalonia) for residential units. Its issuance certifies that the unit is fit for human habitation.
- An activity license (*licencia de actividad*) is required to authorize *a priori* the use of specific premises for a business activity, and sets out requirements that will need to be implemented or complied with in order to effectively operate the business.

The activity license may not be granted if the planning regulations place restrictions on the type of activity to be carried out in the area.

- An opening license (*licencia de apertura*) certifies that the requirements set out in the activity license have been complied with and that the premises are fit for the activity.

Some city councils replace the need for a specific permit with a simple responsible declaration by the owner that the building complies with all the necessary requirements. The building may be inspected by the authorities at any time to check effective compliance, and breach of the terms of any permit may result in fines, closure of the premises or even demolition.



5. Environmental liability

The purchaser of a property in Spain becomes liable for soil pollution or contamination of the building even if it did not cause the pollution or contamination. A purchaser should identify any potential or actual contamination of the soil resulting from previous use of the land. The law requires that remedial action is taken in the case of soil pollution. The party responsible for the contamination is normally responsible for carrying this out, but the owner or occupier of the property is also liable unless they can prove that the contamination

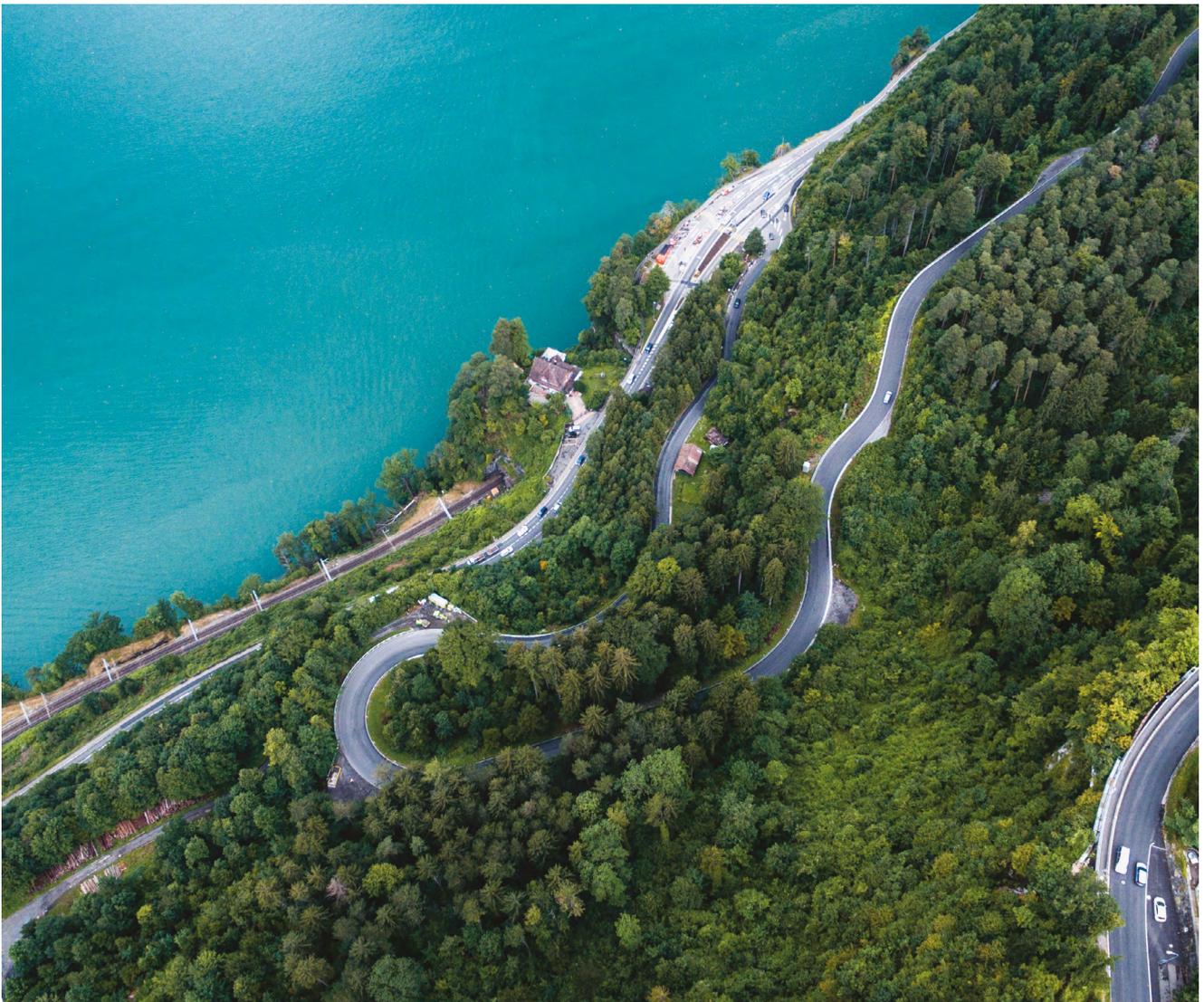
was caused before their acquisition of the property and can ensure that the person responsible carries out the clean-up.

A holder of security over land is not liable for environmental damage provided it does not take possession of the land and does not itself cause, or knowingly permit, damage to the environment.

Great care must be taken if the security is enforced because owners of land can be liable for environmental damage on that land

or arising from it, even if they did not cause the damage. A mortgagee should not go into possession of land without careful consideration of the implications of potential environmental liability.

As a result, it is particularly important to carry out a technical environmental due diligence exercise before purchasing or bidding on a property if there is the slightest suspicion that there might be contamination.



6. Leases

Spain has generated several Urban Lease Acts (each of them known as *Ley de Arrendamientos Urbanos*) over the decades. Each Act creates its own lease regime that governs leases that complete during the period that it is in force. The regimes created in these different acts coexist in daily life since the regime applicable to a particular lease is the one that was in force when the lease was signed, although transitional provisions in more recent acts may imply amendments to previous regimes.

The Urban Lease Acts applicable to existing leases are:

- Decree 4101/1964, of December 23, 1964 (the Urban Lease Act 1964), modified or complemented by certain special transitory provisions established by Urban Lease Act 1994;
- Royal Decree-Law 2/1985, dated April 30, 1985 (Urban Lease Act 1985, often known in Spanish as *Decreto Boyer*); and
- Law 29/1994, dated November 24, 1994 (Urban Lease Act 1994, as amended by Law 4/2013 of June 4, 2013 and recent Law 2/2015, dated March 30, 2015 (the Reforms)).

Each Act establishes two different regimes; one for residential leases and one for non-residential leases.

Some types of leases (such as agrarian land, military housing, seasonal or short-term leases, leases on parking spaces) are excluded from the urban lease regime and ruled by specific laws or, failing a specific regime, by the Spanish Civil Code.

The statutory regime that governs a Lease Agreement depends on the date of its execution.

Statutory provisions largely provide for stronger rights of the tenants of residential leases (e.g. in relation to termination, rent including operating expenses, maintenance and repair obligations).

6.1 Duration

There is no minimum length laid down for commercial or residential leases. However, in residential leases executed after June 6, 2013, the landlord must allow extensions to the term up to a minimum of three years (this term is five years for leases entered into before the Reforms).

Most leases provide for a mandatory period for both parties and then the possibility to extend or terminate at the tenant's discretion. Once the agreed extensions are over, if the tenant stays, the Spanish Civil Code provision for tacit extensions (*tácita reconducción*) would apply, with further extensions by the same term in which the rent is denominated (daily/monthly/yearly).

The Urban Lease Act 1994, as redrafted by the Reforms, provides that the tenant may terminate the lease unilaterally at any point after the first 6 months of the lease by giving the landlord 30 days' notice. An indemnification of up to one month's rent per outstanding year of lease may be payable by the tenant in case of unilateral termination if explicitly agreed in the lease.

6.2 Rent

Rent is usually calculated on the basis of a figure per m² of usable space. While rental figures are given as an annual rent, usually rental payments are due on a monthly basis and are paid in advance.

Residential rental payments are exempt from value added tax, which is, however, applicable for non-residential leases and treated as additional to the rent.

6.3 Rent review

The Urban Lease Act 1994, as redrafted by the Reforms, currently rules that the parties must specifically agree in the lease agreement that the rent will be subject to annual reviews. If no such agreement is included, no rent review will be allowed. This is a new feature of the regime as of 2015, as under all previous lease regimes rent reviews were automatic and carried out in accordance with the change of the consumer price index (IPC or *Indice de Precios al Consumo*).

New leases subject to the Reforms also require determination in the lease of the rent review system to be followed. By default, the index to be applied will be the Guarantee of Competitiveness Index (*Indice de Garantía de Competitividad*) rather than the traditionally used consumer price index.

Rent reviews need to be notified to the tenant, and the calculation justified if the tenant so requests.

Since the new rent review system is very recent, most existing leases are still subject to the automatic review system using the consumer price index. However, since the consumer price index does not necessarily move in line with market rents, in long-term non-residential leases it is not unusual for the parties to agree a rent adjustment in line with market rents after the third year (fifth year for leases governed by the Urban Lease Act 1994 prior to the Reforms).

6.4 Operating expenses

In non-residential leases, the tenant is generally obliged to pay all operating expenses relating to the property including costs of maintaining common areas, real estate tax and waste tax where applicable. This is less usual in residential leases, although it is common practice in the market to pass on the cost of Real Estate Tax to the tenant.

6.5 Maintenance, repair and renovation at end of lease

Under all legal regimes, tenants bear all costs for ordinary repairs and maintenance of the premises. By law, the landlord generally remains responsible for structural and major repairs unless otherwise agreed.

The landlord may carry out improvement works at the premises during the term of the lease if they cannot reasonably be delayed, but a rent reduction may be applicable if the works temporarily prevent the tenant from using a part of the property. At the end of the works, except if otherwise agreed, the landlord may increase the rent in proportion to the cost of the works.

The tenant is not supposed to renovate the property at the end of the lease, but rather to hand it over to the landlord in its original state except for normal wear and tear.

6.6 Assignments/transfers and subleases

A residential tenant may not assign or sublease without landlord's consent.

Non-residential tenants are entitled to assign or sublease without consent, but the landlord retains the possibility to increase the rent by 10% in case of partial sublease and 20% in case of total sublease or assignment of the lease. However, most leases tend to waive this legal regime and either exclude the

possibility to sublet or assign, restrict it to group companies of the tenant, or require landlord consent for the assignment or sublease.

6.7 Termination

Breach of the lease agreement obligations by one party entitles the other party to terminate the agreement.

Furthermore, the landlord is entitled to terminate the lease agreement for the following reasons:

- non-payment of rent or of any other amount assumed by the tenant;
- non-payment of the deposit or of its consideration balance;
- sublease or assignment without the prior consent of the landlord;
- the tenant inflicting malicious damage on the property or the performance of works without the consent of the landlord when the landlord's consent is necessary;
- the tenant committing irritating, unhealthy, harmful, dangerous or unlawful activities in the house; and
- when the property will not satisfy the tenant's needs for a permanent residence.

The tenant, on the other hand, is entitled to terminate the lease agreement for the following reasons:

- the landlord does not carry out the necessary repairs to preserve the property in habitable conditions;
- the landlord carries out improvement works against the will of the tenant;
- the landlord disrupts the use of the property by the tenant; and
- unilateral termination by giving advance notice to the landlord.

The lease agreement will also expire for the following reasons:

- loss of the property not caused by the landlord;
- the property being declared in a state of ruin by the competent authority;
- expiry of the term agreed by the parties in the lease agreement with its corresponding extension periods;
- joint decision of both parties to terminate the lease; and
- tenant's death, when the heirs have no legal right to subrogate into the lease.

Finally, the Urban Lease Act 1994, as redrafted by the Reforms, currently rules that the lease agreement may be terminated if the landlord's right expires due to certain legal circumstances (such as the exercise of a repurchase right (*retracto convencional*) or a call option on the property, or forced sale through mortgage enforcement proceedings) unless the lease had been registered prior to the existence of the circumstances which eventually deprived the landlord of title.

6.8 Sale of a leased property

The tenant is granted first refusal and pre-emption rights on the rented premises by law; therefore no transfer of the property may be carried out without notifying the tenant of the terms of the transaction so that the tenant can decide whether to match the offer. If the transfer is carried out without complying with this formality, the tenant will have a repurchase right in the same terms once it finds out about the transfer.

This pre-emption right is typically waived in non-residential leases and in most residential leases.

The pre-emption right does not apply when the landlord is selling either a complete building or all the sections it owns in a particular building.

7. Tax considerations

7.1. Asset deal v share deal

Real estate investments can be made either by acquiring the property directly (asset deal) or by acquiring the shares of the entity owning the property (share deal). Usually the choice between asset deal or share deal will be driven mainly by the tax consequences. In most cases, the purchaser will not have the option to choose because the seller will impose the structure taking into account its own taxation.

7.1.1 ASSET DEAL

A. VALUE ADDED TAX AND TRANSFER TAX

The acquisition of properties through an asset deal is subject to (i) VAT (*Impuesto sobre el Valor Añadido*, IVA) or (ii) Transfer Tax (*Impuesto sobre Transmisiones Patrimoniales Onerosas*). The VAT or Transfer Tax is payable by the purchaser.

The possible scenarios here are very diverse:

- Transfer of the property by non-VAT taxpayers is subject to Transfer Tax at a rate of 6% to 11% (depending on the region where the property is located).
- Transfer of the property by VAT taxpayers is taxed as follows:
 - The transfer of land, both land for development and developed land, is subject to VAT at a rate of 21%.
 - The transfer of rural land and land which cannot be developed is exempt from VAT and subject to Transfer Tax at a rate of 6% to 11%, unless the acquirer is a VAT taxpayer entitled to full or part deduction of the VAT accrued on the transaction, in which case the transferor may waive

the VAT exemption, so that the transaction becomes subject to VAT at a rate of 21%.

- First transfer of buildings is subject to VAT at a rate of 21%. For residential properties, the applicable VAT rate is 10%.
- First transfer of buildings that has been in continuous use for a period of over two years (under a lease agreement) and second and subsequent transfers of buildings are exempt from VAT and subject to Transfer Tax at a rate of 6% to 11%, unless the acquirer is a VAT taxpayer entitled to a full or part deduction of VAT accrued on the transaction, so that the transaction becomes subject to VAT at the rate of 21%. For residential properties, the applicable VAT rate is 10%.
- Second and subsequent transfers of buildings with a view to them being substantially refurbished are subject to VAT at a rate of 21%.
- Transfers of buildings resulting from the exercise of a call option by a lessee in a financial lease contract are all subject to VAT at the rate of 21%.
- The transfer of a group of assets that represent the transfer of a business or part of a business as a going concern is not subject to VAT, with any building included in the transferred assets being subject to Transfer Tax at a rate of 6% to 11%. In these particular transactions, it is not possible to waive the VAT exemption.

B. STAMP DUTY

Notarial deeds that record land and building transactions subject to VAT are subject to stamp duty

(*Impuesto sobre Actos Jurídicos Documentados*). Rates vary from 0.5% to 2.5% depending on the location and type of transaction. The tax is payable by the purchaser.

C. TAX ON THE INCREASE IN VALUE OF URBAN LAND

The transfer of property other than rural land is generally subject to the Tax on any Increase in Value of Urban Land (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana*), calculated by the relevant city council at the time of the sale. The tax is payable by the transferor.

7.1.2 SHARE DEAL

The acquisition of properties through a share deal is exempt from Transfer Tax and VAT.

A legal exception to this rule exists for transactions where the transfer of the shares is made with the purpose of avoiding the payment of the Transfer Tax or VAT that would have been paid in case of transfer of the real estate. The law considers that there are tax avoidance reasons when at least 50% of the transferred assets consist of real estate located in Spain and are not used for business activities, provided that as a result of the purchase, the recipient of the shares acquires control or increases control over the entity. In this case, the transaction is subject to Transfer Tax at a rate of 6% to 11% or VAT at a rate of 21% or 10% of the value of the underlying real estate assets at the time of the transfer.

7.2 Value added tax

VAT is payable by the purchaser on completion of the acquisition of the property. In certain cases, the so-called reverse charge

mechanism applies. Under this mechanism, instead of VAT being charged by the transferor, it is self-charged by the purchaser (output VAT). At the same time, the purchaser is entitled to deduct such VAT (as input VAT). The practical effect of the reverse charge mechanism is that, where the purchaser qualifies to deduct 100% of the VAT from the acquisition, there is no VAT payable by the purchaser to either the transferor or the Spanish tax authorities.

7.3 Other real estate taxes

7.3.1 REAL ESTATE TAX

Owners of real estate must pay Real Estate Tax (*Impuesto sobre Bienes Inmuebles*). This is a local tax payable annually by owners of real estate and the holders of certain other property rights. Real estate tax is calculated on the basis of the cadastral value (*valor catastral*). This is set by the municipality in which the property is located on the basis of certain criteria established by law. The tax is calculated by applying a multiplier to the cadastral value as recorded in the cadastral register. This tax cannot be reduced or offset in any way.

7.3.2 SPECIAL TAX ON REAL ESTATE OF NON-RESIDENT ENTITIES

Entities resident in a tax haven jurisdiction owning real estate or rights over property located in Spain are subject to a special tax on real estate owned by non-resident entities (*Gravamen Especial sobre Bienes Inmuebles de Entidades No Residentes*) at a rate of 3% of the cadastral value (*valor catastral*) of the property. This tax accrues at December 31 each year.

In the case of transfers of real property situated in Spanish

territory by entities subject to the special tax, the assets transferred will be subject to the payment of this special tax.

This special tax is not payable if the real estate properties are continuously or habitually linked to a business activity in Spain other than the mere holding or leasing of the properties.

7.4 Taxation of rental income from real estate

7.4.1 DIRECT INVESTMENT THROUGH A PERMANENT ESTABLISHMENT

Rental income derived from the property owned by a permanent establishment in Spain is subject to Spanish non-resident income tax (*Impuesto sobre la Renta de No Residentes*) at a rate of 25%.

The taxable income is the net profit after deducting costs, as shown in the annual profit and loss account. With some minor exceptions, all costs relating to the activities of the permanent establishment are tax deductible, apart from interest, royalties or commission paid to the head office in exchange for technical assistance or for the use of other goods or rights.

Many of the management and general administration expenses are deductible.

Depreciation of property is tax deductible to the extent permitted under the relevant regulations.

7.4.2 DIRECT INVESTMENT WITHOUT A PERMANENT ESTABLISHMENT

If the investor does not have a permanent establishment in Spain, rental income is subject to Spanish non-resident income tax (*Impuesto sobre la Renta de No Residentes*) at the standard rate of 24%. The tax rate is reduced to

19% for taxpayers resident in the EU or in the European Economic Area. The basis for calculating taxable income is the gross income received, save for taxpayers resident in the EU, for which the net profit after deduction of expenses directly related to the real estate is used as basis of the tax.

Note that investment in real estate, in itself, is likely to create a permanent establishment, in which case rental income is taxed as above.

7.4.3 INDIRECT INVESTMENT THROUGH A SPANISH CORPORATE ENTITY

Rental income is subject to Spanish Corporate Income Tax (*Impuesto sobre Sociedades*) at the rate of 25%. Taxable income is the net income after the deduction of expenses, as shown in the annual profit and loss account.

7.4.4 INDIRECT INVESTMENT THROUGH A SPANISH PARTNERSHIP

Since a partnership (*entidad en atribución de rentas*) is deemed to be transparent for tax purposes, any profits generated by the partnership are attributed to the individual partners.

Rental income is taxed as above, depending on whether or not the property is deemed to constitute a permanent establishment in Spain.

7.5 Taxation of dividends from a company owning real estate

The distribution of dividends to shareholders is subject to Spanish non-resident income tax at the rate of 19%, unless:

- the EU Parent-Subsidiary Directive applies, in which case no tax is payable; or
- an applicable tax treaty reduces the tax to a lower level, in which case an equivalent tax credit will be received in the shareholder's country of residence.

Branch tax

Income obtained by a permanent establishment that is transferred abroad is subject to a supplementary tax at the rate of 19%.

The tax does not apply to income obtained in Spain through a permanent establishment by an entity which is tax-resident in another EU Member State or in a state with which Spain has signed a tax treaty (unless otherwise provided in the tax treaty).

7.6 Taxation of capital gains on real estate

Capital gains from the sale of real estate assets in Spain are taxed as follows:

Capital gains realized by foreign investors with a permanent establishment in Spain are subject to Spanish non-resident income tax at a rate of 25%.

Capital gains realized by foreign investors without a permanent establishment are subject to Spanish non-resident income tax at a rate of 19%, unless an applicable tax treaty provides otherwise.

In this case, the purchaser is obliged to withhold tax at 3% of the agreed price, or make an equivalent payment on account, as part payment of the tax. This does not apply to contributions of real estate made to companies resident in Spain when they are incorporated or if they increase their capital.

7.7 Taxation of capital gains from the disposal of shares in a company owning real estate

Capital gains from the disposal of shares in a Spanish company are subject to Spanish non-resident income tax at a rate of 19%, unless an applicable tax treaty provides otherwise.

7.8 Taxation of gain on disposal of partnership interest in a partnership owning real estate

The partnership (*entidad en atribución de rentas*) is regarded transparent for tax purposes and any gain generated by the partnership are attributed to the individual partners and taxed as indicated above.

7.9 Real estate investment trusts

Spanish REITs (so-called SOCIMI, *Sociedad Anónima Cotizada de Inversión en el Mercado Inmobiliario*) are taxed at a 0% corporate income tax rate provided that the shareholders owning at least 5%

of the SOCIMI are taxed on the dividends received at a minimum rate of 10%. Where shareholders do not meet this requirement, SOCIMIs are taxed at 19% corporate income tax rate on the dividends distributed to those shareholders (this 19% is a tax to be paid by the SOCIMI and not a withholding tax on the dividends distributed).

The SOCIMI is required to distribute 80% of profits arising from rental income and ancillary activities, 50% of profit from the disposal of qualifying assets or shares and 100% of profits arising from qualifying shares.

7.10 Real estate funds

Spanish real estate funds (so-called FIIs, *Fondos de Inversión Inmobiliaria* and SIIs *Sociedades de Inversión Inmobiliaria*) are taxed at 1% corporate income tax rate, with no dividend distribution obligations.

FIIs and SIIs are very efficient tax deferral vehicles as the shareholder is only taxed when they receive a dividend or when they redeem/transfer their participation in the SII or FII.

8. Real estate finance

It is common in Spain to obtain finance in connection with real estate transactions, whether for acquisition, construction or merely as leverage.

Acquisition and investment financing is generally configured as a loan disbursed in one single drawdown. The debt will be serviced by the income produced by the property, while the principal will be secured with a security package featuring, notably, a mortgage on the property and pledges on the income-producing contracts.

On the other hand, development financing will generally take the shape of a credit facility, from which amounts may be drawn down as necessary to pay contractors as construction progresses. Since during the construction phase the property will not typically be producing income, it is common for interest to be capitalized during the construction, actual debt service starting only upon completion of the property. A mortgage will exist from day one on the land and extend automatically to any new constructions, but pledges will evolve as the contracts related to the property vary with its development.

8.1 Interest rate risks

Although it is now possible to obtain loans at fixed interest rates, it has always been the practice of Spanish banks to grant variable interest financing, and financing on large scale projects remains overwhelmingly subject to variable rates.

A borrower wishing to control interest rate risk is therefore obliged to enter into a financial hedging agreement of some kind

reducing the volatility, such as a swap, cap or collar derivative. While ISDA master agreements are not unknown in the Spanish market, the Spanish Banking Association (AEB or *Asociación Española de Banca*) has issued its own model derivative agreement, known as CMOF (*Contrato Marco de Operaciones Financieras*), which in the Spanish market plays substantially the role of the ISDA master agreements. Special terms and conditions of the relevant type of derivative and a trade confirmation for each particular transaction complement the general CMOF entered into with a financial counterparty.

When the counterparty of the derivative is the same entity that provides the main financing (or a member of the financing syndicate, in the case of syndicated loans), it is common for the hedging agreement to be secured *pari passu* with the underlying financing or by a second-ranking mortgage on the property.

8.2 Mortgages as security

Real estate security may be granted on the land, buildings constructed on it and fixtures which form part of those buildings. It is also possible to take security over the bare ownership (as distinct from the use), the right to build on the site (*derecho de superficie*), the beneficial ownership (*usufructo*) or an administrative concession (*concesión*).

When extending over several properties (e.g. a portfolio of assets, or a single building which has been divided horizontally into several plots forming a condominium), the parties will need to determine the maximum liability secured by each property.

Liability secured by a property is usually broken down into several concepts: repayment of principal, ordinary interest, default interest, and enforcement costs and expenses. A mortgage may not secure more than five years' interest, whether ordinary or default interest. The amount allotted to each concept acts as a cap, and the property is only liable to the maximum of the secured liability stated in the mortgage deed. Any amount due by the debtor which exceeds this maximum secured liability will need to be claimed separately by the creditor as an unsecured claim (or secured by security other than the real estate mortgage).

When creating a mortgage, the parties are obliged to estimate a value for the property that will act as reference value for the auction (*valor de tasación*) in case of enforcement of the mortgage. The value must be supported by a third-party market price valuation at the time of granting of the mortgage deed, but does not need to be updated later (bear in mind that any later update of such value may trigger payment of stamp duty on the whole mortgage secured amount).

The market price valuation to be carried out before the granting of the mortgage has a second purpose, which is to set the maximum amount of the financing. In order to be eligible for securitization in Spain, a loan cannot have been granted for an amount higher than 80% of the market price of the property, so Spanish financial entities are often unwilling to finance beyond this threshold.

8.3 Further collateral agreements

Other than the mortgage, the regular security package of a real estate finance transaction would typically comprise:

- a pledge on the shares in the relevant company, which may or may not include the right for the pledgee to exercise voting rights in the company;
- a pledge on the company's bank accounts, which may or may not involve blocking the balance on the accounts or forbidding disposals without the financing entity's consent or subject to certain restrictions; and which will in any event allow the financing entity to enforce the pledge through a direct cash sweep on any monies; and
- a pledge of credit rights arising from contracts related to the property. These can be rather varied depending on the state of development of the property, and might include, inter alia, the purchase agreement over the property, the agreement with the general contractor for the construction works, any lease or similar agreements producing regular income, management or operational agreements, and even any hedging agreements related to the financing itself. In the event of enforcement of such pledges, the creditor will notify

the counterparties of the pledged agreements so that they will start paying any due amounts (e.g. rents) directly to the creditor.

Regarding insurance policies on the property, three courses of action are possible in order to establish a security, and it is not uncommon for several of them to be put in place simultaneously: (i) the mortgage can be made to extend automatically to payments made by the insurance company due to loss or total or partial destruction of the property; (ii) the creditor may be appointed as an additional beneficiary or loss payee of the insurance policy; and/or (iii) a pledge can be granted on the credit rights arising from the insurance policy.

Less usual in transactions with Spanish financial entities, but *de rigueur* with international finance providers, are duty of care agreements with managers of the property.

Also common are the execution of subordination agreements with entities providing equity or shareholder finance to the company.

8.4 Taxation on the creation of security

The execution of the mortgage deed is subject to stamp duty (*Impuesto sobre Actos Jurídicos Documentados*) at rates which depend on the region where the property is located

(0.5% to 1.5%). The rate of stamp duty is calculated over the total liability secured by the mortgage (principal, interest, default interest and enforcement costs and fees).

Pledges of shares are not subject to stamp duty, but the grant of a pledge involves payment of notary fees, as a public document is required.

A pledge of credit rights and moveable assets must also be created pursuant to a public document to benefit from priority over other creditors, so notary's fees are involved. A pledge of moveable assets must be registered at the Moveable Assets Registry (*Registro de Hipoteca Mobiliaria y Prenda sin Desplazamiento*), and registry fees and (if granted as a public deed (*escritura publica*)) stamp duty must be paid.

Pledges over credit rights may be registered at the Moveable Assets Registry if they are granted as pledges without dispossession of the pledged assets, in which case registry fees and (if granted as a public deed (*escritura publica*)) stamp duty are payable.

Glossary

TERM	EQUIVALENT
Acciones al portador	Bearer shares
Acciones nominativas	Nominative shares
AJD or Impuesto sobre actos jurídicos documentados	Stamp duty
Anotaciones en cuenta	Electronic shares
Arras	Good faith deposit (in property purchases)
AEB or Asociación española de banca	Spanish banking association
Cédula de habitabilidad	Certificate of fitness for occupation required for residential properties in some regions of Spain, notably in Catalonia
Código civil	Spanish civil code
Concesión administrativa	Administrative concession
Contrato de arras	Reservation agreement
Contrato privado	Private sale agreement
Derecho de aprovechamiento por turnos	Time sharing
Derecho de habitación	Right of habitation
Derecho de superficie	Leasehold
Derecho de uso	Right of use
Derecho de usufructo	Beneficial interest
Dirección general de comercio e inversiones	The general office for trade and investments
Escritura pública	Public deed
Entidad en atribución de rentas	Corporate entity where profits are attributed directly to the individual partners
FIIIs, fondos de inversión inmobiliaria and SIIIs sociedades de inversión inmobiliaria	Spanish real estate funds
Gravamen especial sobre bienes inmuebles de entidades no residentes	Special tax on real estate owned by non-resident entities
Hipoteca cambiaria	Securities mortgage
Hipoteca de máximo	Credit account mortgage
Hipoteca flotante	Floating mortgage
Hipoteca inversa	Reverse mortgage

TERM	EQUIVALENT
Hipoteca ordinaria	Ordinary mortgage
IBI or Impuesto de Bienes Inmuebles	Real estate tax
Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana	Tax on any increase in value of urban land
IVA or Impuesto sobre el Valor Añadido	VAT
Impuesto sobre la Renta de No Residentes	Spanish non-resident income tax
Impuesto sobre Sociedades	Spanish corporate income tax
ITP or Impuesto sobre Transmisiones Patrimoniales Onerosas	Transfer tax
Índice de Garantía de Competitividad	Guarantee of competitiveness index
IPC or Índice de Precios al Consumo	Consumer
Impuesto de Sucesiones	Inheritance tax
LAU or Ley de Arrendamientos Urbanos	Urban Lease Act
Ley Hipotecaria	Spanish mortgage law
Licencia de actividad	Activity license
Licencia de apertura	Opening license
Licencia de obras	Works permit
Licencia de primera ocupación	First occupancy permit
Propiedad en pleno dominio	Absolute freehold
Propiedad en proindiviso	Co-ownership
Propiedad horizontal	Condominium
Registro de Hipoteca Mobiliaria y Prenda sin Desplazamiento	Moveable assets registry
Retracto convencional	Contractual repurchase right
Saneamiento por evicción	Seller's liability for the purchaser being deprived of the property because of prior third-party rights

TERM	EQUIVALENT
Saneamiento por vicios ocultos	Seller's liability for any hidden defects of the property
Servidumbre real	Easement
Sociedad anónima	Public limited company
Sociedad limitada	Spanish limited liability company
SOCIMI or Sociedad Anónima Cotizada de Inversión en el Mercado Inmobiliario	Spanish REIT
Superficialario	Leasehold owner
Tácita reconducción	Tacit extension (in leases)
Valor catastral	Cadastral value
Valor de tasación	Reference value for the auction in case of enforcement of the mortgage

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This guide was written predominantly by Ines Chamarro of our Real Estate practice group and Maria Alonso of our Tax practice group.

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