

Sources of law and information

1. What are the main sources of real estate law?

The main sources are the:

- Civil Code.
- Real Estate Act 1998.
- Mortgage Act 1946 (governs mortgage agreements and other *in rem* limited rights).
- Mortgage Regulations 1947.
- Horizontal Division Act 1960 (introduced a special condominium regime applicable to buildings).
- Urban Leases Act 1994 (governs leases of housing units and business premises).
- Agricultural Leases Act 2003 (governs leases of property used for agricultural purposes).

In addition, each Autonomous Community has zoning legislation covering planning, land development, and the rights and duties of landowners.

2. How is title to real estate evidenced? If there is a public register, is it of title or of transactions?

Title is normally evidenced by registration at the Land Registry, although this is not mandatory. Mortgages, however, must be registered.

If not registered, title may be evidenced by any relevant document, for example, a private agreement or a notarial public deed. Buyers are advised to register title in order to benefit from protection given by the Land Registry against any contradictory or inconsistent transactions (for example, a previous sale of title to another buyer or previous mortgages).

Registration is of title rather than transactions. However, some information on past transactions is available at the Land Registry.

3. If there is a register of title:

- **Is there a state guarantee of title?**
- **Is there public access to the register?**
- **What categories of documents and information are registered?**
- There is a state guarantee, but only if the title appears in the register. Due to the non-mandatory registration system (*see Question 2*), the actual status of a piece of real estate may not always match the status shown at the Land Registry.
- Yes. Under the Mortgage Act, the register (and all documents mentioned on it) is open to public inspection by anyone with an interest in the legal status of any real estate (for example, a prospective buyer or mortgage-backed lender).
- The type of documents and information registered include details about the owner of real estate (including any inheritance or past insolvencies), encumbrances (including mortgages and attachments), *in rem* rights (such as easements and concessions), and other rights such as certain options and leases. Conditions precedent or subsequent, reservation of title and transfer

limitations are also registered.

4. Is title insurance used (or available)?

It is normally not necessary to have title insurance as title transfers or encumbrance transactions that are consistent with information disclosed at the Land Registry may not be challenged, except in cases of bad faith. Title insurance is not common either in respect of unregistered real estate assets or transactions which cannot benefit from Land Registry protection (for example, transactions without consideration).

Types of ownership

5. How may real estate be held (that is, what types of tenure exist)?

The basic form of tenure is ownership. The owner has the right to use its real estate (for example, dispose of or develop the property, or create an encumbrance) subject to planning and zoning limitations, the rights of neighbouring owners and other general needs, for example, aviation liens. All rights attached to real estate may be exercised directly by the owner or transferred to a third party (either for consideration or for free). There are also other rights attached to real estate, including surface rights and administrative concessions (an *in rem* right granted by public authorities to private entities; the holder of the concession is entitled to use, develop and operate a specific property and holds certain rights, for a certain period of time, as a full beneficiary rather than the owner of the real estate).

Acquisition and disposal of business premises

6. How is real estate in the market identified and accessed?

Real estate agents are normally appointed by sellers/landlords to market property and by buyers/tenants to identify potential property. Real estate agents may also negotiate the commercial terms of an acquisition or disposal.

7. What are the principal legal stages in the procedure for the acquisition/disposal of owner-occupied business premises? How long does the process generally take? At what stage does the acquisition/disposal become binding on the parties?

There are four principal legal stages. The parties usually:

- Sign a private agreement containing all or at least the essential elements of the sale such as the identity of the parties, price, method of payment, liabilities of the parties, description of the property and other conditions. In more sophisticated transactions, the agreement may contain provisions such as conditions precedent or subsequent, representations and warranties, rent guarantees and arbitration clauses, choice of jurisdiction or choice of law clauses. The agreement may be preceded by a non-binding letter of intent that allows the parties to establish the basic terms and provisions of their future contractual relationship, without undertaking an obligation to acquire or dispose of the business premises. When executing the private agreement, the buyer often provides a deposit as security for due and timely completion of the deal.
- Appear before a notary public who grants a public deed of sale of the property. Any act or contract that creates, transfers, amends or extinguishes *in rem* rights over real estate must be executed as a public deed.
- Settle the relevant taxes.

- Register the title to the property at the Land Registry (buyer only) (*see Question 2*).

In addition, the prospective buyer often conducts a due diligence review in order to check legal, technical, environmental and other matters affecting the targeted real estate. The owner may also grant a call option to the buyer. This gives the buyer the right to acquire the premises from the owner within a certain period of time (although the buyer is not bound to acquire the real estate). The buyer normally pays an option premium to the owner. This may be deducted from the sale price of the property, if the buyer decides to exercise the option. Title to real estate may be transferred only if:

- Legal possession of the building is handed over to the buyer; and
- Delivery is the consequence of a valid legal transaction (for example, a donation or sale and purchase agreement).

Real estate may be handed over to a new owner by means of the delivery of the keys to the premises, a certificate of delivery or any other document conveying the physical control and possession of real estate. Although it is most common for the transfer to be completed through a deed of sale, title to real estate is conveyed by any transaction so providing.

The process of transferring title to real estate may take a few days to several weeks or months, depending on the negotiation issues. For complex real estate assets (for example, shopping malls), the due diligence and the negotiations may delay the completion of the transfer by four to six weeks.

8. What are the principal legal documents? Is notarisation required?

The principal legal documents are the private purchase and sale agreements, which are valid, binding and enforceable. Generally, these agreements may only be registered at the Land Registry and, therefore, benefit from the protection it gives (*see Question 2*), if notarised before a notary public. Lease agreements are normally evidenced by a private agreement. However, in order to register the lease, the agreement must be notarised as a public deed.

9. What kind of warranties is a seller usually required to give a buyer?

Under the Civil Code, the seller must transfer property to the buyer without hidden defects, and must guarantee the buyer free and undisputed use of the property. However, this regime may be modified, if the parties desire.

Complex transactions usually include warranties covering any liabilities that existed before the real estate was transferred but which were not discovered until after the sale, including:

- Full ownership.
- No liens or encumbrances.
- Licences and permits.
- Planning status.
- Construction and technical matters.
- Environmental issues.
- Owner's association regulations.
- Lease agreements.
- Taxes.
- No material judicial or administrative dispute, or claim over the transferred real estate.

10. How are acquisitions generally financed? Do landlords generally require rent deposits, guarantees or other security from the tenant?

Mortgage-backed financings are normally used to finance acquisitions. Lenders usually require borrowers to offer additional security in any of the following forms:

- Pledges over rental income.
- Pledges of shares in the asset owner.
- Pledges of VAT collection rights.
- Assignment of fire and damage insurance benefits.

Non-recourse financings (that is, loans for which the borrower is not personally liable, and where the lender must recover the owed amount by foreclosure on the real estate by which the loan is secured, or even more commonly, loans where the shareholders of the borrower do not provide any guarantees to the lender) are another method of financing acquisitions, particularly for operating businesses.

Tenants must make a cash deposit of two months rent as security. The deposit must be paid when the lease agreement is executed. The landlord must place the deposit with the regional housing authorities. The parties may, however, agree a deposit for a higher amount and/or create any additional guarantee they consider appropriate (for example, delivery of bank guarantees or parent company guarantees).

11. Can an owner/occupier be liable for pre-acquisition events?

Yes. Under tort liability rules, the owner of a building may be liable for any damage or loss to neighbouring real estate and individuals caused by pre-acquisition events (for example, construction or design failures, or breach of maintenance duties).

An owner/occupier may also be liable for civil and criminal environmental damage caused by pre-acquisition events (for example, failure to take action to avoid damage caused by the existence of groundwater or soil pollution). In addition, environmental administrative rules may impose certain obligations on an owner/occupier. For example, where damage is caused by polluted soil, the occupier (and, failing it, the owner) must clean up the pollution, if the original polluter fails to do so.

Where real estate, or *in rem* rights over real estate, is transferred, the real estate itself is attached as security for settlement of the Local Property Tax.

It is normal practice to include in the transaction documents representations and warranties covering liability of the owner/occupier for pre-acquisition events.

12. Does a seller have any post-disposal liabilities?

Yes. A seller is generally liable for all post-disposal damages or liabilities caused by events that occurred before the sale of the real estate, although the parties may agree otherwise.

13. Is VAT (or equivalent) payable on the acquisition/disposal? Who pays? What are the rates? Are there any exemptions?

VAT is generally payable on the acquisition/disposal of real estate in the course of a business activity. The buyer pays 7% VAT for housing units and 16% VAT for all other types of real estate.

The following are generally exempt from VAT:

- Transfers of plots of land, which cannot be built on.

- The second and subsequent transfers of buildings or constructions (the first transfer is not exempt).

The taxpayer may waive the VAT exemption provided that both:

- The seller and the buyer are taxable persons for VAT purposes; and
- The buyer is entitled (under the provisions of the VAT Act 1993) to a 100% VAT credit allowance.

Real estate transactions, which are exempt from VAT, are subject to transfer tax of 6% or 7% (unless the VAT exemption is waived), depending on the region in which the real estate is located (*see Question 14*).

14. Is stamp duty/transfer tax (or equivalent) payable on the acquisition/disposal? Who pays? What are the rates? Are there exemptions?

Transfer tax is payable if either the:

- Seller is not taxable under VAT rules.
- Transfer is subject to, and exempt from, VAT, and the taxpayer does not waive the VAT exemption (*see Question 13*).

The buyer is responsible for paying transfer tax.

Transfer tax rates are set by the Autonomous Community where the real estate is located. The normal rate is 7%. However, if the Autonomous Community does not establish a specific rate, a rate of 6% will be levied. Some Autonomous Communities apply lower tax rates if the transfer is subject to, and exempt from, VAT, and the VAT exemption is not waived (*see Question 13*).

As the transfer of real estate is normally formalised in a notarial deed, and provided it is taxed under VAT rules, stamp duty will also be payable at a rate of 0.5% to 1% (depending on the Autonomous Community where the real estate is located) of the value stated in the notarial deed. However, if the property deal is exempt from VAT and the taxable person waives the exemption, the applicable stamp duty rate increases to 1.5% to 2%. The buyer is responsible for paying stamp duty.

The transfer of shares in a company is generally exempt from VAT and transfer tax. However, it will be subject to transfer tax if:

- More than 50% of the assets of the company consist of real estate property located in Spain;
- The acquirer purchases more than 50% of the shares in the company; and
- The company does not have as its exclusive business the construction or development of real estate.

The tax is based on the actual value of the real estate owned by the company.

There is also a special tax on the real estate of non-resident legal entities, which own real estate, or hold *in rem* rights on real estate, in Spain. This tax is levied on 31 December of each year and must be paid in January of the following year. The tax rate is 3% of the cadastral value of the real estate (that is, the value of the land and buildings on the land, if any, established in accordance with technical regulations issued by the municipal authorities). There are, however, certain exceptions. For example, entities resident in a country with a Convention for the Avoidance of Double Taxation with Spain, including an exchange of information clause, do not need to pay the tax, provided certain conditions are met.

15. What other acquisition fees and costs are normally payable?

The following additional acquisition fees are usually payable:

- **Local tax on the increase in value of the real estate.** This is levied on acquisitions, and creations and/or transfers of *in rem* rights over real estate. The tax rate is determined by the respective municipalities within the limits established by law. If the transfer is made for consideration, the seller will be responsible for paying the tax. However, if the transfer is made without consideration, the buyer will be liable.
- **Notarial and registration fees.** These are normally paid by the buyer by virtue of a contractual provision to this effect. If there is no such provision, the majority of the notarial fees will be paid by the seller. Generally, notarial fees are calculated as 0.03% of the deal consideration. However, if the consideration exceeds EUR6 million (about US\$7.5 million), the fee is freely negotiable with the notaries. Registration fees are calculated as 0.02% of the deal consideration with a cap of EUR 2,181 (about US\$2,703) per property and transaction.
- **Advisors' and agents' fees, and other legal costs.** These are usually payable by the parties who owe the fees.

16. What other disposal fees and costs are normally payable?

The seller must pay the local tax on the increase in value of the real estate, if the real estate is transferred for consideration.

Holding business premises

17. Are there restrictions on foreign registered or foreign-controlled entities owning or occupying real estate or giving guarantees or security in respect of real estate ownership/occupation?

Generally, there are no restrictions. However, companies with a registered domicile or main place of business in a tax haven (under Spanish legislation this includes, among others, Luxembourg, Liechtenstein, Monaco, the Seychelles, Gibraltar and Andorra) must obtain clearance before investing in Spanish real estate. They must also report the investment to the General Directorate of Investments and Commerce (a public body reporting to the Economy Ministry) by filing the relevant standard form within 30 days of closing the transaction.

Investments by a foreign entity in Spanish real estate exceeding EUR3 million (about US\$3.8 million) must also be reported to the General Directorate within 30 days of closing.

18. Does change of control of a company affect its holdings of real estate?

No, but tax regulations may apply. For example, the special tax on the real estate of non-resident legal entities (see [Question 14](#)) may be applicable or the transfer of shares may be subject to transfer tax.

Lease agreements also generally include change of control provisions, which give the landlord the right to terminate the lease or increase the rent in the event of the sale of the tenant's shares.

19. In what circumstances do local or state authorities have the right to purchase business premises compulsorily? Will the purchase price be market value?

Local or state authorities may not compulsorily purchase business premises without a previous declaration that the purchase is in the public interest or would be of use to the public.

The purchase price will be an equitable amount (*justiprecio*), which may be established by agreement between the competent authorities and the owner of the business premises. If no

agreement is reached, the *justiprecio* may be fixed by taking into account, among other things, the market value, the taxable value of the premises and/or an average of both.

20. Are any municipal taxes payable on the occupation of business premises? Are there any exemptions?

Municipal taxes are payable by owners of real estate and holders of *in rem* rights over real estate. This tax is levied on a yearly basis at a rate of 0.4% of the cadastral value of urban real estate. Municipalities may increase or reduce the tax rate within the limits established by the Local Finance Act.

There are no exemptions for owners or holders of *in rem* rights over business premises. However, a 50% tax credit is granted for any kind of real estate where a thermal or sun energy system has been installed.

21. How can business premises be used to finance or fund the business?

Mortgages on business premises, and sale and lease-back transactions may be used to finance or fund the business.

Typical commercial lease terms

22. Are rents or lease terms regulated or subject to a voluntary code?

Lease agreements are subject to the Urban Lease Act (ULA) 1995, unless they are subject to the former Urban Lease Act 1964 or Royal Decree 2/1985.

Lease agreements for business premises are governed by the provisions that the parties themselves have agreed to (except for a number of compulsory provisions under Title I, IV and V of the ULA). If the parties have not agreed on provisions, the lease will be subject to the provisions contained in Title III of the ULA and the Civil Code. If there is a particular article in Title III of the ULA that the parties do not wish to be applicable, they must expressly state that it is to be excluded from the lease agreement.

23. What are the typical terms of a lease (whether contractual or regulated) of owner-occupied business premises relating to:

- Length of lease term?
- Rent review?
- Alienation?
- Repair?
- Insurance?
- **Length of lease term.** This may be freely agreed by the parties. The average lease term depends very much on the sector. Leases of large units within a commercial centre normally range between ten and 15 years to tie in tenants who occupy the commercially most significant businesses.
- **Rent review.** The ULA does not set out any provisions regarding rent reviews. The parties usually establish a rent review procedure based on the National Consumer Price Index. Turnover rents (or turnover rents combined with minimum fixed rents) are also commonly used in the commercial centre sector.

- **Alienation.** Under the ULA, tenants may sublet or assign the premises to any third party without the landlord's consent. However, the landlord may increase the rent by:
 - 10% for partial sublets; and
 - 20% for total sublets or assignments.

A change of tenants resulting from mergers, divisions or transformations is not considered an assignment. These legal provisions are normally waived by the tenant and replaced by a more landlord friendly regime in the contract.

- **Repair.** Provisions contained in the ULA regarding leases of housing units and maintenance of premises will apply to leases of business premises, unless otherwise agreed by the parties. The landlord may carry out all improvement works it considers necessary. The tenant must repair any damage it (or its employees) has caused including damage resulting from normal wear and tear. The tenant is not entitled to carry out any repairs, which may affect the structure of the premises, unless it has obtained written consent from the landlord. These legal provisions are usually replaced by contractual provisions.
- **Insurance.** The landlord may insure (wholly or partially) the rent payable by the tenant. Fire and damage insurance is also the responsibility of the landlord and recovered from the tenant. Loss of rent insurance is common but rarely recoverable from tenants. Tenants usually take out insurance for the business activities they perform while leasing the premises.

24. Is VAT (or equivalent) payable on rent?

Yes.

25. Can named tenants typically share their business premises with group companies?

Anchor lease agreements (these are entered into with tenants who hold the commercially most significant businesses in the commercial centre) often allow tenants to assign their contractual position to other group companies without any penalty or rent increase. An assignment to group companies is usually possible provided that the group parent company (or any other group company with enough financial strength or credit rating) remains liable as a guarantor.

26. What events give the landlord a right to terminate the lease ?

The landlord may terminate the lease if the tenant does any of the following:

- Defaults on its payment.
- Fails to pay the rent deposit.
- Carries out dangerous or illegal activities in the premises.
- Fails to comply with its repair and maintenance obligations.
- Does not notify the landlord within one month of subletting or assigning the premises.

However, Spanish case law indicates some reluctance to allow contract termination on the grounds of default, if the breach:

- Does not relate to an obligation that is considered essential.
- Can be cured.
- Is not exclusively attributable to the defaulting party.

27. What events give the tenant a right to terminate the lease ?

The tenant may terminate the lease agreement if the landlord fails to comply with the provisions of the agreement (for example, if the landlord fails to deliver the premises or fails to repair the premises).

28. What is the effect of the tenant's insolvency (under general contract terms and insolvency legislation)?

The Insolvency Act 2003 (22/2003) provides for the continuation of agreements in the event of the tenant's insolvency. In addition, the Act specifically states that the declaration of insolvency will not affect any existing agreements that provide for reciprocal obligations that both parties have yet to perform.

Any contractual clause that allows cancellation or termination of the agreement in the event of the insolvency of one of the parties will be disregarded. Any outstanding obligations under such agreements will be payable directly to the bankrupt estate, as these credits will not be subject to the moratorium or reduction rules laid down in the insolvency proceedings.

An insolvent tenant may reinstate the lease agreement and stop eviction proceedings exercised by its landlord before the declaration of insolvency at any time before the moment of effective eviction by paying all amounts due, including the landlord's court costs up to such time.

It is important to note that the Insolvency Act will only come into force on 1 September 2004. Under current insolvency regulations, the tenant's insolvency is a valid reason for the landlord to terminate the lease. In addition, there is currently no obligation to reinstate lease agreements with insolvent tenants (as described above).

29. Do tenants of business premises have security of occupation or any rights of renewal at the end of the contractual lease term?

There is no statutory right of renewal. Therefore, the parties may either expressly exclude or include the possibility of renewal in the lease agreement. If there is no express provision and the tenant continues to lease the premises with the landlord's consent for 15 days after the original lease has expired, the Civil Code will allow the tenant to renew the lease.

Leases for business units normally allow the tenant to extend the lease once subject to a market rent review.

Residential leases for staff

30. Are short-term residential leases available? Is there any minimum/maximum length of term?

The parties are free to agree on the duration of a residential lease among themselves. However, if the agreed term is less than five years, the lease will be automatically renewed for subsequent periods of one year up to a minimum of five years, unless the tenant notifies the landlord of its wish not to continue the lease. If the tenant does not wish to continue the lease, it must notify the landlord at least 30 days before the lease (or of any of its subsequent extensions) expires.

31. Are there restrictions on foreign nationals as tenants?

No.

32. Is an employer guarantee usually required?

Although a guarantee is not usually required, an employer's reference normally is. The landlord may sometimes require the employer to enter into the agreement directly (as a tenant). The tenant is also

required to pay a cash deposit.

Planning law

33. What is the institutional framework of planning control?

The development, construction and use of real estate is regulated by the Planning Regulations, which are approved by the competent local authorities and Autonomous Communities, and subject to the general principle of hierarchy (higher level regulations may not be amended or contradicted by more specific ones).

Planning Regulations are implemented by the Autonomous Communities and, therefore, the applicable legal structure of each regulation may differ.

34. When is planning permission required?

The principal planning permits and licences required for the construction of buildings are:

- **Construction licences.** These must be obtained before any new premises can be constructed.
- **First occupancy licences.** These are obtained once the premises are built and the local authorities have verified that the construction of the premises complies with the relevant construction licence.
- **Activity licences.** These must be obtained before any activity is carried out on the owned or leased premises (normally, for new constructions, the activity licence is granted at the same time as the construction licence). Any change in the use of the property requires a new activity licence.
- **Opening licences.** These are granted once the activities are about to begin and verify that the conditions imposed for the issuance of the relevant activity licence have been fulfilled.

Premises may not be erected and/or used unless the relevant construction and operating licences have been obtained.

35. If planning permission is required:

- To which body or bodies are initial planning applications made?
- Do third parties have the right to object?
- In what circumstances will there be a public inquiry?
- After how long is the initial decision made?
- Is there a right of appeal?
- Approximately how long does the whole procedure take?
- **Application.** Initial planning applications are made to the local authorities where the buildings are located.
- **Third party rights.** Interested third parties have the right to object before the local authorities.
- **Public inquiries.** A public inquiry is only required if the activity licence (*see Question 34*) is for potentially hazardous activities.

- **Initial decision.** The time limit for local authorities to grant or reject planning permission varies between one and two months, depending on the type of planning permission and the location.
- **Appeals.** Any resolution from an administrative body infringing the law may be appealed and declared null and void.
- **Duration.** The duration of the whole procedure depends on the type of premises and their specific location. Generally, obtaining a construction licence may take approximately four months. An activity licence may take between three months and one year.

36. Are there any special planning regimes for certain types of buildings or locations?

Certain types of buildings (such as commercial centres and hotels) are subject to special planning regimes. For example, commercial licences, which are granted on a discretionary basis by the Autonomous Communities, are required for the development of large commercial areas built after 1995. Usually, a commercial licence must be granted before all other municipal construction and operating licences are awarded.

Reform

37. Please summarise any proposals for reform.

There are currently no proposals for reform.

Useful websites

38. Please list web addresses for business occupier organisations, industry bodies, etc.

Spanish Council of Shopping Centres (AECC)

Website. www.aedecc.com

Madrid Official Bar of Property Agents

Website. www.coapimadrid.org

Property Agents' General Council

Website. www.consejocoapis.org/junta_de_gobierno.htm

Spanish planning newsletter

Website. www.rdu.es

Madrid Planning Council

Website. www.urbanismo.munimadrid.es