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The International Comparative Legal Guide To Real Estate 2010

A practical cross-border insight
into real estate law



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1 Real Estate Law

- 1.1 Please briefly describe the main laws that govern real estate in the USA. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1.**

Real estate is governed primarily by the state laws of each of the fifty United States. A combination of state statutory and common law governs such areas as future estates, concurrent ownership, landlord and tenant rights, servitudes, transfer of interests, and title insurance. With some exceptions, private property rights are protected against adverse action by governmental entities and third parties. Most aspects of real estate transactions are left to the parties to negotiate, with regulatory intervention generally limited to matters of public policy, such as laws ensuring the habitability of residential buildings. Federal law applicable to real estate is primarily directed to sensitive resources and industries and to government lands.

- 1.2 What is the impact (if any) on real estate of local common law in the USA?**

Local common law governs much of real estate rights and transactions, though in many states common law has been increasingly codified.

- 1.3 Are international laws relevant to real estate in the USA? Please ignore EU legislation enacted locally in EU countries.**

Generally, no.

2 Ownership

- 2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

A little less than half of the states restrict, to some extent, ownership of real estate, particularly agricultural lands, by non-resident aliens. Some restrictions apply only to foreign individuals, not to corporate entities.

3 Real Estate Rights

- 3.1 What are the types of rights over land recognised in the USA. Are any of them purely contractual between the parties?**

Ownership, use rights, and future interests are recognised. Many rights, particularly use rights, are purely contractual between the parties.

4 System of Registration

- 4.1 Is all land in the USA required to be registered? What land (or rights) are unregistered?**

Registration of land is generally not required. However, the platting of land is generally a prerequisite to enjoying certain benefits of ownership, such as obtaining a building permit or selling portions of a tract. Platting usually involves obtaining municipal approval of a survey showing planned or actual features of a piece of property. Plats are registered (recorded) in the real estate records.

- 4.2 Is there a state guarantee of title? What does it guarantee?**

No, there is no state guarantee of title. Buyers typically purchase private title insurance.

- 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Generally, registration (recording) of rights is not compulsory. However, because registration (recording) is the primary means of giving constructive notice of property rights to the world at large, parties voluntarily register (record) most real property rights.

In many jurisdictions, unregistered (unrecorded) property rights are not valid against a subsequent acquirer of the same or greater estate, for value, who does not have notice of the unregistered (unrecorded) conveyance and who registers (records) his interest first.

- 4.4 What rights in land are not required to be registered?**

Most rights in land are not required to be registered (recorded), though registration (recording) is desirable to put third parties on notice. Rights which are apparent from inspection of the land, so as

to put inquirers on notice, sometimes go unregistered. Leasehold rights are a common example.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

There is no probationary period in the United States.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Title is transferred upon the completion of the purchase and the delivery of a valid deed (instrument of transfer) to the buyer.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Priority of rights is governed by statute. Generally, earlier rights have priority over later-acquired rights. However, in some jurisdictions, later acquirers who register (record) their interests in the real estate records can gain priority over holders of earlier-acquired, unrecorded rights. Also, parties with rights in the same property can establish, by contract, the priority of their respective rights relative to each other.

5 The Registry / Registries

5.1 How many real estate registries operate in the USA? If more than one please specify their differing rules and requirements.

Generally, each county in each state has its own registry. In addition, a few states have a registration system similar to the Torrens system in New Zealand. Rules and requirements, such as the requirement that recordable documents must bear notarised, original signatures, are generally similar from one county to another. However, many jurisdictions have unique requirements, such as those pertaining to the size of document margins or the language of notary acknowledgments.

5.2 Does the Land Registry issue a physical title document to the owners of registered real estate? Can any transactions relating to registered real estate be completed electronically? Can information on ownership of registered real estate be accessed electronically?

Typically, the only physical title document provided by the registry to the owners of registered real estate is a recorded original of the deed (instrument of transfer) evidencing the date and time of recording. In a small but growing number of states, transactions relating to registered real estate can be completed, and information on ownership of registered real estate can be accessed, electronically.

5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Generally, no.

5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

Public access to the register normally is not restricted. Generally, together with a survey, a buyer can obtain from the real estate records all necessary information regarding encumbrances and other rights affecting real estate.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in the USA? Please briefly describe their roles and/or duties.

a) Selling and purchasing agents (or realtors)

Agents/Realtors advertise the sale of properties and locate interested parties and available properties. They are sometimes involved in negotiating the terms of the transaction.

b) Lawyers

Lawyers document transactions, negotiate terms, and perform legal due diligence.

c) Notaries

Notaries attest signatures on documents, especially those to be recorded.

d) Others

Title insurance companies search the registry (real estate records) for encumbrances affecting the property, prepare a summary thereof, and insure that, upon completion of the transaction, title will belong to the buyer.

Escrow agents prepare settlement statements, facilitate the transfer of funds, submit documents for recording, and generally assist with the closing of the transaction pursuant to the parties' instructions. Title insurance companies often fill this role.

Surveyors survey real estate, depict encumbrances, and certify a legal description of the property to the buyer and the title insurance company.

6.2 How and on what basis are these persons remunerated?

Agents/Realtors typically receive a fee calculated as a percentage of the purchase price. Lawyers typically receive fees based on an hourly rate or, less commonly, a set fee. Notaries receive a nominal fee. Escrow agents receive a flat fee. Title insurance companies charge insurance premiums that are either negotiated with the insured party or fixed by a state insurance commission. The surveyor's fee usually depends on the nature of the survey requested and how busy the surveyor is.

6.3 What are the main observable consequences on the real estate market in the USA arising out of the global credit crunch and worldwide recession in 2008/9? Please include both local and international investors in your answer.

The general economic downturn, complicated by a severe credit crunch in commercial real estate, has drastically impacted the commercial real estate market. Although financing is still available to many investors, the financing now available is significantly different from that being offered prior to the global credit crunch.

Specifically, more capital is being required in connection with financing transactions, which is a deviation from the business model that many investors have been operating under for a number of years, resulting in less transactions. Additionally, as real estate values continue to decrease in many areas, investors are trying to gauge whether (i) the values will continue to decrease and they should continue to abstain from investing, or (ii) whether values have reached bottom and they should begin investing again. Finally, as commercial vacancy rates rise, rents are softening, giving tenants an advantage in the negotiations of new leases, and the modification (retrading) of existing leases.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

The minimum legal formality for the purchase and sale of real estate is the acceptance of a deed (instrument of transfer) by a buyer and the acceptance of a purchase price by the seller. Also, contracts for the purchase and sale of real estate generally must be in writing to be enforceable.

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

Generally, there is no broad duty of disclosure. However, failure to disclose certain environmental conditions can result in a loss of defences to liability. In Texas, for example, there are disclosure requirements regarding underground storage tanks and water service.

7.3 Can the seller be liable to the buyer for misrepresentation?

Absent fraud, a buyer's acceptance of a deed (instrument of transfer) usually relieves a seller of statutory liability for misrepresentations. However, often sellers and buyers will agree contractually that specified representations (e.g., pertaining to the condition of the property) survive the closing of the transaction for a period of time. In such cases, sellers can be liable to buyers for misrepresentations for a specified period of time after the transfer of the subject property.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

Sellers sometimes warrant the condition of the property. However, such warranties are generally very limited in both scope and duration. The function of warranties is both to apportion risk between the parties and to provide information. Generally, warranties should not be relied upon as a substitute for a buyer carrying out its own due diligence.

7.5 Does the seller warrant its ownership in any way? Please give details.

Generally, yes. Often, sellers warrant that they have not previously conveyed ownership, or other property rights, to another, except for

specified encumbrances. In addition, buyers often purchase a guarantee of the condition of title from a title insurance company.

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

Generally, a buyer succeeds to all of the liabilities attached to the real estate purchased.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

The US banking industry is heavily regulated. Different rules apply to the financing of residential real estate and to the financing of commercial real estate. Regulations include legal lending limits and property appraisal standards.

Most lending regulations do not differentiate between residents and non-resident persons. However, under the Foreign Investment in Real Property Tax Act ("FIRPTA"), transferees of an interest in real estate are required to withhold tax if the transferor is a foreign person or entity. In addition, lenders are prohibited by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) from doing business with persons suspected of terrorism. Lending regulations generally do not differentiate between real estate loans to individuals and real estate loans to corporate entities.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

Lenders typically protect themselves by foreclosure, a call on guarantors, and, in the case of income-producing property, collecting on a collateral assignment of the income stream. Often, the threat of foreclosure leads to the negotiation of a new payment schedule if the borrower is still viable.

8.3 What minimum formalities are required for real estate lending?

A promissory note and a security instrument (a mortgage or deed of trust) constitute the minimum formalities required for real estate lending. Also, federal laws require banks to obtain an appraisal of real estate collateral.

8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Generally, registering (recording) a mortgage (or deed of trust) prior to the registration (recording) of the claims or security interests of other creditors protects a lender from most claims against the real estate asset by other creditors. An exception would be the claim of a contractor who furnished labour or materials to the subject property before the registration (recording) of the mortgage, which would take priority over the mortgage notwithstanding later registration (recording).

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

In some jurisdictions, real estate transfers are subject to transfer taxes. Transfer tax regimes vary, but tax amounts are usually based on the value of the real estate transferred or on the purchase price.

9.2 When is the transfer tax paid?

Transfer taxes are usually paid at the consummation of the transaction.

9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

No, real estate transfers are not subject to VAT.

9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

Sellers pay capital gains taxes on the profit from the sale of a property. In some jurisdictions, transfer taxes are generally paid by the seller. A foreign seller is also subject to FIRPTA tax on disposition, which tax is withheld by the buyer at the time of the sale and paid to the federal taxing authority.

9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes. Generally, real estate transfer taxes do not apply when ownership interests in a company, rather than in the real estate assets of the company, are transferred.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

Leases of business premises are regulated by laws related to contracts, real property, insurance, construction, and commercial and zoning rules. Parties are generally free to allocate responsibility for compliance with applicable laws between themselves contractually.

10.2 What types of business lease exist?

There is a wide variety. Space leases, ground leases, and triple-net leases are common.

10.3 What are the typical provisions for leases of business premises in the USA regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

a) Length of term

Depending on the parties' needs, terms typically last anywhere from

several months to several years. An initial term with renewal options exercisable by a tenant is a common type of provision.

b) Rent increases

Incremental rent increases are often established at the time of the lease. Also, tying future rent adjustments to an objective standard, such as changes in the Consumer Price Index, is common.

c) Tenant's right to sell or sub-lease

Leases often prohibit a tenant from assigning or sub-leasing to another without landlord consent. In such cases, tenants sometimes reserve the right to assign to an affiliate.

d) Insurance

Tenants are often required to maintain all-risk casualty insurance covering the leased premises and interior fixtures and general liability insurance for the leased premises. In some instances, tenants are also required to maintain personal property, worker's compensation, and/or business interruption insurance. Landlords are typically obligated to carry property insurance and general liability insurance covering the building and common areas, with tenants each paying a proportionate share of the landlord's insurance premiums. Waivers of subrogation are typical.

e) (i) Change of control of the tenant

Change of control is sometimes subject to restrictions similar to those limiting assignment of the lease by the tenant. Requirements regarding the resulting financial condition (e.g., net worth) of the tenant are also common.

e) (ii) Transfer of lease as a result of a corporate restructuring (e.g., merger)

Transfer due to corporate restructuring is sometimes subject to restrictions similar to those limiting assignment of the lease by the tenant. Tenants sometimes retain the right to merge with an affiliate without prior landlord consent.

f) Repairs

Great variety exists. For example, triple-net leases require tenants to bear the burdens associated with ownership, including repairs. Space leases typically require landlords to make at least necessary structural repairs.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

Generally, rent is taxable income to the landlords. In addition, state and/or city taxes, such as a commercial occupancy tax payable by the tenants, apply in some jurisdictions.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Business leases terminate upon expiration of the term. Also, parties sometimes retain a right to terminate for certain defaults, after giving notice and an opportunity to cure. Renewal options or automatic extensions of the term in the absence of a default are often negotiated. Compensation for early termination varies. For instance, loss of revenue over the unexpired term is often used as part of the equation to measure damage from default. However, some jurisdictions impose a duty to mitigate damages.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?

Generally, the landlords are released from liabilities that accrue after the sale of their interest, but not usually for pre-sale non-compliance. The tenants usually are not released from liability, either for pre-sale non-compliance or post-sale obligations. However, a release can be negotiated by the parties.

10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the “environmental footprint” of a building. Please briefly describe any “green obligations” commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).

In prior years, aspirational clauses were the norm. As sustainability objectives have become an imperative in the industry, there is now substantial focus on operating expense definitions, damages, default, and affirmative and negative covenants with respect to sustainability concepts.

11 Zoning and Environmental Issues

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land? Please briefly describe them and include environmental laws. Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.

Zoning and most matters concerning use and occupancy of land and buildings are governed by municipal codes and city ordinances. However, federal and state laws, such as the Americans with Disabilities Act (ADA) and its state equivalents, have significant regulatory impact in such areas as public access for the disabled and health and safety.

The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and analogous state laws are some of the primary sources of environmental liability exposure for an owner of real estate. While many of these Superfund-type laws do not impose legal requirements for remediation, they generally impose liability on current owners and operators of contaminated sites (as well as on certain past owners and operators of contaminated sites) for the costs of remediation and other damages from the contamination.

The state (or a subdivision thereof) can force land owners to sell land to it under the power of eminent domain for certain public uses such as building or expanding a public road, redeveloping a blighted neighbourhood, or building a school, a park, or public utilities. Generally, the state actor first attempts to negotiate with the property owner to purchase the property for fair value. If agreement is not reached, the state actor files a court action to exercise eminent domain. A hearing is held at which the state actor must show that good faith negotiations have failed and the taking of the property is for a public use (as defined by law). The property owner is given an opportunity to respond. If the state's petition succeeds, proceedings to establish the fair market value of the property follow, with each side offering expert testimony, usually from appraisers, regarding the property's value. Either side may appeal the court's decision.

11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

State and local governments primarily control land/building use and/or occupation. The U.S. Environmental Protection Agency administers the main federal programmes relating to pollution control and remediation. Many of these programmes have been delegated to state environmental agencies. Furthermore, many states have additional independent environmental programmes. Generally, the buyers obtain reliable information on such matters from land use lawyers, title insurance companies, and environmental lawyers and consultants.

11.3 What main permits or licences are required for building works and/or the use of real estate?

Generally, building permits are required for construction and subsequent alterations, and a certificate of occupancy is required for use and occupancy. Additional permits and licences may be required depending on the nature of the business conducted on the property. For instance, additional permits are required for certain agricultural and mining uses, and a liquor licence is required for the sale of alcoholic beverages. A common prerequisite to obtaining a building or use permit is that the proposed building or use must comply with zoning regulations applicable to the subject property.

11.4 Are building/use permits and licences commonly obtained in the USA? Can implied permission be obtained in any way (e.g. by long use)?

Building and use (occupancy) permits are almost always required. Generally, implied permission cannot be obtained in any way.

11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?

The cost of building/use permits and the time involved in obtaining them vary from one jurisdiction to another and are based chiefly on the size and complexity of the project. Cost of permits can range from a small fee to thousands of dollars. Timeframes vary from almost immediately to several years.

11.6 In what circumstances (if any) is environmental clean up ever mandatory?

Requirements for environmental clean up vary from state to state. Some states, such as California, impose stringent cleanup requirements. Other states tie clean up requirements to certain transactional triggers. Other states have a risk-based clean up requirement. While many states do not impose a legal requirement for remediation, they generally impose liability on owners and operators of contaminated sites for the costs of remediation and other damages from the contamination.

11.7 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in the USA.

To date, neither the United States nor individual state governments regulate, in any comprehensive way, the energy performance of buildings. Only a few U.S. cities have adopted regulatory requirements, and most of those apply only to government projects

and facilities. However, the U.S. Green Building Council, a private non-profit organisation, has developed standards for environmentally sustainable construction and a rating system known as Leadership in Energy and Environmental Design (LEED). LEED certification is increasingly sought by developers and demanded by tenants and therefore enhances a project's marketability. The LEED rating system focuses on sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process. Government regulatory requirements and guidelines, where they exist, are often based on the LEED system.

12 General

12.1 Are there any current proposals for significant reform of real estate law in the USA? Please give details.

Yes. Proposals for reform include expanding electronic filing of recordable documents and harmonising real estate laws among the states.

12.2 Date at which law is stated.

March 1, 2010.



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Tim Powers is a partner, a member of the Board of Directors and oversees the international practice of Haynes and Boone. His practice focuses on international business law with a primary emphasis in international banking and finance and international investment in real estate. Tim has served on the Council of the Real Property, Probate and Trust Law Section of the American Bar Association, and has also chaired the Section's International Investment in Real Estate Committee. He is an active member of the Anglo-American Real Property Institute, the International Bar Association and the Council on Foreign Relations. Tim is listed in the Euromoney Guide to the *World's Leading Real Estate Lawyers* and in *An International Who's Who of Real Estate Lawyers* published by Law Business Research. He has also been selected by his peers to be listed among "The Best Lawyers in America®", and as a "Texas Super Lawyer". Tim has published multiple works including "Foreign Investment in United States Real Estate: A Comprehensive Guide", and "Complying with FIRPTA: A Manual of Forms". Tim earned a bachelor of arts degree with honours from the University of California at Los Angeles, and his law degree from Southern Methodist University.



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