

Higher Education Real Estate Lawyers Conference

Real Estate Issues Related to Foreign Educational Programs

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University International Facts

More than 260,000 U.S. Students Studied Abroad in 2008/2009 Academic Year

- Although down by .8% cf'd to 2007/2008, more than half of campuses responding (55%) reported increases in 2009/2010 cf'd to 2008/2009 year.
- Overseas Study by U.S. Students has increased 4X in the past 25 years in which have been tracking

(Open Doors 2010 Report)



University International Facts

- American Students are Heading to *LESS* Traditional Places
 - Double digit increases to Argentina (up 15 %), South Africa (up 12%), Chile (up 28%), the Netherlands (up 14%), Denmark (up 21%), Peru (up 32%) and South Korea (up 29%)
 - Fifteen of the top 25 destinations located outside of Western Europe
 - In nineteen countries English not a primary language

(Open Doors 2010 Report)



University International Facts

- Number of American students studying in Middle East increased by 9%, though region host to only slightly over 1% of total number of students studying abroad
 - Israel hosts largest number of students in region
 - But, number of U.S. students rising dramatically in others, e.g., United Arab Emirates and Qatar (though total numbers still relatively low)

(Open Doors 2010 Report)



Universities Surveyed Tell Us

- **Reasons to Increase International Presence**
 - Recruitment of Research Talent and Students (28%)
 - Growing Reputation Abroad (26%)
 - Increasing Linkages with Universities Overseas (19%)
- **Additional –**
 - Sharing research, access to top scholars, access to additional funding and grants, etc.

Competitive Pressures Fueling

- Development of new and sometimes more affordable program opportunities in these destinations
- Expanded range of fields and program durations

(Open Doors 2010 Report)

Expanded range of fields and program durations

Broad proliferation and spectrum of programs, e.g.:

- Accounting
- Animal Science
- Arts
- Chinese Language
- Communications
- Computer Science
- Design
- Engineering
- European Studies
- French Language
- French Studies
- General/Customized
- Geography
- Geology
- Greek Language
- History
- International Business
- International Relations
- Latin American Studies
- Management
- Marketing
- Music
- Nursing
- Photography
- Political Science
- Pre-Medical
- Psychology
- Religious Studies
- Sociology/Culture
- Social Work
- Spanish Language
- Theater



International Program Changes

- Traditionally, colleges/universities have built their international presence through:
 - study-abroad programs
 - research partnerships
 - faculty exchanges
 - joint degree programs offered with foreign universities
 - ***Overseas branches & subsidiaries are now on the rise***

Overseas branches & subsidiaries are considered *RISKIER*

- **What are the increased Risks?**
 - Lack of Appreciation for Legal Obligations & Risks, e.g.:
 - U.S. Embargo / Sanction Programs
 - Anti-Boycott Regulations
 - Foreign Corrupt Practices Act
 - Inadequate Due Diligence

Legal Issues to Consider

1

CAN U.S. COLLEGE/UNIVERSITY ENTER INTO
INTERNATIONAL ENDEAVOR WITH INVOLVED
ENTITY OR COUNTRY?
(different than should it)

- **Embargoed and Sanctioned Countries**

- *Extent of embargo / prohibited transactions differ by specific program*

- **“Bad Boy Lists”**

- *For ex: Specially Designated Nationals lists*

Legal Issues to Consider

2

ANTI-BOYCOTT ISSUES



Anti-Boycott Regulations

- A boycott is an agreement to stop doing business with, selling to, transacting with, or discriminating against another country
- Middle Eastern countries seek a boycott of Israel in their contracts
- This request may be found in bid invitations, contracts, letters of credit, MOUs, or verbal representations

Examples of Boycott Language & Other Restrictions

- “We are fully aware of the Syrian legislation concerning the boycott of Israel and undertake to comply with it.”
- Request for Description of Business with Israel is reportable
 - *Failure to report is itself a violation of Anti-Boycott regs*

Legal Issues to Consider

3

ANTI-BRIBERY



Foreign Corrupt Practices Act (FCPA)

Giving anything of **Value** (including a promise or authorization) to a **Foreign Official** with **Knowledge of or Intent** that some or all of the gift is for the purpose of **Influencing** the Foreign Official to assist in obtaining a **Business Advantage** for the **Covered Person** making the payment.



Foreign Official

Officer, employee or other person acting **in an official capacity** for:

- A foreign government
- Any department, agency or instrumentality of a government
- Any quasi-governmental entity and corporation owned or controlled by a foreign government (parent corporations)
- Any Public International Organization (i.e. UN, etc)
- Any Foreign Political Party
- Candidate for Foreign Political Office

Covered Persons

- U.S. Citizens
- U.S. Residents
- U.S. Visitors who commit bribery while in U.S.
- U.S. Corporations, Partnerships or other Businesses
- Foreign Subsidiaries of U.S. Businesses if U.S. Company owns 50% or More

Additional Covered Persons

- Other Corporations & Business Organizations with a Principal Place of Business in the U.S.
- Other persons if they participate in a prohibited activity as an officer, director, employee, representative (including stockholder acting on behalf of the company) or agent of any U.S. business.



Exceptions / Affirmative Defenses

- Grease Payments for “Routine Government Action”
- Reasonable expenses to promote performance of contract or display services
- *But, only if lawful under written laws and regulations of the foreign country*

Anti-Bribery Special Note

Numerous Other In-Country Anti-Bribery Statutes



Legal Issues to Consider

4

Host County's Real Estate Investment Laws

- Foreign Investment Restrictions
- Special Agrarian Legal Ownership Issues
- Prior Entity Formation & Approval
- Registration & Reporting

Specific Real Estate Issues - Mexico

- Mex. Constitution Art. 27, Sec. 1 grants right to acquire ownership of land to Mexican individuals companies.
- Also grants discretionary power to grant the same right foreigners, *subject to the condition that foreigners agree with the Ministry of Foreign Affairs to consider themselves as Mexican nationals and not to invoke the protection of their home governments.* (Calvo Clause)
 - *If this covenant is breached, all rights to the real property will revert to the Mexican nation.*



Specific Real Estate Issues - Mexico

- Mex. Constitution Art. 27, Sec. 1 also prohibits foreigners from acquiring direct ownership of land and water located within “Restricted Zones”:
 - 100 kilometers of the national borders
 - 50 kilometers of the national shorelines
- Foreign Investment Law of 1993 modified restriction:
 - Allows foreigners to acquire ownership of land within Restricted Zones, provided acquired for nonresidential purposes and through ownership of a duly formed Mexican company

Ownership of land for residential purposes still available if use indirect ownership structure (e.g. a trust administered by Mexican institution, usually a bank)



Specific Real Estate Issues - Mexico

- Mex. Constitution limits the amount of lands designated for agricultural, stockbreeding or forestry activities that may be owned by business (including non-profit) corporations.
- Certain lands designated as agricultural, stock breeding or forestry activities may be owned by a community or “*Ejido*”
 - *Existence of these provisions requires extra due diligence*

Specific Real Estate Issues - Mexico

- Lands may be de-incorporated from *Ejido* if:
 - Termination of agrarian regime application approved by meeting of members of *Ejido*
 - Resolution of a meeting of members of *Ejido* – in the event land parcels have already been specifically assigned to each member of *Ejido*
 - Transfer of land by *Ejido* for causes of evident utility to business corporations



Specific Real Estate Issues - Mexico

- Highly technical steps prescribed by the 1992 Agrarian Law, as amended , required ... failure to observe may lead to nullification
 - Publication required in order to cut off rights of *Ejido* members, as well as family members, workers on *ejido* property, and neighboring owners
- Process takes **one to one & a half years** from date termination of agrarian regime application approved by meeting of members of *Ejido* to issuance of private title to land and registration of same in Public Registry of Property



Specific Real Estate Issues - Mexico

- Additional issues:
 - Real estate transfers must be formalized by Notary Public
 - Transfer tax applies (except if first transfer by *Ejido* member to non-*Ejido* entity)
 - Together = @ 5% of purchase price
 - Title insurance available in Mexico



Specific Real Estate Issues - Mexico

- Leases:
 - Must be in writing to be enforceable; some Mexican states require registration with local treasury department
 - Lessors usually require guarantor
 - Lessees usually responsible for maintenance
 - Most matters subject to negotiation/will of the parties
 - But, lessees have right of first refusal to acquire property in case of sale, lessor's insolvency, etc. *even if not in Lease*



Specific Real Estate Issues - Mexico

- Commodatum:
 - “Free Use” or “Bailment” Arrangements
 - Need to be in writing to be enforceable; some Mexican states require registration with local treasury department
 - Tenants usually responsible for maintenance (except for hidden flaws)
 - Most matters subject to negotiation/will of the parties



Specific Real Estate Issues - Germany

- Purchase agreements must be notarized, otherwise not binding
- Letters of intent customary, but not binding
- *Lease agreements with a term of one year or more are subject to termination with statutory notice if do not comply with written form requirements (550 Ger Civ Code)*



Specific Real Estate Issues - Germany

- Real estate transfer tax (RETT) based on purchase price varies by location
- RETT may be avoided if by property through purchase of shares of entity holding real estate
 - *But, any one purchaser may not purchase 95% or more of shares*
 - Remaining 5+% shares must be purchased by "*unrelated third party*" or remain with seller



Specific Real Estate Issues - Germany

- Additional tax and corporate issues need to be considered in the context of share purchase transaction



Specific Real Estate Issues - So. Korea

- Foreign individuals & foreign companies may acquire real estate
 - Except for farmland, among others
- Foreign corporation =
 - Corp established under foreign laws
 - Corp established under Korean laws in which more than ½ of employees, members or staff (e.g., directors, executives) are foreign nationals
 - Corp established under Korean laws in which more than ½ of shares owned by foreign nationals



Specific Real Estate Issues - So. Korea

- Under Foreigner's Land Acquisition Act, intent to purchase land must be reported in advance
- In some cases – triggered by location, designation of purpose of land, or size of parcel acquired – **prior permission required**
- Acquisition of buildings not subject to prior report or permission requirement, *but land & buildings not sold separately*, so if land purchased with building, report or permission will be required



Specific Real Estate Issues - So. Korea

- When report required, copy of executed contract should be filed within 60 days from agreement date of contract (along with certified copy of land registration & IDs)
 - Usually processed on same day
- When prior permission required, *must request prior to execution of contract*
 - Normally processed within 15 days from date of filing request
 - Failure to request permission prior to execution of contract *subjects person to criminal or monetary penalties*
 - Imprisonment of up to 2 years OR Fine of up to 30% of land price
 - *And, contract will be rendered invalid*

Specific Real Estate Issues - So. Korea

- In addition to Foreigner's Land Acquisition Act report, when foreign national acquires real estate for commercial purposes (for profit-making activities), must also file Foreign Direct Investment (FDI) notification, pursuant to Foreign Investment Promotion Act (FIPA)
 - May not be applicable to Non-Profit Activities
- If acquisition is made by non-resident foreign national, must also file report under Foreign Exchange Transactions Act (FETA)
- Registration of transfer of ownership must also be made



Specific Real Estate Issues - So. Korea

- Acquisition tax assessed on total acquisition costs
 - (i.e., purchase price + finance costs + service fees, etc.)
- Registration tax assessed also based on total purchase price
- Sale or other transfer of buildings subject to 10% Value Added Tax (VAT)
 - unless part of “Comprehensive Business Transfer” (i.e., sale of all rights & obligations pertaining to a business)
- 11% capital gains surtax in addition to regular income tax theoretically applicable in “high appreciation” zones (but since zones not designated yet, no surtax being imposed yet)



Specific Real Estate Issues - So. Korea

- If foreign national establishes a Foreign Direct Investment Company in Korea for profit-making purposes after acquiring real estate in the name of the foreign national, *the acquisition tax and registration tax will be imposed again since there will be a deemed change in ownership*

Specific Real Estate Issues - So. Korea

- Statutory receipts must be maintained for acquisition
 - otherwise, may be penalized at rate of 2.2% on the amount of disbursement not supported with receipts
- But note: statutory receipts issued by sellers of buildings, but not land
- To avoid penalty, purchaser should file copy of sale & purchase contract of real property with tax authority when file annual corporate tax return for fiscal year in which real property acquisition date falls



Specific Real Estate Issues - So. Korea

- Depreciation of property – excluding land – allowed for tax deduction purposes under Corporate Income Tax Law
 - But only when depreciation expenses are recorded in accounting books
- Depreciation method for a building is limited to the straight-line method
- If buildings made out of steel/concrete, standard range of useful life is 30-50 years

Specific Real Estate Issues - Brazil

- Foreign individuals & foreign companies may acquire real estate
 - Under Ordinance #1.005 (Feb. 8, 2010), as updated by Ordinance #1.097 (Dec. 13, 2010), non-residents must enroll with the Corporate Taxpayer Registry prior to acquisition
- Special conditions / restrictions apply to land located near coasts, borders and certain specific areas designated of national security importance

Specific Real Estate Issues - Israel

- Israel encourages both local and foreign investments by offering a wide range of incentives and benefits to investors in real estate (See Law for the Encouragement of Capital Investment)
 - To qualify may require minimum investment, investment in Priority Areas (A& B)
 - If forego grants, may eligible for tax incentives



Legal Issues to Consider

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Real Estate Investment Needs Driven by Business
Structure Selected & Investment Treaties



Selection of Business Structure

- Host countries' domestic laws may limit business structure options when real estate investment involved
 - Ex: Some countries **REQUIRE** entity establishment before allowing purchase of real estate by foreign investors
 - Ex: Other countries may require establishment of host country Foreign Direct Investment Company or registration of Branch Office if real estate acquired for profit-making activities, *but not in the case of non-profit business activities*



Business Structure Issues

- Investment Treaties addressing real estate investment may modify domestic laws
 - Providing safe haven against creating “Permanent Establishment” (i.e., a tax presence) resulting from certain activities (including owning real estate for commercial purposes)
 - Also may provide for National Treatment, Due Process, etc.
- Free Trade Agreements may contain Investment chapter

Some Alternative Structures

- Direct Registration of Home Country Entity
- Representative Office/Liason Office
- Branch Office
- Foreign Investment Company
- Wholly-owned Domestic Entity Subsidiary

Direct Registration

- **Other countries allow direct registration of Foreign Entity**
 - Allow filing a sample form with the Government (such as Ministry of Foreign Affairs, Ministry of Foreign Investment, etc.)
- *Liability for home country entity should be Assessed (including creation of tax presence or Permanent Establishment)*

Representative Office / Liaison Office

- **Allowed in Many Countries**
 - Usually used for companies testing the waters to see if there is a market for their products
- **Restricted Activities**
 - May not be allowed to “Carry on Business”
- **But, there are benefits**
 - Ex: Sometimes tax exempt (no Permanent Establishment)
- May be good for few **employees on the ground** to facilitate a program with host university



Branch Office

- *Not a separate entity* ... Risks:
 - Extensions of home entity with no independent legal existence
 - *Places home entity assets and personnel at risk*
 - Education certification registration can be very slow
- One step up from a Representative Office ... Benefits:
 - Can “Do Business”
 - May be treated as “In-Country” entity (i.e., national treatment)

Foreign Investment Company

- Required by various countries
- May require a large investment to begin and certain levels of funding on an on-going basis
- Company registration tax may apply (rates may vary by region within host country)
- Legal fine print must be examined carefully
- Depends on political and economic landscape of the involved country

Wholly-Owned Domestic Entity

- Availability of Business & Tax Exempt Entities (non-profits) differ by country
- Government Requirements
 - In-Country Involvement
 - Ownership of shares & IP (local ownership requirements)
 - Registration Requirements
 - Full Blown Entity with all issues pertinent thereto
 - Board Resolutions / Powers of Attorney / Notary
 - Local Directors



Legal Affiliate

- Creating a foundation or non-profit entity
- Members (local Member requirements)
- Control Issues
- Business Restrictions
- Funding Restrictions



Non-Governmental Organization

- **DEPENDS ON TYPE OF WORK BEING DONE**
- Usually an easier creation
- Frequently exempt from:
 - VAT
 - Duties/tariffs
 - Importation of Funds restrictions

Memorandum of Understanding (MOU)

- Usually entered into with an overseas government entity
- Sometimes assists in setting up business
- Sometimes required
- Come in all shapes and sizes

Bottom Line

- **EVERY ARRANGEMENT WILL BE DIFFERENT**
- **Type of structure will depend on numerous factors:**
 - Activity (student/faculty exchange, joint research, joint teaching, share grants, issue degrees, etc.)
 - Length of venture or stay in country
 - Nature of Home University / College
 - Host Country involved
 - Nature of Host Institution
 - Available Business / Non-Profit Structures
 - As modified by applicable Investment Treaties / Tax Treaties / Free Trade Agreements

Legal Issues to Consider

6

NUMEROUS ADDITIONAL LEGAL
CONSIDERATIONS



In Context of Real Estate Transaction

- Many countries do not have Non-Profit or Public Entities (income tax issues)
- Applicability of other taxes (e.g., VAT, property taxes)
- Choice of Law / Choice of Forum
- Type of legal system / legal environment / business culture
- Sovereign Immunity Issues
- Enforcement mechanisms (Litigation vs. arbitration)



In Context of Real Estate Transaction

- Insurance (domestic insurance requirements)
- Premises liability
- Funding of Acquisition Costs / Lease Deposits, etc.
- Transfer pricing issues ... (e.g., arms length interest rate for any **related party** financing provided)
- Currency Exchange limitations



In Context of Larger Activity

- BIS / ITAR export controls regulations re: research, technology, technical exchanges
- Deemed export rule
- Employment laws
- Health and Safety regulations
- IP Matters



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