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LÓPEZ-IBOR ABOGADOS  
BUYING AND SELLING REAL ESTATE IN SPAIN

ILN REAL ESTATE GROUP



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## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER SPANISH LAW

### I. Procedure of a real estate transaction

#### 1. Formal procedure of a real estate transaction in Spain starting from the signing of the purchase agreement (including the closing) until formal ownership vests in the purchaser

Before any formal transfer begins, it is highly advisable to take some initial checks relating the property's current legal, tax/economic and town-planning situation: Legal information is normally obtained from the Land Registry (by requesting excerpts relating current liens and charges; Tax/Economic information may be obtained from the Town Hall and from the "ownership association" ("comunidad de propietarios"), if any, as under Spanish Law, who acquires a property is liable for the amounts owed to the ownership association and the payment of local property tax; and Town Planning information, may be obtained by requesting from the Seller or the Town Hall the Activity License/First Occupation License ("Licencia de Actividad/Licencia de Primera Ocupación") for commercial/housing purposes or in the event of land, Town Planning information ("cedula urbanística").

Formal procedure of a real estate transaction in Spain normally begins with a private purchase and sale promissory agreement ("contrato de arras") detailing the conditions of the sale which the parties have agreed during negotiation. According to this agreement, the owner promises to sell the designated property and the buyer promises to buy it at an agreed price and within the agreed period. This agreement usually involves the payment of a deposit

or a percentage of the price. As a rule, if the buyer fails to complete the purchase and/or payment terms, he will lose this deposit; on the other side, if the owner fails to complete the sale, he must repay twice the amount of the deposit (or as agreed). An alternative is to sign a sale option contract.

Despite parties may commit to sale and purchase under the terms of a private agreement between them, Spanish legal system requires mandatorily the execution of a public deed to register the property in the Land Registry. Further to the execution of the public deed, in order to be a completely valid, effective and legal transaction, it is highly advisable and virtually necessary to register the transfer or property before the Land Registry. Registration is essential to prove the title held over the property against third parties.

The execution of the public deed -or engrossment of private purchase agreement as a public deed- is drawn up by the Notary Public and executed in front of him as he is legally required to review and judge the legal capacity of the parties to enter into the transaction. Once executed, the last requirement before its registration is the clearance of all taxes related to the transaction. (Please see Section III for further details).

#### 2. Spanish legal system in Spain permits different sorts of ownership like ownership of the whole land and construction or ownership for example only of one unit or lots of units (condominium) of the improvements.

In Spain there are different ways to own property: it is possible to own the whole



piece of land or only a fraction of the land (plot) after segregating the land.

It is also possible to own the building without owning the land where it was built, if the land / building is subject to an allotment permit / horizontal property regime.

### **3. Spanish legal system permits joint ownership of real property**

Joint ownership is permitted. Under the Spanish Horizontal Property Law, buildings with more than one owner have common spaces which are property of all owners.

As explained above, certain entities like trusts, unknown to Spanish Law, may have serious problems to formalize their property, as their registration as owners in the Land Registry is not permitted. Aside from this, practically all legal entities may own real property.

### **4. The ownership of a building is implied in the ownership of the land.**

Under the right of accession (art. 358 et seq. of the Spanish Civil Code), a building is owned by the owner of the land unless otherwise proven. If the building was built by another party, such a third party has the right to compensation for the necessary expenses or, alternatively, the owner of the land can ask such a third party to buy the land.

Surface rights may be granted over a plot to build and develop. In this case, plot and buildings would have different owners, but once the Surface rights expire, all that is built over the plot will revert to the owner of the plot.

### **5. Registration of the Property**

The Land Registry, with delegations at

every Spanish region, is the formal registry where title over property is protected. Legal principle *Prior tempore potior iure* ("First registered has the better right") grants protection to the registered over any other transaction which is not.

The Good faith purchaser who acquires a property from the person who appears in the Registry with the faculty to transfer, shall be maintained in acquisition, once registered his right, no matter the right of the transferee is lately annulled or resolved (Article 34 of the Spanish Mortgage Law).

### **6. Special aspects to take into account, if the real estate transaction is organized as share deal**

The transfer of shares is exempt from VAT and transfer tax. Nevertheless, transfer tax/VAT can be incurred on the transfer of shares in companies, when the transfer of the shares is made with the purpose of avoiding the payment of the tax that would have been paid in case of transfer of the real estate. The law considers there are tax avoidance reasons where 50% or more of the assets consist, directly or indirectly, of real estate located in Spain and are not used for business activities, and, as a result of the transfer, the buyer acquires control over the company (i.e., more than a 50% stake in its share capital) or increases its stake once it has obtained control. Transfer tax is payable at a rate ranging between 6% and 11% of the value of the underlying real estate assets at the time of the transfer. Transaction costs include notarial fees, requisition fees, legal and other fees relating to due diligence, and agency fees.

In addition, it is very important to carry out

a full due diligence of the entity you are willing to acquire in order to detect relevant contingencies and take those into account when negotiating the terms of the transaction, otherwise, the buyer might be exposed to several and relevant liabilities.

## II. Financing tools of the transaction

Typically, in Spain, investors finance transactions with mortgage loans but it is also possible to finance transactions by means of vendor loans also called owner financing. It can be a good option for buyers who don't qualify for a traditional mortgage.

The advantages of using owner financing for buyers who are not able to secure a mortgage are a faster and cheaper closing with flexible downpayments, and the disadvantages are higher interests and sometimes due-on sale clauses if the seller has a mortgage on the property.

Spain has a very competitive mortgage market and as a result, there's plenty to choose from when it comes to loans. However, non-residents buying Spanish property with a mortgage have more limited access to loan types and conditions. Resident buyers are often offered up to 80% LTV (loan-to-value) but for non-residents, LTV is much lower, some banks only finance 50% of the purchase.

### What should be taken into account when thinking about the financing of a purchase project in Spain?

It depends on the way the deal is structured. Often the owner holds the ownership of the property until they are paid in full, which happens when the buyer either makes the final payment or refinances with a mortgage from another lender.

When taking out a Spanish mortgage the

buyer must be aware that the transaction involves several costs. These are levied in addition to the taxes and fees charged as standard on a purchase. It used to be the case that the buyer took on all costs associated with a mortgage, but in recent years, consumers have successfully won high-profile court cases against the banks and reclaimed mortgage costs. We recommend seeking advice before signing your mortgage to make sure you fully understand which costs are to be paid.

## III. Costs for transaction

**What tax aspects are directly involved in a purchase of real property, for example real property transfer tax and what is the percentage of it?**

Several taxes are involved in a Commercial Real Estate transaction.

- Value Added Tax –VAT: (“Impuesto sobre el Valor Añadido IVA”): The supply, leasing or letting of Commercial Real Estate or of a building for first occupation is subject to Spanish VAT. Second and further supplies of a building or of parts thereof are exempt from VAT. However, in so far as commercial real estate is basically aimed at developing business activities and most buyers of this kind of real estate also qualify as taxable person for VAT purposes as they are generally dedicated to the development of business activities, said buyers by waiving to the tax exemption, are allowed to exercise a right of option for taxation under VAT for these supplies, leasing and letting of commercial property. By way of this mechanism, buyers are entitled to deduct and to obtain reimbursement of the VAT paid with the property acquisition provided



that statutory requirements are complied with. Should these requirements fail, the transaction would be subject to Property Transfer Tax. Finally, the building activity is also subject to VAT. There are different applicable VAT rates depending on the nature of the transaction, the general tax rate is 21%.

- The Property Transfer Tax ("Impuesto sobre Transmisiones Patrimoniales – ITP"): This tax is imposed, among other acts, over the second and subsequent transfers of property. When dealing with Commercial Real Estate Transfers, this tax is rather unusual as buyer generally exercise the right of option for taxation under VAT. If requirements under VAT regulations fail, the transfer of the property will then be subject to this tax. The tax rate is different depending on each Spanish region and calculated (percentage) according to the purchase price that appears in the Public Deed of transfer. Percentages applied by the different Spanish regions move between 4% and 10%.
- Public Document Tax ("Actos Jurídicos Documentados – AJD"): This tax is applied to the execution of agreements or rights when they are granted as notarial, trade and/or administrative documents in Spanish territory (or abroad if they have legal or economic effects in Spain). Rates applied depend as well on the Spanish region it is executed and on the final Tax applied to the transaction (VAT or Property Transfer Tax). When VAT is applied to the transfer of property, the rates of this tax move between 0.4% and 1.5% of the purchase price.

- Tax on the Increase in Value of Urban Land ("Impuesto sobre Incremento del Valor de los Terrenos de Naturaleza Urbana-IVTNU"): This is a local tax which is levied on the implicit value increase that urban land gains by time elapse, therefore, this tax is calculated considering the time passed since the last transaction -exceeding of one year-. The taxable amount is based on the property cadastral value (not the sale and purchase price) of the land and the effective rate increases from 3,7% to 3% depending on the property holding period.

In addition to the precedent, if the buyer takes out a mortgage loan, these are the associated fees and costs:

#### **Valuation fee**

In order to approve a mortgage loan, the bank first needs to carry out a valuation on the property. This is a compulsory step and costs vary depending on the property price. Expect to pay between a few hundred euros and several thousand. Note that the valuation is usually carried out by a valuer named by the bank, not one chosen by you.

#### **Mortgage fee**

All banks charge a fee for setting up a mortgage and approving the loan. The fee is levied on the amount loaned so the more you borrow, the higher the mortgage fee. It's worth comparing fees charged by different banks and opting for a lower one, particularly if your loan is substantial. Banks generally charge between 0.5% and 2% of the loan, with the average around 1%. In 2020, the European Court of Justice ruled that the mortgage fee is unnecessary and should not be paid by the buyer, although Spanish jurisdiction has yet to follow suit.

## Subrogation fee

If you are buying a property in Spain that already has a mortgage, you may want to take over the loan yourself. Fees to transfer a loan from the vendor to the buyer are around 0.5% of the loan's value.

## Stamp duty

Known as *Impuesto sobre Actos Jurídicos Documentados* in Spanish (AJD), this tax is charged on a mortgage loan. AJD is levied as a percentage on the loan and the amount varies depending on the region of Spain.

## Notarial fees

The notary charges a fee for the title deeds and notary services when you buy a Spanish property. Buying with a mortgage involves an extra section on the title deeds with the subsequent additional charge.

## Land Registry fees

As is the case with notary fees, Land Registry fees also rise when a mortgage is involved because the loan must be registered as a charge against the property.

## Paperwork costs

The bank will employ a *gestoría* (professional company providing paperwork services) to pay the mortgage taxes and fees and to register the title deeds. The cost of this varies depending on the size of the mortgage loan and the work involved. Some banks operate with a particular *gestoría* and give buyers no opportunity to choose an alternative.

## Insurance policies

When you take out a mortgage in Spain, you must also contract insurance for the property covering both the building itself (*continente* in Spanish) and its contents (*contenido*). The bank supplying the mortgage loan will offer to

provide insurance cover as well, you are not obliged to take out insurance with them, but in practice, you are likely to get better terms and conditions for your mortgage if you do.

Your bank may also offer life and mortgage insurance policies. Neither are mandatory for a mortgage loan in Spain, but you may wish to look into these for additional financial security. Always check the terms and conditions of insurance policies and beware of clauses that oblige you to take out a policy with your bank for the duration of the loan. Insurance offered by banks is not necessarily the cheapest on the market.

If you are a seller, you will also need to obtain an energy efficiency certificate of the property to be transferred and bear its cost, which may vary depending on the type of property.

## Can the seller get his money out of your country after the transaction (repatriation of funds)?

There is no restriction to the repatriation of funds. However, in the case of transfers of real property situated in Spanish territory by taxpayers without a permanent establishment in our Country, the purchaser shall be obliged to withhold and pay to the Tax Authorities 3% or make the appropriate payment on account of the agreed consideration, as payment on account of Non-resident Income Tax imposed on the capital gain obtained from the sale of the property. If the amount withheld exceeds the effective tax due, the non-resident taxpayer is entitled to claim reimbursement of such excess.

## If you buy real estate that is leased to one or more persons are you allowed to terminate the lease contract(s) or which restrictions have to be taken into account?

The tenant has a pre-emption right over the leased property unless expressly waived. Once

this is cleared, property may be sold to any other third party. The buyer may not terminate the lease agreements currently in force as the transfer of a property means that the acquirer succeeds in all of the previous owner's rights and obligations. According to the Spanish Urban Leasing Act ("Ley de Arrendamientos Urbanos"), lease agreements in force can only be terminated without cost when the property is going to be used to live by its owner or its family.

**Are you allowed to change the use of a building from residential use to office space or do you need official approval for doing so or is it not allowed at all?**

Every property has a "license of use" indicating if it is for residential or commercial use. This license may be changed or amended by approval of the Town Hall (according to the Urban Plan and the individual features of the property) and by approval of the "ownership association" ("comunidad de propietarios"), if the building has more owners.

**To get a feeling as to the amount of costs involved, what costs should be taken into account if a foreign investor bought an existing building (and land) for a purchase price of EUR 5 million, particularly**

- **notarial costs:** Notary Public's costs will be around EUR 10,000-25,000.
- **land register:** Inscription of the transfer of Property before the relevant Land Registry may be around EUR 5,000-12,500.
- **real property transfer tax:** EUR 200,000 (4%) - 500,000 (10%) Value Added Tax general tax rate if applicable: EUR 1,050,000 (21%)

Public Document Tax when transaction is subject to VAT: EUR 20,000 (0.4%) - 75.000

(1.5%)

- **advising lawyer (due diligence):** EUR 5,000-8,000, depending on the type of property. Due diligence over the land subject to zoning regulations would be more costly as this is a complex area of the law.
- **estate agent:** Estate agent usual rate may vary between 3% and 8% of the transaction value, depending on the case.
- **others:** It depends on the financing of the transaction, for illustrative purpose, read question 8 above (e.g., *Paperwork "gestoría" costs, insurance costs*).

#### **IV. Costs for holding real estate**

**What tax aspects are directly involved when holding a property, for example yearly land tax after the transfer of ownership and what is the percentage of it?**

- Property Tax ("Impuesto sobre Bienes Inmuebles –IBI") is a yearly paid tax, managed by the Town Halls and calculated using the property cadaster value estimated by the Cadastral Office (Dependent of the Ministry of Economy/Tax Authority). The effective tax rates vary from each Town Hall as they are entitled to fix their own final rates within the range from 0,4% to 1,1% of the cadastral value.
- Special Tax on Property of Non-Resident Entities. Foreign entities holding real estate which do not fall within the following categories shall pay this annual tax. The taxable consideration is 3% of the real property cadastral value. Foreign entities exempt from this tax are: i)

international public Institutions and foreign States, ii) entities entitled to apply a double tax treaty entered into with Spain containing information exchange clause, provided that the final individuals direct or indirectly holding the share capital of such entity are also resident in a country with a double tax treaty entered into with Spain containing information exchange clause, iii) foreign entities carrying out economic activities (other than mere holding or leasing of immovable property) in Spain on a regular basis; iv) listed companies and v) non-profit organizations recognized by countries with a double tax treaty entered into with Spain.

- Wealth Tax ("*Impuesto sobre el Patrimonio*"). Under certain circumstances when the commercial real estate cannot be regarded as engaged in business or economic activities for the purposes of the Wealth Tax, this fiscal charge is imposed annually on individuals holding property in Spain. The effective tax rate varies depending on the value of the estate wielded by the individual in Spain. The tax is only applicable to individuals, not to entities holding the commercial property. However, there is some controversy at the moment between the Spanish Government and certain regions like Madrid and Andalucía where they had implemented certain tax allowances which are now challenged by the Spanish Government.
- Local Taxes for public services such as i.e. garbage collection; right of use of public property, etc. are generally

payable annually. Considerations and prices vary from each Town Hall where the property is located. These local taxes are payable by the real estate owner.

## V. Foreign investors

### Why is it a good time to invest in Spain?

- **directly in real estate:** during the last two years, prices have gone down 30% on average so far and analysts believe they will stabilise by the end of 2023. It is an excellent time to invest directly in real estate. Even more, Spanish Banks provide mortgage financing at reasonable rates.
- **through other clear and secure financial products?** Current economic situation seems to have understood that Spain does not offer this kind of products at the moment. However, large multinational corporations based in Spain but with great activity overseas are having an excellent performance and keep growing each year (banking, telecommunications, energy).
- **In commercial real estate or in residential property?** The current situation invites us to invest in real estate transactions in many different ways (Sale-and-leasebacks, leasing and sub-leasing, etc.).

Particularly in Madrid, the education sector is very active at the moment, transforming offices buildings into college buildings in the city centre.

The living sector is attracting a lot of investment, especially in co-living and senior living. The logistics sector has increase available space by 1.6



million square meters in 2022.

Hotels have been reactivated since 2021 expecting to open 130 new hotels in Spain by 2024 Agribusiness is also increasing every year.

Data centres also experimenting high potential

Back to office after pandemic and retail are recuperating 2019 figures.

Energy optimisation and procurement strategies to reduce cost and manage risk is producing a lot of building refurbishment and transformation into A category buildings.

**Is any individual person and legal entity allowed to buy property in Spain or are there restrictions with regard for example to nationality or registered office or legal entities? If there are restrictions are there ways to organize a domestic entity for the purchase on a valid legal structure notwithstanding?**

Spain has no restrictions to investment in this sense; all the same, investments from financial havens will be subject to notification to Spanish Authorities (previous to purchase). When completing transaction, current anti money-laundering regulations requires the Notary Public to identify and record every (UBO) individual person holder of more than 25% of the legal entity party of the transaction (including all individuals' holders of the legal entities which hold the company, and so on).

Just to mention that the trusts, as legal entities, are not recognized under Spanish law. In this sense it is advisable to use other corporate figures to invest (especially in real estate as the Land Registry would not register transaction or property as the trusts are

unknown to the Registrar).

**If a foreign investor buys a plot of land in Spain to run a business there, what kind of official approvals are needed and what time and effort are needed normally to get it?**

To invest in Spain, and operate in general, foreign companies need to obtain a Spanish Tax Id. No. ("NIF"), needed to operate in Spain. This number may be obtained by filing a standard form before the Tax Authority and provisional number –valid to operate- is obtained in a short term (several days). Definitive number is issued within a month. Depending on the business that the foreign investor is willing to carry out, further licence may be needed. If the investor is an individual, he or she shall obtain a ("N.I.E.").

**Do foreign investors have to be entered into a transparency register or how are money laundering aspects to be checked and verified for the relevant authorities?**

Regulation of foreign investment in Spain is now more complex, which is why it is necessary to obtain legal advice to determine whether a transaction is subject to authorization or whether there are additional requirements. This counsel is crucial if we consider that the lack of prior authorization results, among others, in the investment being void and having no legal effect, as well as the application of significant fines.

On September 2018, Law 10/2010 on the prevention of money laundering and the financing of terrorism was urgently modified to implement the 4th Anti-Money Laundering Directive, in order to comply with the ultimatum of the European Union. Also Order JUS/319/2018 of 21 March was issued to create the Spanish Transparency Register (*Registro de Titularidades Reales*). Additionally, although a new single Register of



Real Property Ownership has been introduced by Royal Decree-Law 7/2021 of 27 April, it has not been yet implemented, as further regulation is necessary and is still pending to be passed.

Legal entities are responsible for filing UBO information with the Transparency Register (*Registro de Titularidades Reales*) when filing their annual accounts. Breach of the obligation to identify the UBO under Law 10/2010 may constitute a serious or minor infringement, entailing sanctions.

#### ***Assistance to foreign investors in Spain***

**López-Ibor Abogados S.L.P.** knows personally several estate agents and advisors and works closely with them. These agents and advisors are well-known top-tier real estate firms who now the market and may advise when and where great opportunities can be found.

**López-Ibor Abogados S.L.P.** has also advised numerous clients throughout the entire real estate development process.

**López-Ibor Abogados S.L.P.** has advised in a great number of successful real estate transactions in all legal aspects including the drafting of all kind of property transfer agreements, finance of the transaction, tax issues, administrative requirements and registration of the transaction.

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