



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Real Estate 2022

Spain: Law & Practice
Daniel Tienda, Toni Barrios,
Jorge del Castillo and Juan Moncada
Cases & Lacambra

practiceguides.chambers.com

Law and Practice

Contributed by:

Daniel Tienda, Toni Barios,
Jorge del Castillo and Juan Moncada
Cases & Lacambra see p.25



CONTENTS

1. General	p.4	3.8 Lenders' Liability under Environmental Laws	p.11
1.1 Main Sources of Law	p.4	3.9 Effects of a Borrower Becoming Insolvent	p.11
1.2 Main Market Trends and Deals	p.4	3.10 Consequences of LIBOR Index Expiry	p.11
1.3 Impact of Disruptive Technologies	p.4		
1.4 Proposals for Reform	p.4	4. Planning and Zoning	p.12
2. Sale and Purchase	p.5	4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning	p.12
2.1 Categories of Property Rights	p.5	4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction	p.12
2.2 Laws Applicable to Transfer of Title	p.5	4.3 Regulatory Authorities	p.12
2.3 Effecting Lawful and Proper Transfer of Title	p.5	4.4 Obtaining Entitlements to Develop a New Project	p.13
2.4 Real Estate Due Diligence	p.5	4.5 Right of Appeal against an Authority's Decision	p.13
2.5 Typical Representations and Warranties	p.6	4.6 Agreements with Local or Governmental Authorities	p.13
2.6 Important Areas of Law for Investors	p.6	4.7 Enforcement of Restrictions on Development and Designated Use	p.13
2.7 Soil Pollution or Environmental Contamination	p.7	5. Investment Vehicles	p.14
2.8 Permitted Uses of Real Estate under Zoning or Planning Law	p.7	5.1 Types of Entities Available to Investors to Hold Real Estate Assets	p.14
2.9 Condemnation, Expropriation or Compulsory Purchase	p.7	5.2 Main Features of the Constitution of Each Type of Entity	p.14
2.10 Taxes Applicable to a Transaction	p.7	5.3 Minimum Capital Requirement	p.15
2.11 Legal Restrictions on Foreign Investors	p.8	5.4 Applicable Governance Requirements	p.15
3. Real Estate Finance	p.9	5.5 Annual Entity Maintenance and Accounting Compliance	p.16
3.1 Financing Acquisitions of Commercial Real Estate	p.9	6. Commercial Leases	p.16
3.2 Typical Security Created by Commercial Investors	p.9	6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time	p.16
3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders	p.9	6.2 Types of Commercial Leases	p.17
3.4 Taxes or Fees Relating to the Granting and Enforcement of Security	p.10	6.3 Regulation of Rents or Lease Terms	p.17
3.5 Legal Requirements before an Entity Can Give Valid Security	p.10	6.4 Typical Terms of a Lease	p.17
3.6 Formalities when a Borrower Is in Default	p.10	6.5 Rent Variation	p.18
3.7 Subordinating Existing Debt to Newly Created Debt	p.11		

6.6	Determination of New Rent	p.18	7. Construction	p.21
6.7	Payment of VAT	p.18	7.1	Common Structures Used to Price Construction Projects p.21
6.8	Costs Payable by a Tenant at the Start of a Lease	p.18	7.2	Assigning Responsibility for the Design and Construction of a Project p.22
6.9	Payment of Maintenance and Repair	p.18	7.3	Management of Construction Risk p.22
6.10	Payment of Utilities and Telecommunications	p.19	7.4	Management of Schedule-Related Risk p.23
6.11	Insurance Issues	p.19	7.5	Additional Forms of Security to Guarantee a Contractor's Performance p.23
6.12	Restrictions on the Use of Real Estate	p.19	7.6	Liens or Encumbrances in the Event of Non-payment p.23
6.13	Tenant's Ability to Alter and Improve Real Estate	p.19	7.7	Requirements before Use or Inhabitation p.23
6.14	Specific Regulations	p.19	8. Tax	p.24
6.15	Effect of the Tenant's Insolvency	p.20	8.1	VAT p.24
6.16	Forms of Security to Protect against a Failure of the Tenant to Meet Its Obligations	p.20	8.2	Mitigation of Tax Liability p.24
6.17	Right to Occupy after Termination or Expiry of a Lease	p.20	8.3	Municipal Taxes p.24
6.18	Right to Assign a Leasehold Interest	p.20	8.4	Income Tax Withholding for Foreign Investors p.24
6.19	Right to Terminate a Lease	p.20	8.5	Tax Benefits p.24
6.20	Registration Requirements	p.21		
6.21	Forced Eviction	p.21		
6.22	Termination by a Third Party	p.21		

1. GENERAL

1.1 Main Sources of Law

The main sources of Real Estate law in Spain are:

- the Spanish Civil Code;
- the Act 49/1960, of July 21st, on Horizontal Division (special condominium regime applicable to buildings);
- the Act 29/1994, of November 24th, on Urban Leases;
- the Decree of 8 February 1946, on the Mortgage Act;
- the Decree of 14 February 1947, on Mortgage Regulation;
- the Royal Legislative Decree 7/2015, of October 30th, on the Land Act;
- the Act 38/1999, of November 5th, on Building Development (LOE);
- the Act 13/2015, of June 24th, on the Amendment of the Mortgage Act and the Cadastre Act; and
- the Act 22/1988, of July 28th, on Coasts.

In addition, Spanish Regions have regulation powers about urban and zoning legislation covering, among other aspects, planning and land development.

1.2 Main Market Trends and Deals

The real estate market projected an increase during 2021, in particular, in residential, hospitality and logistics. Market trends such as built-to-rent, coliving, hospitality and alternative finance sectors significantly increased in 2021.

Some of the most relevant transactions executed during 2021 were:

- the sale and purchase of the logistic portfolio of Inversiones Montepino. EUR1,000 million;

- the sale and purchase of the logistic portfolio by Blackstone in, among other countries, Spain: EUR520 million;
- the sale and purchase of the hotel group Selenta: EUR440 million; and
- the sale and purchase of a commercial premises portfolio by KanAm Group to Axa: EUR280 million.

1.3 Impact of Disruptive Technologies

Technology has had a disruptive effect on the economic fundamentals of the real estate sector in Spain. It enables competition and placement, appearing to be the best mid- and long-term strategy for real estate players and could transform the role of real estate asset managers to incorporate new techniques such as:

- e-commerce real estate platforms – these will allow practically 100% of the property search process, with visits to the property, communications with the owner and negotiations to be carried out online;
- energy efficiency – for property developers, technological advances may boost the energy efficiency of the buildings;
- artificial intelligence (ai), the internet of things, blockchain technology (used in cryptocurrencies, banking and healthcare systems), virtual and augmented reality.

1.4 Proposals for Reform

Spanish authorities are supporting the approval of new regulations, the implementation of stimulus programmes (supported by the EU) and the design of protocols to help and support the real estate industry.

Some regional and local administrations in Spain are implementing real estate tax-friendly measures offering more flexible regulations (ie, coliving) and simplifying and streamlining urban and planning procedures, relieving bureaucratic obligations, creating less rigid and more attrac-

tive financing structures for investment, and thus avoiding limitations and prohibitions.

The future act on the right to housing, currently under an approval procedure, might have a significant impact on the real estate sector, as well as new local regulations on the physical characteristics of dwellings, aimed at improving certain aspects such as hygienic conditions, thermal comfort of buildings, lighting, and acoustic insulation, to adapt to the needs of teleworking.

2. SALE AND PURCHASE

2.1 Categories of Property Rights

The main property right in Spain is absolute property or full ownership, the common law equivalent of “freehold”. Absolute property grants the entire right to enjoy, use, encumber and dispose of an asset without limitations other than those set forth in the applicable regulation, such as planning and zoning limitations, the rights of neighbouring owners, and other general needs, eg, aviation liens.

Spanish legislation stipulates, among others, other rights attached to real estate, such as:

- joint ownership (*condominio*), ie, ownership of a thing or right belonging *pro indiviso* to several owners;
- surface rights (*derecho de superficie*) that entitle an owner to build on third parties’ land, taking ownership of what has been built for a period which may not exceed 99 years; and
- administrative concessions that give entitlement to use, develop and operate public land in return for compensation and a limited period.

2.2 Laws Applicable to Transfer of Title

Concerning private transfers, the Spanish Civil Code states the general applicable regulation for

the transfer of property. The regulation is stated in Section 1.1. Act 33/2003, of November 3rd, on Public Administration Holdings, applies to the transfer of public properties.

Depending on the activity to be carried out with the property, the type of transmission and the location, some administrative regulations and authorisations such as first-occupancy licences, special planning regulations and sectorial legislation on coastal areas and roads, among others, may apply.

2.3 Effecting Lawful and Proper Transfer of Title

Real estate may be transferred only if:

- legal possession is delivered to the buyer; and
- the delivery is executed through a valid legal transaction or existence of a title (Spanish theory of “title and mode”).

Although it is most common for the transfer of real estate assets to be executed through a deed of sale, it may be conveyed in writing, in a public or private deed, or verbally (except for the donation of real estate assets that requires the granting of a public deed).

Although registration in the Land Registry is not compulsory (except for certain rights such as mortgages or “surface rights”), it is highly recommendable. Such registration grants public protection to any good-faith third-party purchaser who acquires its title from a registered owner.

There are no new processes or procedures to complete real estate transactions driven by the COVID-19 impact.

2.4 Real Estate Due Diligence

The prospective investor often conducts a due diligence review to check legal, technical, envi-

ronmental and other matters affecting the targeted real estate. Such review usually includes issues such as:

- title of ownership of the asset;
- charges and encumbrances;
- the existence of leases and occupancy status;
- works and co-ownership rules;
- urban planning status;
- litigation and administrative proceedings over the asset;
- tax schemes;
- payment of property taxes; and
- third-party rights (including Public Administrations).

Spanish real estate industry has diversified its sources of information during 2021. Data rooms have been substituted by VDR (virtual data rooms) particularly seeking new digitally enabled business models using digital tools to accelerate the process.

2.5 Typical Representations and Warranties

Real estate transfer contracts include representations and warranties (R&W) from the seller and the buyer. Some examples are as follows:

- the capacity of the seller to execute the transaction;
- the asset is free of charges, encumbrances, tenants, and occupants, is up to date with payment of taxes, expenses and free of any litigation or administrative procedures;
- compliance with the regulations in force;
- concerning the environmental status of the asset; or
- confirming that there are no third-party rights such as preferential acquisition or pre-emption and redemption rights (*tanteo y retracto*).

Spanish law does not allow remedies in cases of false statements. The Spanish Civil Code automatically provides statutory warranties against any dispossession regime (*saneamiento por evicción*) and a warranty against hidden defects or encumbrances of the asset sold (*saneamiento por vicios ocultos*).

An alternative regime of R&W may be agreed by the parties, with the express waiver of the Spanish Civil Code's warranties or including both legal provisions and an alternative scheme, including those driven by COVID-19.

Sellers often seek to limit the scope of the representations by methods such as:

- a basket establishing a threshold for the compensation;
- limitation periods; and/or
- liability caps.

The buyer's remedies against the seller for misrepresentation include resolution of the contract, with the return of any reciprocal benefits, compensation of damages to the buyer, or the obligatory execution of the agreement.

Title insurance is not common practice in respect of unregistered real estate assets or transactions that may not benefit from Land Registry protection (eg, transactions without consideration).

2.6 Important Areas of Law for Investors

The most important areas of law for an investor to consider when purchasing real estate are:

- real estate contractual law – civil law: property rights, charges and encumbrances that may affect the asset;
- urban and administrative – public law:
 - (a) the regulations pertaining to planning and zoning which may affect the asset; and

- (b) the granted licences;
- corporate law – structuring the investment; and
- taxation – the direct and indirect tax structure implications of RE transactions.

2.7 Soil Pollution or Environmental Contamination

R&W regarding environmental matters are not common practice, but some regulations request them under certain parameters or occasions, especially when the object of a transaction is a land plot and to confirm the compliance with the environmental legislation in force. In this respect, both EU legislation and Spanish legislation must be considered applicable.

In general, it applies the “polluter pays” principle, which means that the person who caused the pollution is liable and shall assume the expenses of the compensation and bear the costs of remediation.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

General municipal urban development plans (PGOU) contain the uses permitted for a plot, sector, and zones.

Urban agreements with the relevant public authorities are common in Spain to facilitate a project, eg, the execution of public interest or local sectorial plans, such as the construction of roads and communications infrastructure, or the execution of the hydraulic and energy policy, supply infrastructure, etc. In addition, it is possible to subscribe to an urban agreement (*convenio urbanístico*) between the Town Hall and a developer. See **4.6 Agreements with Local or Governmental Authorities**.

2.9 Condemnation, Expropriation or Compulsory Purchase

An expropriation procedure is only permitted under Spanish Law if the expropriation is justified by public interest and under the payment of compensation or “fair price” to the title holders affected.

The procedure first requires the prior declaration of “public utility” of the project and requires the occupation of the property or the acquisition of the affected economic rights. In order to carry out the expropriation, the expropriator must submit a file, which must be duly published.

2.10 Taxes Applicable to a Transaction

Taxation on real estate transactions depends on the envisaged deal scheme (ie, asset or share deal), the type of real estate asset to be transferred (rustic or urban land), constructions as well as the condition of the parties intervening in the transaction, ie, entrepreneur acting as such or consumer.

Asset Deal

VAT and property transfer tax

The condition of the seller determines whether an asset deal shall be subject to VAT or property transfer tax.

If the seller does not qualify as an entrepreneur or as a professional for VAT purposes, the real estate transfer will be subject to property transfer tax (“Transfer Tax”) borne by the purchaser. Applicable tax rates vary depending on the autonomous region where the asset is located (tax rates range from 6% to 11% on the “value of reference”).

If the seller qualifies as an entrepreneur or professional for VAT purposes, the real estate transfer will be subject to VAT, which shall be charged by the seller and borne by the purchaser. The

applicable VAT rate shall generally be 21% (10% in the case of transfers of dwellings).

However, the transfer of real estate subject to VAT could benefit from a VAT exemption if certain requirements are met. Nevertheless, should the transfer be exempt from VAT, it shall be subject to Transfer Tax.

The seller may waive the VAT exemption upon enquiry from the acquirer, provided the latter may benefit from the VAT deduction in its ordinary course of business. In such a case, increased stamp duty will be levied.

Furthermore, should a real estate asset be transferred within an ongoing concern, such transfer will not be subject to VAT but to Transfer Tax on the “value of reference” of the real estate assets being transferred.

Tax on the increase of the value of the urban land

Where an asset deal concerning urban land is carried out, it is generally subject to tax on the increased value of the urban land (TIVUL).

However, the transfer would not be subject to tax on the increased value of the urban land if the seller does not derive profit from the transfer of the relevant real estate.

Stamp duty (actos jurídicos documentados)

A transfer of a real estate asset that is subject to VAT shall also be subject to stamp duty, which shall be borne by the purchaser. The applicable tax rate would depend on the autonomous region within Spain where the real estate asset is located and range from 0.75% to 1.5% on the value consigned in the notarial deed by means of which the real estate asset is being transferred. Also, in the case of a waiver of the VAT exemption, an increased tax rate for stamp duty (up to 2.5%) shall apply.

Share Deal

Should the transfer of real estate be carried out by means of a share deal, the transaction would not be subject to VAT, Transfer Tax or TIVUL.

However, Section 314 of the Spanish Securities Market Act set forth an anti-abuse rule to prevent circumvention of the taxation that would correspond to a regular direct transfer of real estate should the latter be directly transferred. In this context, this specific anti-abuse rule shall apply in those cases where:

- the acquirer obtains the control over an entity in which at least 50% of its assets are comprised of real estate assets located in Spain not used for business or professional activities;
- the acquirer obtains control over an entity in which some assets are shares in other entities whose asset is, in turn, comprised of at least 50% of real estate assets located in Spain not used for business or professional activities; or
- the shares transferred have been previously received in consideration for in-kind contributions materialised by means of a contribution of real estate assets within a three-year clawback period.

2.11 Legal Restrictions on Foreign Investors

The extraordinary measures introduced by the Royal Decree Law 8/2020, of March 17th, to deal with the economic and social impact of COVID-19, currently, there is almost a total liberalisation of foreign investment and exchange control in Spain, in line with EU legislation.

In this regard, foreign direct investments to be made in critical sectors, or carried out by specific categories of investors, shall be subject to prior authorisation by the competent public authority.

Occasional restrictions imposed by the applicable legislation must be considered, such as restrictions on foreigners (non-EU) in acquiring properties located in places considered a Defence Zone of National Interest.

3. REAL ESTATE FINANCE

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions of commercial real estate are generally financed by loans (bilateral or syndicated) granted by local Spanish banks. There are also international and domestic private debt lenders that provide financing related to commercial real estate assets, often in bridge or mezzanine loans.

The structure of the financing and security package granted (see **3.2 Typical Security Created by Commercial Investors**) depends mainly on the transaction characteristics and the borrower profile.

When acquired commercial real estate assets require construction works (either development or refurbishment), lenders usually finance the acquisition of the real estate assets and their refurbishment or development. The common practice is for financings to include different tranches and conditions for drawdown.

Banks in Spain offer to finance acquisitions of commercial real estate assets to corporates and real estate investors in the form of real estate leasing, which consists of establishing a rental period with a purchase option at the end of the contract. This long-term financing (usually from ten to 15 years) offers certain tax advantages to be considered.

Structures may adjust but not differ materially when the transaction being financed is the acquisition of large real estate portfolios.

There are other alternatives for financing acquisitions of commercial real estate, such as “Real Estate Crowdfunding”, where the finance is provided by pooling smaller investments of private investors.

3.2 Typical Security Created by Commercial Investors

The most common security package to secure repayment of the financing of the acquisitions and/or developments of commercial real estate would typically comprise:

- a mortgage on the real estate asset;
- a pledge over the shares of the company holding the real estate asset;
- a pledge on the company’s bank accounts;
- a pledge granted on the credit rights arising from any income-producing agreement entered by the borrower and related to the specific real estate asset (such as construction agreements and lease agreements).

Each type of security has its own formalities to be effective against third parties, and therefore, it is advisable to confirm on a case-by-case basis that the security is validly created and perfected.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no restrictions on granting security over real estate assets to foreign lenders, provided that the mortgagor is not considered a consumer.

Entities granting real estate loans to consumers or rendering brokerage services for the granting of such loans that are not a credit institution or other entity registered with the Bank of Spain must be duly registered.

Nevertheless, it is necessary to highlight that the lender must consider the potential enforceability of the granted securities in a possible event of default by the borrower.

In the event of the granting of floating mortgages, the beneficiaries of this kind of security must always be, among others, “credit entities” or public institutions, as referred in Article 153 bis of Decree of 8 February 1946, which approves the Mortgage Act.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

A security:

- is granted in a public deed;
- has valuable content; and
- may be registered in a Public Registry, the formalisation of that security shall trigger stamp duty.

The tax rate would vary depending on the region where the public deed is executed but will range from 0.5% to 3%.

No stamp duty shall be levied should the security not be granted on a public deed (ie, only in the granting of mortgages may stamp duty not be avoided).

3.5 Legal Requirements before an Entity Can Give Valid Security

Spanish corporate law prohibits Spanish companies from providing financial assistance in the form of financing, advancing funds, granting security or guarantees, or assisting in any manner that contributes to the purchase of their own shares or of their parent company (public limited liability companies) or any of the group companies (private limited liability companies).

Infringement of the prohibition would render any such financial assistance null and void.

Corporate benefit issues may arise in relation to the security or guarantees provided by group companies in a group financing.

With respect to the corporate benefit rules, under Spanish corporate law, the directors of a company must exercise their powers in the interests of the company and its shareholders.

Spanish corporate law provides that directors must act diligently in the management of the company and faithfully and with loyalty to the company.

3.6 Formalities when a Borrower Is in Default

Before starting a judicial or extra-judicial foreclosure proceeding, the lender must formally notify the borrower.

The notification must state:

- that a breach of the terms of the loan has occurred, detail the specific breach and that, consequently, the loan is terminated early according to the relevant clause of the loan agreement; and
- the total amount due because of the early termination of the loan.

Spanish courts have traditionally been reluctant to uphold loan acceleration and subsequent enforcement of security if the default is not deemed material.

Spanish law prohibits what is known as “*pacto comisorio*”, which comprises any agreement by virtue of which the lender would be entitled automatically to keep the property granted as collateral if the debtor fails in its payment obligations.

3.7 Subordinating Existing Debt to Newly Created Debt

The subordination of existing debt to a newly created one is possible under Spanish law by an agreement between parties which establishes an order of preference of the debt (ie, senior, mezzanine, junior).

The subordination implies that certain debts are subject to prior repayment of other debts.

Spanish legislation stipulates the order of preference of certain kinds of credits and establishes those which have special privileges (ie, properties secured by a mortgage).

3.8 Lenders' Liability under Environmental Laws

A lender may not be liable for the borrower's breach of the environmental regulations unless it acquires the property where the environmental infringement has been committed due to the enforcement of the security. In such a scenario, the lender could be deemed liable for the environmental damage.

3.9 Effects of a Borrower Becoming Insolvent

In principle, the validity of security interest shall not be affected by the declaration of insolvency of the borrower. Nevertheless, Act 1/2020 on Insolvency provides that the special privilege of secured creditors shall be restricted to the fair value of the property or right over which the security has been created, subject to certain deductions.

In determining the limit of the special privilege, the reasonable value and rights of the assets shall be understood in the case of real estate as the value resulting from a report issued by an approved appraisal company registered in the Bank of Spain's Special Register.

If the borrower becomes insolvent, certain effects related to security interests are created. Secured claims on assets or rights that are used in the insolvent debtor's business or required to continue the running of the business may not be initiated or continued until the earlier of:

- the date a settlement agreement becomes effective, which does not prevent the right of separate enforcement over those assets or rights;
- a year from the date of the declaration of bankruptcy without the liquidation phase being opened.

3.10 Consequences of LIBOR Index Expiry

In general, the financing for the acquisition of commercial real estate granted in Spain is usually denominated in euros and, therefore, the EURIBOR (Euro Interbank Offered Rate) is the most frequent benchmark.

The Financial Conduct Authority (FCA) confirmed the announcement of 5 March 2021 that banks shall no longer be compelled to submit to the London Inter-bank Offered Rate (LIBOR) after 2021. Key points in the transition away from the LIBOR include practical considerations on moving to new rates (such as the Secured Overnight Financing Rate (SOFR) or the Sterling Overnight Index Average (SONIA)) and what practitioners should do to prepare for the change.

Additionally, the FCA announcement on the discontinuation and cessation of the LIBOR panels includes the exceptional extension of the USD LIBOR tenors (ie, the length of time remaining before a financial contract expires) until 30 June 2022.

The effect of the expiry of the LIBOR needs to be analysed in the context of the terms of each contract. Normally, well-drafted contracts have

“fall-back provisions” that specify an alternative rate if the LIBOR is unavailable. The problem is that the new rates are likely to be lower than the LIBOR rates they replace.

The transition shall have important problems such as time and cost impact and potential execution risk that amending LIBOR-referencing contracts bilaterally shall have on businesses. In response to those concerns, the International Swaps and Derivatives Association (ISDA) has launched the ISDA 2020 interbank lending rate (IBOR) Fallbacks Protocol and the IBOR Fallbacks Supplement to the 2006 ISDA Definitions.

4. PLANNING AND ZONING

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Regions—Autonomous Communities – hold the territorial and urban planning competence, regulating the supra-municipal urban instruments applicable to each region. The Spanish government has the competence to set out the basic and general rules and liaise with the regional planning regulation through its sectorial competences (such as ports, roads, coastline and coasts, water planning, energy networks, etc).

Urban instruments such as general municipal urban development plans (*Planes Generales municipales de Ordenación Urbana*), and Urban Development Action Programmes (*Programas de Actuación Urbanística*) regulate and inform the municipal urban planning. Town Halls are competent authorities to draft, pass and issue building licences and permits.

4.2 Legislative and Governmental Controls Applicable to Design,

Appearance and Method of Construction

The Act on Building Development (*Ley de Ordenación de la Edificación*), which regulates the building process, sets out the rights and obligations of the intervening parties in the building procedure, including liabilities and cover for purchasers.

Requirements are further developed by the Technical Building Code, which stipulates basic safety and habitability requirements.

Depending on the scope of the works, construction licenses may be required, together with technical projects. The authorities, in general, are regulating to simplify the urban process, including the substitution of the occupancy licence for a self-written formal statement formula (*declaración responsable*) made by the constructor and declaring the validity and compliance of the executed work with the building licence granted.

4.3 Regulatory Authorities

As previously stated in **4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning**, different authorities are involved when it comes to regulating the development, design and use of a plot, such as the local authorities, regional authorities and the state.

Competent local authorities are responsible for the drafting and approval of a general urban development plan (*plan general urbanístico*) that determine the buildability of the plots and the priority use of the land following specific technical and administrative restrictions, establishing the land classification, the action units (*unidades de ejecución*) and fixing the public service estimations.

Finally, state and regional regulations must be considered for certain actions, such as areas

of special protection and coastal and public domain areas or military territory.

4.4 Obtaining Entitlements to Develop a New Project

As stated in **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction**, a building licence and the approval of construction projects (*proyecto de ejecución*) by the Town Hall must be granted to develop a new project or complete a major refurbishment.

The procedure for a building licence approval is divided, in general terms, into the following stages.

- Phase 1 – submission of the building licence request: the application shall be submitted before the Town Hall together with some technical documents, among others, the basic project (*proyecto básico*), project's memory, plans, etc, together with a tax fee;
- Phase 2 – review: the Town Hall shall review the documents submitted, and, if any documents are missing or need to be amended, the applicant shall be notified for their correction. The municipal experts draft the applicable technical and legal reports. They are intended to support the legality of granting a building licence in compliance with the regulation in force. There may be some other sectorial reports required, depending on the location and the scope of the building works (eg, environmental reports);
- Phase 3 – granting resolution of the licence: the granting may be subject to the fulfilment of certain conditions (ie, technical amendments that the Town Hall may consider).

4.5 Right of Appeal against an Authority's Decision

Any citizen can appeal to declare null and void or claim amendments to any administrative deci-

sion or act related to the urban planning law, if these decisions or acts infringe the law. The decision may be reviewed by a judicial court.

Such a claim does not necessarily require proof of a subjective right or legitimate interest.

4.6 Agreements with Local or Governmental Authorities

It is possible to enter into an agreement – named “urban agreements” – with local or governmental authorities, agencies, or utility suppliers to facilitate the development of a project. These agreements are subject to the principles of legality, transparency and publicity.

Depending on the scope of the urban activity affected, they may be classified into two main groups:

- planning agreements, the main objective of which is planning modification; and
- management agreements, which seek to speed up the management and execution of planning.

Expropriation agreements may be reached during an urban expropriation process with the payment of a “fair price” or compensation.

4.7 Enforcement of Restrictions on Development and Designated Use

Restrictions on development and designated use are enforced “ex ante” and “ex post”.

Ex ante controls are applied by granting licences through a regulated procedure, as stated in **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction** and **4.4 Obtaining Entitlements to Develop a New Project**, and by the exercise of the urban supervisory duty.

Ex post mechanisms are applied through the exercise of the sanctioning power of the administration and the granting of additional measures aimed at stopping the administrative offence, including the suspension of construction works and demolition.

Regional entities, as previously mentioned, are simplifying the regulation to expedite ex post controls instead of the necessity of the prior granting of a first-occupancy licence. This procedure does not give an exemption from an ex post control by the administration.

5. INVESTMENT VEHICLES

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Several alternatives are available to hold real estate assets in Spain. The typical vehicles to hold real estate assets are:

- a limited liability company (*Sociedad de Responsabilidad Limitada*) or a public limited company or Spanish corporation (*Sociedad Anónima*);
- regulated investment vehicles, such as:
 - (a) a SICAV – a Variable Capital Investment Company;
 - (b) the SOCIMIs – Spanish listed investment trust companies (*Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario*) are known as non-financial collective investment institutions, whose principal corporate object is either the holding of leased urban assets or holding a stake in the share capital of other SOCIMIs or foreign entities of analogous or similar activity;
 - (c) the real estate investment company (*Sociedad de Inversión Inmobiliaria*) known as a non-financial collective investment institution, necessarily a pub-

lic limited company, which invests mainly in urban real estate for rental purposes; or the real estate investment fund (*Fondo de Inversión Inmobiliaria*)–FII) known as a non-financial collective investment institution, without legal personality, which invests mainly in urban real estate for rental purposes.

The regulated investment vehicles are subject to a special legal regime, with obligations deriving from their regulation. Moreover, regulated collective investment vehicles are more restricted due to incorporation costs and prior registration requirements to be fulfilled before the National Securities Market Commission (CNMV). Some regulated vehicles are necessary under specific circumstances stated in the EU directives and Spanish legislation.

5.2 Main Features of the Constitution of Each Type of Entity

The main features of the constitution of an entity are the following.

A Limited Liability Company (SL)

An SL company may be incorporated by a sole or several shareholders.

Capital is divided into shares (*participaciones*) according to the capital contributed by each shareholder, who benefits from the limitation on personal liability from the company's debts. They are not marketable securities. An SL is incorporated by public deed and registered with the Commercial Registry.

A Spanish Corporation or Public Limited Company (SA)

An SA may be incorporated by a sole or several shareholders. Capital is divided into shares (*acciones*) according to the capital contributed by each shareholder, who benefits from the limitation on personal liability from the company's

debts. The incorporation process is like an SL, with some specifications.

An SA has an open structure that allows the transmission and traffic of shares as negotiable securities.

The founders of a company have the flexibility to tailor its structure to their specific needs by including certain clauses in the by-laws, for which they should seek the appropriate legal advice. It is common practice to sign a shareholders' agreement to regulate matters not strictly related to the governance and ownership of the company, such as:

- mechanisms and restrictions to the transfer of shares;
- voting criteria;
- the resolution of deadlocks;
- financing requirements and capital calls;
- business plans and strategies; and
- control of management and shareholders meetings, etc.

5.3 Minimum Capital Requirement

The minimum capital required to incorporate an entity in Spain is as follows:

- for an SL – EUR3,000 (except in the case of a business limited liability company), fully subscribed and paid up upon incorporation;
- for an SA – EUR60,000, necessarily fully subscribed and at least 25% paid up upon incorporation;
- for a SOCIMI – EUR5 million, necessarily fully subscribed and paid up;
- for a FII – EUR9 million, necessarily fully subscribed and paid up with a minimum number of 100 stakeholders; if a real estate investment fund is incorporated by compartments, each shall have a minimum share capital of EUR2.4 million, and the aggregate of all

compartments shall not be less than EUR9 million; and

- for an SII – EUR9 million; if a real estate investment fund is incorporated by compartments, each of them shall have a minimum share capital of EUR2.4 million, and the aggregate of all compartments shall not be less than EUR9 million.

5.4 Applicable Governance Requirements

The applicable Spanish regulation is the Royal Legislative Decree 1/2010, of March 1st (the “Act on Corporations”–Ley de Sociedades de Capital), for which governance requirements are flexible and allow their setting up and organisation mainly on a shareholder's consensus basis.

- Shareholders' meetings – for an SL, different majorities (and quorums if an SA) are established depending on the content of the resolutions. It may be increased in the by-laws.
- The management body, which must be appointed by the Shareholders' Meeting, may adopt different forms:
 - (a) a sole director;
 - (b) two or more directors who act jointly;
 - (c) several directors acting joint and severally; or
 - (d) a board of directors with a minimum of three members.
- Directors must act diligently and with loyalty to the interests of the company.
- Transfer of shares:
 - (a) an SL must be recorded in a public document, and its transfer is generally not freely transferable (unless acquired by other shareholders, ascendants, descendants, or companies within the same group). In fact, unless otherwise provided in the by-laws, the law establishes a pre-emptive acquisition right in favour of the other shareholders or the company in the event

- of a transfer of the shares to persons other than those previously referred to;
- (b) for an SA, the transfer depends on how they are represented (share certificates, book entries, etc.) and on their nature (registered or bearer shares). In principle, they may be freely transferred unless the by-laws provide otherwise.
- Every shareholder has several rights, such as the right to information and the right to challenge corporate resolutions.

Governance requirements applicable to collective investment schemes (FIIIs or SIIIs, and in some cases, for SOCIMIs) are provided for in Law 35/2003, of November 4th, on Collective Investment Schemes applying to open-ended funds and Law 35/2003, of November 4th, on Collective Investment Undertakings.

5.5 Annual Entity Maintenance and Accounting Compliance

The incorporation of a company requires that certain obligations related to accounting and, sometimes, auditing be carried out. These requirements depend on the type of entity.

An SL and an SA are obliged to keep accounting records of their business activities. In this regard, entities should register their annual accounts before the Commercial Registry.

It is mandatory for some capital companies to audit their annual accounts when they exceed the regulatory limits. In this regard, a company that meets two of the following three requirements for two consecutive financial years at the date of the close of each financial year is not obliged to audit its annual accounts:

- when its total assets do not exceed EUR2,850,000;
- when the net turnover does not exceed EUR5,700,000; and

- when the average number of employees during the financial year does not exceed 50.

6. COMMERCIAL LEASES

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Some rights established in the Spanish regulation allow the use of a property without ownership.

- A lease (*arrendamiento*) – one of the parties, the landlord, undertakes to provide to the other, the tenant, the enjoyment or use of a property for a certain time and price. The law distinguishes between urban and rural leases. Urban leases may be dwelling or residential leases (“dwelling-use lease”) and non-dwelling or commercial leases (“commercial lease”). Furthermore, lease agreements for tourist use are expressly excluded as urban leases and governed by regional and local specific legislation or by the seasonal lease regime.
- Right of usufruct (*usufructo*) – entitles the beneficiary to use and obtain benefit of a property owned by a third party, the bare owner, in exchange for a price and for a limited time.
- Use and habitation (*uso y habitación*) – entitles a person to receive and use a property belonging to a third person.
- Surface right (*derecho de superficie*) – like common law, separates land ownership from the right over the construction. The right entitles its owner to build on third parties’ land, taking ownership of what has been built for a certain period (which may not exceed 99 years).

6.2 Types of Commercial Leases

In a commercial lease, a landlord rents a property to a tenant to perform a business or economic activity. The leases are governed by the principle of freedom of contract, with the following exceptions:

- the rent guarantee must be at least equal to two months' rent; and
- court jurisdiction.

In the absence of an agreement, the leases are governed by the Title II of the Urban Lease Act and, subsidiarily, by the Spanish Civil Code.

There is a particularity regarding the lease of industries or business leased jointly with the property and facilities (such as hotels). In this case, the parties may either subscribe to a hotel or hotel industrial leasing agreement. In the former, the leased property is the hotel itself and is regulated subsidiarily by the Urban Lease Act, while in the latter, the leased object is a business unit (with all its elements and assets, including the labour force) regulated by the Civil Code subsidiarily. In practice, hotel leasing is governed by the agreement of the parties.

6.3 Regulation of Rents or Lease Terms

In general, parties may freely agree on the rent and terms of lease agreements. For instance, rent may be fixed voluntarily, except for social housing. However, the Urban Lease Act establishes a few mandatory provisions.

- Residential leases' minimum period: for residential leases entered after March 2019, the landlord must allow the lease to be extended for up to a minimum of five years if the landlord is an individual or seven years if it is a legal entity. The parties may freely agree on the duration of a commercial lease.
- Rent review: the Spanish Urban Lease Act regulates a rent-review limit to residential

leases under which parties may only agree to annual reviews no higher than the Spanish consumer price index, published by the National Statistics Institute. The rent review may not be carried out more than once per contractual year.

- Rental guarantee: it is compulsory to require and provide a cash deposit equivalent to one month's rent for residential leases and two months' rent for commercial leases.

Only measures concerning the suspension of evictions for tenants in vulnerable situations ruled due to COVID-19 continue applying. After 28 February 2022, most legislation affecting lease terms is no longer in force.

However, local authorities are ruling on the granting of rental subsidies, by direct award, to tenants of usual/regular housing who, either or not because of the economic and social impact of COVID-19.

6.4 Typical Terms of a Lease

The typical terms of a residential lease agreement are as follows.

- The term of the lease may be freely agreed upon by the parties. However, for residential leases, it is a minimum of five years or seven years, depending on whether the landlord is an individual or a legal entity. The landlord may only terminate the lease before its expiry in the event of a material breach by the tenant. An exception may be applicable under certain circumstances when the owner wants to move to the property to establish it as his or her main residence.
- The rent is paid as agreed by the parties. In the absence of an agreement, the rent shall be paid monthly, within the first seven days of each month.

- The sublease and assignment of the agreement must be expressly agreed; otherwise, the tenant shall not be entitled.
- Unless otherwise agreed, the landlord is obliged to perform the necessary repairs so that the tenant may continue carrying out the purpose for which the real estate was leased. Normally, the parties agree that the tenant must repair any damages to the property and perform any necessary actions to keep it in a good state of maintenance and repair. The landlord must carry out any such works affecting the structure and facade of the property.
- In the event of sale, the tenant has a pre-emption right, but the right may be expressly waived by the tenant.

6.5 Rent Variation

It is standard practice that the parties agree to review the rent after a certain period.

Rent variation in residential leases must be expressly agreed by the parties. Moreover, for those agreements entered after 6 March 2019, rent variation may not rise above the Consumer Price Index.

Variation may only be set to happen annually.

6.6 Determination of New Rent

In most leases, a rent increase is determined in accordance with the National Consumer Price Index or other variables, as stated in **6.5 Rent Variation**, subject to previous agreement of the parties.

6.7 Payment of VAT

The lease of real estate is generally subject to VAT at a 21% rate. The lessor shall charge VAT to the lessee, who shall bear the VAT cost. However, residential leases are generally exempt from VAT.

Commercial leases owned and leased by businesses are subject to VAT at a rate of 21% if specific Spanish tax law requirements are met.

6.8 Costs Payable by a Tenant at the Start of a Lease

Other costs payable by a tenant at the start of a lease are:

- a mandatory rent deposit (*fianza*) borne by the tenant in an amount equivalent to one month's rent for residential lease agreements and two months' rent for non-residential lease agreements;
- it is usual to undertake complementary guarantees to secure payment of rent (under a limit in dwelling lease agreements);
- although not obliged, the tenant may also subscribe to a home insurance to limit his or her liability in the event of any contingency;
- tenants may agree that one rental month's brokerage fee shall be paid to the real estate agency if it has been necessary to find the premises to lease;
- a tenant is obliged to declare the transfer tax – TPO – to the region when formalising the lease contract, although it is exempt in some regions if several requirements are met (ie, Madrid).

6.9 Payment of Maintenance and Repair

Unless otherwise agreed, the landlord is obliged to carry out the necessary repairs so that the tenant may continue carrying out the activity for which the property was leased. Normally, the parties agree that the tenant must repair any damage to the leased property resulting from normal wear and tear and perform any actions necessary to keep it in a good state of maintenance and repair and that the landlord carries out the works affecting the structure and facade of the property.

Legal provisions regarding residential leases and maintenance of premises shall apply to leases of business premises unless otherwise agreed by the parties. These legal provisions are usually replaced by contractual provisions.

6.10 Payment of Utilities and Telecommunications

Utilities and telecommunication expenses, including taxes, are usually borne by the tenant.

No legal restrictions apply to the agreement between the parties to state the landlord's ability to recover service charges from tenants. In most cases, the tenant enters into a contract directly with the utility services.

6.11 Insurance Issues

It is common practice that the landlord subscribes to an insurance policy to protect the property itself. It may freely subscribe to a recovery rent payments insurance.

However, even if not mandatory, it is standard practice for the tenant to arrange an all-risk insurance policy to cover any civil liability for damages related to the business activity carried out on the property and an all-risk comprehensive insurance policy to cover, among others, damage caused by theft, fire, smoke, water and explosion, as well as any other related risks to the contents of the property.

6.12 Restrictions on the Use of Real Estate

The tenant is obliged to use the leased property as a "diligent parent", assigning it to the agreed use. This rule applies to residential and commercial leases. Furthermore, the landlord is entitled to terminate the lease agreement in the case of annoying, unhealthy, harmful, noxious, dangerous, or unlawful activities that occurred on the leased property or if the tenant maliciously damages the property or carries out activities forbid-

den in the by-laws of the owners' association of the building where the property is located.

Concerning the commercial lease agreements, it is common practice that parties may agree on the possibility of terminating the contract in the event of the impossibility of obtaining an opening/activity licence since this circumstance effectively makes the property unsuitable for the purpose of being exploited economically.

6.13 Tenant's Ability to Alter and Improve Real Estate

The tenant is not entitled, without the written consent of the landlord, to carry out works that modify the configuration of the dwelling or its accessories (eg, garage, storage room), and the tenant may not carry out works that decrease the stability or safety of the dwelling.

Despite the right to terminate the contract, the landlord may require the tenant to restore the property to its former state or maintain the alteration made.

6.14 Specific Regulations

Urban leases are under the legal framework of the Urban Leases Act (as amended by Royal Decree Law 7/2019) and, subsidiarily, the Spanish Civil Code. Urban leases are divided between residential and non-residential leases (vid. *Supra*).

Rural leases are regulated by the Spanish Rural Leases Act (*Ley de Arrendamientos Rústicos*), which applies to leases such as the lease of a farm, including all machinery and the right to cultivate crops, etc. In default of express regulation, the Spanish Rural Leases Act and the Civil Code apply and the applicable custom and practice.

6.15 Effect of the Tenant's Insolvency

The Urban Lease Act does not expressly provide as a cause for termination of lease agreements the insolvency of the tenant.

The Spanish Insolvency Act states the general principle of the continuation of the lease agreements in the event of the tenant's insolvency. Any outstanding payment obligations under the lease agreement shall be paid to the landlord directly against the insolvency estate. In the same respect, the Insolvency Act establishes the nullity of the clauses of the contract that set the termination solely due to the declaration of insolvency.

Moreover, an insolvency tenant may stop eviction actions exercised, as well as reinstate the lease agreement by paying all amounts due, including the landlord's court costs up to that time.

6.16 Forms of Security to Protect against a Failure of the Tenant to Meet Its Obligations

The Urban Lease Act states that, prior to taking possession of the leased property, the tenant must deliver to the landlord a rent guarantee equivalent to one month's rent for residential leases and two months' rent for commercial leases. This deposit is held by the landlord (or deposited in a public administration, depending on the region), to be returned to the tenant upon termination of the lease agreement.

The parties may also agree additional guarantees to cover payment defaults by the tenant (ie, bank guarantees, comfort letters, deposits, or specific default insurances). However, additional guarantees in residential leases shall not exceed two months of rent.

6.17 Right to Occupy after Termination or Expiry of a Lease

When the initial term expires, lease agreements are automatically extended by one year if the rent was fixed annually or extended by one month if the rent was fixed monthly, provided that:

- the parties have not agreed on anything in this regard; and
- the tenant stays in the leased property more than 15 days after the termination of the lease agreement without express opposition from the landlord.

This automatic renewal is named "tacit holding over" (*tácita reconducción*), laid down by Section 1566 of the Spanish Civil Code. The "tacit holding over" may be expressly excluded by mutual agreement of the parties.

6.18 Right to Assign a Leasehold Interest

In commercial leases and unless otherwise agreed by the parties, the tenant may:

- assign its position in the lease agreement to any third party without the landlord's consent; and
- sublease the premises.

The landlord may increase the rent by 10% (in the case of partial subleases) or in an amount of 20% (for total subleases or assignments).

In residential leases, and unless otherwise agreed by the parties, any such assignment or sublease shall be expressly authorised by the landlord.

6.19 Right to Terminate a Lease

Failure by either party to comply with the obligations resulting from the lease agreement shall entitle the party who has fulfilled its obligations to claim the termination of the agreement.

The landlord is entitled to terminate the lease agreement, among others, if the tenant:

- defaults on rent payment or any other amounts assumed by or which corresponds to the tenant;
- subleases or transfers totally or partially the leased property without prior consent from the landlord;
- causes harm to the leased property due to wilful misconduct or gross negligence.

The tenant is entitled to terminate the lease agreement if the landlord:

- interferes in the use of the leased property;
- fails to carry out the necessary repairs to preserve the property in a suitable condition for its normal use.

In addition, a breach by the tenant of the following obligations entitles the landlord to terminate the lease:

- expiry of the lease agreement term;
- loss or destruction of the real estate asset;
- mortgage foreclosure (when the leased agreement has been formalised after the establishment of the mortgage without the mortgagor's knowledge);
- usufruct extinction (if the beneficial owner had granted the lease agreement and the tenant was aware of this);
- compulsory expropriation.

6.20 Registration Requirements

Lease agreements may be registered in the Land Registry; however, it is not mandatory. Unregistered urban leases may not be effective against a third-party purchaser registering their rights if that purchaser fulfils the requirements laid down in Article 34 of the Spanish Mortgage Law.

In practice, it is not usual to register lease agreements in Spain since, in order to register the lease, the agreement must be notarised as a public deed (ie, implies notary and registry fees and the payment of the stamp duty tax).

6.21 Forced Eviction

The landlord may force the tenant to leave if the lease agreement has been terminated for any reason. The estimated time is usually between two and six months. Royal decree 37/2020 includes eviction moratoriums due to the coronavirus crisis. The suspension of evictions of vulnerable people who have no other place to live has been extended until the end of the state of emergency (9 May 2021).

6.22 Termination by a Third Party

In the strict sense, a lease agreement may not be terminated by a government or a municipal authority. However, if a public authority orders the closure of the premises where the specific economic activity is carried out due to non-compliance, eg, with certain measures regarding occupational hazards, and by virtue of this, as well as in accordance with the clauses of the contract, the contract may be terminated.

7. CONSTRUCTION

7.1 Common Structures Used to Price Construction Projects

The most common structures used to price construction projects are as follows.

- A fixed price – the price shall be considered as a lump sum, fixed, and closed pursuant to the definition in Article 1,593 of the Spanish Civil Code. In this case, the contractor shall not be entitled to claim a price increase, even if the actual costs and expenses result in a sum higher than budgeted. However, depending on the contract, the lump-sum price may

be subject to review in particular circumstances.

- A unit price – a price is agreed by means of a unit or quantity or unit prices per piece or based on a module (ie, per unit of work or unit of measurement).
- A price agreed based on the cost incurred and duly proved by the contractor in the execution of the works, to which a spread is added in favour of the contractor.
- Open book mechanism, which means a price mechanism where it is defined and processed in the reimbursement of “actual costs” to the contractor.

7.2 Assigning Responsibility for the Design and Construction of a Project

Act 38/1999, of 5 November 1999, on Building Development (LOE) establishes certain obligations and liabilities which may be involved in a construction project.

In this respect, the “building agents”, as defined in the LOE, are all the individuals or legal entities involved in the building procedure.

By virtue of Article 17 of the LOE, the building agents are liable to the owners and third-party purchasers of buildings or parts of buildings from the date of reception of the construction works. The liability may be joint and severally requested when it may not be allocated individually and when there is a concurrent fault, without it being possible to specify the involvement of each agent in the damage caused.

The contractor usually assumes the risk of damage or destruction of the construction works until the delivery of the completed works to the developer, including some period of guarantee after delivery of the works.

The LOE establishes specific periods during which a claim may be made against the party

involved in the construction, depending on the type of the defect affecting the building:

- for a ten-year period, for damages caused to the building affecting structural elements which compromise the stability of the building;
- for a three-year period, for damages caused to construction elements which result in the failure to fulfil habitability requirements; or
- for a one-year period for damage due to defects in construction affecting elements of the finished building.

The developer and the rest of the building agents may be deemed liable for construction flaws under the regime of Article 1,591 of the Spanish Civil Code.

7.3 Management of Construction Risk

In addition to the guarantees stated in the LOE, depending on the type of damages caused by construction faults and defects and the concrete contingencies that may arise during the construction, some typical guarantees that may be agreed upon are as follows:

- withholdings;
- performance bonds;
- work certifications (partial and final work certificate);
- default partial and final penalties;
- bank guarantees;
- subrogation rights in contracts with subcontractors in the event of default by the contractor;
- the developer’s right to designate or impose subcontractors for certain parts of the project; and
- restrictions on the use of materials.

On the contractor’s side, there are commonly agreed measures, such as advance payments

or, eg, rights to suspend work in the case of payment delays.

7.4 Management of Schedule-Related Risk

There is no standard form to establish any mechanisms to cover the events of breach by the contractor of any of the partial milestones or the final time limit fixed in the works deadlines programme.

In principle, the contractor shall be liable for construction delays if caused deliberately or negligently. The owner is entitled to claim damages in accordance with the Spanish Civil Code, but the assumptions of force majeure shall not be attributable to the contractor. In the case of serious delay, the owner shall be entitled to terminate the contract.

Specific coverage should be included in the corresponding contract. It is standard practice to include penalties imposed on the developer/seller if the construction or delivery milestones are not met on time.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Construction contracts always require the works to be completed by a specified date and form. Despite the guarantees stated in Act 38/1999, of 5 November 1999, on Building Development (see **7.3 Management of Construction Risk** and **7.4 Management of Schedule-Related Risk**), additional guarantees may be agreed to ensure the execution of a construction project. See **7.3 Management of Construction Risk** in this regard. Comfort letters, bank guarantees, parent and group guarantees and letters of credit are commonly used.

7.6 Liens or Encumbrances in the Event of Non-payment

Under the Spanish Civil Code, the contractor is entitled to terminate the works agreement or claim its compulsory performance (ie, the pending payment), including the payment of damages (Article 1,124 Spanish Civil Code).

In the case of default of payment, the contractor shall not have direct legal action towards the works; however, it may initiate a court case and request a precautionary measure claim to encumberance the property.

7.7 Requirements before Use or Inhabitation

The contractor should comply with some legal provisions; depending on the location of the property and its use, the following licences/certificates must be obtained:

- if the property has a residential use, a final works certificate is required, and in most cases, a first-occupation licence or self-declaration to verify that the property may be used for residential purposes;
- few regions establish the need for a certificate of occupancy (*cédula de habitabilidad*), or a formal architect declaration stating the compliance of the property with the requirements to obtain such a certificate to allow its transfer;
- if the aim is to use the property for professional use, it shall also be necessary to obtain an activity and opening licence, and it may require some other permits, depending on the type of activity to be developed.

8. TAX

8.1 VAT

See **2.10 Taxes Applicable to a Transaction** for the tax implications arising from the transfer of real estate.

8.2 Mitigation of Tax Liability

Subject to certain requirements, the transfer of real estate companies with a large real estate portfolio engaged in economic activities cannot be subject to stamp duty.

8.3 Municipal Taxes

Only the owning of real estate is subject to real estate tax (IBI). This local tax is paid annually by the owner to the City Council where the asset is located. The final tax liability is calculated from the cadastral value of the asset.

8.4 Income Tax Withholding for Foreign Investors

Income tax for foreign investors depends on whether the asset is owned directly by an individual or through a company.

If the asset is directly owned by a foreign company or individual without a permanent establishment in Spain, income derived from rent is subject to a general non-resident income tax of 24% in Spain. Should the investor be an EU/EEA tax resident, the applicable rate shall be reduced to 19% and certain expenses could be deducted (eg, depreciation of 3%).

In the case of a transfer by a foreign company or individual without a permanent establishment in Spain, the capital gain derived from the transfer will be subject to a 19% tax rate. The purchaser must withhold 3% of the purchase price on account of the non-resident income tax to be paid by the seller.

Under certain circumstances, the transfer of Spanish companies owning real estate in Spain by foreign individuals could be exempt from taxation by application of a Double Taxation Treaty.

Finally, the ownership of real estate by a non-resident could be liable to wealth tax under certain circumstances.

8.5 Tax Benefits

Spanish companies subject to corporate income tax have the right to deduct the depreciation of construction contributing to economic activities. Depreciation expenses are allowed in the corporate income tax taxable base if they are accounted for in accordance with the depreciation rates set forth in the corporate tax law. Certain accelerated amortisation schedules may be of application provided certain specific requirements are met.

Spanish individuals who derive rental income may be entitled to deduct certain expenses from their personal income tax due, such as the relevant real estate asset depreciation. In addition, the rental income of dwellings may benefit from a 60% reduction on the personal income tax due.

Certain tax benefits apply to different regulated Spanish real estate vehicles. Thus, Real Estate Investment Companies (*Sociedad de Inversión Inmobiliaria*) and Spanish SOCIMI may benefit from certain tax benefits (ie, mainly reduced company income tax rates) if certain corporate and investment requirements, which must be individually analysed, are met.

Furthermore, the Spanish Corporate Income Tax Law set forth a special tax regime for entities involved in the rental of dwellings located in Spain, provided that, among other requirements, the latter own and operate at least eight different dwellings during a period of three years.

Cases & Lacambra is a client-focused international law firm dedicated to offering comprehensive advice in business law. With a presence in Europe and America, the firm has a proficient track record in complex transactions involving the financial sector, special situations, financial markets regulations, cross-border disputes and transactions with special tax conditions. The

firm focuses on providing bespoke solutions to clients, including financial institutions, investment services companies, investment funds, family offices, business conglomerates and high net worth individuals. The Cases & Lacambra teams are high profile, committed to excellence and cross-border-oriented.

AUTHORS



Daniel Tienda is a partner and the head of Cases & Lacambra's real estate practice in Spain. He has an extensive understanding of the real estate cycle in Spain, allowing him to provide bespoke

legal advice to foreign investors in the Spanish market in cross-border transactions. Daniel acts mainly for hedge funds, family offices, private equity firms, developers and construction companies comprising acquisitions and divestments through share deals, asset deals and credit portfolios. His expertise includes a variety of real estate assets, such as land, residential buildings, offices and commercial spaces. He has broad expertise and focuses on the hospitality sector as well as the drafting and negotiation of all types of real estate contracts (leasing, construction, architectural and design, hotel management, finance and restructuring, etc), urban matters, planning and licensing with the public administration.



Toni Barios is a partner in the markets and financial services group of Cases & Lacambra and leads the financial practice in Spain. He advises financial institutions and companies in

financing and debt-restructuring transactions, bilateral and syndicated, domestic and cross-border, including structured finance, corporate and acquisition finance, project finance (real estate, energy, and infrastructures), structuring and perfecting security and intercreditor and inter-lender issues. His practice includes guidance to financial institutions, funds and other non-traditional lenders in debt investment transactions, secondary debt trading, non-performing loan transactions, distressed debt and special situations. He has been personally involved in negotiating the main public and private financing and debt restructuring transactions in the past decade in Spain and handled various cross-border financing transactions involving various countries, including the UK, France, Germany, the Netherlands, the USA, Mexico and Canada.

Contributed by: Daniel Tienda, Toni Barios, Jorge del Castillo and Juan Moncada, Cases & Lacambra



Jorge del Castillo is a partner at Cases & Lacambra in Spain, focusing on tax law. Jorge has over ten years of experience as a lawyer and specialises in providing tax advice to national

and international companies in mergers and acquisitions, as well as in structuring business investments in Latin America through Spain. He also has extensive knowledge related to providing tax advice to high-net-worth individuals.



Juan Moncada is a managing associate in Cases & Lacambra's real estate practice in Spain. He has broad experience in all legal aspects relating to real estate

investment, with a strong international profile and proficiency in legal-commercial advice. He has guided numerous transactions involving the development, sale and acquisition of real estate and credit portfolios, share and asset deals and a range of real estate assets; among others, land, residential buildings, offices, logistic centres, gas stations, tourist complexes, retail spaces and hotels. His practice includes drafting and negotiating of all types of real estate contracts (leasing, construction, architectural and design, hotel management, surface rights, finance and restructuring, etc).

Cases & Lacambra

Calle Alcalá 61, 4^a
28014
Madrid
Spain

Tel: +34 91 061 24 50
Email: spain@caseslacambra.com
Web: www.caseslacambra.com

CASES & LACAMBRA



Chambers Guides to the Legal Profession

Chambers Directories are research-based, assessing law firms and individuals through thousands of interviews with clients and lawyers. The guides are objective and independent.