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International Real Estate News

Committee Update of the Real Estate Section of the
International Bar Association Legal Practice Division

SEPTEMBER 2017



by neighbours to block short-term rental activity.

These concerns have been addressed by the majority party with the submission of a parliamentary bill introducing mandatory approval by the condominium prior to any short-term rental activity.

Nevertheless, this new proposal is not immune to criticism, both from the opposition parties and property owners currently engaging in short-term rental activity (eg, undue restriction to private property, lack of compelling occupancy and noise nuisance).

Final remarks

Short-term rental in Portugal faces complex challenges and risks, and the debate over its boundaries as a business activity has only just begun. This is a debate that will touch on other regulatory dimensions and require great skill to devise clear and fair home-sharing rules.

Regulatory issues aside, this business activity is expected to remain highly profitable. Thus, investment in properties for short-term rental is expected to continue, even though it is paramount to closely follow legal changes and current debates in these areas.

Real estate guarantees in Spain

The real estate sector is experiencing significant growth in Spain. The number¹ of building licences granted has significantly increased; around 62,000 new properties were built in 2016, with a forecasted growth of 20 per cent² in 2017. The strong signals of the recovery of the sector have attracted the interest of local and foreign investors in the Spanish real estate market.

Developers are selling off-plan properties with the support of: (1) new technologies, which results in easier sales of the final units; and (2) the financing of the construction process.

The aforementioned sales are often granted through a private sale and purchase agreement (SPA), by means of which a down payment is executed by the purchaser. The SPA does not transfer the ownership of the property, but binds the parties to conclude the agreement at a later stage through the signing of a public title deed before a public notary. Therefore, generally speaking, the transmission of the ownership of a property in Spain requires: (1) a title binding the parties; and (2) the '*traditio*' (delivery of the property),³ which will take place with the granting of the title deed.⁴ When both requirements are fulfilled, the purchaser becomes the new owner. Despite this, the incorporation of the sale and purchase

deed into the Land Registry is still highly recommended.

Legal risks

Off-plan property acquisitions have advantages for purchasers seeking lower prices and medium-term acquisitions, and the same is true for investors looking for an upside and high yields. However, there are downsides linked to the risk of the late completion of the project due to a wide range of situations, such as construction matters, delay of the licences by the competent public administration, bankruptcy, delay or denial of a certificate of occupancy, and issues with utility suppliers. In these cases, the purchaser may seek a refund of the anticipated amounts.

In order to reduce the aforementioned risks, the former Act 57/1968 established the obligation of developers to grant guarantees in favour of purchasers to ensure the refund of the prepaid amounts in the case of default if the construction was not finalised or delivered on time.

Improvement of the regime in force

The former regime (Act 57/1968) was in force until its revocation by the Building Act.⁵ Consequently, a new regime came into force on 1 January 2016. The new regulation's

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purpose is to boast the legal certainty of real estate projects under construction. According to the new regulation, the obligation to refund the anticipated amounts in the case of default by the developer is extended to the financial entity (banks), whose intervention is mandatory during the process of construction, requesting that the developer secures the down payment executed by off-plan purchasers. The measure contributes to minimising the risk of losing advanced funds, thereby widening the legal protection of purchasers.

The key aspects of the Building Act in force are as follows:

Guarantees

The developer shall ensure the refund of advanced payments in the case of default, not only for the price, but the taxes⁶ and legal interest, by fulfilling two cumulative conditions:

1. the granting of an individual security or bank guarantee for each buyer covering the refund of the amount paid (hereinafter, the insurance company and bank will be referred to as 'the Guarantor'); and
2. the deposit of the prepaid amount in the so-called special bank account (the 'Special Account'), which is different from any other accounts held by the developer, and will only be able to be addressed in order to attend to construction needs.

Information

The SPA shall include: (1) the seller's obligation to refund the amount in the case of default, including the case in which a certificate of occupancy is not granted; (2) providing the full details of the Guarantor; and (3) appointing the bank in charge of the Special Account.

Additionally, the advertisement of the sale of properties shall include a reference to the aforementioned statements.

Bank liability

The bank hosting the Special Account shall supervise the effective granting of the security or bank guarantee. Otherwise, it will be liable for the return of the sums paid, if necessary.

Repayment by the insurance company and bank

In the case of default, the purchaser is entitled to request from the seller, through formal notification, the refund of the prepaid amounts. If the purchaser is not refunded within 30 days, the individual will be entitled to bring an action before the court against the Guarantor, who will be obliged to repay within 30 days. The action may be executed directly against the Guarantor when it cannot be brought against the seller. It must be underlined that bank guarantees expire after two years from the breach of contract without notifications requesting the refund.

Enforcement

Whether a default occurs, the purchaser holds the following rights: (1) to terminate the contract requesting the refund of the amounts paid; (2) to grant an extension by including in the contract the new deadline to complete; and (3) the purchaser will be able to submit the action up to five years from the breach.⁷ This action is brought separately and in addition to the possible civil claim for damages.

Infringements and penalties

The lack of granting of a security or guarantee could trigger a penalty against the developer of up to 25 per cent of the amounts subject to the refund obligation.

Guarantees expiration

Without prejudice to the paragraph above on the repayment by the insurance company and bank, the guarantees will be in force until a certificate of occupancy⁸ is granted that states that the dwelling fulfils the legal requirements to be inhabited, and the effective delivery of the unit takes place.

Banks liability

Banks that have not committed to their obligations in relation to the opening of the Special Account will be jointly and severally liable, together with the developer, for the refund in the case of default.⁹

The Spanish Supreme Court ruled in Decision 527/2016 of 12 September 2016 that guarantors are obliged to verify the documents and data of the developer, and

confirm whether they are accurate according to the obligations in the SPA. Otherwise, the insurer might be liable due to its lack of due diligence.

The aforementioned legal protection granted in favour of purchasers and supported by Spanish case law should be considered together with some other legal guarantees that apply to the real estate sector, such as the obligation to respond to defects arising that affect the structural elements of the building during ten years, and in relation to consumer protection legislation in force in Spain and Europe.

Investors will find a secure market for their real estate transactions in Spain, which has developed solid legal certainty.

Conclusion

The Spanish legal framework has been adapted to introduce solid guarantees not only to property owners and real estate investors but also developers and builders.

There are recent reforms (ie, improvement of the *sociedades cotizadas de inversión en el mercado inmobiliario* (SOCIMI) regime (real estate investment trusts)), which are granting certainty and stability to the real estate sector in Spain, helping its professionalisation and attracting foreign investment to the country.

Notes

- 1 Annual rate increase of over 36 per cent.
- 2 Data provided by Servihabitat.
- 3 The title and *traditio* transfer regime (*teoría del título y el modo*) is a legal requirement foreseen in Arts 609 and 1095 of the Spanish Civil Code.
- 4 Art 1462 of the Spanish Civil Code.
- 5 First additional provision of *Ley 38/1999 de 5 de noviembre de la Ordenación de la Edificación* amended by the *act 20/2015 de 14 de julio, de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras*.
- 6 The tax payable will be value added tax (VAT) unless a transfer tax is payable, which will be entirely paid with the granting of the public title deed. On the contrary, VAT will be payable with each instalment when it comes to *arras confirmatorias*.
- 7 Art 1964 of the Spanish Civil Code.
- 8 Similar documents might be requested in particular regions of Spain.
- 9 Superior Court Case decision dated 21 December 2015.

Acquisition of real estate in Switzerland by foreigners: additional restrictions proposed

In March 2017, the Federal Council of Switzerland opened a hearing procedure for an amendment of the Lex Koller, the law restricting the acquisition of real estate by persons abroad. The Federal Council has proposed more and, in part, very severe restrictions for discussion. In particular, commercial properties shall be subject to the Lex Koller again and the acquisition of shares in listed real estate companies shall again be restricted.

The proposals by the Federal Council are very controversial. In fact, the two most far-reaching proposals were rejected by Parliament in 2014. Thus, it remains unclear whether and what changes will be enacted in approximately two to three years after the completion of the legislative procedure.

Commercial properties

The most far-reaching proposal relates to commercial properties, that is, properties used for commercial or business purposes (office, production, logistics, retail, hotel, etc). Such commercial properties shall again be subject to the Lex Koller. Persons abroad would thus be excluded from acquiring commercial properties in Switzerland in the future. A permit would be available as an exception only if the owner uses the property for the owner's business activities and does not lease the property to third parties.

This fundamental change would repeal the liberalisation of the Lex Koller that was enacted in 1997. As a consequence, foreigners would be excluded almost completely from

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