

INVESTMENT IN INTERNATIONAL REAL ESTATE – U.S. LAWYERS BEWARE

***18TH ANNUAL REAL PROPERTY & ESTATE PLANNING SYMPOSIA
WASHINGTON D.C. APRIL 25TH THROUGH APRIL 28TH, 2007.***

THE CASE OF ITALY

The Italian real estate market – both residential and commercial – has seen consistent growth over the past years. There are no restrictions to foreign ownership – whether private or commercial.

Although a great deal of the interest in this sector by foreign buyers is due to the significant cultural patrimony of Italy, recent legal and tax reforms have also helped simplify the investment climate. Nevertheless, the Italian legal and tax environment is complex and full of dangers to the unwary. In this regard, it is essential that potential investors be certain to have a local independent legal advisor to assist them throughout the process of purchasing, owning, investing in and selling real property in Italy.

Note that all transfers of real estate in Italy must take place with the assistance of a notary who is both a public official and private professional. The notary has, among his/her other responsibilities, the requirement to prepare and file the final deed of transfer of real property and, in that context, must necessarily be concerned with the interests of both buyer and seller. This makes having independent counsel all the more important.

The purpose of this article is to highlight certain key areas in which prospective property owners in Italy and their U.S. attorneys should be particularly aware.

1. Essential Contracts

Foreign buyers are often confused by the legal significance of the various contracts involved with the purchase of real estate in Italy. Such confusion can, and often does, lead to litigation and deals being broken. For this reason it is essential to understand the following fundamental aspects:

Proposal to Purchase: once a property has been identified it is standard for real estate agents in Italy to have a buyer make a formal offer through the use of a Proposal to Purchase (“*Proposta di Acquisto*”) which specifies a certain number of days for the seller to accept. The proposal is accompanied by the payment of a deposit (see “*Deposits*” below) – usually 10% - of the sales price.

It is essential to note that the Proposal to Purchase is a binding contract and irrevocable for the buyer. Once the seller accepts the offer, the buyer is bound to proceed with the purchase – even before having the opportunity to review title and other relevant legal and tax documents - and will forfeit the deposit given if he/she fails to complete the transaction for any reason. Once

accepted, the parties would then enter into a formal type of purchase and sales agreement, explained below, but with the buyer bound to complete the transaction.

An alternative and recommended approach is to incorporate the terms of the Proposal to Purchase directly into the purchase and sales contract ensuring to allow a period in which the buyer has the right to carry out a full due diligence on the property and/or entity(ies) holding the property and the possibility of the buyer backing out should the due diligence point to there being some legal or tax problem associated with the property.

Preliminary Contract of Sale: the “Preliminary Contract of Sale”, a type of purchase and sales contract (known in Italian as the “*Contratto Preliminare di Vendita*” or “*Compromesso*”) is a binding agreement that formalizes the agreement between buyer and seller on each and every aspect of the sale. The contract must clearly identify the parties to the transaction, give the full legal description of the property, specify the price, the amount, date, terms and method of payment of any deposit paid and the terms of final payment, including amount, timing and method. The contract should also state all the guarantees, commitments, assurances that each party gives to the other with respect to the property and to completing the transaction.

The closing takes place on or before a set date, which must be specified in the Preliminary Contract of Sale, before an Italian notary chosen by the buyer. The date set for the closing should be carefully considered in light of the time the parties agree will be necessary to carry out due diligence, obtain a mortgage or other contingencies particular to the transaction.

While the Preliminary Contract of Sale does not confer final ownership it does form the basis upon which the notary shall draft the deed to be signed at the closing. It is therefore essential that this contract be carefully considered by both parties and their advisors prior to execution of the deed.

Deposits: there are two types of deposits (“*Caparra*”) which may be paid at the time of signing either the Proposal of Purchase or the Preliminary Contract of Sale - and the differences are critical. The first is a “*Caparra Confirmatoria*”. When a deposit is so defined and should there be default on the part of the buyer, that party loses the entire deposit. Should instead the seller default, the seller must pay the buyer twice the amount of the deposit. The second type of deposit is a “*Caparra Penitenziale*” which allows either party to withdraw from the transaction, the defaulting buyer still losing the deposit, but the defaulting seller only required to returning the actual deposit paid.

2. Due Diligence

Before committing to a purchase, a buyer will need to carry out the due diligence appropriate to the transaction. The restrictions on building in Italy and the authorizations that may be required for any specific transaction need be examined carefully. In addition, in the event of a commercial transaction, a tax due diligence would be essential.

EXAMPLES OF DOCUMENTS REQUIRED FOR LEGAL DUE DILIGENCE

1. List of the proprietor(s) of the property.
2. Copy of deed(s) by which ownership of the property (of land and/or buildings) passed to proprietor(s) (“*Atti di provenienza*”). Details any liens, restrictions, etc.
3. Cadastral certificates of land and/or buildings (“*certificati catastali*”).
The Italian cadaster (*catasto*) is the land evidence registry of all real estate located in Italy and a title search of this registry is essential to any purchase.
4. Cadastral maps.
The property’s blueprint (*planimetria*) and cadastral maps (*mappe catastali*) should be compared to the current property.
5. Concessions and/or authorizations which have been issued by Administrative Authorities, e.g. zoning, habitability, regularization with non-conformities, etc.
6. Concessions and/or authorizations which have been requested but not yet issued by Administrative Authorities, obligations to fulfil for the Administrative Authorities.
7. Copies of documents under points 5 and 6 above relative to the property and to activities carried out thereon (e.g. sports, swimming pools).
8. Condominium regulations.
9. Environmental approvals.
10. Indication as to the individuals and/or entities which actually operate the activities (e.g. individuals, companies, associations etc.) (“Operators”).
11. The following documents relative to each entity Operator: Memorandum of Association, Articles of Association, managers’ and partners’ resolutions, balance sheets from the previous 3 years.
12. Any contractual relationships which Operators may have entered into with any of its individual partners as third parties.
13. Contracts between the Operators and any employee, supplier, collaborator etc.
14. List of any farmers who work the land, sharecroppers, tenant farmers etc, together with relevant documentation.
15. List of any litigation that the Operators, its partners or others who may own the land may be involved in.

3. Preemptive Rights

Where the property being purchased is agricultural, working farmers on abutting land will have a 30 day right of first refusal (“*diritto di prelazione*”) to purchase the property on the same terms and conditions as appears on the Preliminary Contract of Sale. There is a similar right afforded the Italian Ministry of Cultural Heritage and Cultural Activities with respect to the sale of properties considered of historic, cultural or artistic value.

4. Holding Title

Foreign individuals can hold property in Italy in their own names or through an Italian or foreign company. Italian law now also recognizes foreign trust ownership of real property. Similarly, foreign companies are free to purchase directly in their own name or through Italian or other foreign companies. However the ownership is held, how the property will be taxed in both the

U.S. and Italy should be examined, particularly where the property shall be utilized commercially. The estate tax and inheritance laws of both countries should also be considered.