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Timur Bondaryev

Bohdan Shmorhum

Felipe Isa Castillo

Anders Forkman

Bruce D. Greenberg

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Cross-Border Real Estate

TIMUR BONDARYEV, BOHDAN SHMORHUN, FELIPE ISA CASTILLO,
ANDERS FORKMAN, AND BRUCE D. GREENBERG*

This article surveys significant legal developments in cross-border real estate, focusing on recent developments in the Ukraine, Dominican Republic, Sweden, and Mexico.

I. Ukraine¹

Legal developments in Ukraine during the year 2016 were primarily focused on the sphere of e-government services. But there were also some significant changes that affect the area of real estate law. In particular:

A. RECENT CHANGES IN THE OWNERSHIP RIGHTS TO IMMOVABLE PROPERTY REGISTRATION²

City councils, accredited persons, and notaries,³ i.e. state registrars, from the beginning of 2016, are entitled to register ownership rights to real estate and real property. Such registration shall be performed by making respective records in the State Register of Ownership Rights to Immovable Property.⁴ Thus, the practice of issuing ownership certificates is no longer to be applied in Ukraine. Moreover, the improved digital communication and registration system provides for public access to such registers as the State Land Cadastre, the Unified State Register of Court Decisions, the Unified State Register of Private Entrepreneurs, Legal Entities and Civil Organizations, and the Unified Register of Permissive Documents for Construction.

* Editor of the submission: Wojciech Baginski, LL.M (University of Virginia), EMBA Expected '17 (Kellogg-WHU), Managing Partner at Baginski.Pro. He is an Attorney at Law admitted to practice in New York, England and Wales and Poland.

1. Timur Bondaryev, Bohdan Shmorhun are the authors of the section on Ukraine. Timur Bondaryev is an Attorney, Managing Partner, and Head of the Real Estate and Construction, Antitrust and Competition practices at Arzinger. Bohdan Shmorhun is a Junior Associate of the Real Estate and Construction practice at Arzinger.

2. Amendments to On State Registration of Rights to Real Estate and Their Encumbrances (Law No. 834-VIII) (Ukr.), art. 1, para. 1, cl. 1, *available at* <http://zakon5.rada.gov.ua/laws/show/834-19>.

3. On State Registration of Rights to Real Estate and Their Encumbrances (Law No. 1952-IV) (Ukr.), art. 10, para. 1, *available at* <http://zakon3.rada.gov.ua/laws/show/1952-15>.

4. *Id.* art. 10, para. 3, cl. 5.

As of October 2016, the Registration Law⁵ was amended to ensure even better protection of the property titles from violations by third parties, especially from illegal shares takeover. These amendments,⁶ *inter alia*, enable: (1) owner notification in the event of any application for the registration of any ownership right; (2) obligation of the State Registrar to verify the information on the real estate object in certain state registers prior to committing any registration; (3) automatic registration of the rights and encumbrances according to the court decision received from the State Court Administration; and (4) notarial certification of the Head's and Secretary's signatures on the minutes of participants' general meeting of legal entity.⁷

B. THE NEW COURT PRACTICE RELATED TO THE MORTGAGED PROPERTY RETROFIT

Courts have recently adopted decisions stating that retrofit of the mortgaged objects causes the creation of the new (unmortgaged) ones.⁸ Recent judicial practice⁹ invented a new principle according to which the mortgaged object retrofit does not lead to creation of a new property.¹⁰ Thus, the risk of evading the obligations under the mortgage agreement should be mitigated.

II. Dominican Republic¹¹: Purchasing Dominican Real Estate from Government

On September 27, 2016, the Dominican Republic ("DR") Executive Branch issued Decree No. 268-16¹² creating the Evaluation Commission of Lands Registered as Owned by the Sugar Mills belonging to the Dominican State Sugar Council or Consejo Estatal del Azucar ("CEA").¹³ The Decree recognizes the DR's economic transformation which has made it so that

5. *Id.*

6. On Amendments to Improvement of State Registration of Rights to Immovable Property and Property Rights (Law No. 1666-VIII) (Ukr.), available at <http://zakon5.rada.gov.ua/laws/show/1666-19>.

7. *Id.* art. I para 12.

8. See, e.g., Megabank PJSC v. Malvy-Market LLC, 914/4006/13 (2016) (Ukr.), available at <http://www.reyestr.court.gov.ua/Review/56250418>.

9. Finansy & Credit PJSC v. PERSON_6, 6-1213??16 (2016) (Ukr.), available at <http://www.reyestr.court.gov.ua/Review/58986639>.

10. "The disputable apartment should not be considered as a newly created object of immovable property, as it was created on the basis of existing pledged property using its functional elements, so the previous court decisions that the apartment is not subject to the mortgage but the other property is anticipatory." *Id.*

11. Felipe Isa Castillo is the author of the section on Dominican Republic. Dr. Castillo is an Attorney, Managing Partner, and Head of the Real Estate and Tourism and Foreign Investment Law Practice at Arthur & Castillo (AC Law).

12. *Creating the Evaluation Commission of Lands Registered as Owned by the Sugar Mills of the Dominican State Sugar Council (CEA)*, Presidential Decree No.268-16 (2016) (Dom. Rep.).

13. *Dominican State Sugar Council (CEA)*, Law No. 7 (1966) (Dom. Rep.).

Government lands originally dedicated to sugar production, farming, or agriculture have been converted into urban, commercial, and tourism properties. Since this transformation, autonomous and local institutions often compete for the benefits of using and selling property that may belong to them based on different interests.

According to Land Registration Law 108-05,¹⁴ the Dominican Government is the original owner of all real estate properties that constitute the Dominican Republic, and real estate properties registrable under the Dominican government's name are those over which no one can prove a right. But there is no title or deed issued to every piece of government real estate property as a national survey and inventory of all government-owned real estate assets is pending.¹⁵

The purpose of Decree 268-16 is (a) to make an inventory of government-owned land; (b) to audit real estate transactions affecting government lands; (c) to determine the best use of real estate owned or presumed owned by the government in accordance with their nature and characteristics; (d) to make efficient surveys, amendments, and updates of plots of land that allow for the cleansing of lands and their ownership; and (e) to decide about their use by other government institutions.

The Decree, as part of public policy, also seeks to protect government property rights and grant public access to titled real estate property through "trustworthy and quick" legal means. As such, the Decree recognizes the lack of a clear and efficient property purchase and titling process, which is often discovered by investors who purchase property from government institutions or from private sellers who purchased real estate originally owned by the government.

Challenges exist in confidently buying Dominican real estate from government institutions or private parties who originally purchased from the Dominican Government. How can you verify title if there is no title? Is there an explicit process across all government institutions for purchasing real estate? The answer to these questions depends on each particular case. While it is true that one can buy property from the government through an entity whose representative is empowered to sell by power of attorney from the Executive Branch¹⁶ and the sales contract is then approved by the Dominican Congress,¹⁷ getting title to real estate property through

14. Land Registration Law 108-05 enacted on March 23, 2005. Principle III states the following: "The Dominican State is the original owner of all the lands that conform the territory of the Dominican Republic. They are registered on behalf of the Dominican State all the lands over which no one may prove any right of property."

15. *Commission for Titling Government Lands*, Presidential Decree 624-12 (2012) (Dom. Rep.).

16. *Representation of the State in Juridical Acts*, Law 5148 (1938) (requires a power of attorney by the President to a Government representative for executing real property sale contracts over Government property) (Dom. Rep.).

17. *Constitución de la República Dominicana* [Constitution of the Dominican Republic] Jan. 26, 2010, art. 93(k) (grants the Dominican Republic Congress the power to approve or disapprove Contracts for the sale of Government assets submitted by the Executive Branch) (Dom. Rep.).

trustworthy and quick legal means will require a completed government property survey and titling as well as clear contract validation and closing requirements enabling an easy real estate property transfer process.

III. Sweden¹⁸

A. CO-OPERATIVE ECONOMIC ASSOCIATIONS (CONDOMINIUMS)

In an effort to modernize certain aspects of co-operative associations, the Swedish government proposed amendments to the Co-operative Economic Association Act¹⁹ in October 2015.²⁰ The proposal was adopted and went into effect on July 1, 2016.²¹ Its importance in relation to real property lies in the fact that it applies to condominiums as they are a form of a co-operative economic association.²²

The new legislation includes amendments relating first to the notice required for convocation of a general assembly. It allows for notice to be sent to members by email rather than ordinary mail and states that the notice of convocation shall as a general rule be sent between four and six weeks before an annual meeting and two to four weeks before an extraordinary meeting. The new legislation also sets out that particular documentation should be provided at the annual general assembly. This documentation includes the annual report and the auditor's statement, which must be provided at least two weeks prior to the meeting, instead of one week. Finally, the association membership registries are now required to record additional information such as the time of membership and the point in time when membership was terminated.

B. PLANNING AND ZONING REGULATIONS

Several amendments enacted during 2016 apply to the Planning and Building Act.²³ Among the more important change is the requirement that municipal decisions relating to the adoption or amendment of zoning plans may now be appealed directly to the Land and Environmental Court,²⁴

18. Anders Forkman, partner at Advokatfirman Vinge, Malmoe, Sweden, authored the section on Sweden.

19. *Om Ekonomiska Föreningar* [Economic Association] (Lagen 2002:149) (Swed.).

20. Proposition [Prop.] 2015/16:4 [government bill] (Swed.), available at <http://www.regeringen.se/contentassets/0fd35d7d9c0548c8b4d565b4d6a32c08/modernisering-av-lagen-om-ekonomiska-foreningar-prop.-2015164>.

21. LAG OM ÄNDRING I LAGEN OM EKONOMISKA FÖRENINGAR (Svensk Författningssamling [SFS] 2016:108) [Law Amending the Law on Economic Compounds, Swedish Codes of Statutes] (Swed.), available at <http://rinfo.beta.lagrunmet.se/publ/sfs/2016:108/pdf,sv>.

22. *Bostadsrättsförening* [Tenant] (Swed.).

23. Prop. 210:900 Plan- och bygglagen [government bill] (Swed.), available at https://riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/plan-och-bygglag-2010900_sfs-2010-900.

24. *Mark- och miljödomstolen* [Land and Environment Court] (Swed.).

rather than the County Administrative Board.²⁵ In effect, this change reduces the number of appellate bodies from three to two (the decision of the court may be appealed to the Land and Environmental Court at the Court of Appeal²⁶) and is intended to shorten the planning procedure.

C. TAXATION

On October 27, 2016, the Finance Department submitted a notice to parliament that it intends to propose amendments relating to taxation of transfer of real property from individuals to limited liability companies.²⁷ Current legislation allows an individual to transfer real property to a limited liability company, typically owned by the individual himself, without triggering any capital gains tax provided that the consideration is less than the taxation value of the property (in theory the taxation value shall correspond to 75 percent of the market value). The shares in the company can then be sold to a third party without incurring any capital gains tax (popularly known as a “cat’s tail transaction”). This tax structure resulted in a considerably lower overall tax than if the individual were to sell the property at market value to a third party. In order to avoid this, the government’s future proposal will introduce thresholds where a transfer from an individual to a company will be considered to constitute a taxable transaction. The purpose of the notice is to allow the future legislation to take effect retroactively on October 28, 2016, on the condition that it is passed by parliament.

IV. Mexico: Improving Mexico’s Reputation in the Global Financial Markets Through the Implementation of New Valuation Standards²⁸

The federal government of Mexico has recognized that the Valuation and Review Standards and Code of Ethics must change in order to attract global investors. The Instituto de Administración y Avalúos de Bienes Nacionales (“INDAABIN”), Mexico’s federal government organization that administers nearly 100,000 federal assets in the Republic of Mexico, determined that a higher level of public confidence in the valuation profession was necessary. It therefore decided to standardize requirements for both external hired appraisers and internal reviewers within the Institute, and as a result, adopted a set of standards and a code of ethics, which conformed to International Valuation Standards (“IVS”) and placed personal responsibility on the valuation professionals in the sector. The new standards and code of

25. *Länsstyrelsen* [Country Board] (Swed.).

26. See *Mark- och miljödombstolen*, *supra* note 23.

27. Regeringens skrivelse 2016/17:38 [government report series] (Swed.), available at <http://www.regeringen.se/rattsdokument/skrivelse/2016/10/skr.-20161738/>.

28. Bruce D Greenberg, FRICS, MAI, ASA, SRA, Managing Director/Country Leader of Duff & Phelps Mexico, authored the section of Mexico.

ethics will require valuation professionals and reviewers in Mexico to communicate their analysis and opinions in a manner that is not misleading. Further, their obligations must be performed with objectivity, integrity, independence, and professionalism.²⁹

Some of the initial administrative reform undertaken by INDAABIN include:

- Perform a detailed analysis of the existing administrative and working documents of INDAABIN, which included processes, regulatory procedures, and the language of its documents to conform to IVS;
- Classify and score the University programs within Mexico that provide valuation curriculums;
- Classify and score the professionals who work within INDAABIN as valuation reviewers, and develop review guidelines for their internal professionals which conform to IVS; and
- Classify and score the professional appraisers, who are registered with the federal government to perform valuations for INDAABIN, and develop guidelines to perform external appraisals which conform to IVS.³⁰

The first round of norms, which included the Valuation Standards and Code of Ethics for all valuation disciplines, were adopted into Mexico Federal Law on December 3, 2015, in Mexico City by the Secretary of Public Administration (“SFP”), Minister Virgilio Andrade of Mexico. Among the critical components of the Valuation Standards and Code of Ethics that were adopted into law by the Secretary of Public Administration are:

- Ethics: A valuation professional must promote and preserve the public trust inherent in the appraisal practice by observing the highest standards of professional ethics;
- Record Keeping: A valuation professional must prepare a work file for each appraisal or appraisal review assignment. A work file must be in existence prior to the issuance of any report; and
- Competence: A valuation professional must be competent to perform the assignment. If the valuation professional is not competent, [they] must decline or withdraw from the assignment

29. Asistencia Técnica en la Alineación de los Procesos de la Dirección General de Avalúos y Obras del Instituto de Administración y Avalúos de Bienes Nacionales (Mex.), available at <http://www.duffandphelps.com/assets/pdfs/news/valuation-services/code-of-ethics-and-valuation-and-review-standards-1.pdf>.

30. Bruce Greenberg, *Improving Mexico's reputation in global financial markets through the implementatio of new valuation standars*, IMMOBILIARE (Oct. 5, 2016), <http://www.inmobiliare.com/improving-mexicos-reputation-in-global-financial-markets-through-the-implementation-of-new-valuation-standars/>.

before accepting the assignment, and further have the adequate education and tools to perform the assignment.³¹

On July 25, 2016, these Code of Ethics, and International Standards of Valuation were published in the Federal Registry of Mexico.³²

31. *Id.*

32. Valuation Standards and Code of Ethics, Diario Oficial de la Federación [DOF] 3-12-2015 (Mex.), *available at* http://www.dof.gob.mx/nota_detalle.php?codigo=5445623&fecha=25/07/2016.

