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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Cross-Border Real Estate

TIMUR BONDARYEV, OLGA IVANOVA, FELIPE ISA CASTILLO,
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This article surveys significant legal developments in cross-border real estate, focusing on recent developments in Ukraine, the Dominican Republic, and India.

I. Ukraine¹

The Ukrainian real estate market has been showing slight signs of recovery lately, along with “strengthening of occupational activity in all sectors” of commercial property in the Kiev region and in major regional cities.² Residential development and the respective transactions pipeline have shown a dramatic rise, triggered by an unstable currency and clean-up of the Ukrainian banking system. This clean-up resulted in dozens of Ukrainian banks going into administration, which, in turn, fueled mistrust in the banking sector and resulted in a massive outflow of deposits into brick-and-mortar investments. After a slight economic upturn in 2016, “Ukraine’s economy continued to follow the recovery trend, demonstrating moderate growth.”³ The Deposit Guarantee Fund, established with the purpose of protecting the rights and legitimate interests of bank depositors, remains one of the main property suppliers on the real estate market, having under its management thousands of meters of real property inherited from the insolvent banks.⁴

International retailers seem to be very keen to enter the Ukrainian market. 2017 has shown some international newcomers teaming up with domestic franchisees, with some major openings being declared for 2018, such as H&M and Decathlon.⁵ A number of major new retail developments were

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2. Nick Cotton, *Ukrainian Real Estate Trends in 2017*, THE CAUCASUS BUS. WK. (Nov. 16, 2017), <http://cbw.ge/real-estate/ukrainian-real-estate-trends-2017/>.

3. CBRE Ukraine, *Kyiv Retail Market, H1 2017: Moderate rental growth fueled by stronger occupied demand*, 1 (2017), http://www.cbre.ua/wp-content/uploads/2017/08/CBRE-Kyiv-Retail-Market-Report-H1_2017_ENG.pdf.

4. DEPOSIT GUARANTEE FUND, <http://www.fg.gov.ua/en/> (last visited Mar. 10, 2018).

5. *Id.* at 5.

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announced, while existing international retail groups have shown aggressive development, with new openings and acquisitions in Kiev and major regional cities. Domestic retailers keep flexing their muscles and getting a bigger market share, making strong competition for international colleagues and taking advantage of the very low manufacturing costs in Ukraine.

International financial organizations have committed to supporting Ukrainian infrastructure development, including restoration of the Ukrainian Donbas region, which should boost infrastructure development and investments.⁶

In our view, these are the top five most important trends in Ukrainian real estate law in 2017:

1. The concept of an escrow account was finally introduced in Ukrainian law;⁷
2. Massive deregulation in the construction sector, which entailed simplification and increased transparency of construction procedures and shortening terms, allowed Ukraine to boost its position in *Doing Business*, taking seventy-sixth place in overall rating and thirty-fifth place in the ease of attaining a construction permit;⁸
3. The State Land Cadastre announced a shift to blockchain technology, which should allow more reliable data synchronization and exchange, providing protection from substitution as a result of external interference.⁹ This shift will contribute to “implementation of public control over the system”;¹⁰
4. The Ukrainian government has enhanced the quality requirements for road construction.¹¹ Pursuing adoption of the world’s best

6. *ЄС має намір виділити 50 млн євро для Донецької та Луганської областей наступного року, - Жерівський* [EU intends to allocate 50 million Euros for Donetsk and Luhansk regions next year], *Цензор.НЕТ [Censor.net]* (Nov. 11, 2017, 7:55 am), https://ua.censor.net.ua/news/462172/yes_maye_namir_vydilyty_50 mln_yevro_dlya_donetskoyi_ta_luganskoyi_oblasteyi_nastupnogo_roku_jebrivskyyi.

7. See Law on Amending Certain Legis. Acts of Ukraine on Increasing the Level of Corporate Governance in Joint Stock Companies (VIDOMOSTI VERKHOVNOI RADY UKRAINY, 2017, No. 47, p. 7).

8. See *Геннадій Зубко: Україна піднялась на 105 позицій у рейтингу «Doing Business-2018» за індикатором «Отримання дозволу на будівництво»* [Gennady Zubko: Ukraine has risen by 105 positions in Doing Business-2018 rating by the indicator “Obtaining a construction permit”], *за індикатором «Отримання дозволу на будівництво»* Міністерство регіонального розвитку, будівництва та житлово-комунального господарства України [MINISTRY OF REGIONAL DEV., CONSTRUCTION, HOUSING, AND COMMUNAL SERV. OF UKR.] (Oct. 31, 2017), <http://www.minregion.gov.ua/press/news/gennadiy-zubko-ukrayina-pidnyalas-na-105-pozitsiy-u-reytingu-doing-business-2018-za-indikatorom-otrimannya-dozvolu-na-budivnitstvo/>.

9. *Державний земельний кадастр перейшов на технологію Blockchain* [State Land Cadastre switched to Blockchain technology], *Держгеокадастру* [ST. GEODETIC LIBR.] (Oct. 3, 2017), <http://land.gov.ua/derzhavnyi-zemelnyi-kadastr-pereishov-na-tekhnohologiiu-blockchain/>.

10. *Id.*

11. See Regulation on Approval of Requirements for Quality Control of Works on New Construction, Reconstruction and Overhaul of Public Highways (OFICIJNYJ VISNYK UKRAINY, 2017, no. 20, p. 15).

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practices, Ukraine introduced mandatory FIDIC- application in public road development projects;

5. Agricultural land is still not for sale, and the legal ban seems to be extended for 2018 for the seventeenth year in a row.¹² Despite the high interest in the unique Ukrainian black earth, which many foreign investors have demonstrated for years, agricultural land is still treated as a bargaining chip in political games. The existing model of long-term leases of agricultural land has proven to be a very accessible and reliable tool to secure agricultural facilities by domestic and international agricultural companies, which have been successfully working and growing in the Ukrainian market for years and have under management huge land banks all over Ukraine.

Ukraine's reform drive continues to power ahead to make a positive impact on the investment climate and offer a diverse range of viable opportunities for investors.

II. Dominican Republic: Incidence of AML Laws in Cross-Border Real Estate Transactions¹³

The conveyance or transmission of rights over real property in the Dominican Republic (DR) is governed by freedom of contract principles, coupled with the requirement of a notarized written document to satisfy statute of frauds considerations and a series of property transfer and registration processes and requirements established under the Tax and Real Property Registration Laws.

These requirements consist mostly of documents that the parties can produce, while matters related to money, its payment, or origin for purposes of closing real estate transactions were traditionally entrusted to financial entities. On June 1, 2017, the DR enacted Law 155-17 Against Money Laundering and Terrorism Financing (AML Law or Law 155-17).¹⁴

At the outset, Law 155-17 designates "non-financial" persons obligated to participate in the prevention, evaluation, and mitigation of crime, a category that includes lawyers, notaries, real estate brokers, and other legal professionals.¹⁵ These persons are now bound by obligations similar to

12. Law on Amendments to Section X "Transitional Provisions" of the Land Code of Ukraine (VIDOMOSTI VERKHOVNOI RADY UKRAINY, 2018, No. 5, p. 36).

13. 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).

14. Ley 155-17 Contra el Lavado de Activos y Financiamiento del Terrorismo [Law 155-17 Against Money Laundering and Terrorism Financing] (G.O. No. 10886); "Money laundering" is defined as "the process through which one person or organization transforms the monetary gains derived from a criminal or illegal activity in funds, that appear as originating from a legal source." art. 2.

15. *Id.* art. 2, 33(e).

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those of financial institutions¹⁶ and are restrained by some prohibitions addressing practices that have occurred in cross-border real estate practice in the Dominican Republic.

From the regulatory side, it is inferred from article 33 of Law 155-17 that lawyers, notaries, and other legal professionals who perform real estate transactions for their clients in matters such as the “[p]urchase, sale or renovation of real estate properties,” should perform client due diligence to get to know their client before accepting representation or assisting in such matters.¹⁷ Among the prohibitions for legal professionals, article 64(e) of Law 155-17 establishes that they may not “liquidate, pay or accept the liquidation or the payment in cash in any currency or in precious metals, in relation to the following operations: (i) Conveyance or transmission of rights over real estate properties for an amount in excess of one million Dominican pesos, (roughly US\$21,000.00).”¹⁸

These provisions, which require a payment trail or evidence of payment other than cash, must now be considered in the negotiation of price and payment terms and conditions among parties conveying or transmitting real property rights and as part of organizing a real property closing.

Finally, article 64 of Law 155-17 prohibits notaries and registrars from processing real estate property transactions unless they receive, for purposes of conservation, “truthful evidence of the means of payment.”¹⁹ This provision means that the notary or registrar may reject undocumented real estate transaction payments and payments paid or received by unidentified persons and additional information may be requested as a way to satisfy AML law requirements and discharge their duties.

III. India²⁰

Real estate has largely been an unregulated sector in India. The year 2017 has seen significant changes in the legal and regulatory framework with a view to introduce a regulator and ensure transparency and accountability in the real estate sector.

On May 1, 2017, the Real Estate (Regulation and Development) Act of 2016 (RERA) came into effect.²¹ First, RERA has introduced sweeping changes in the regulatory framework for real estate. Second, RERA mandates the creation of a website by each State Government. Developers

16. E.g. establishing programs and policies of evaluation, management and mitigation of risks, client due diligence, registry of data and duty to inform the authorities of suspicious activities, prohibited operations or transactions.

17. Law 155-17 art. 33(e)(1).

18. *Id.* art. 64(e).

19. *Id.* art. 64, ¶ II.

20. Avikshit Moral, partner at Juris Corp and Apurva Kanvinde, senior associate at Juris Corp, India authored the section on India.

21. Ministry of Housing and Urban Poverty Alleviation Notification, 2017, GAZETTE OF INDIA, pt. II sec. 3(ii) (Apr. 19, 2017).

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are required to register details of on-going and new projects with the Real Estate Regulatory Authority (RERA Authority) before marketing and selling flats in any project.²² All such details are thereafter public data and are available for viewing.

Prior to the enactment of RERA, each state had its own law and market practice, and there was no separate regulator to protect the interest of flat buyers. In case of delay or failure to deliver on time, flat buyers would be left with no option but to succumb to long, drawn-out litigation in civil court. Developers would execute one-sided agreements, and the gaps in legislation added to the turmoil of flat buyers. With the setting up of the RERA Authority, there is a dedicated regulator for the real estate sector that is obligated to settle disputes in a timely manner.

Some of the key aspects that RERA aimed at achieving were to prevent misuse of funds and to increase control in the hands of flat buyers. With this objective, developers are now prohibited from accepting more than ten percent of the cost of an apartment without registering an agreement for sale,²³ a practice that was widely prevalent in the real estate sector. Further, in order to provide more control to consumers, RERA requires developers to obtain consent from the allottees and the RERA Authority in case of any deviations from a sanctioned plan²⁴ or change in its majority interest.²⁵ Additionally, in order to ensure that amounts collected from allottees are utilised towards construction of the project and not diverted to other projects, RERA mandates that seventy percent of the amounts received from the allottees are to be deposited in a separate account and utilized towards construction costs only.²⁶

Apart from RERA, stringent amendments were introduced to the Benami Prohibition Act of 1988 to curb properties being acquired using black money.²⁷ With the introduction of the demonetization policy and the Benami Prohibition Act, the Government of India has strived to curb black money in the domestic market and levied stringent penalties for its use. Further, on July 1, 2017, the Central Goods and Services Tax of 2017 (GST) was amended, significantly impacting tax liabilities on real estate projects.²⁸

All of these steps are much-needed legislation and a welcome move for the real estate sector to bring back investor confidence. The proof in the pudding will finally lie in the implementation of these laws.

22. The Real Estate (Regulation and Development) Act, 2016, GAZETTE OF INDIA, pt. II sec. 1, § 3 (Mar. 25, 2016).

23. *Id.* § 13.

24. *Id.* § 14.

25. *Id.* § 15.

26. *Id.* § 4(2)(I)(D).

27. Ministry of Finance (Department of Revenue) (Central Board of Direct Taxes) Notification, GAZETTE OF INDIA, pt. II sec. 3(ii), No. 97 (Oct. 25, 2016).

28. Ministry of Finance (Department of Revenue) (Central Board of Excise and Customs) Notification, GAZETTE OF INDIA, pt. II sec. 3(i), No. 9 (June 28, 2017).

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