

Ownership and transfer of real property: an international study

By William C. Prather

IN MOST countries the transfer of real property is a complicated matter. In some, there are problems of land ownership by foreign persons, and of extraordinary or punitive taxation. In others, risk is encountered by the buyer of not acquiring clear ownership or title to the property bargained for. Costs, expenses and special taxes of conveyancing range from exorbitant in some countries, to reasonable in others, and to relatively low in a few.

In a very few countries the time element involved in conveyancing may be as short as one week, but in the majority, the time from acceptance of an offer to closing can stretch from two months into forever. In only a handful of countries is the property conveyancing process thoroughly reliable, low cost and expeditious.

Property and the ownership of property

The meaning of "property" is a combination of inter-related rights, duties, privileges and obligations, usually consisting of an exclusive right to possess, use and dispose of anything of any value. One must draw a distinction between land and other property which is heritable, and goods and chattels which are movable. It is apparent that property can be, and is, defined quite differently from one sovereign country to another.

In most countries there are two major categories of property: *real* and *personal*. Within the English (Common) Law jurisdiction real pro-

THIS article briefly analyses the systems through which the ownership of real property is transferred in a number of countries. It covers in particular the different types of real estate ownership, potential legal problems in transfer, taxation, the cost of conveyancing and the period involved in the transfer process.

The information contained in the article was collated from the results of a comprehensive questionnaire sent to property specialists and lawyers throughout the world who replied with details concerning the process of conveyancing in their respective countries.

erty is generally defined as "Land and anything permanently affixed to the land, such as buildings, fences, and those things attached to the buildings, such as light fixtures, plumbing and heating fixtures, or other such items which would be personal property if not permanently affixed".

Most of the western countries, including all of those having a French heritage, respect this definition, with minor variations. However, the definition is not appropriate in most of the socialist countries.

Ownership of real property can be either *absolute* or *qualified*. It is absolute where one person has exclusive domination over it, and may use or dispose of it at will, subject only to the law. The law of Luxembourg defines it as follows: "The right of ownership

is the right to enjoy and dispose of property in the most absolute sense, provided it is not put to a use which is prohibited by statute or regulation". The expressions 'fee simple' and 'freehold' are also used in many Western countries to describe this.

Ownership is "qualified" when the property is encumbered or restricted in some way, for example mortgaged. When this is so the enjoyment or use of the property is limited, delayed or is for recurring periods, as in "time-sharing", or when the incidents of absolute ownership are shared with another.

In many countries there are restrictions placed upon who may own property. In Denmark, Indonesia, Yugoslavia, Kuwait and Thailand, for example, it is forbidden by law for foreign nationals to own immovable (heritable) property. Conversely, subject to de minimis limitations, such as taxes and easements (rights of way), anyone may purchase real property and own it absolutely in the following countries: Australia, Belgium, Brazil (urban land only), Canada, Cayman Islands, France, Greece (except certain border areas), Israel, Italy, Jamaica, Korea, Portugal, United Kingdom, United States, West Germany and Zimbabwe.

There are some qualifications. For example, in Australia, if the prospective owner is a corporation, it must be duly registered and domesticated, and in other countries, such as Egypt, only qualified ownership by foreign nationals is permitted.

In Singapore foreigners may

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acquire absolute ownership of certain types of real property but this may be extended by the government to include other categories. In Switzerland real property transactions must conform to the LEX Friedrich (1985) and such ownership by non-Swiss nationals can at best be described as qualified.

It is possible, in four special economic zones of the People's Republic of China, to "buy" premises which are guaranteed by law to offer unrestricted occupancy providing the "land use fees" (tax) are paid.

Under French law anyone or any entity may own land absolutely; there are generally no restrictions to the ownership of real property (immobilier) and this is guaranteed under article 544 of the Civil Code. There are other categories of ownership: indivision, co-propriete, and sole ownership which is diminished by granting certain property rights to third parties.

The overriding sovereign right of eminent domain is not counted in this study as a factor militating against absoluteness of property ownership

as the sovereign right of pre-eminence exists in every country. Prospective purchasers of property in a given country should, however, give attention to the reputation of the government, whether it observes as well as imposes law and order, whether it is volatile or likely to endure, and whether it is financially able and willing to pay fair value to a property owner in the event of the pre-emptive right being exercised.

Taxation of real property ownership and transfer

In most countries failure of the landowner to pay what is known as recurring charges can result in dispossession. In addition, late charges for fines can be, and usually are, made on the dispossessed for non-payment. In most countries some form of tax is levied on "absolutely owned" real estate. Only in Norway is real estate free of all taxes and rates. In the Dominican Republic, Kuwait and the Cayman Islands real estate is not

subject to the payment of any recurring taxes or charges although in all three countries there are taxes on land transfer.

In the following countries land ownership as such is subject to one or more types of recurring charges or taxes: Argentina, Australia, Brazil, Denmark, Equador, Egypt, France, Greece, India, Indonesia, Israel, Jamaica, Jordan, Korea, Malaysia, Portugal, Singapore, Sweden, Thailand, Trinidad & Tobago, Tunisia, USA, West Germany and Zimbabwe.

Real estate transfer taxes based upon purchase price or market value, and almost always payable by the purchaser, are imposed with varying exceptions and rate progression differences in the following countries:

Austria	8%
Cayman Islands	7.5%
Dominican Republic	5.5%
Ecuador	5%
Egypt	2-12%
France	8.5%
Greece	12%
India	8%
Israel	4.5%
Jamaica	7.5%
Malaysia	2%
Portugal	17%
South Africa	2%
South West Africa (Namibia)	2.45%
Sweden	2%
Thailand	2.5%
Tunisia	1-14.6%
West Germany	2%
Zimbabwe	3-5.7%

Not considered in this survey, but imposed in a number of countries, is a capital gains tax payable by the seller of the property on the increased value of the property between its previous sale and the next. In Israel, for example, a "Land Betterment Tax" ranging from 12% to 40% of the increased value is payable by the seller.

Title

Title is the combination of factors by which the owner of real estate has the rightful possession of his property. It is the union of all of the individual

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elements of ownership which make up total ownership. Only in 'absolute title' or 'absolute ownership' are all of the elements of total ownership represented. In the USA a person offering his real estate for sale to another will, typically, offer to sell a marketable title to the property. This means that there are no clouds or claims against the property that conflict with those of the offering owner, and that the title when conveyed will pass to the new owners free and clear.

Each property has had a chain of different owners over the years and a continuous record of the conveyancing among such owners is called the "chain of title". Prior to sale it is always necessary to check the chain of title to determine whether or not there are any conflicting claims. This checking is almost always carried out by a lawyer, either working independently or for a lending institution or other firm, or as an employee of a title insurance company. Recently, however, there has been a trend towards licensing broader acting abstracters, including non-attorneys, as title researchers or as licensed conveyancers.

There is a sizeable private insurance business in the USA which specialises in assuring or guaranteeing that title passes to the purchaser of the property. These companies issue a "certificate of title" to the new owner, representing the latest link in the chain. In addition to being widely used in the USA title insurance is prevalent in several of the English speaking countries other than England.

The system co-exists frequently with the "Torrens System", through which the insuring function is undertaken by the government or a public official. This system was adapted from marketable ship registration and includes land registration, title certification and conveyancing. It has proved successful in Australia, parts of the USA and India. Under this system of land registration the state in effect guarantees the title.

After the original registration of a

section of land in the public tract, all subsequent transactions affecting the registered property must be filed with the Torrens Registrar. Proponents of the Torrens System maintain that an official governmental adjudication of title is better than unofficial examination and assurance of the chain of title by private parties.

In most parts of the world, including the USA, insured title is provided not by an insurance company or by a government registrar, but by a lawyer who issues his opinion of the state of the title after examining all relevant documents. If it is in order, he will issue an "Abstract of Title". In Black's law dictionary an "Abstract of Title" is defined as a "condensed history of title to property as revealed by public records". It is, in effect, a synopsis of the material, together with statement of all liens, charges, inhibitions, liabilities or restrictions to which the same may be subject and of which it is in any way material to prospective purchasers.

Real estate law typically covers only the rights, duties and relationships of the owning and transfer parties. It often does not extend to the legal and technical incidence of "cadastral" records and the relationships between the legalistic aspects of transfer documents and the practical everyday use of land parcels within their bounds and without encroachment on the parcels of others. Countries where a functional form of cadastral survey and title registration is in operation include Austria, Australia, Belgium, Denmark, Egypt, Fiji, France, Italy, Jordan, Luxembourg, Malaysia, Netherlands, New Zealand, Singapore, South Africa, Sweden, Thailand, United Kingdom, USA, West Germany and Zimbabwe, although Italy, the Netherlands and Singapore appear to lag in the up-dating process.

In England the Ordnance Survey is an excellent survey and mapping system but it, too, seems to suffer by not

being kept sufficiently up to date. This system, however, has since been switched to a computerised map system thus correcting at least a part of the lag factor. A number of countries, notably Australia and Singapore, maintain a mixed system of Torrens and the "old way", the division being between urban and agricultural land.

The process of purchase

In determining the price one is willing to pay for a property, a would-be purchaser would like to have at least a rough idea of the going rate or the fair purchase price of the property in question. However, in no country participating in the survey does a valuation index of similar properties in similar locations exist, although in the USA some effort has been made in this direction.

It may often be advisable for potential purchasers to seek advice as to the value of the property from more than one source. The opinion of local residents, brokers, lawyers, notaries and lenders in particular should be sought even when there is a reliable index. However, a would-be buyer should not omit consulting a professional appraiser, coupled with individual observation and research.

In determining how much he is willing to pay, the prospective purchaser should not overlook the fact that the market price of the land consistently understates the value of the land by an amount equal to the capitalised value of the real property taxes. It is very important for the would-be purchaser to consider that his total outlay must include not only the purchase price agreed upon but also transaction taxes, broker's commission, lawyer's fee and a variety of closing costs, all of which can be a considerable and sometimes formidable addition.

A potentially expensive pitfall for the would-be buyer in the initial bargaining process is known as "gazumping" and is the subject of current debate in England and Wales. Gazumping means that the seller, after having verbally sold his prop-

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erty to buyer A, then accepts an offer from buyer B at a higher price.

One proposal to deal with this is that the buyer and seller should be required to make a preliminary deposit of up to 1% of the purchase price as soon as the sale has been agreed but before the exchange of contracts. If one side then reneges on the agreement the other party can claim both deposits. Excessive delays by the recording, registration and cadastral officials, particularly at local level, are cited in England for making the risk of being gazumped so acute.

Gazumping is not peculiar to England and, indeed, can occur in most of the countries surveyed. Remedies may be available from the civil law courts but few buyers pursue such actions. (The system of real property transfer is quite different in Scotland and gazumping is not a possibility.)

In most parts of the world anyone wanting to buy or sell real property will go to a real estate agent. One question is who the agency is the agent of, or, more importantly, whether it is the buyer or seller who has to pay the agent's commission. In some countries this is determined by law, as in France where, in theory, it is the seller who has the agent and in fact it is the seller who pays the agent's commission.

In other countries it is often the purchaser who has the agent and pays the commission. Typically, in most countries, a prospective purchaser will initiate the purchase and conveyancing process by signing a short standardised document "offer and acceptance" to make his offer. In both England and the USA in recent years the lawyers' monopoly on conveyancing appears to be ending. Other institutions have been empowered to employ their own solicitors to prepare all the necessary transfer documents, handle closing and advise as to the condition of the title.

There is now provision also for a new kind of para-professional, a conveyancer. In effect, that is a para-legal having at least three years' legal

grounding plus practical experience in conveyancing. Thus, while almost anyone with the requisite training would be eligible to act as a conveyancer, a title insurance company would have to be persuaded that he had the requisite ability and was safe enough to insure. The provision whereby a purchaser is entitled to convey a property on his own behalf has not been affected by the 1986 Act in England.

The move in the USA to diminish the monopoly of the attorney derives from a report from the Special Commission of the American Bar which recommended the limited licensing of para-legals to provide such services as drafting simple wills, performing selected tax services and conducting real estate closing, including the drafting of simple documents of transfer. The recommendations of the report are far from established in the USA and indeed in a number of States for para-legals to act as attorneys in some matters, rule changes would have to be incorporated into the law by the State Supreme Court.

In France the real estate agent or agents will prepare, and have executed by both parties, the original contract of purchase and at that point turn the entire matter over to the co-ordinator, a licensed conveyancer. This is the notaire, and in France, Austria, the Netherlands, Belgium, West Germany, Tunisia and many of the French-speaking countries the notaire is something special: an indispensable public and private official who is a specialist in real estate law and conveyancing as well as the law of commerce, taxation and finance.

He performs all of the closing functions and makes sure that taxes are paid, all done — usually — very efficiently, and always for a fee. This fee, which includes an amount collected for the government as tax on the transaction, is fixed by law, differing as between a new and an old resi-

dence. The *Chambre de Notaires* insures the client against loss from fraud, embezzlement and other intentionally unlawful acts of the notaire.

One of the greatest problems involving conveyancing has always been the time interval between offer and receipt of title. Only in Thailand can a real estate transaction be wound up in one day. In some countries, such as Greece and Jordan, the process is quick and efficient, perhaps only one week. In many others, including Australia, Denmark and England, the average time interval is between two months and up to 10 weeks if there is a purchase mortgage involved. In Israel, West Germany and Jamaica the period is normally between four and six months. In Egypt the period is from one month to one year depending on the documents required and the problems raised by the parties.

Computerisation of the cadastral system was cited by a number of countries, for example Austria, Australia, Singapore, France, South Africa and England, as a present day factor which has markedly shortened the average closing interval and promises to do so even more dramatically in the future.

The survey reveals that the most significant delay factor in all the countries is the bureaucratic problem of obtaining necessary approvals, releases and other actions from various arms of the government.

Transaction costs

The costs for completing a conveyancing transaction vary enormously and the check-list of transaction costs includes the following items: real estate broker's fee, transfer fees, taxes, attorney's fees, title research and evaluation, abstracting, survey, appraisal fees, owner's title insurance, document preparation fees, loan application, origination fee, settlement and escrow costs, hazard insurance premiums, lender's title insurance, loan payment insurance, credit report. Further, the following taxes may apply: capital gains tax, security time deposit for payment of

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taxes ("caution"), inheritance tax (now known in the UK as CTT), tax on devolution of joint owners' interest to surveyor/seller, stamp taxes, transfer taxes.

The overall taxes will, of course, differ from one country to another but, as a rough rule of thumb, a typical estate agency fee would be as follows:

Argentina	4%
Austria	3%
Australia	3%
Channel Islands	2%
Denmark	1.73%
Finland	5%
France	5%
India	4%
Israel	2%
Jamaica	5%
Korea	0.5%
Singapore	2%
Sweden	3%
Thailand	5%
Trinidad & Tobago	3.1%
United Kingdom	2.5%
United States	6%

Fees paid to the attorney, notaire, conveyancer, abstractor and others in the conveyancing capacity are:

Argentina	5%
Austria	4%
Australia	2.5%
Brazil	3%
Cayman Islands	1%
Channel Islands	3%
Denmark	2.3%
Dominican Republic	0.75%
Ecuador	6%
Egypt	7%
(5% paid by the seller)	
Fiji	3.5%
France	6.5%
Greece	4%
India	3%
Indonesia	2%
Israel	2%
Korea	5%
Kuwait	2%
Singapore	2%
South Africa	4%
Trinidad & Tobago	2.5%
Tunisia	1%
United Kingdom	3%
United States	6%
Venezuela	1.5%
West Germany	1%

Foreclosure

It is important when discussing the topic of conveyancing to consider foreclosure, a form of induced property transfer. This is the process which is enacted when a borrower defaults; the lender recoups the money owed to him out of the property put up as security for the loan.

Foreclosure may involve the voluntary conveyance of the security to the lender; an auction sale by the lender to the highest bidder; an "arm's length" sale to the lender; a controlled sale under the auspices of government authorities, or as an award in consequence of a court action. In all, the result is the same. In order for the lender to collect, the borrower must be divested of possession.

The time it takes to foreclose and the costs involved are quite naturally of interest to both parties. In the United States, for example, the cost ranges from about 25% of the loan balance in Illinois to about 1% of the loan balance in Texas. Moreover, the time involved ranges from about one month in Texas to about one year in Illinois.

Most countries recognise no difference in foreclosure as to the purchase of the loan, for example, a home financing loan vis-à-vis a commercial

'Bureaucratic delays are a significant factor'

business loan, or as to the kind of security, for example, a home vis-à-vis other types of property. The exception is Brazil, where under recent social legislation the family home cannot be mortgaged at all or sold, except for taxes. In deciding whether or not to foreclose the mortgage, lenders will weigh both the

time and cost factors of reclaiming the property against alternatives such as rescheduling the debt.

Conclusion

All forms of real and personal property exist, in fact, in all countries. However, each country has the sovereign right to define property categories in any way it wishes, specify and restrict who may own what, and specify or restrict the manner and incidence of ownership, including the

'Many laws of property transfer are outdated'

manner and means of transferring it. This should be done in the form of law. Most of the countries covered by the survey have a land law or regulation which spells out most of the incidents of real property ownership and transfer, but many of these laws are outdated or incomplete.

For those countries wishing to codify and update their conveyancing laws in a comprehensive way, it is suggested that national legislators study closely a triad of "model legislation" developed recently in the United States: *Uniform Acts: Land Transactions, Simplification or Land Transfers, Condominium*, published in the United States by West Publishing Company.

Better still, a national consideration of the three model statutes can help to focus the spotlight on the concept that a subject, even an entire country, governed by the law, is preferable to a subject or a country that is governed by that which can change from day to day. Reliability, one of the musts in any conveyancing system, is possible only within the framework of law. ■

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