

THE REAL ESTATE
LAW REVIEW

EIGHTH EDITION

Editor
John Nevin

THE LAWREVIEWS

THE REAL ESTATE
LAW REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Nevin

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATORS

Gavin Jordan, Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Louise Robb

SUBEDITOR

Anna Andreoli

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom

by Law Business Research Ltd, London

87 Lancaster Road, London, W11 1QQ, UK

© 2019 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at February 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-009-7

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALLEN & OVERY SCS

AL TAMIMI & COMPANY

AUMENTO LAW FIRM

BELLWETHER GREEN

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

BIRD & BIRD

CHIOMENTI

CORDATO PARTNERS LAWYERS

DENTONS

DE PARDIEU BROCAS MAFFEI

DLA PIPER

ESTUDIO BECCAR VARELA

GUZMÁN ARIZA

HENGELER MUELLER

HERBERT SMITH FREEHILLS CIS LLP

LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK

MAPLES GROUP

N.DOWUONA & COMPANY

NIEDERER KRAFT FREY

NISHIMURA & ASAHI

NORTON ROSE FULBRIGHT SOUTH AFRICA INC.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU STOICA & ASOCIAȚII

SLAUGHTER AND MAY

SOŁTYSIŃSKI KAWECKI & SZŁĘZAK

TSMP LAW CORPORATION

URÍA MENÉNDEZ

WOLF THEISS

CONTENTS

PREFACE.....	vii
<i>John Nevin</i>	
Chapter 1 BREXIT AND REAL ESTATE.....	1
<i>John Nevin</i>	
Chapter 2 ARGENTINA.....	5
<i>Pedro Nicholson and Delfina Calabró</i>	
Chapter 3 AUSTRALIA.....	15
<i>Anthony J Cordato</i>	
Chapter 4 AUSTRIA.....	26
<i>Tibor Fabian and Markus Uitz</i>	
Chapter 5 BELGIUM.....	35
<i>Yves Delacroix and Alexandre Emond</i>	
Chapter 6 BRAZIL.....	46
<i>Franco Grotti and Guilherme de Toledo Piza</i>	
Chapter 7 CAYMAN ISLANDS.....	55
<i>George Loutas</i>	
Chapter 8 DENMARK.....	64
<i>Torben Mauritzen</i>	
Chapter 9 DOMINICAN REPUBLIC.....	76
<i>Fabio J Guzmán Ariza, Christoph Sieger and Alfredo Guzmán Saladín</i>	
Chapter 10 ENGLAND AND WALES.....	82
<i>John Nevin</i>	

Contents

Chapter 11	FRANCE.....	96
	<i>Pierre Gebarowski and Guillaume Rossignol</i>	
Chapter 12	GERMANY.....	113
	<i>Jan Bonhage and Thomas Lang</i>	
Chapter 13	GHANA.....	126
	<i>NanaAma Botchway</i>	
Chapter 14	HONG KONG.....	136
	<i>Dennis Li</i>	
Chapter 15	INDONESIA.....	146
	<i>Ayik Candrawulan Gunadi and Tania Faramutia</i>	
Chapter 16	ITALY.....	157
	<i>Umberto Borzi</i>	
Chapter 17	JAPAN.....	166
	<i>Norio Maeda, Takuya Shimizu, Keisuke Yonamine and Yujin Gen</i>	
Chapter 18	LUXEMBOURG.....	183
	<i>Serge Hoffmann and Philippe Eicher</i>	
Chapter 19	NETHERLANDS.....	193
	<i>Max van Drunen and Leen van der Marel</i>	
Chapter 20	POLAND.....	204
	<i>Janusz Siekański and Radosław Waszkiewicz</i>	
Chapter 21	QATAR.....	214
	<i>Nicola de Sylva</i>	
Chapter 22	ROMANIA.....	225
	<i>Valentin Creața</i>	
Chapter 23	RUSSIA.....	238
	<i>Sergey Kolobov</i>	
Chapter 24	SCOTLAND.....	249
	<i>John Bingham</i>	

Contents

Chapter 25	SINGAPORE.....	261
	<i>Jennifer Chia, Yvonne Lian and Zan Wong</i>	
Chapter 26	SLOVENIA.....	277
	<i>Markus Bruckmüller and Petra Jermol</i>	
Chapter 27	SOUTH AFRICA	287
	<i>Pieter Hugo Niehaus</i>	
Chapter 28	SPAIN.....	295
	<i>Diego Armero and Rodrigo Peruyero</i>	
Chapter 29	SWEDEN.....	305
	<i>Jan Berg and Carl-Magnus Ugglå</i>	
Chapter 30	SWITZERLAND	314
	<i>Andreas F Vögeli and Oliver Zbinden</i>	
Chapter 31	UNITED ARAB EMIRATES	323
	<i>Iain Black and Joe Carroll</i>	
Chapter 32	UNITED STATES	337
	<i>Meredith J Kane</i>	
Appendix 1	ABOUT THE AUTHORS.....	353
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	369

PREFACE

I am delighted to introduce the eighth edition of *The Real Estate Law Review*. The continued success of the *Review* confirms its relevance to real estate practitioners and their clients. Real estate is increasingly viewed on a global basis and readers can only benefit from a general understanding of how individual jurisdictions operate within the global real estate market.

This edition extends to 31 jurisdictions, and we are delighted to welcome new contributions from distinguished practitioners from around the world. I am very grateful to all contributors for their hard work and essential role in compiling this eighth edition. Each chapter provides an invaluable insight into key legal issues and market trends in the author's jurisdiction and, together, they offer an up-to-date synopsis of the global real estate market.

The *Review* seeks to identify distinctions in practice between the different jurisdictions by highlighting particular local issues. We believe that this offers investors and occupiers and their professional advisers an invaluable guide to real estate investment outside their own domestic market. Overseas investors are increasingly prepared to look beyond traditional markets and sectors to exploit international opportunities as and when they arise. Often, investors need to act quickly, and we hope that the *Review* provides an advantageous starting point to understanding cross-border transactions in the light of the reader's own domestic forum.

International economic and political instability continues to have a significant effect on the global real estate market. In the UK, Brexit-generated uncertainty remains as negotiations for leaving the EU are still ongoing as we approach the 29 March 2019 deadline. However, the continued attraction of UK real estate to overseas investors confirms that each event or development in a particular country must be seen in a global context to ascertain the bigger picture. It is no longer possible to ignore globalisation and view real estate markets in isolation. Brexit notwithstanding, the UK remains a safe haven for investors from around the world, and investment levels in London and the wider UK market remain buoyant.

In addition to all the distinguished authors, I would like to thank the members of the Law Review team for their tireless work in compiling this eighth edition of *The Real Estate Law Review*.

John Nevin
Slaughter and May
London
February 2019

ROMANIA

Valentin Creța¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

Based on the Roman law system, Romanian law distinguishes between rights *in rem*, as rights over or in connection with real estate, and rights *in personam*, as personal rights on performance of obligations.

The ownership over real estate is a right *in rem* and grants its holder the full right to use and dispose of the real estate. The other rights *in rem* (i.e., superficies, usufruct, easements, *usus* and *habitatio*) grant their holders only part of the attributions of the full ownership.

The superficies right is of particular importance to investors and, starting with the New Civil Code (which entered into force as of 1 October 2011),² enjoys unitary regulation. The superficies right entitles its owner to erect and to own a building on a third party's land. The owner of the building obtains the right of use on the land. The superficies right can be obtained for free or for a fee and is available for a maximum of 99 years, with the possibility to be extended repeatedly.

The ownership may be public or private. The public ownership belongs solely to public entities (i.e., Romanian state, counties or localities) and operates on real estate regulated by law as being publicly owned. The private ownership may belong to public or private entities and operates on any other real estate than that which is subject to public ownership.

There are several forms of private ownership: (1) exclusive ownership – granting the free use and disposal of the real estate to a single entity; (2) co-ownership by share quotas – real estate owned by more entities on ownership quotas, usually as pro-rata shares; and (3) joint ownership – real estate owned by more entities without determining their quotas (usually in wedlock).

A recent institution under Romanian law is the fiduciary agreement,³ which creates the possibility for any person to transfer rights (including ownership) to one or more fiduciaries (e.g., credit institutions, investment companies, management companies, insurance companies), to exercise full prerogatives of such rights, for a specific purpose and period (not exceeding 33 years), for the benefit of one or more beneficiaries (constitutor, fiduciary or third person).

1 Valentin Creța is a partner at Popovici Nițu Stoica & Asociații. The author would like to thank the real estate development team, including Andreea Grosu and Cristiana Blei, for its valuable support.

2 Law No. 287/2009 on Civil Code.

3 The fiduciary institution is similar to trust under the Anglo-Saxon law system.

In Romania, there is no leasehold ownership. A lease is a right *in personam* and provides its holder only the personal right to use the property against the payment of rent during the contractual period.

ii Registration system

Romanian real estate is registered with the land registry operated by the National Agency for Cadastre and Land Registration. Land registry is publicly available and ownership information can be obtained by requesting a land book excerpt.

The land book excerpt consists of three parts: (1) real estate description (surface, location and use type); (2) ownership information (owner, title and relevant documents); and (3) encumbrances (e.g., mortgages, easements, interdictions and litigations).

The land registry is undergoing a process of modernisation, implementing an online system for accessing the necessary services. Currently, the land book excerpt may be obtained online and, in the future, all other services related to the ownership right (registration, dismemberment, consolidation, etc.) will be available online.

The registration of real estates with the land registry was given constitutive effect as of 1 October 2011. As a general rule, the rights *in rem* over real estate registered with the land book may only be transferred by registration with the land book, based on the valid title on the real estate. Likewise, rights *in rem* may be cancelled solely by removal from the land registry, based on their holder's written consent or a final judgment.

Such rule shall only be implemented after completing the cadastral measurement formalities within each territorial unit, envisaged for the years to come.

Until then, all formalities with the land book registry have only an opposable effect, so failure to register real estate operations with the land book registry does not affect their validity, but deprives the parties from legal protection against third parties who are not bound to observe such operations.

iii Choice of law

Real estate transactions have to observe certain rules to be effective in Romania, such as authentication of the transfer deed by notary public, registration with the land book registry, price payment in local currency (for legal persons) and fiscal certificate attached.

Generally, parties to a transaction on real estate in Romania are free to choose the law applicable to the contractual matters, to the extent that the chosen law does not prejudice the Romanian legal provisions that cannot be exempted. Should the parties fail to choose a governing law, the Romanian law (*lex rei sitae*) will apply.

The aforementioned also applies when the parties are citizens of a European Union Member State.⁴

⁴ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

II OVERVIEW OF REAL ESTATE ACTIVITY

The Romanian economy followed the same path in 2018 as in 2017 and in the second quarter registered the highest percentage growth (1.4 per cent) in the European Union⁵ and a GDP annual growth rate of 4.3 per cent.

The real estate market is in continuous growth, as approximately 189,000m² of modern shopping centres are expected to be delivered in the entire country. The delivery of warehouse spaces is estimated to approximately 330,000m² in first half of 2018. Office buildings delivered in the first half of 2018 are of approximately 33,000m², but the second half of the year is expected to lead up to deliveries over 150,000m².

In 2018, although e-commerce is increasing rapidly in Romania (biggest jump in the EU in 2017, up by 37 per cent), vacancies remain low in the retail market, which focused in 2018 on the upper-middle segment, Romanian brands and luxury brands intake. The existing trends, retail parks in small cities and extension of existing spaces in large cities, are still increasing in 2018, alongside continuous development of DIY stores.

The office market remained very strong, with the Bucharest market registering leasing transactions of approximately 52,000m² in the first half of 2018⁶, with the tendency to move towards the Centre West and central submarkets, offering alternatives to the crowded northern part of Bucharest.

Regional cities were much more active than Bucharest, Timisoara and Cluj-Napoca, adding around 72,000m² in new modern office spaces in the first half of 2018.⁷

During the first half of 2018, yields remained relatively unchanged from the previous year; however, the market noted a slight compression, especially in the industrial sector. By the end of the year, the average transaction value will surpass the average registered in 2017. Rent levels in the office and retail markets remained broadly unchanged, proving that the real estate market has reached a level of stability and maturity, while storage facilities' rents have registered a 10 per cent increase.

III FOREIGN INVESTMENT

As of 1 January 2014, all restrictions imposed by Romanian law on land ownership by foreign individuals and legal entities from EU Member States were removed. Moreover, land acquisition by non-EU nationals is permitted subject to reciprocity,⁸ according to international treaties; however, non-EU nationals cannot acquire ownership of Romanian land in more favourable conditions than EU citizens.

Buildings are not subject to such restrictions and can be freely owned by foreign individuals and entities, to the extent that the relevant ownership is not also attached to a land quota.

It is common practice for foreign individuals and entities to indirectly acquire and hold real estate through special vehicles in the form of legal entities under Romanian company law.

5 Eurostat – flash estimate of GDP for the second quarter of 2018 and foresight published in European Economic Forecast Summer 2018 (Interim).

6 Reported transactions over 5,000 m² office space (first half of 2018).

7 Mid-Year 2018 Market Update published by Colliers International Romania.

8 The reciprocity principle states that foreign nationals are subject to the same restrictions related to real estate acquisitions as applied to Romanian nationals by their own country.

Foreign investors benefit from national favourable treatment, have access to all sectors of the economy⁹ and are granted important benefits, such as the full repatriation of capital and profits obtained in Romania, full protection against expropriation and nationalisation, and access to incentives and funds provided by EU and Romanian legislation.

In the context of land market liberalisation, a new regulation was enacted in April 2014¹⁰ providing a pre-emption right in favour of co-owners, lessees, neighbouring owners (irrespective of their nationality) and the Romanian state, in this order, at equal price and in equal conditions, in case of selling agricultural lands outside locality borders.

Romania supports investments implementation throughout state aid schemes, stimulating growth and sustainable development. In 2014, a new state aid package¹¹ was adopted and it will be in force until 2020. Through this, Romania will benefit from approximately €43 billion of European funds.

IV STRUCTURING THE INVESTMENT

The acquisition of Romanian real estate is usually structured either as an asset deal (by which the real estate is purchased directly) or a share deal (by the acquisition of the shares of a Romanian company owning the targeted properties).

i Asset deal

The asset deal investment may be implemented either by simple acquisition of assets or as transfer of business (ongoing concern transfer). In this later case, the acquisition includes not only the property, but also the business attached to the respective asset (e.g., movable and immovable assets, agreements, employees, trademarks).

Through direct transfer of assets from the owner to the investor, the impact of the historical problems related to the title or to the vendor is diminished or even excluded.

This way, the acquirer:

- a* does not take over the fiscal exposures of the current owner and the obligations from the agreements that are not transferred to the investor (outside the transfer of business);
- b* secures a transfer of ownership in good faith and subject only to the land book registration rules;
- c* may register higher expenses with the fiscal depreciation than the vendor (as existing owner) and, to this end, the acquirer would register a reduced taxable profit and, implicitly, the income tax is lower; and

9 As per the Doing Business Report published on the national government website, the main investment opportunities and key sectors in Romania are: automotive and car component production, aerospace, wood industry, energy and renewable energy, IT&C, infrastructure, agriculture, food industry, pharmaceuticals and healthcare, chemicals, fast-moving consumer goods (FMCG), tourism, real estate and construction and natural resources.

10 Law No. 17/2014 on certain measures to regulate the sale and purchase of agricultural lands located outside the locality's borders.

11 Government Decision No. 332/2014 on state aid granting for investments stimulating the creation of minimum 10 new jobs (maximum scheme budget approximately €600 million) and Government Decision No. 807/2014 on state aid granting for investments of minimum 44 million lei in fixed assets (maximum scheme budget approximately €600 million).

- d* may maintain certain authorisations (attached to the transferred assets) that do not lose their validity (e.g., fire-fighting permits). On the other hand, the other authorisations (e.g., operating permits) have to be obtained again by the investor.

The taxes attached to asset deal investments are higher than for share deals. The registration tax and the notary public's fees for contract's authentication amount up to 1 per cent of the transaction price.

In case of business transfer, this percentage would apply to the entire transaction price stipulated under the authenticated agreement. The taxes may be lowered by splitting the transaction documents into a framework agreement (non-authenticated) establishing the structure of the investment and, separately, an authenticated agreement having as subject matter only the immovable assets, so the taxes are applied only to the price agreed for the immovable assets.

The existing guarantees over the transaction and the assets provided by the original contractors remain in the vendor's patrimony (except for the legal guarantees), and the acquirer shall benefit only the guarantees provided by the vendor under the sale-purchase agreement (eviction and defects).

If the vendor is only a project company, there is a risk that it will no longer conduct business after the assets' transfer and it will be dissolved. In this case, it is recommended that the risk be covered through independent contractual guarantees provided by mother companies or by title insurance.

ii Share deal

The share deal consists of transferring the entity (usually a company) currently owning the real estate, by transferring the shares in the respective entity.

The most commonly used corporate structures are the joint stock company and the limited liability company.

- a* The joint stock company is the most complex corporate structure, composed of a minimum of two shareholders, with a minimum share capital of €25,000, in Romanian lei equivalent, and complex management rules. This is the entity suited for the investors interested in capital-driven structures and the only type of company to be listed with the stock exchange.
- b* The limited liability company is a more simple corporate structure, which may be incorporated even by a single shareholder, with a minimum value of the share capital of 200 lei and more simple management rules. It can have maximum of 50 shareholders.

In both corporate structures, the company's obligations are guaranteed with the company's patrimony, and the shareholders are liable only to the limit of their contribution to the share capital.

Another possible investment structure for an asset deal or share deal is the joint venture agreement. The participants bring together funds, assets or both, as contribution for developing a project, the ownership on the assets remaining in the participants' patrimony. The participants establish their rights and obligations in the agreement and appoint one of them as manager, representing the joint venture.

The joint venture does not imply the incorporation of a separate entity by its partners, so all the obligations shall be guaranteed by the participants with their contributions and their patrimony.

Although the law requires that only the asset deals should be authenticated by the notary public so as to be valid, having an agreement concluded in authenticated form confers advantages on the investor when claiming the enforcement of contractual obligations.

In some cases, various formalities should be fulfilled for a valid transaction. For example, approvals for transferring special regime real estate (historical or archaeological monuments, protected areas), approvals from guarantors or persons holding specific rights on an asset (financial institutions, other creditors) and Competition Council clearance (if the transaction meets the Competition Law conditions on minimum turnover, change of control, etc.).

The investment structure should be carefully chosen, with particular attention to the ownership history (the remnants of the communist regime still affecting the ownership titles and the owners' rights and obligations), the current status of the asset, tax regime and, most importantly, the investors' profile, protection and expectations.

V REAL ESTATE OWNERSHIP

i Planning

Facilities may be developed on certain land provided that parameters established under the applicable territory planning and urbanism documentations are observed.

The urbanism documentation represents the outcome of land-plot planning (reflecting localities' organisation, constructible areas and building conditions) and provides general information regarding the possibility of erecting buildings on specific land.¹²

After confirmation that a building may be developed, the investor should obtain information on the land plot scope of use (economic regime) and on construction conditions (technical regime), based on the urbanism certificate.

The urbanism certificate also provides information on the approvals and permits necessary for a building permit. The urbanism certificate does not grant the right to build, this being established only by the building permit issued based on the formalities required under the urbanism certificate, the technical documentation of the building and the legal requirements.

ii Environment

Irrespective of having a facility under development or a standing investment, the owner (including contractors, agents, tenants, employees) is bound to observe the environmental regulations.

These apply to any type of pollution (noise, land, water and air pollution, waste disposal and evacuation) and are related to all operational permits necessary for the development or exploitation of all facilities (e.g., fire-fighting, operating, environmental, health and security work, civil protection).

A particularity for Romania (and in many other countries of the former Communist Bloc) is that many developments, especially brownfields, generate a false image of clean projects, while they may hide dangerous or prohibited materials that are covered by the

12 Law No. 350/2001 on land planning and urbanism, as amended by Government Emergency Decision No. 51/2018.

evolution of the land plots or buildings and are difficult to detect. To this end, it is advisable that the investors retain specialised consultants for the environmental aspects of the development.

The real estate beneficiaries bear the liability for ensuring compliance with the environment protection laws, which, depending on the outcome of the breach, may be administrative, civil or criminal liability.

iii Fire safety requirements

Certain constructions¹³ (e.g., high and very high buildings, office and commercial buildings or exceeding 600 square metres, as well as buildings for cultural or touristic activities) are subject to fire safety authorisation. The authorisation has to be obtained prior to the commencement of any construction, and the person bound to obtain it is either the investor or the beneficiary of the investment.

The fire safety authorisation is issued after submitting technical documentation (containing fire safety scenarios, fire safety notices, evacuation plans, etc.) and is valid as long as the conditions met at its issuance are fulfilled and no changes are made to the building. The lack of authorisation triggers administrative fines, but in case of major breach of fire safety requirements (irrespective of the existence of the authorisation) the authorities may stop the building operation. Moreover, criminal liability may be a factor if a fire causes bodily injury or death.

iv Completion of the project

Romanian law regulates the reception of construction works, certifying the fulfilment of the construction works and the construction takeover by the investor.

The reception regulations were significantly amended in 2017,¹⁴ implementing new elements such as partial reception (which allows the building reception on execution stages, before its completion), new structure of the reception committee (mandatorily involving multiple local authorities), new force of the reception committee's decision (which is now compulsory for the investor) and simplification of the reception options (the reception may only be admitted or rejected).

v Tax

All asset owners owe local taxes on land and buildings. Exemptions may be available if the buildings serve a public or social interest.

The land tax is determined on: (1) surface; (2) location (e.g., inside or outside the locality's borders); and (3) use category (e.g., constructions, agricultural), as all such are established by the local authorities.

The tax on buildings is determined by the building category, namely 0.08–0.2 per cent of the fiscal value of the residential buildings, 0.2–1.3 per cent on non-residential buildings

13 Government Decision No. 571/2016 for approval of the categories of buildings and fittings out subject to fire safety approval or authorisation, Law No. 307/2006 on fire protection, as amended by Law No. 28/2018.

14 Government Decision No. 343/2017 regarding the approval of the regulation for the reception of construction works and related installations.

and 0.4 per cent on agricultural buildings. The fiscal value of the buildings has to be updated every three years by valuation, for buildings that have not been acquired during this period. Otherwise, the applicable quota of local tax is increased to 5 per cent.

In case of transfers, taxes vary depending on the transaction structure. In a share deal, the stake seller owes the corporate income tax, which is of 16 per cent¹⁵ of the capital gain (reduced to zero if the shareholder is a company owning more than 10 per cent of the shares for minimum one year, subject to additional conditions), or the personal income tax of 10 per cent.¹⁶ For foreign nationals, additional benefits may be available under the conventions for the avoidance of double taxation.

In asset deals, 16 per cent corporate income tax¹⁷ applies on the profit, except for the case of natural persons, for which the tax is 3 per cent of the taxable income. As per the new fiscal regulations,¹⁸ natural persons are exempt from taxation in case of asset deals lower than €100,000, in Romanian lei equivalent (referred to as 'non-taxable amount'), the 3 per cent being applicable to the difference between the transfer price and the non-taxable amount.

A reverse taxation mechanism is applicable to constructions and lands whose transfer is subject to VAT, which applies if both seller and buyer are registered for VAT purposes in Romania. Otherwise, the normal VAT system applies.

If the land is not for construction purposes, the transfer is VAT exempt (with no deduction right). VAT exemptions also apply to transfer of buildings, except for the new buildings.

For all real-estate transactions where an exemption applies, the seller can opt to levy VAT, based on prior notification of the tax authorities.

vi Finance and security

The acquisition of real estate either through asset deals or share deals is most commonly financed by banks. The foremost securities are the mortgages, which may be established over immovable assets, owner's shares and certain present and future rights attached to the property (e.g., rent, indemnities, bank accounts).

The mortgages established over the immovable assets are valid if the relevant agreement is concluded in authenticated form before the public notary and become effective as of their registration with the land book registry.

Regularly, such mortgages that totally or partially encumber the real estate go along with interdictions to transfer the asset, to build or to implement any other operation that might affect the property (e.g., partitioning, consolidation, lease, easements).

The mortgage agreement validly concluded and registered with the land book registry or the Electronic Archive for Security Interests in Movable Property represents enforceable title. Thus, the enforcement procedure of the corresponding security is simplified and the court intervention for establishing the enforceability of a mortgage is not necessary.

15 The microenterprise taxation regime applicable for certain companies has not been considered.

16 Personal income tax was reduced from 16 to 10 per cent as of 1 January 2018, according to Government Emergency Decision No. 79/2017.

17 A microenterprise taxation regime applicable for certain companies has not been considered.

18 Government Emergency Decision No. 3/2017 for amendment of the Fiscal Code, approved by Law No. 177/2017.

VI LEASES OF BUSINESS PREMISES

i Features of lease agreements

The lease of all premises is governed by the New Civil Code.

The lease agreement signed by the parties and registered with the fiscal authorities or authenticated by a notary public represents enforceable title as regards the payment of rent and the obligation to return the premises (upon the term expiry or following the expiry of a notice period), respectively the evacuation of the tenant. Thus, the landlord is exempted from additional formalities and expenses and may directly initiate the enforcement procedure for failure by the tenant to observe such obligations.

ii Duration and the right of renewal

The lease period may be determined by the parties. Should the parties not provide the lease term, the lease is considered concluded for one year. In all cases, the lease agreement may be concluded for a maximum of 49 years. The longer lease term shall be *de jure* reduced to 49 years. The lease agreement ceases on the expiry date of the lease term, when determined, or upon the request of any party through unilateral termination, with the observance of a notice period, in case the duration was not determined.

Romanian law provides the prolongation by tacit renewal: if the tenant continues to execute the lease agreement following the term expiry without any opposition of the landlord, a new lease is considered to be concluded, under the same conditions, including the guarantees. However, the new lease term shall be undetermined.

As standard practice, the parties include renewal provisions in the lease agreements, not leaving such aspects to fall under the legal standard renewal clause.

iii Repair works and related costs

As general rule, in the absence of an alternative parties' agreement, regular repairs resulting from normal wear and tear are the tenant's responsibility and repairs relating to the building's structure and common areas are the landlord's responsibility.

Insurance of the building is usually the landlord's responsibility, but a share of its value may be included in the service charges owed by the tenant. The tenant may be obligated to conclude certain insurances related to the rented space and its activity (e.g., civil liability insurance against third-party claims, insurance against damage and loss of furniture, equipment).

iv Service charge

Usually, in addition to rent and other costs, a tenant of commercial premises (e.g., office, retail, logistic) may be obligated to pay service charges as part of the aggregate expenditures incurred by the landlord in respect of all the expenses regarding the building (e.g., utilities for common areas, managements fees, insurance premiums, property taxes).

v Subletting and assignment of rights

According to the New Civil Code, the tenant is entitled to sublease the premises or to assign its rights on the premises, if that is not expressly forbidden in the agreement.

Similarly, unless otherwise stipulated in the agreement, the lessor is entitled to assign its rights from the lease agreement without the consent of the tenant.

vi The rent

The rent may be freely established by the parties, either globally or fixed on time units. No rent control exists in the private sector. Should the parties fail to establish the payment terms, it shall be paid: (1) in advance, if the lease term is under one month; (2) on the first business day of each month, if the lease term is between one month and one year; or (3) on the first business day of each quarter, if the lease term is at least one year.

The rent is generally calculated on the basis of the premises' area and is subject to VAT payment in accordance with Romanian tax legislation.

As standard practice for the lease of premises in commercial centres, the financial obligations of the tenant comprise: (1) minimum guaranteed rent established in €/m²; (2) turnover rent established as percentage for certain period (usually per year) of the net total turnover achieved by the tenant in connection with the premises, which is payable if it is higher than the prepaid minimum guaranteed rent; and (3) operating costs including common operating costs, marketing costs and own operating costs (utilities), measured either by independent consumption metres or by engineered value.

Payments are usually designated in euros and payable in Romanian lei. Fixed rent is subject to annual indexation. In addition, parties may agree upon increase of the rent by using different calculation methods (e.g., average level of the rents in the commercial centre or collected from similar tenants, results of the commercial centre or of the tenant's activity in the premises or the economic evolution of the geographic area or the country).

vii Tenant's liability

The leases for commercial premises are usually executed in favour of the landlord (excepting the cases of anchor tenants, with a strong market position and negotiation power) and, therefore, all matters of the tenant's liability and financial obligations are strictly regulated under such agreements.

Regularly, the tenant is financial liable for early termination of the agreement (save for the termination by landlord's fault), being compelled to pay the rent and related costs calculated until the end of the lease period or until the premises are leased to a new tenant at similar rent level.

Usually, the tenant obtains at its own cost the permits and authorisations necessary for the premises' use and related renovation works. Such tenant's renovation works are usually not to be reimbursed to the tenant, except for the lease termination by landlord's fault.

Generally, the tenant assumes any risk of damage caused in or to the premises and is liable for the alteration and degradation of the premises, including in the case of fire, to the extent he or she cannot prove the force majeure or fortuity cases.

Also, the tenant is liable to observe (and take appropriate measures to limit and prevent) the general fire protection regulations,¹⁹ applicable for office or retail premises.

viii Security of tenure

There are no mandatory provisions regarding the guarantees the tenant must provide to the landlord to secure the tenure.

¹⁹ Law No. 307/2006 on fire protection, as amended by Law No. 28/2018, and Order No. 712/2005, as amended by Order No. 786/2005 and Order No. 187/2010 issued by the Ministry of Administration and Interior Affairs.

In practice, the tenant provides either a deposit or a letter of bank guarantee, valid throughout the lease period, for a value generally amounting to three months' rent and operating costs.

The parties may also agree for the tenant to provide a parent company guarantee (e.g., corporate guarantee, comfort letter), unconditionally securing the performance of the tenant's obligations.

VII DEVELOPMENTS IN PRACTICE

i The inflation rate

The board of the National Bank of Romania has increased the monetary policy rate to 2 per cent in January 2018 (from 1.75 per cent at the end of 2017) and 2.5 per cent in May 2018 (maintained this level by October 2018), with the consequence of proportional increase of the lending and deposit facility rates (currently at 3.5 per cent for lending and 1.5 per cent for deposit).

ii Law No. 77/2016

In 2016 the Law No. 77/2016 was enacted on the discharge of mortgage-backed debts through transfer of title over immovable property, granting the consumers in a non-performing loan under €250,000 the possibility to give back the residential property to the bank if they cannot return the loan and if the impossibility of repaying the loan is because of unpredictable causes (e.g., financial crisis, exchange rate).

Banks have reacted to this law, increasing the initial contribution of the borrower in a normal mortgage agreement from 15 per cent up to 25–35 per cent, depending on the bank.

The initial trend to give back properties was diminished by a Constitutional Court Decision²⁰ stating that not all non-performing loans are subject to such measure and the applicability of the law has to be investigated from case to case. This decision has also had an impact on the banking conditions for granting a loan, because some of the banks have revised the conditions for the initial contribution mentioned above, again applying a limit of only 15 per cent.

Although banks have warned that Law No. 77/2016 will significantly affect real estate financing, recent statistics show that the value of real estate loans in Romanian leu granted by the banks (to natural persons) in the first nine months of 2018 have increased by 10 billion lei²¹ compared to the value of loans granted in the same period of the past year.

iii The 'First Home' governmental programme. Limitation of indebtedness level for loans

Launched in 2009, the 'First Home' governmental programme represented a very important financing source for residential acquisitions. Between 2009 and the end of September 2016, the financing granted with guarantees amounted to approximately 34 billion lei.²²

20 Decision No. 623/2016 of the Constitutional Court.

21 Statistics performed by the National Bank of Romania.

22 Statistics presented by the Romanian government.

Although it was a very effective measure during the economic recession, it seems that the programme is currently following a deceleration strategy.²³ In this regard, in 2016, the programme benefited from a guarantee limit of 2.9 billion lei; in 2017 the figure was 2.5 billion lei; and a limit of 2 billion lei was expected in 2018, out of which, in the first semester, 80 per cent were already exhausted. If the current strategy is maintained, it appears that the programme will have an increasingly smaller budget until it is taken off the market.

The real estate transactions with natural persons may be affected in 2019, as the National Bank of Romania will limit as of 1 January 2019²⁴ the indebtedness level for loans from banks and non-banking financial institutions to 40 per cent (except for first-home buyers, for which the ratio may be of 45 per cent) for the first time since 2007. These limitations will not apply to refinancing of credits contracted before 2019.

iv The new Fiscal Code

The real estate market continues to be subject to legal changes that might have significant consequences.

The Fiscal Code applicable since 1 January 2016 reduced the standard VAT rate from 24 per cent to 20 per cent for 2016 and, respectively, to 19 per cent for 2017. A previously announced reduction of VAT rate to 18 per cent from 2018 is no longer being applied. Substantial amendments of the fiscal regulations were approved in 2018 (not less than 14 government decisions and laws being enacted), mainly for (1) reducing the personal income tax from 16 to 10 per cent; (2) increasing the threshold for the companies' microenterprises regime from €500,000 to €1 million; and (3) new rules on thin capitalisation mechanism.

A significant fiscal measure applicable from 2018 was the VAT split payment, which implies the operation of a separate bank account for VAT payment, in all transactions subject to VAT.

The measure is applicable as of 1 January 2018 to the public companies and companies that have contractual relations with the state and, if the system proves effective, the measure will be extended to all VAT-taxable persons in 2019.

Recently, the EU Commission (EC) has decided that Romania's VAT split payment mechanism is contrary to both the EU's VAT law²⁵ and the principle of the freedom to provide services within the Union.²⁶ The main reasons for the EC decision being the taxpayer eligibility criteria for the mandatory use of this system and the sanctions imposed on beneficiaries acquiring goods and services from suppliers using the system.

The EC rejected Romania's request to apply the system in its current form and sent a letter of formal notice on 8 November 2018 (as part of the EU infringement procedure for failure to comply with Community law). If Romania fails to take remedial action within the two months following that date, the EC may send a reasoned opinion (a formal request that the country comply with EU law).

23 On 29 November 2016, the Romanian government signed the deceleration strategy of the 'First Home' Programme for 2017–2020.

24 National Bank of Romania Regulation No. 6/2018 for amendment of Regulation No. 17/2012 on lending conditions.

25 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

26 Article 56 of Treaty on the Functioning of the European Union.

v Other relevant aspects

A new package of laws on public procurement was adopted in 2016, initiating changes aimed to simplify the process and to create better communication between the public and private sector and more transparency.

The national strategy²⁷ for public procurement contains the obligation to implement FIDIC standards within the public procurement agreements to unify the contractual arrangements, but it has recently been announced that such agreements may differ from FIDIC standards, so we may expect some changes in this field.

VIII OUTLOOK AND CONCLUSIONS

Romania was predicted to have the highest economic growth in Europe in 2017 (together with Ireland), growing by around 5.5 per cent.²⁸ Over the next two years, the economy is expected to grow slightly, with rates of 4.2 per cent in 2018 and 3.6 per cent in 2019.

Consequently, the economic grounds for business development are promising and Romanian real estate offers interesting opportunities in all business sectors.

The Romanian real estate market is still under a reshaping process given the adoption of the New Civil Code, as the corresponding legal practice and case law are under a settlement process. The ownership reinstatement process triggered to cure the state's abusive actions under the communism period appears to be reaching its end, as the specific terms granted under the restitution laws for filing restitution claims are overdue.

Although the legal system may raise concerns about stability perspectives and the duration of court proceedings is rather long, significant steps have been made in fighting corruption, with Romania receiving positive assessments in this respect.

27 The adoption of such strategy was assumed within the Romanian Partnership Agreement for the 2014–2020 Programming Period.

28 International Monetary Fund, latest World Economic Outlook, October 2018.

ABOUT THE AUTHORS

VALENTIN CREAȚA

Popovici Nițu Stoica & Asociații

Valentin Creața is co-head of the real estate practice of Popovici Nițu Stoica & Asociații, leading the real estate development group.

Valentin Creața holds a degree in law from the University of Bucharest and is member of the Bucharest Bar.

Throughout his career, spanning the past 18 years, Valentin Creața has provided key advice to high-profile real estate investors and developers in relation to the major acquisition, construction and operation projects, including the largest shopping centres and residential projects, office buildings, logistic centres and industrial parks.

Valentin Creața represents clients in a wide range of corporate governance cases and complex commercial matters, leading the real estate transactions team into the largest transactions in the market.

He is highly experienced in structuring and implementing high-ranked real estate portfolios or assisting extended greenfield and brownfield developments.

According to international legal directories, ‘the real estate team at Popovici Nițu Stoica & Asociații operates to “the highest professional standards” and “is deeply committed to their needs”’; Valentin Creața is recommended’.

AL TAMIMI & COMPANY

Tornado Tower, 19th Floor

Majlis Al Taawon Street

PO Box 23443

West Bay, Doha

Qatar

Tel: +974 4457 2777

Fax: +971 4436 0921

n.desylva@tamimi.com

www.tamimi.com



ISBN 978-1-83862-009-7