Fall 24

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BUYING AND SELLING REAL ESTATE IN ITALY

ILN REAL ESTATE GROUP

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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER ITALIAN LAW

"Buying and Selling Real Estate in ITALY"

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I. INTRODUCTION

This brief guide has the goal to provide legal explanation on the main aspects of the real estate transactions in Italy.

II. REAL ESTATE TRANSACTIONS ACCORDING TO ITALIAN LAW

Land

There are different types of land that can be purchased, such as agricultural or building lands. Although these are always and, in any case, real estate sales, rules and taxation may vary according to the classification of the land.

For agricultural lands, it is possible to build under certain conditions; the agricultural land can be transformed into building land at the discretion of the Municipality.

Residential properties

The most common forms of residential property purchase and sale concerns independent units or property inside a condominium.

Residential properties are known to be a low risk and medium yield investment option. It is possible to buy property to refurbish and sell, or to rent.

Commercial properties

The purchase of a commercial property essentially recalls what has been indicated above for residential properties, although obviously not for residential use.

Commercial properties are a medium to high yield investment option and are associated with longer leases (6 + 6 – year period or 9 + 9 – year period).

III. METHODS OF SALE AND PURCHASE

III A) Private sale

Real estate may be sold and purchased through a sales agent or by private sale directly between a seller and a purchaser.

1. Assistant of a Real Estate Agent ("REA")

REAs are usually appointed for the research of a residential and commercial property in Italy.

REAs charge a commission that usually varies from 3% to 6% of the purchase price.

REAs accompany to visit/s the real estate and provide the preliminary basic information, including legal information and the main conditions established by the seller to complete the sale.

If the real estate meets the purchaser's approval, the purchaser is requested to sign a binding unilateral offer to purchase ("Unilateral Offer").

This is usually a form produced by the REA, containing the purchaser's offer to buy the real estate for the price requested by the seller.

In the majority of cases the Unilateral Offer is issued together with the deposit in the REA's hands of a bank check representing a percentage of the sale price, that will be utilized as part of the payment of the purchase price.

The bank check, depending on the case, may be cashed by the seller when

accepting the Unilateral Offer or in one of the following steps of the deal.

It is important to underline that the Unilateral Offer is binding for the purchaser only, until the seller declares in writing to accept it.

One of the most delicate issues relating to the Unilateral Offer is that the standard form utilized by the REAs are not usually accurate legal documents and often miss relevant element of the sale i.e. existence of mortgages or other burdens and encumbrances; condominium debts; regularity of the construction from the applicable real estate construction laws; litigation on the ownership of the real estate etc.

Thus, the Unilateral Offer should be properly examined to avoid that it is not enough protective for the purchaser and is enforceable also in case one or more of the previously mentioned problems is disclosed after the Unilateral Offer is accepted (or to be granted that if this happens the deposit will be returned to the purchaser).

2. Preliminary Agreement

The preliminary agreement is the key step for the purchase of real estate, and it is a contract utilized when the REAs assistance is present too.

The preliminary agreement is drafted after the seller delivers to the purchaser all the documentation and information pertaining to the real estate, such as the title of property, mortgages and encumbrances, the condominium's account reports when appropriate, compliance with construction laws and regulations, existence of proper concessions and authorizations for possible refurbishment, compulsory energy certification, and other details delineated on a case-by-case basis.

The supply of the above-mentioned documentation and information allows the purchaser to conduct a due diligence whose results will be the basis for the drafting of the final deed of sale or for the execution of the pre-closing activities that may be necessary to legally transfer the property of the real estate to the purchaser without limitation or conditions (cancellation of mortgages, payment of condominium arrears, regularization of construction irregularities etc.).

At the time of the signature of the preliminary agreement, the purchaser makes a down payment that constitutes an anticipation of the purchase price, that varies depending on the conditions of sale and is usually between 20% and 40% of the price.

The down payment (so called "*caparra")* has also the function of a guarantee, on behalf of both parties, for the execution of the final deed of sale.

With the preliminary agreement, the parties will also agree on the timeframe for the execution of the final deed of sale.

In some cases, it is worthwhile to register the preliminary agreement in the Real Estate Public Register to avoid that, pending the term for the execution of the final deed of sale the seller, breaching the preliminary agreement, sell the same real estate to a different purchaser or that seller's creditors attack the real estate with mortgages or seizures.

Since the moment of the registration, the real estate remains fully available for the purchaser and is not available for any third person right or demand.

The registration of the preliminary agreement is advisable for example when the "*caparra*" is particularly high, or the term for the final deed of sale is far away, or lack of trust on the seller, or risk of seller's bankruptcy .

3. Notarial Deed of Sale

The role of the Notary in the real estate transactions is compulsory since a legally and fully valid deed of sale enforceable toward the seller and any third party must be executed by a public Notary.

On the other hand, the Notary has also a role of guaranteeing the regularity of the transfer of ownership.

The Notary must verify the respect of all the compulsory provisions that regulates the legal transfer of real estate and the details of the sale.

In order to validly stipulate the final deed of sale, under penalty of nullity of the deed itself

- in the case of land: the seller shall produce the certificate of urban use (so called *"certificato di destinazione urbanistica");*

- in case of properties: the deed must include the details of the license or building permits/concessions according to the age of construction; for works executed prior to September 1, 1967, the seller may render a declaration about the date of construction without need to report the details of license/concession/permit.

It is also necessary that the conformity with urban-cadastral planning of the properties be documented or declared.

The Notary is also in charge for:

- drafting the final deed of sale, based on the preliminary agreement;
- confirming in the deed of sale that the payment has been duly completed and the contract therefore constitutes an acknowledgment and evidence of the payment;
- registration of the deed and assessment and payment of stamp duties;
- registration of the transfer of the ownership on the name of the purchaser with the Real Estate Registry and with the Real Estate Land Registry.

These two last formalities conclude the process of ownership transfer.

After the mentioned formalities are completed, the purchaser has in his/her hands the document that testifies the title of property and if all the steps are duly completed has all the rights for future disposal of the real estate.

Although the role of the Notary is neutral with respect to both the parties, it is usual that the Notary is appointed and paid by the purchaser.

III B) Auction

An important segment of the real estate market is made up of auction sales, resulting from real estate foreclosures.

The methods for participating to an auction for the purchase of real estate are as follows:

1. Consultation of portals / publications

It is possible to consult the internet portals connected to the Courts, with reference to the place of interest, on which the announcements relating to the auction sales of the foreclosed properties in the various executive procedures are published; or, alternatively, printed publications, available free of charge at the Courts or available for purchase at kiosks.

2. Report consultation

Once the asset of interest has been identified, it is advisable to read the report drawn up by the consultant appointed by the judge, to assess the condition of the real estate.

3. Judge's ruling

Of extreme importance is the examination of the sale order issued by the Judge, which contains the conditions for the offer, including i) the amount of the deposit to be paid, which shall not exceed one tenth of the target price and the term within which to pay it, ii) the minimum amount of the increase to be made to the offers, iii) the term, not exceeding sixty days from the award, within which the price shall be deposited and the methods of deposit, iv) the date and place where the auction will be held. Everyone, except the debtor, can submit an offer for the purchase of foreclosed real estate, personally or by means of a solicitor, in the registry of the property enforcement section of the competent Court.

The offer must be filed in a sealed envelope, on the outside of which are noted, after identification, of the person who materially provides for the deposit, by the receiving registrar, the name of the execution judge or the delegated professional and the date of the hearing fixed for the examination of the offers.

4. Opening the envelopes

If the sale takes place by auction at the hearing set in the sales order, the judge's delegate will open the envelopes, or the envelope in the case of a single offer.

In the latter case, if the offer is equal to or higher than the value of the property established in the order of sale, the same is certainly accepted; if, on the other hand, the price offered is lower than the price established in the sales order by no more than a quarter, the judge may proceed with the sale when he/she considers that there is no serious possibility of obtaining a higher price with a new sale and no requests for assignment were presented by creditors.

If there are more bids, the delegate invites the bidders to bid on the highest offer, with the possibility of a raise; the asset, therefore, will be awarded to whoever has made the highest offer, also considering other elements, such as the deposits given, forms, methods, and times of payment.

5. Conclusion of the auction

The successful bidder shall pay the balance of the price within the term and in the manner set by the order of the Judge that orders the sale and deliver the document proving the payment to the registry; only following this payment the Judge issues the decree of transfer of the estate that completes the

transfer of ownership and that is registered in the competent registers.

IV. OTHER MAIN METHOD OF ACQUIRING PROPERTY

Gift

This is a typical act of gift which involves an increase in the assets of the donee (the one who receives the gift) with a corresponding patrimonial sacrifice of the donor (the one who transfers the asset).

The law requires for the donor the "*full capacity to dispose of his/her assets*". For the donee, by way of derogation from the general discipline on legal capacity, and similarly to the provisions for the will, the law states that the gift can also be made on behalf of the unborn, even if not yet conceived.

The law also allows legal entities to gift if this capacity is recognized by their statutes or articles of association, and to receive them.

The gift is a personal act that does not allow, therefore, representation, except for the possibility, for the donor alone, to release of a special power of attorney through which to give a third party the task of designating the donee from a category of subjects (natural or legal persons) or things indicated by the same.

Mortis causa succession

The real estate can be acquired by succession.

Succession may be regulated by the will or, in the absence of the same, directly by law (so called "*successione testamentaria*" and "*successione legittima").*

The phases that mark the succession are three:

i) the first coincides with the opening of the succession, which is the first phase immediately following the death of the person. The succession opens at the time of death, in the place of the last domicile of the deceased.

ii) the second consists in the so-called denunciation of the inheritance, i.e., determining who owns the assets and to what extent, and whether on the basis of a will or according to law.

iii) the third consists in the acceptance of the inheritance and the consequent attribution of assets to the heir/heirs.

Usucaption

The usucaption is an original way of acquiring the ownership of real estates through the continuous, uninterrupted and uncontested possession for a certain period of time.

The ordinary term of usucaption requires 20 years to elapse, while the abbreviated one requires 10 years to elapse and occurs when possession of the real estate was purchased in good faith "by virtue of a title that is suitable for transferring ownership and that it has been duly transcribed".

For the small rural property, the abbreviated term of usucaption is further reduced to 5 years from the date of the transcription of the title.

The purchase by usucaption of the property requires a judicial assessment, having the purchaser to provide rigorous proof of continuous, uninterrupted and unobjected possession for the period required by law.

V. FORMS OF OWNERSHIP

The forms of ownership vary according to the needs of the interested person

depending by a number of elements, such as taxation issues, estate planning, costs.

The most common structures of ownership are single ownership, co-ownership, companies, trust. It is also possible to buy an interest in a property by buying shares or units in the ownership structure.

Single ownership

Single ownership is the simplest and least expensive option in which the owner has sole control of the real estate. The main disadvantage with individual ownership is that it does not offer any asset protection, as the individual's creditors will have the right to claim against the personal assets of the owner, including the real estate.

Co-ownership

Co-ownership may be of a different type: i) joint ownership by two or more persons holding undivided quota over the real estate such as ownership by spouses, ii) co-ownership by two or more persons holding specific quota of the real estate.

In an usual real estate community, each participant can transfer his/her quota or his/her right when he/she wants, to whoever he/she wants, at the price deemed more convenient, without having to respect any right of first refusal of the other co-owners.

The pre-emption right provided for by the Italian civil code is specifically foreseen for inheritances (i.e., succession retract), according to which the co-heir who wants to sell his/her quota must notify the proposed sale to the other co-heirs having the pre-emption right.

The pre-emption right only applies to onerous assignments and, therefore, it does not apply to cases of gift of the quota to unrelated third party; also, it does not apply if the sale is made to a co-heir, but only if it is sold to an unrelated third party.

Companies

Real estate may be acquired thought a company structure. The most used legal forms are limited liability companies.

Residential property is typically owned by individuals, while owners of commercial property are most frequently legal entities under either private or public law.

Trust property (*negozio fiduciario)*

Trust is a *"sui generis"* hypothesis of ownership, in which the beneficiary (that can be individuals, trusts or companies) transfers to the trustee the ownership of the real estate that shall be managed in the interest of the beneficiary and under the indications of the latter.

The trustee, by virtue of the so-called "*pactum fiduciae*", is required to re-transfer the property to the beneficiary, either at his request or at the expiry of the agreed term.

The trust is created by a document called trust deed.

VI. TYPES OF *IN REM* RIGHTS IMPACTING ON OWNERSHIP

Ownership over the property is the principal and main real right that allows the widest powers.

According to article 832 of the Italian Civil Code the ownership is' *"the right to enjoy and dispose of things fully and exclusively, within the limits and in the ways provided by the law ".*

The referred limits include the other real rights, so-called minor *in rem* rights.

They are:

i) real rights of enjoyment: emphyteusis, surface rights, usufruct, real right of use, real right of residence, easements (or predial easements);

ii) real warranty rights: pledge and mortgage.

Minor *in rem* rights are constituted and remain linked to the real estate, regardless of the change of the ownership of the estate itself (i.e., right of *sequela*).

Minor *in rem* rights are enforceable against purchasers of the real estate subject to the transcription in the Real Estate Registry.

Minor *in rem* rights not transcribed are opposable to the purchasers if mentioned in the deed of sale of the real estate, as in this case the real estate is transferred encumbered by the minor *in rem* right.

Differently from the right of ownership, which is not subject to statute of limitation period and is protected by specific actions (*rei vindicatio* action, *actio negatoria servitutis*), minor *in rem* right expire due to non-use for the 20-year period.