

General/ International Chapter

International Real Estate: Key Aspects

by

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1 Introduction: Real estate abroad

Many people no longer limit the horizon of their activities and aims to the borders of their own country. New transport and communications media, the political stability and integration of *Europe*, cross-border activities, prolonged stays in foreign countries and the acquisition of real estate abroad are an expression of this trend. Especially the last of these – in the form of vacation homes, second homes or a new main domicile – is gaining in interest and importance within *Europe* and world wide. The ongoing integration of the *European Union*, in particular the free movement of persons and capital as well as the single European currency, has made its contribution to the growing trend for foreign nationals to acquire real estate abroad, above all in southern *Europe*. European countries such as *France*, *Spain*, *Italy* and *Portugal* are among those most favored by foreign buyers who seek a mild climate, a more relaxed lifestyle and recreational surroundings. But interest is increasingly extending to destinations such as *Croatia*, *Malta*, the *Caribbean*, the *Bahamas* and elsewhere, and even cooler regions such as *Canada*, *Sweden* and *Ireland* are popular.

The acquisition and ownership of real estate across borders raises legal and tax issues, and problems may occur whose full extent is often unsuspected by those concerned. Private acquisitions of real estate are not infrequently made without any accurate knowledge of the legal, tax and economic background. Even if **quality of life** and personal use are paramount motives for the purchase of noncommercial real estate, the acquisition of property is always a **capital investment**. As value maintenance and capital growth – as well as aspects of tax and inheritance law – will accordingly play a vital role, it is important to clarify these key framework conditions before acquiring real estate in order to be protected from unexpected legal and tax consequences. While this applies to real estate in general, it is particularly true for property located abroad.

Every purchase of real estate abroad must clearly be approached with **particular care** by buyers without sufficient legal and possibly linguistic knowledge, but this should not deter them from trying. Nevertheless, it is generally advisable to play it safe by calling in lawyers, tax experts, architects and trustworthy real estate agencies familiar with local conditions. The costs incurred will almost always be more than offset by the smooth and correct handling of the procedures involved.

Other countries have different habits – and different legal systems. This applies quite particularly to real estate and tax law, which may assume very different forms in various countries. So foreign acquirers of real estate cannot let themselves be guided by their native feeling for what is right, but must inform themselves in an unprejudiced way about the circumstances prevailing locally. Still, the acquisition of real estate is quite safe in most countries as long as certain **basic rules are observed**.

Ownership of real estate satisfies a basic human need. To acquire a piece of property in an attractive location is equivalent to gaining a certain quality of life, and in most cases sensible asset diversification. At the same time, it means acquiring an asset that almost always retains its value, and in most cases gains in value over a longer period of time. However, it is important to observe certain important principles here too.

2 Finding the right property

2.1 Brokers, dealers and developers

In every country, many players are involved in the real estate sector. A great deal of money can be earned and lost in this business, but few if any qualifications or other professional or personal preconditions are generally required to take part in it. Corresponding **care** must therefore be taken, as there will always be some among the many agents, brokers, general contractors and promoters whose business methods cannot be called respectable.

Real estate brokers

Real estate brokers (agents) are found throughout the world. Whereas it requires authorization in some countries to be a real estate broker/agent, others exercise no supervision at all, so that absolutely anyone can try to run an agency. The services offered by a broker may also vary greatly. In some countries, the broker or agent does practically everything for the buyer, including drawing up the contract, administrative work, completion of tax forms, etc. Often, however, the broker does no more than bring the buyer and seller together and, at most, accompanies the transaction as far as the notary or a selected lawyer. As a rule, brokers receive a **commission** only when a purchase actually takes place. If no sale results, they go away empty-handed. That's why brokers are interested in **rapid closure** and accordingly tend to urge prospective customers to buy. However, good brokers always have the overall consulting service for their client in mind and endeavor to praise the prospective property in relatively objective terms. Professional brokers also tend to have an extensive portfolio of real estate from which to select the most suitable for their client. However, the fact that the broker is commissioned by the seller and usually receives payment for his services from the latter tends, in practice, to produce a bias in favor of the seller's interests – although this is contrary to the rules of the profession and often also infringes the legal obligation to neutrality. As a buyer, therefore, one should always maintain a certain **distance** and **communicate** this reserve clearly.

The business of a real estate broker for privately used real estate normally has a **strong local orientation**. Brokers tend to limit their activities to a particular city, province or region. In some small countries, however, brokers may extend their activities over the whole country (for instance in *Malta* or the *Caribbean*). Larger real estate brokers may have an extensive network of branches and their activities can extend over several regions or even across the whole country. However, their individual offices obviously have a local orientation. Franchise companies are also expanding throughout the world, especially from the *USA*. They comprise a number of autonomously managed and independent real estate brokers who present a united brand vis-à-vis the outside and apply uniform standards for marketing, quality assurance, etc. Only in the luxury segment is a certain level of internationalization to be observed, although here too the leading brokers continue to be specialists with a strong local presence. Some companies with an international scope of operations thus offer luxury real estate world wide via exclusive networks of brokers.

Real estate dealers

In contrast to brokers, who essentially merely bring buyer and seller together and receive a commission for this service, **real estate dealers** act as buyers and sellers on their own

behalf. The buyer must be even more careful in this case, as a real estate dealer who wants to sell a property now acts completely in his or her own interest and tends to urge the buyer to make a quick closure. In addition, there is obviously a danger that the dealer may try to take advantage of an unsuspecting buyer, for instance by concealing important facts about the property. In this case it always makes good sense to call in an independent expert (such as a reputable agent, real estate expert or lawyer with experience in real estate).

Developers

The term **developer** refers to a kind of general contractor responsible for the overall realization of real estate projects. The *developer* is usually the owner of a piece of land which is ready for development and handles all the building work up to the marketing and final handover of the individual real estate. Buyers must exercise the greatest caution when buying real estate from a *developer* for various reasons. Firstly, the *developer* is obliged to complete specific project phases within certain periods of time, which may lead to the use of somewhat more aggressive sales methods. Moreover, the buyer may incur an extensive financial risk by buying the real estate on the basis of a mere plan, i.e. before any building work has been started or while this is still in progress. New or still unbuilt real estate should be acquired only from very well-established and reputable developers. Corresponding guarantees are indispensable.

2.2 How to recognize a reliable real estate professional

The reputability of a real estate professional cannot be determined on the basis of generally applicable paradigms. However, a number of **indications** may allow a conclusion to be drawn one way or the other. Although these seem obvious to many readers, experience shows that it is nevertheless important to make oneself aware of this time and again.

Reputable brokers, real estate dealers and developers will always be distinguished by a professional, **reserved** manner. **Professional associations**, whose members comprise real estate brokers, architects, surveyors, developers, etc., are found in all countries. Depending on the organization, the selection criteria for membership usually guarantee a certain quality standard. Moreover, it makes sense to find out how long the relevant broker, real estate dealer or developer has been established. Anyone who has already been in business for many years, possibly at the same address, would normally merit a positive valuation. You should also ask openly for references and not neglect to check them.

2.3 Key criteria to note when looking for real estate

Although common knowledge, it is nevertheless worth stressing that **location** is the most important factor in the selection of any piece of real estate. Quite apart from the present circumstances, special care must also be taken to check how the environment may change in the future. So it is not irrelevant if **projects for constructing** freeways, airfields, power lines, waste dumps or similar major developments are planned in the area. One should also know in which **construction zone** the building plot and its surrounding plots are situated (might a neighbor add another story to his house and in so doing obscure the marvelous lake view?). The best way to be quite sure about these factors is to buy existing real estate in surroundings which are already well developed and in which rezoning is unlikely.

If there are still many undeveloped plots of land around a property, it is difficult to estimate how the surroundings and perhaps the entire appearance of the locality may change. Many location factors must be considered, above all the **quality of the local municipality**. Thus the way in which this quality is likely to change in a positive way in the future is of critical importance for any gain in the value of the real estate. This will be explained in greater detail later. Also the quality of the **location within the municipality** where the real estate is situated is important. Is the house located on a quiet street in a quiet area? Where are the nearest shops, bank, post office, schools and kindergartens, high schools, location of evening classes, restaurants and sports facilities? Are there cultural facilities nearby? How easily can the real estate be reached by public transport? Where is the nearest national or international airport? Where is the nearest rail station? What are the connections like? How far is it to the nearest highway or freeway access? How close is the nearest healthcare facility, and where are the nearest major hospitals?

These questions concerning the **infrastructure** are of **central concern** to anyone interested in acquiring real estate and their answers have a corresponding effect on **price levels**. In general, real estate situated in largely rural localities with a modest infrastructure are much less in demand and are correspondingly more difficult to resell. In contrast, real estate in locations offering an extensive infrastructure immediately command higher prices. In the case of 'bargains', a poor infrastructure is often a major reason for the relatively low price. And although the same demands are not necessarily made on infrastructures around vacation residences – where a rural idyll away from the hustle and bustle of the city is often sought – considerations of this kind are nevertheless just as important as for a principal residence. The ideal for many people is likely to be real estate in a very quiet location in idyllic surroundings, but nevertheless close to a town and an international airport. And it is precisely real estate of this kind that represent the **ultimate luxury** and attract the relatively highest prices world wide.

If interest focuses on the **maintenance and value growth potential**, it should be noted that owner-occupied residential properties often tend to be a poor investment in real terms – i.e. when adjusted for inflation. At any rate, the return is not as good than is generally assumed, as real estate tends to be considered a very secure and above all an inflation-proof investment. However, the most important factor in maintaining and increasing the value of residential real estate is not its current location quality but potential positive changes, i.e. the **improvement of location quality**. Such improvements are often the result of expanding residential areas, especially in the periphery of larger cities, and of associated infrastructure improvements in transport links and shopping facilities. However, the expansion of the infrastructure can also have a negative impact on location quality, such as the construction of new freeways or the extension of airports with the associated changes in flight paths. The latter can have an impact up to dozens of kilometers distance from the actual location of the airport.

In making a possible estimate of the future potential growth in value of a real estate, it is always worth while clarifying the planned and future development of the residential area in which it is located as well as any changes in local infrastructure in advance of purchase.

Important aspects of the real estate itself are the **size and shape** of the plot, the **orientation** of the building and its **exposure to sunlight**, the **view** as well as the extent to which it is overlooked by neighbors. **Exposure to wind** plays a significant role in many areas (for

example, the *Mistral* in southern *France* or the *Bora* in *Dalmatia*). A secluded outside patio can be very attractive, but excessive exposure to wind can make conditions quite disagreeable outside the house – for instance, in the garden. Tranquility is also important, and **noise**, especially from busy roads and airports, should not be underestimated. **Intrusive odors** also represent an important factor (proximity to paper factories, pig farms, food-processing establishments, etc.). Furthermore, **exhaust emissions** must be considered. In view of the pollution from fumes, it is important to be sufficiently far away from filling stations, covered car parks and busy roads. Likewise, one should be sufficiently far away from **pylons/high-tension lines** and **mobile phone network antennas**. It is also necessary to be aware of possible **risks of accidents**. For instance, industrial or other installations may represent a considerable risk (chemical factory, nuclear power plant, liquid gas tanks, cyanide warehouse of a metal-processing plant, etc.). Given a choice, a prospective buyer would obviously opt for real estate located a sufficient **distance** from installations of this kind.

Where buildings are constructed on a slope, excessive water pressure and thus damp masonry may be a problem. Any danger of **natural hazards** must also be clarified. Landslides, avalanches, earthquakes, forest fires as well as flooding, tidal waves and hurricanes or tornadoes may present considerable risks in certain areas. The situation and construction of the property must be carefully considered to estimate the real risks.

Certain special features must be considered in the case of **rural/agricultural real estate** as well as of **historical real estate** and **real estate located by rivers, lakes and close to the sea**. These will be treated in separate chapters.

What about **access** and access authorization? Is there a public road leading to the property, or only a private road? Is snow clearance an issue in winter?

Security must not be neglected either. How frequent are burglaries in the area where the real estate is located? Is the house very isolated? Is there a need for a burglar alarm? Are there any neighbors and trustworthy persons who can keep an eye on the real estate when the owner is absent? Might there be a need for a private surveillance service?

The most varied criteria must then be considered as regards the property itself. They include the **size and configuration of the rooms** and ancillary premises, the number of bathrooms, potential for additional fittings and extensions (for instance, can the attic be extended?), **construction quality** of the buildings, **heating insulation**, energy consumption, heating system (also a necessity in a country like *Spain* if the real estate is to be used all year round). Penetration of **moisture** (e.g. in the case of old walls, damp subsoil, slope situation) can constitute a major problem which may not be easy, or indeed possible, to solve. The condition of the **roof** is a major consideration, and **pest** damage – not only in the attic – is by no means unusual in many areas. The technical equipment of the property and the various installations must also be carefully examined. What is the state of the electrical installations and the plumbing? Are there telephone, internet, ISDN/ADSL, cable TV connections, a satellite dish? What kind of water supply and waste-water disposal facilities are present? What kind of heating system is in place? In the case of oil heating, the potential environmental risk means that the oil tank must not be placed directly on or in the soil outside. It should be located in the cellar or other separate building and be equipped with a protective trough. One should also check whether the heating installation and the oil tank have been regularly maintained.

In the case of a **swimming pool**, it is also of interest to know whether it has been regularly maintained. What is the condition of the pool? Is there potential for extension? Would this require approval?

It is important to ensure sufficient **sound insulation**, including against **foot fall sound**, especially in apartments/condominiums and duplex villas. To check this out in practice, it is best to spend several days in the building or – more realistically – to have the sound insulation inspected by an expert who can measure it accurately.

Prestige elements such as a sauna, swimming pool, tennis court, parking facility or direct waterfront location naturally increase the value and thus the price of a real estate. The historical importance of the building, an absolutely exclusive location or the fact that it has been built by a celebrity architect can have a significant effect on the price of the real estate.

Properties that are not too large, in good to very good locations, particularly in a region with a promising future in terms of residential development, ideally close to a large city, with high-quality and well-maintained buildings with a practical interior design and appropriate fittings are almost always in demand. Such properties are correspondingly easier to resell and offer above-average potential for value growth.

When searching for real estate, one should ideally already apply those criteria that will be significant to future buyers when it comes to a **resale**.

2.4 The valuation of real estate

The value of real estate is affected very strongly by **subjective criteria**. This makes an objective valuation difficult, and there is never anything like a ‘right’ value, but only value bands, which may be justified on both objective and subjective grounds. The price for a specific real estate is fixed precisely only when the buyer and seller agree on it at the sale. However, this is merely a momentary value.

The **property announcements** in the local press and in specialized publications like real estate magazines give an initial overview of the **price level** of comparable local real estate. As brokers almost always represent the sellers, their price information and recommendations must be taken with all due caution. It is much better to be advised by an independent expert – for example, a chartered surveyor, a lawyer familiar with the relevant market, or a local architect.

In the case of larger, older or special real estate, such as historical buildings, it is wise to commission an **assessment** by an expert (surveyor, architect or civil engineer). The associated costs, depending on the detail of the assessment, the size and location of the real estate and the country, normally range between US\$ 1,500 and US\$ 20,000, and represent a sound investment in most cases. It may even be worth while obtaining a **second opinion**, especially if the initial appraisal was made by a potentially biased party.

It is very important to **find a suitable expert** who can appraise the real estate on objective criteria and analyze its market value as realistically as possible. A suitable expert should possess local building knowledge as well as experience in the type of real estate to be assessed. In the case of older properties, and especially of historical buildings, it is important that the condition of the building and any need for renovation be examined and realistically

assessed. Professional surveyors perform a valuable service here, as these questions cannot be answered by a buyer unfamiliar with local circumstances.

There are various **real estate valuation** methods. In **past-** or **cost-based** methods, the original building costs are extrapolated to their current value via a suitable index and annual hypothetical amortizations are concurrently calculated. The land value is also determined. In contrast, **future-oriented** methods are based on the revenue value or on discounting future revenues. However, **market or cross-comparison** methods are of particular relevance for private, owner-occupied real estate. The price of the real estate being assessed is then determined on the basis of the latest prices of comparable properties. This method is also used intuitively by a layman when comparing different properties.

3 Ownership of real estate

3.1 Possession and ownership

Non-lawyers often confuse the terms ‘possession’ and ‘ownership’. So it is worth briefly clarifying what these two terms, which originate in property law, mean in most legal systems. **Possession entails the actual control** over a physical object (such as an automobile, a shovel or a house) with the intent to have and to exercise such control. A tenant who lawfully rents a house on the basis of a rental agreement from the owner, and therefore has real power to use it, is consequently the possessor of the house (for the duration of the rental). In contrast, **ownership means the fully comprehensive power of disposal and complete dominion** over a property, including the right to transfer it to others. Ownership is, of course, often associated with possession, and these two legal powers often coincide. However, it is important to distinguish between them, as such a distinction may be relevant in certain circumstances.

3.2 Different forms and types of ownership

Sole ownership of real estate is possible in all the legal systems of interest here. The (sole) owner has the most comprehensive power of disposal and legal control which is possible over a piece of real estate within the scope of the prevailing legal and factual limits. As a rule, **various forms of shared ownership** are also possible, especially joint and condominium ownership. The different forms and types of ownership existing in the various countries are explained in the respective country sections. Some jurisdictions additionally allow separate ownership rights to the land and the buildings standing on it, resulting in **splitting of ownership**. This is particularly the case for the right to build which exists in some jurisdictions.

3.3 Encumbrances, easements, charges, liens and mortgages

Ownership can be **encumbered** and **restricted** in various ways. In addition to contractual agreements, which apply only between the contractual parties, all jurisdictions allow various rights relating to real estate, which are generally applicable and can, in most cases, also be entered or noted in a land or ownership register or in the title deeds. In contrast to comprehensive ownership rights, these imply restricted control over rights to a property.

Restricted property rights limit ownership to the encumbered real estate and to this extent take precedence over comprehensive ownership rights.

There are essentially **four types of restrictions on property rights**, although several different designations for them are found in the various jurisdictions. Thus **personal easements** or **personal servitudes** depend on the entitled person and normally end at the death of natural persons whom they benefit, or in case of legal entities being beneficiaries after some period set by law. A classic example is the right of usufruct or life-estate existing in various forms. There are also various forms of **easements on real estate** or **real servitudes**. These involve a servient and an entitled property. The owner of the servient property must **tolerate** certain interventions by the respective owner of the entitled property (such as right of way or right of passage) or **restrict** the exercise of his ownership right in a certain way (e.g. not build higher than one story). **Charges on real estate** have been handed down from feudal times and still exist in some countries. They obligate the owner of the real estate not only to exercise tolerance, but to perform a certain action, for instance to supply a certain amount of grass or to pay an annual land rental. However, it is now usually possible to be released from a real estate charge by paying a redemption fee. To secure claims and to mobilize the value of a piece of real estate, almost all jurisdictions also include various forms of **liens and mortgages (real estate security interests)**.

So it is very important **to check before every acquisition** whether the real estate to be acquired is encumbered with any easements, charges, restrictive covenants, liens or mortgages. Such rights may be significant and may often greatly restrict the enjoyment or use of the real estate. The existence of such encumbrances may also have considerable effects on its value and future appreciation.

3.4 Protection of ownership, proof of ownership and registration

Private property is guaranteed in all the countries considered here by their respective laws and usually even at constitutional level. In countries such as *Switzerland* and *Germany*, a land register allows the exact ownership relationships and encumbrances of real estate to be determined at any time, and a relatively high legal security prevails, also because of the professional liability of the notaries or lawyers handling the transaction. In such countries as the *USA*, where there is no comparable land register, ownership proof is instead based on title documents and the notary's liability is essentially substituted by a **title insurance**. However, secure title to ownership cannot be quite so easily proved in some other countries, and one must be very careful to ensure that full and good title is acquired and appropriately protected. An overview of the real estate market in selected countries is presented in Table 1.

4 Purchase and sale of real estate

4.1 How to proceed with a purchase

The buyer generally bears the greater transaction risk, as is fittingly expressed by a principle of Roman law: *Periculum est emptoris*, or, in other words: *Caveat emptor*. That is why certain precautions and clarifications are needed prior to every purchase in order to minimize the risks. As a long-term investment, which usually ties up large amounts of capital, the acquisition of real estate should additionally be planned and carried out in a **careful** and

Table 1 Overview: Real-estate market in selected countries

	Types and forms of ownership	Usual financing by credit institutions	Usual rental duration for residential real estate	Rental payments	Security due from tenant for residential rental	Usual deposit at purchase
Austria	Sole ownership, co-ownership, joint ownership, apartment ownership, building right	Up to 80% of the estimated value, depending on financial soundness	Agreed by the contractual parties. Usually between 3 and 10 years. Residential rentals as per rental law: at least 3 years	Monthly in advance	Up to 3 months' rent or a bank guarantee for the same amount	5–30%
The Bahamas	Sole ownership, co-ownership, apartment ownership, timesharing, leasehold, trusts	Up to 75% of the market value	Residential rental usually 1 year. Leasing: longer term	Monthly	2 months' rent	10%
Canada	Sole ownership, co-ownership, joint ownership, condominium ownership, timesharing, leasehold, trusts	Up to 75% of the market value. For foreign nationals: 65%	According to use. One year and thereafter month to month	Payment due at beginning of each month	Leasehold: Rent for the first and last months	5%
Croatia	Sole ownership, co-ownership, joint ownership, apartment ownership, building right	Up to 75% of the market value	No specifications	Payment due at beginning of each month	Depends on the contractual relationship and the conditions	10%
France	Sole ownership, co-ownership, joint ownership with right of accrual, apartment ownership, joint tenancy, timesharing, building right	Up to 100% of the market value or the sale price. Foreign nationals: max. 70%	Residential rental at least 3 years	Monthly in advance or quarterly	Residential rental: 2 months rent or one quarter rent if quarterly payment	5–10%
Greece	Sole ownership, co-ownership, apartment ownership, timesharing	Up to 100% of the sale price	Residential rental at least 3 years. Leasing: 10 years with option to extend	As a rule, monthly in advance	2 months	10%

	Broker's commission ⁷	Land register and notaries' fees	Purchase taxes	VAT on new buildings	Annual property and wealth taxes	Capital appreciation taxes as % of appreciation
Austria	Max. 3%, possibly from both buyer and seller, i.e. max, total of 6%	1% land register fee plus authenti- cation costs; 1–3% lawyer's fee	Land transfer tax 3.5%	None (or 20% if chosen by seller)	Ca. 1% of assessed value, no wealth tax	Maximum 50% ³
The Bahamas	6% for developed, 10% for undeveloped building plots	2.5% of the real-estate value (lawyer's fee)	2–10%	None	1–2% of the market value	None
Canada	3–6%	Notaries in Quebec, otherwise lawyers: either hourly fee or flat rate	Varies by province, mostly between 0.5 and 1.5%	7%	Land tax: varies greatly. ⁵ No wealth tax	Ca. 25% of the appreciation
Croatia	2–5%	Euro 35 land register registration fee, Euro 10 signature authentic- ation by notary	5%	22%	Vacation home tax Euro 0.7–2 per square meter of usable area, depending on position and infrastructure. No wealth tax	None ¹
France	5–10%	7%	See land register and notary's fees	19.6%	Land tax and living space tax (varies from place to place); wealth tax, for property above Euro 720,000	No capital appreciation tax for main residence; non-residents 16–33%
Greece	2% from buyer and depending on situation plus 2% payable by seller	Ca. 1.5% at purchase, ca. 2% for donation	Conveyancing fee 7–11%; registration fees: ca. 0.5%	No VAT on property	Land tax: 0.3–8% for natural persons or 0.7% for legal persons, where land value exceeds Euro 243,600	In principle none. Possibly 35% for foreign legal persons

Table 1 (continued)

	Types and forms of ownership	Usual financing by credit institutions	Usual rental duration for residential real estate	Rental payments	Security due from tenant for residential rental	Usual deposit at purchase
Hungary	Sole ownership, co-ownership, apartment ownership, timesharing	60–70% of the financing value (which is ca. 80% of the market value)	Three to five years, often with an option to renew the contract	Monthly or quarterly in advance	Up to 6 months' rent	10%
Ireland	Sole ownership, co-ownership, apartment ownership, timesharing, leasehold, trusts	90% of the market value	Residential rentals 1–3 years. Leasing: 25 years are standard. The contract is renewable every 5 years. Leases of up to 999 years are possible	Quarterly in advance	Depends on the contractual relationship and the conditions	10%
Italy	Sole ownership, co-ownership, joint ownership, apartment ownership, timesharing, inherited building right	Up to 75% of the market value	Four years with automatic extension by another 4 years. Shorter-term contracts may be agreed	Monthly in advance. Other modes of payment may also be agreed	1–3 months' rent	10–30%
Malta	Sole ownership, co-ownership, joint ownership, apartment ownership, timesharing	75–90% of the market value, depending on the bank	Rentals before 1995: non-terminable. Rentals arranged after 1995: by free agreement	Quarterly	1 months' rent	10%
Monaco	Sole ownership, co-ownership, apartment ownership	50–70% of the market value	By free agreement, usually 1–3 years	Quarterly	3 months' rent	10%
Portugal	Sole ownership, co-ownership, joint ownership, apartment ownership, timesharing, building right	60–80% of the estimated value	Rentals before 1990 non-terminable. Rentals since 1990 terminable after a minimum period of 5 years. Leasing agreement terms 7–30 years	Monthly in advance	1–3 months' rent	10–40%

	Broker's commission ⁷	Land register and notaries' fees	Purchase taxes	VAT on new buildings	Annual property and wealth taxes	Capital appreciation taxes as % of appreciation
Hungary	2–5%	As per scale of fees. Total ca. 1%	Conveyancing fee generally 10%, for residential real estate up to 6%	25% if sold by a company	Premises tax: max. 900 HUF per square meter of useful area. Land tax: max. 200 HUF per square meter of useful area	20% discounts if the property was in possession for longer than 6 years
Ireland	1.5–2.5%	Each party pays its own lawyers' fees as agreed, usually 1% of the property value	Conveyancing tax up to 9%; Statutory duties: 2%	13.5%, but included in the purchase price	None	20–40%
Italy	2–3% if only one intermediary, possibly 5% for an exclusive broker	Euro 2,500– 10,000, varies greatly depending on real estate value and notary	3–10%	4–20%	Land tax: between 0.4 and 0.7%, referred to cadastral value. No wealth tax	None
Malta	5%	1%	Transfer duty 5% plus Euro 250 for authorizations	18% on building materials and work contracts	None	35% ²
Monaco	Purchase: 8%. ⁶ Leasing: 10% of the first year	Registration and notaries' fees ca. 9%	Ca. 9%, 7.5% of which are registration fees and stamp duties, the rest the notaries' fees	19.6%	None	None
Portugal	2–6%	Notaries' and land register fees ca. Euro 300 minimum	Real estate transfer tax 6.5%; ⁹ stamp duty 0.8%	19% on building materials and works contracts	0.2–0.8%	25% for non-residents

Table 1 (continued)

	Types and forms of ownership	Usual financing by credit institutions	Usual rental duration for residential real estate	Rental payments	Security due from tenant for residential rental	Usual deposit at purchase
Spain	Sole ownership, co-ownership, apartment ownership, timesharing, building right	Up to 80% in normal cases, in individual cases up to 100% of the market value	As a rule, 3–5 years; minimum tenancy right 5 years for residential purposes	Rent and charges to be settled monthly in advance	One months' rent	10–15%
Sweden	Sole ownership, co-ownership, joint ownership, unlimited right of apartment use, timesharing, building right	Up to 90% of the market value	By mutual agreement of the contractual partners. Normally between 9 months and 10 years	By mutual agreement of the contractual partners. Otherwise monthly in advance	By agreement	10%
Switzerland	Sole ownership, co-ownership, joint ownership, apartment ownership, building right	60–80% of the market value, 50% for investment property	Leasing: normally 5 years, with renewal option for another 5 years	Monthly or quarterly in advance	Bank guarantee or up to 3 months' rent	10–15%
United Kingdom	Sole ownership, co-ownership, joint ownership, tenancy in common, leasehold, trusts	75–85% of the market value	Usually 1–3 years for residential rentals, otherwise anything between 5 and 999 years possible	For short rentals usually monthly, for longer rentals quarterly	For short rentals usually 3 months' rent	10%
United States/Florida	Sole ownership, co-ownership, joint ownership, apartment ownership, timesharing, leasing, tenancy by the entirety, trusts	For local residents up to 90%, for non-residents up to 70% of the market value	Negotiable in line with the tenant's requirements. 30-year leasing contracts are regarded as purchase contracts	Monthly in advance	1–6 months' rent, depending on the credit-worthiness of the tenant; frequently waived	10% and more for residents; 30% and more for non-residents

Notes on the table:

- ¹ There are no capital gains taxes in the following cases:
 – where the real estate was used as a residence for the owner's family
 – where the real estate was sold again more than three years after its acquisition
 – where the real estate was transferred between close relatives or divorced spouses.

² Tax-free, if used as a principal residence for more than two years.

³ Always tax-free after 10 years.

	Broker's commission ⁷	Land register and notaries' fees	Purchase taxes	VAT on new buildings	Annual property and wealth taxes	Capital appreciation taxes as % of appreciation
Spain	Usually 4–7%	Ancillary purchasing costs ca. 3%	Land acquisition tax 7% as a rule	7%	Land tax IBI 0.3–1.1%; wealth tax from 0.2% to 2.5%; as a rule both calculated on the cadastral value	Max. 3.7% of the cadastral value per year; max. 20 years. Must be distinguished from capital gains tax: max 35% for non-residents
Sweden	3–5%	None	Conveyancing fee: none; Statutory duties: 1.5% for acquisition by private persons, and 3% of purchase price for acquisition by a company	25%	Land tax: 0–1%; wealth tax: 1.5% of net wealth exceeding 1.5 million SKr	Private persons: 30% on 2/3 of the capital gained Companies: tax on 90% of capital gains; tax rate as for other income
Switzer- land	2–4%	0.01–0.7% depending on the canton	1–3% depending on the canton	7.6% on building work	Wealth taxes 0–0.7% depending on the canton, plus property taxes in ca. half the cantons of 0.005–0.02%	Between ca. 25 and 70% depending on the canton and duration of ownership
United Kingdom	2–3%	Max. £800 land register fees, plus lawyers' fees	Up to 4% stamp duty. Up to £150 for data searches at local authority	None (5–17.5% on reconstruc- tions and extensions)	None	40% ⁸
United States/ Florida	6% developed; 10% undeveloped real estate	None	Documentary stamp taxes, lawyers' fees, title insurance: 2–5%	None	Land taxes depend on various factors. No approximation possible. No wealth tax	10–28% ⁴

⁴ Capital gains are taxed like regular income; with special exemptions depending on taxpayer.

⁵ For a house in *Toronto* valued at US\$ 500,000, for instance, this tax is about US\$ 4,000 to 5,000.

⁶ Comprising 3% for the 'buyer's broker' and 5% for the 'seller's broker'; this is however freely negotiable.

⁷ Unless otherwise stated, the broker's commission is paid by the respective seller. Broker's commissions are subject to VAT in most countries.

⁸ Only for persons domiciled in the *UK*.

⁹ 0% up to Euro 80,000, then graduated between Euro 80,000 and Euro 500,000; 6% from Euro 500,000. This applies only to real estate which serves exclusively residential purposes.

rational manner. Because real estate designed for private use should above all bring subjective pleasure to its users and not only maintain and increase its value in objective terms, careful clarification of these factors is most important.

1 Start by renting

Before the step is made to buy, it is advisable first, to **rent** a comparable property in a similar location for a short period. Some time should also be spent in that area during the months when the climate is least pleasant.

2 Viewing and detailed inspection of the property

The best thing to do is to inspect the prospective property on several occasions at different times of the day and night (to observe noise, the way the sunlight falls, etc.) and if possible also at various times of the year. It is also worth while living nearby, in the same area or neighborhood, for some time before deciding to buy, if this is possible.

3 Consider the marketability of the real estate

Special-interest real estate is often hard to resell. This applies to old mills, castles, houses with an unusual architectural style, etc., as well as to very expensive and very large properties. The market for such properties is very limited. In contrast, high-quality real estate in good to very good locations on not excessively large plots in a region that is developing in terms of its future residential potential, ideally in the suburbs of a larger city, will almost always find buyers over the long term. Whoever lays value on marketability, i.e. on factors that will also be relevant at a later possible resale, will simultaneously take into account the factors important for preserving the value of the property.

4 Observe real estate price cycles

Real estate prices tend to follow cycles lasting several years. So it makes sense to examine general price trends in recent years in the region in which the prospective real estate is located. Hence, if the analysis shows that real estate prices have risen continuously over a decade, caution is called for, although an unbroken rise in prices does not necessarily mean that a slump will follow. And in the contrary case, we can generally assume that stabilization will follow several years of declining prices. However, it should be stressed that price trends can never be forecast, and only a rough assessment can ultimately be made.

5 Check the legal and tax situation

Before a sales agreement or even a preliminary agreement is signed, all important legal and tax aspects must be clarified in detail. The checklists contained in this handbook set out all the key points.

6 Purchase with the aid of one or several experts

Depending on the country, place and circumstances, it may make sense to consult one or several experts when making the purchase. These may include a competent broker, an

architect or engineer, a notary or a lawyer. In most cases, it is worth while for a buyer (or seller) unfamiliar with local circumstances to obtain advice from a competent source and have the purchase transaction checked. Further information on this point may be found in Section 4.8 below.

4.2 The sales agreement (sale and purchase agreement)

The way in which real estate can be sold is in some respects subject to different rules, laws and regulations in various countries. Whereas a house can be legally sold via a short simple contract in *Spain*, indeed even by verbal agreement (!), many countries require on notarized contract and an entry in the land register to make the purchase of real estate legally valid.

Despite differences in legal systems and practices around the world, the key points that should be covered in a sales contract can nevertheless be summarized as follows:

- A precise designation of the parties to the contract.
- A precise designation and description of the real estate to be purchased (description of the real estate, notes, charges, easements, liens, other encumbrances, covenants and mortgages).
- The purchase price, mode and schedule of payment.
- The time of transfer of ownership and right of occupancy.
- The time of transfer of rights and obligations, benefits and risks.
- The security and interest on deposits, balance payments and funds held in escrow.
- Payment of taxes due, especially of capital gains tax.
- Warranty questions regarding title and material defects.
- Settling existing contracts referring to the real estate (rental and tenancy agreements, insurance policies, etc.).
- Any penalty clauses, forfeits and similar clauses.
- Applicable law and jurisdiction.

These are the most important points, but every sales contract should generally be negotiated and drawn up **on an individual basis**. Nevertheless, **standard form contracts** are usual in some countries (e.g. the frequently used *FAR/Bar* standard contract in *Florida*). Although a preprinted agreement is not suitable for all transactions, the *FAR/Bar* contract is well suited for the great majority of transactions involving residential real estate and even for commercial transactions. The same applies in several other countries. However, it is always advisable to consult a lawyer familiar with local practices and the local legal situation to **at least review** the sales agreement.

4.3 Restrictions on the sale/conveyance

The seller's power of disposal may be restricted for various reasons. Such **restrictions may result from the matrimonial property regime**. If the seller is married, his or her disposal authorization is based on the matrimonial property regime that applies to him or her. It

must therefore be clarified to which matrimonial property regime the seller is subject and whether consent of the spouse is actually required. In many countries, the effects of the marriage, and thus any possible restrictions on the disposal of property, are based on the personal statute or *lex patriae* of the spouses, i.e. on the law of the country whose citizenship the spouses possess. The precise arrangements are a question of the international private law of the country in which the property is located. Many countries require the consent of the spouse for a valid agreement to be concluded if the sale refers to the **matrimonial home of the spouses**. In such a case, that spouse should be joined as a party to the contract and agree to the sale. To prevent possible fraud by the spouse who is the registered owner, the sales agreement should contain a confirmation that the other spouse has actually received separate legal advice before agreeing to the sale.

Furthermore, restrictions on minors and wards of court as well as contractual and legal **pre-emption rights** should be observed. A **contractual pre-emption right** or **right of first refusal** stipulates by contract that in the event of a sale a particular named person has the right to acquire the real estate under the same conditions and the same price that would be offered to any other prospective buyers. Various **legal pre-emption rights** usually also exist, e.g. **in favor of the municipality or the state**. This is often the case, particularly for historical buildings or those of particular cultural importance. Such rights may also exist in favor of lessees, neighbors, etc. Current **tenants** often also possess a pre-emption right and could thus prevent a sale to another party. If a prospective real estate is rented or leased, extreme care must be exercised in its acquisition. It must be precisely clarified whether legal or contractual pre-emption rights exist and whether the real estate had been offered to the tenant or lessee as prescribed. In this context, it is worth mentioning the case of a tenant who is aware of ongoing contractual negotiations between the owner and the prospective buyer. Although initially willing to leave the apartment voluntarily in return for compensation, the tenant may subsequently refuse to do so in violation of the agreement while attempting to obtain still higher compensation from the acquirer. As a rule, there is nothing that the seller or the buyer can do against such unethical behavior by the tenant. In the interest of both parties, a tenant who enjoys pre-emption rights should firstly be offered the real estate so that all those concerned know what their position is after the legal period of notice has elapsed.

Finally, **agricultural properties** are subject to special restrictions in many countries (on this point, see Section 12.3 below).

4.4 Restrictions on acquisition

Analogous to such sales restrictions, some countries also impose restrictions on acquisition. The most significant of these are restrictions on the acquisition of **real estate by foreign nationals**. Whereas there are almost no restrictions of this kind in many of the countries of interest here (such as in *France, Spain, Portugal, Great Britain, Canada* or the *USA*), they are imposed by some countries, and range from minor restrictions and the obligation to obtain a permit up to complete prohibition. More or less strict acquisition restrictions apply in a number of countries including *Switzerland, Austria, Greece* and *Croatia*. The laws in some of these countries even stipulate **draconian sanctions in the event of evasion**. For example in *Switzerland*, evasion of acquisition restrictions on foreign nationals leads to **nullity** of the relevant contracts, which may lead to a total loss of the foreign

buyer's investment. On the other hand, other countries make it easy for such restrictions on acquisition to be bypassed via legal structures. Thus in *Croatia*, the obligation for foreign buyers to obtain approval – and the associated lengthy process of authorization – can be simply and legally avoided by setting up a Croatian company with its own legal personality in whose name the real estate is then acquired without the need for obtaining approval.

It is in any case essential to assure oneself before buying real estate that no sales or acquisition restrictions exist. If they do exist, the prospective buyer must clarify whether approval may be obtained, what the relevant conditions are, and how the obligation to obtain approval may **impact a possible resale**. It can also be worth while to check whether the approval obligation may be lawfully bypassed by means of a suitable legal structure. It must then be clarified with great care whether such a device is also accepted by the relevant authorities and is not classed as a structure established specifically to evade the law.

4.5 Other important points to consider when acquiring real estate

The following key points must be considered when acquiring real estate. However, other legal obligations and requirements may also impair rights to real estate ownership, depending on the country in question.

4.5.1 Capacity to act and entitlement of the seller

The authorization of the seller to conclude contracts in general and the ownership transfer in particular follows from his/her **status as the owner of the real estate**. The person presenting as the seller must possess the unrestricted **ownership** of the real estate to be sold, and appropriate proof should be requested. The seller must be **legally capable** as well as **authorized** to dispose of the real estate. A seller is legally capable as long as he/she is not restricted in his/her legal capacity to act. Restriction of the seller's capacity to act may be due to that person not yet being of an age to perform the sale. In this case, authorization by a legal representative or a ruling by a judge of the guardianship court must be submitted to allow the legal business to be carried out. Moreover, there must be no temporary legal incapacity or disallowance of business activity due to a criminal conviction. If the seller is married, it may not be possible for him/her to legally sell the matrimonial home without the consent of the spouse, or other restrictions based on the applicable matrimonial property regime may require involvement of the spouse.

If the seller is a **legal entity** (such as a company, foundation, etc.), the legal capacity of its executive organ or the latter's representative must not be restricted. Ultimately, legal persons are always represented by natural persons, who sign contracts on their behalf. The same criteria naturally apply to these representatives as described above, i.e. they must possess full legal capacity. It must also be demonstrated that the legal person has **authorized** his/her legal representative to **perform the sale**, so that the sale can actually go through. If the purpose of the company does not expressly include the acquisition and sale of real estate, a decision by the owners (shareholders of a company) is required in most countries, i.e. a decision by the managing board does not suffice. A restriction of the capacity to act by legal persons may also result from other circumstances – for instance, if the company has gone into receivership. The authorization to perform legal business for the company then passes to the receivers. If a legal person is a contractual partner, **special care** must be taken with regard to the authorization or legal capacity of the persons acting on its behalf.

4.5.2 Third-party claims and unpaid taxes

Every buyer should acquire comprehensive clarity about the existence of any third-party claims which encumber the real estate. Various easements/servitudes, liens and other **encumbrances on real estate**, as well as **lease and tenancy agreements, mortgages** and **unpaid taxes** can have considerable effects on the possibility of acquisition, and on the value and resale possibility of the real estate. These risks can extend to everything that has any connection whatsoever with the real estate. The seller need not necessarily intend any malicious concealment, but may simply have forgotten or overlooked something. In many cases – especially in the case of rural real estate – the contracts in question will already have been concluded between the person owning the real estate before the current seller and the neighbors regarding matters such as rights of way and grazing rights. Even if such rights have not been recorded in a register, they may nevertheless be fully effective. For example, informal permission to let cattle graze on a particular meadow can over many years become a legally enforceable right of lease or even a restricted property right. It is consequently advisable in most cases, especially in the case of **rural real estate**, to talk to the neighbors, the local authorities (such as members of the communal council) and other persons familiar with local circumstances in order to avoid unpleasant surprises.

If the seller has failed to pay bills from building tradesmen and contractors, the creditors can have a special **building tradesmen's lien** or a lien entered in the land or ownership register in some countries. For the new owner, such liens mean that his/her real estate is liable for payment of any outstanding bills. This must be borne in mind, especially when acquiring a newly built apartment or house, and the seller must be requested to provide proof that no bills are outstanding.

The real estate may often also be liable for capital gains and other taxes and duties not paid by the seller. In some countries, the taxes encumbering real estate have the character of a lien, i.e. the relevant real estate is directly liable for any unpaid taxes. Appropriate security for the buyer is thus absolutely necessary and may be arranged by means of a bank guarantee or by having a corresponding sum retained by a notary or lawyer.

Encumbrances and third-party claims are **apparent first from the ownership or land register** (where such a register exists), but they may also exist **by law** (e.g. the tacit rights of use or outstanding tax demands mentioned above) without being recorded in a register. Accordingly, **the greatest care** must be exercised in these matters. All existing encumbrances on, and third-party claims to, the real estate must be included in the sales agreement without fail and there must be agreement on who bears or redeems which encumbrances and debts. Before every real estate acquisition, a current extract must be obtained from the respective ownership or land register, and it must be comprehensively clarified whether the real estate is liable to any encumbrances and third-party claims.

The lawyer called in to act as consultant in the acquisition of the real estate shall clarify all outstanding matters in order to determine the legally protected claims and rights of third parties that may apply to the prospective real estate, and to ascertain any entitlements that the owners of neighboring properties may have. It is also important to **view the real estate** to be acquired, as this is a way to reveal those entitlements that cannot be determined from documents. If, for example, a path crosses the property it may follow that the land is

encumbered with a legally protected footpath, despite the fact that this right was not fixed in any document. A talk with the neighbors often helps to clarify such situations.

4.5.3 Provisions for protecting the environment, nature and the cultural heritage

Environmental protection

Environmental protection is a sensitive issue in conjunction with real estate transactions and ownership, not least because environmental pollution in general must be cleaned up by the current owner of the real estate if those who caused the pollution are unknown or unable to pay. This principle, applicable today in most countries, gives rise to delicate legal questions.

Some countries require former waste-disposal sites, as well as other land polluted with noxious substances, to be cleaned up (often **at the costs of the current owner of the property concerned!**) if they represent a risk of causing damage or creating a nuisance. It makes sense to clarify the situation even in countries with no current legislation for cleaning up polluted land. This is because the possible presence of noxious substances, whether below ground or in the building structure, has an impact on the value and resale chances of the real estate, and may even render it **unsellable**, apart from making people sick. If relevant legislation exists, the authorities may demand that polluted land be cleaned **at any time** and not only within the scope of a building project. Environmental protection measures may have **considerable impact**, such as limitations of use, higher insurance costs, major additional expenditures as well as delays in building projects due to assessments, cleaning and waste-disposal measures. Possible claims by third parties, such as owners of neighboring properties polluted by hazardous substances, represent another problem. A few countries maintain registers of polluted land. However, a relevant check is often the only way of clarifying the exact condition of the land. As a rule, potential buyers are well **advised to refrain from** acquiring real estate polluted by hazardous substances, or otherwise representing an environmental problem, as the associated risks are very difficult to estimate and are usually too high.

Protection of nature and the cultural heritage

Although nature-conservation regulations generally have no impact on correctly zoned real estate, it is nevertheless wise to clarify the situation as appropriate. A more important factor is represented by **restrictions relating to historical buildings** subject to protection. In most countries, the government or local authorities invest in the preservation of historical buildings at local and national level and keep records of this cultural heritage. Restrictions are normally noted in public registers or in the land register and often take the form of mandatory official approval before any changes can be made. However, the authorities may also intervene in the case of a not (yet) classified building which may be deemed worthy of protection. Anyone acquiring historical real estate that may be worthy of preservation must include these eventualities in the clarification procedure. It may be worth while discussing any planned building projects in advance with the relevant authorities in order to avoid unpleasant surprises.

The other aspect of heritage preservation is that owners of protected properties may be eligible for **state subsidies** toward renovation and similar costs in certain circumstances.

4.5.4 Access to relevant records and documents

Today, most countries maintain some type of **ownership register** which records the existence and scope of private rights to real estate. These registers may be set out in diverse ways, and their legal status also varies greatly. However, the books of the relevant registering authority must always be viewed before making a final decision to buy on the basis of information supplied by the owner or seller of the prospective real estate. The result of viewing the relevant register is usually of decisive importance to the buyer. It allows the buyer to determine, firstly, whether the seller in question is the **lawful owner** of the prospective real estate, and, secondly, whether the real estate is **free of encumbrances** or, alternatively, the kinds of encumbrances that exist (easements, mortgages, etc.). Generally, a later objection in litigation that the purchaser was unaware of an entry in the register is normally invalid. It also makes sense to check various documents, especially the sales agreement that forms the basis of the seller's ownership, or agreements on easements, financing agreements, etc. Another important point is proof of complete payment or securing of all taxes and duties by the previous owner, as the respective property and/or its owner are liable for unpaid taxes and duties in many countries.

Whoever buys an apartment or house that implies membership in an **owners association** (e.g. relating to shared facilities of a residential property) must request copies of all relevant minutes and documents relating to the association, especially a copy of the minutes of the last general meeting, a list of expenditures, proof of the reserve fund and the name of the administrator. In particular, one should check whether the meeting has decided on any building works that have not yet been carried out, or other larger expenditures.

Before every acquisition, the following must be checked by consulting the relevant register extracts and documents:

- Proof of the seller's **lawful ownership** and **authorization to dispose** of the real estate
- Proof of all existing **encumbrances and claims** on the real estate
- Proof that all **taxes** and duties have been paid by the seller
- Proof of any existing **tenancy and lease agreements** or of any corresponding negative declarations by the seller
- Where an **owners association** exists: minutes of the most recent meetings as well as confirmation that the seller has honored all his/her financial commitments to the association

4.5.5 Division of costs

It can never be precisely forecast at the time of signing the sales agreement when the actual transfer and complete payment will take place. Also, certain costs accrue up to the day of the transfer at the expense of the seller. Sales agreements consequently often contain clauses which divide up such costs between the seller and the buyer on a time basis. As a rule, this cost division is not exactly set until the transfer date has been fixed. The most common examples of such cost divisions refer to land taxes, insurance premiums for third-party liability (the real estate must always be covered!), rental income, contributions to condominium or other owners associations and advance payments of maintenance costs.

It is also advisable for the buyer to ensure that all invoices for electricity, gas, water, telephone, TV license fees, etc., have been paid by the previous owner up to the transfer date, otherwise problems might arise when the property is re-registered.

4.6 Powers of attorney

It may be advantageous to use powers of attorney when dealing with a foreign notary, local authorities or lawyers, especially if the buyer is a foreign national and speaks the relevant language insufficiently or not at all.

The general rule is that the form, effect, changes and cancellation of powers of attorney which concern the disposal or administration of real estate are subject to the law of the country in which these properties are located. In other words: powers of attorney relating to transactions with real estate are subject to the law prevailing in the location of the relevant real estate, and a choice of law in this respect is usually excluded. Even if such powers of attorney do not require any particular form in some countries, those referring to real estate transactions usually require **to be notarized**. This also makes good sense quite generally for important business. Even if a choice of law were permitted (such as when the *lex patriae* of the grantor of the power of attorney were applicable), it is **advisable for the power of attorney to be based on the local law in every respect**. After all, the power of attorney must above all be recognized locally, where the real estate is located.

If the notarization is performed by a foreign notary, it will generally need to be legalized or **authenticated**. Most countries are party to the *Hague Convention of 5 October 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents*, which requires the document bearing the signature and stamp of the notary to be provided with an *apostille* on which a higher government authority supervising notaries confirms that the notary really is authorized to exercise his/her function. This is required so that the document will be recognized in the foreign country in which it will be used.

Powers of attorney may be granted in the form of a **special or general power of attorney**, and either as a power of attorney limited in time or as an enduring power of attorney. In most cases, a special power of attorney restricted to the purchase transaction is required.

4.7 Acquiring real estate through a holding structure

The most varied factors will dictate whether real estate should be held via a company or other holding structure rather than directly. Certain features specific to various countries will be outlined here. Thus it is not uncommon in the *USA* to hold real estate via a limited liability corporation. In addition to any tax advantages, this is done especially for reasons of *asset protection*. In other countries, such as *Switzerland*, non-resident foreign nationals are prohibited from holding residential real estate via companies. The most varied regulations and reasons may exist in which a specific legal device may appear to be necessary, make sense, or not, as the case may be.

In general, **the more expensive the real estate** the more sense it will make to use a holding structure rather than buying directly in one's own name. It is debatable where to draw the line here, but in most cases a minimum value of US\$ 500,000 can be taken as a basis. Depending on the country and situation, however, this threshold may also be

set significantly lower. This is the case in *France*, when using the popular *Société Civile Immobilière*, or in *Croatia*, where the only straightforward way of acquiring real estate may be to establish a local holding company.

The larger and more valuable the real estate, the more will not only **fiscal and succession-planning aspects**, but also questions of **asset protection** and **confidentiality**, play a role. It is often best to buy smaller properties directly in one's own name – or possibly under the name of one's children or other persons, depending on the inheritance-law situation. The legal consequences in the event of succession can then be influenced by means of a will or other suitable legal instrument. But also in the case of larger properties the question arises whether it is worth while setting up a suitable legal structure, such as a company, to hold the real estate, or whether the same end cannot equally be achieved by means of a will, transfers between living persons or other contractual arrangements.

4.7.1 When does it make sense to use a holding structure?

In some situations, the use of a holding structure such as a company makes good sense for legitimate reasons of fiscal and succession planning. In *France*, for example, it is certainly often a good idea to establish a French real estate company (*Société Civile Immobilière*, *SCI*) in order to achieve more flexibility with regard to the law applicable in the case of an inheritance. This is because exclusive application of French law is mandatory for directly owned real estate, whereas company shares are considered as movable assets and can accordingly be inherited with the testator's other movable assets. In the *United Kingdom*, it makes particular sense for a non-resident and/or non-domiciled owner to hold real estate via a (foreign) company rather than directly for tax reasons. For this purpose, companies are usually set up in countries where company taxes are nil or limited and annual maintenance costs are low. Such jurisdictions include *Jersey*, *Liechtenstein*, *Malta* and *Panama*, where companies can be set up and maintained at low cost and with no or only limited local tax consequences. However, tax consequences may have to be taken into account depending on the country of residence of the company owner. So it is essential to clarify all circumstances and tax consequences carefully – including in the country in which the company owner is resident.

It is also worth noting that corporate and other holding structures (such as private foundations and trusts) are not infrequently recommended and also implemented despite **failing to pass** a thorough scrutiny by the relevant tax authorities – where such scrutiny takes place. Many countries have now extended the relevant tax laws with very comprehensive **abuse regulations**. If more than 50% of a company's assets consist directly or indirectly of real estate, that company will often be taxed just like real estate. Thus the capital gains from the sale are also taxed on the same basis (and cannot simply accrue tax-free in a zero-tax country) when the responsible tax authorities discover the true nature of the transfer. Ultimately, many company structures are based on the transfer of company shares without notification being made to the tax authorities. Although it is often highly unlikely that the tax authorities ever find out about the transaction, it cannot form the basis of a legal arrangement. The list of ways used in the various countries to try to 'save' taxes, in some cases by means of complicated structures, could fill a whole volume. Only one thing is certain: in some countries and for larger real estate it is certainly possible and makes good sense to save taxes and increase legal flexibility by setting up suitable holding structures. However, to do

so requires **international know-how** and **relevant country-specific knowledge** as well as extensive experience in connection with holding structures for real estate to be held by foreign nationals.

In addition to tax and succession-planning aspects, it is also desirable in certain cases for reasons of **confidentiality** and **asset protection** to hold real estate via the intermediary of a company rather than directly. The effective owner, then, will not appear in the ownership or land register.

4.7.2 When is it better to acquire real estate directly?

In many countries, such as *Spain*, *France* and *Italy*, it does not usually make much sense to acquire privately used real estate via a company, for various reasons. Firstly – for example, in *France* – comprehensive regulations aim to prevent acquisition via the intermediary of companies and thus make such procedures more complicated – with the notable exception of the already mentioned domestic *SCI*. Secondly, this can even have tax disadvantages, as companies are often liable to higher capital gains tax than directly owned properties at a later resale. Furthermore, most companies (again perhaps with the exception of a French *SCI*) lead, to considerable administrative costs. In many countries it therefore makes more sense to acquire real estate in the lower to middle price range directly in one's own name. However, careful planning is of particular importance in this case, and includes drawing up a suitable will or possibly also acquiring the real estate in the names of one's children.

4.8 The execution of a real estate purchase

The procedure involved in acquiring real estate differs from country to country, and sometimes very greatly. Whereas it is generally unproblematic in a country such as *France*, the greatest care must be exercised in *Italy*, for example. As the various jurisdictions apply the most diverse regulations with regard to contractual requirements and ownership transfer, only the most essential points can be summarized at this juncture.

In any sales transaction, a distinction must always be made between a new property still at the planning stage, and an already completed or used property. In the case of **new or still incompletely built properties**, the purchase price is, as a rule, payable in advance in several installments according to the progress of the building work. The buyer may therefore incur a considerable **financial risk** in certain circumstances, depending on the project developer. This can and should be secured by a suitable **insurance policy or bank guarantee**. In some countries, this form of security or insurance is mandatory (although this requirement is not always observed in *Spain*, for example). Other countries have no legislation aimed at protecting the buyer, and due care must therefore be taken.

Although **preprinted standard form contracts** are easy to complete, they are usually designed to benefit the contractual partner who has designed them or suggests that they be used. On the other hand, balanced individual contracts are a frequent source of trouble. Insistence on an individually prepared contract may not only affect the mood of the contractual negotiations, but may also change the result decisively. Especially in the case of larger real estate, it is essential to prepare an **individual sales agreement** appropriate to the situation with the aid of a competent lawyer. Nevertheless, standard form contracts are usual

and can be used with no problems in some places, such as *Florida*. There, such contracts are designed and published by the bar association and are prepared in a correspondingly fair and comprehensive manner. It should be checked in each individual case whether standard form contracts are usual, who has published them and whether they seem to be appropriate in the individual case.

As the **transaction risk** involved in a purchase is usually greater for the buyer than for the seller, the buyer should – independently of the seller or any associated persons (such as the broker) – have the documents relevant to the sale checked by a lawyer. As in all important transactions, **trust is good, but security is better**. Before and during the sales procedure, it must always be clear what **guarantees are offered by the contractual partners** so that what has been promised and agreed in a contract can also be executed – if necessary by the agency of the courts. So it usually makes sense to conclude a **preliminary agreement** – assuming this is permitted by the relevant jurisdiction – in order to obligate the seller to conclude the sales agreement and, if necessary, also to enforce the seller's declaration of intent via a court.

The buyer should always take care to ensure the necessary security either by means of provisional registration (where possible) or an appropriate guarantee by the seller. Some countries allow a **provisional entry of the acquisition in the land or ownership register** in order to secure the buyer's rights vis-à-vis third parties. This is done to safeguard the interests of the buyer and is to be recommended if available. The same purpose is also served, alternatively or additionally, by requiring the seller to set up a **bank guarantee** in the amount of the purchase price. It must run until the ownership rights of the buyer have been definitively entered in the relevant ownership register or the title deeds have been issued.

In most countries, the sales agreement – which may be drawn up privately or by a notary – is entered in a **public register**, usually known as the **land or ownership register**, in order to ensure public access to proof of purchase. The buyer should always insist on immediate conclusion of a notarial sales agreement (where applicable) and on his/her name being entered as the owner in the relevant register.

For the safe conclusion of a real estate transaction, it is advisable to consult an expert, and not only in the event of difficult questions. The expert's fee will be a fraction of the damage that could result from improper or careless action.

4.9 Defects and warranty claims

All jurisdictions make a distinction between **legal** and **material defects**.

Legal defects are those that affect the ownership rights to the real estate. Thus a legal defect exists if the seller is not the real owner of the real estate, or if the real estate is encumbered with a mortgage or right of use unknown or undisclosed at the time the contract was concluded. Also, the buyer should be aware if other legal obligations exist for which the real estate is liable – easements and encumbrances of all kinds, or claims by someone with a stronger entitlement (e.g. in the case of a double sale by the former owner), etc. As a rule, the seller is liable vis-à-vis the buyer to ensure that the real estate is free of legal defects. Depending on the type and severity of the defect, the buyer can in general be entitled to a

reduction of the purchase price, to withdraw from the agreement or to claim compensation for damages.

Material defects are those present physically on the property, such as a leaky roof, peeling paint, etc. Material defects can be further distinguished in **patent defects**, which would involve a visible deterioration of the property, and **latent defects**, which only an expert may discover upon inspection. A **concealed defect**, on the other hand, would in most cases constitute a fraudulent misrepresentation and would normally give the buyer the right to claim that the contract is void.

In almost all jurisdictions, the seller is generally liable for both legal and material defects. However, relevant warranty claims always lapse after a certain time. A buyer should always try to safeguard against possible obligations associated with the real estate and any undiscovered defects such as environmental pollution. In contrast, the seller has an interest in limiting any warranty claims after conclusion of the contract. For used properties, any warranty by the seller is, as a rule, waived in the sales agreements. In most cases, therefore, only **maliciously undisclosed defects** can justify damage compensation claims.

4.10 Key points that a seller should consider

The seller is the contractual party who normally bears the **lower risk**. However, he/she should also observe a number of important points.

From the viewpoint of the seller, it is particularly important that the **purchase price is paid in full or secured** before or concurrently with the transfer of ownership. This may be done, for instance, by means of a promise to pay, transfer of a bank check or a deposit with a notary. A direct bank transfer is in general not recommended for practical reasons. To protect the interests of both parties, the purchase price should only be paid upon the signing of the notarial sales agreement. If the buyer has to sell his/her previous home to pay for the acquisition, special care must be taken, as it must be certain that he/she really can sell the real estate and thus secure the funds required for the acquisition of the new house. A definitive form of security, for instance by means of an irrevocable bank guarantee, is essential in this case. But, quite generally, the seller should also check whether the buyer has received financing approval from his/her bank before breaking off negotiations with other prospective buyers or making other arrangements in the assurance that the sales agreement will indeed be concluded.

In many jurisdictions, the **observance of contractual or statutory time limits** is an absolutely basic condition for the correct fulfillment of a contract. If one of the contractual parties (for instance, the seller) is delayed, the other party may, in certain circumstances, be released from his/her contractual obligations and may possibly also claim compensation for damages. So both parties are well advised to observe all agreed or legally stipulated time limits to the letter.

The seller must also ensure that he/she can produce all authorizations (e.g. consent of his/her spouse) needed for the purchase, as failure to do so would delay the transaction.

Moreover, in most countries the seller is obliged to inform the buyer of **any defects** and, as a rule, the seller must also inform the buyer of the existence of any **pre-emption rights**. Often, the seller is liable to a comprehensive **obligation for information and disclosure**

and bears corresponding liability vis-à-vis the buyer. So it is important to clearly indicate any defects in the sales agreement for purposes of later evidence. Accordingly, it is essential for the seller to settle all **questions of liability** in the agreement in detail. In general, it is recommended wherever possible to exclude all liability by the seller from the agreement (this is also usual for second-hand property in most countries). This liability exclusion should be comprehensive and expressly include liability for legal and material defects, error and damage compensation, as far as this is permissible on the basis of the local law. In any case, care must be taken to ensure that the sales agreement contains **no guarantees** which the seller is unable to satisfy. If the seller makes any representations and warranties, a carefully drafted sales agreement will limit the warranties and representations to the period of time the seller has owned the real estate and exclude the periods of ownership by previous owners.

The seller should also note who is responsible for which **fees, taxes and lawyers' or notaries' fees**. In many cases, notaries' fees and transfer taxes are divided on a 50/50 basis, but this division is ultimately a matter for negotiation. Lawyers' costs are usually borne by the party commissioning the lawyer. However, the seller is always responsible for **paying capital gains tax**.

If real estate is sold together with **furniture** (especially valuable furniture, for example, antiques that belong to a historic property), the purchase price may be split (property/furniture) and, as a consequence, the taxes may be somewhat reduced as most taxes are only calculated on the basis of the purchase price of the property, and not on the furniture.

In most cases, the seller is also liable to pay the **broker's commission**. This varies **between 2% and 10% of the sale price** in different countries and is usually subject to value added tax (where such a tax exists). It should be noted that only in justified exceptional cases it is in the seller's interest to conclude an exclusive agreement with a single broker, in particular for expensive properties where confidentiality is usually important. As a rule, however, it is more advantageous to commission several brokers with the sale in order to maximize the exposure of the real estate.

Further, the seller should from the outset find out precisely any **other costs** for which he/she is liable that may be involved in the sale, i.e. which will be deducted from the sale price, and what **tax consequences** the sale may have. The **real estate acquisition taxes**, which are levied everywhere, are as a rule borne by the buyer. However, if they cannot be collected from the buyer, they may in some countries be charged to the seller. This is particularly relevant when the seller remains resident in the same country.

When apartments or houses belonging to an **owners association** (e.g. concerning the shared amenities of a condominium) are sold, the amount of any reserve or renovation fund must be determined, as this can have an effect on the sale price.

4.11 Checklist: Acquisition of real estate

The following checklist offers a systematic approach to clarifying all essential factors (**'due diligence'**) which must be taken into account when acquiring real estate.

1 The location

Location is the first and most important factor to be considered when selecting a property. In addition to the current circumstances, it should be noted how the environment may change in future. A future positive change in the location quality is the most important factor for the potential growth in value of real estate.

- Location quality of the local municipality.
- Position within the municipality.
- Changes in location quality to be expected in the mid- to long-term.
- Orientation of the building (north/south, east/west).
- Sunlight exposure of the building, balconies, terraces, gardens – during all seasons.
- Climatic situation: Does the climatic zone meet expectations? Consult tables of average monthly temperatures, air humidity and rainfall.
- Wind exposure: How frequently and strongly do winds blow in this location? Possibly consult a relevant wind atlas. Winds (such as the *Bora* in *Dalmatia* or the *Mistral* in *France*) can considerably impair comfort in outside areas (such as during garden parties).
- If the house is on a slope: water pressure, danger of landslides, avalanches, etc.
- Level of groundwater table: relevant in particular with regard to basements and cellars, but also if it is desirable to have one's own well, for example, on a country estate.
- View: Is the view safe from obstruction by subsequent building?
- Privacy: Do neighbors have a view into/overlooking the property?
- Size and shape of the real estate.
- Access: Asphalted, concreted, gravel, dirt road?
- Is access possible in winter? Winter service? Who clears the snow?
- Waste-disposal service.
- Noise (roads, airports, rail lines, etc.).
- Smells (paper factories, pig farms, food industry, etc.).
- Sufficient distance from filling stations, covered car parks and heavily used roads (exhaust and noise emissions).
- Sufficient distance from pylons/high-tension lines and mobile phone network antennas.
- Shopping facilities, banks, post office.
- Schools and kindergartens, secondary and higher schools, evening-class venues.
- Sports facilities.
- Cultural facilities.

- Public transportation: How can the property be reached by public transportation? Where is the nearest national or international airport? Where is the nearest rail station? How good are the connections?
- Links to road and freeway network.
- Basic healthcare.
- Extended healthcare: Where are the nearest major hospitals?
- Existing or planned future projects for the construction of freeways, airports, high-voltage power lines, transmission equipment, power plants, waste disposal tips, factories or other major public or private projects?
- Existing or planned future projects for changing flight paths of nearby airports?
- In which construction zone is the real estate located? Existing or planned future projects for other buildings in the vicinity?
- Is the real estate located in a protected area?
- Major accident risks: Are there any industrial or other plants in the vicinity which may pose a risk (chemical plant, nuclear power plant, liquid gas tank, cyanide storage of a metal-processing factory, etc.)?

2 Building materials and building quality

- Size and distribution of main and ancillary rooms.
- Fitting and extension options.
- Architecture.
- Construction of the building (masonry, concrete, wood).
- Quality of the materials used.
- Windows (wood, plastic, aluminum).
- Energy consumption.
- Thermal insulation: Is a heat insulation certificate needed/available?
- Footfall sound/soundproofing (especially important for apartments).
- Penetration of moisture (e.g. old walls, sloping location).
- Condition of the roof.
- Pest damage (e.g. termites).
- Asbestos contamination (old tiles, insulation materials, etc.).
- Lead contamination (old, decaying paints, plumbing, etc.).

It is often advisable to call in a building expert familiar with the local building standards in order to correctly assess the condition of the real estate.

3 Interior design

- Standard and equipping of kitchen, bathroom, showers, toilets.
- Quality of the materials used.
- Design and interior architecture (e.g. color concept).
- Wheelchair access: Is the house also suitable for elderly or handicapped people?
- Special details.

4 Installations and household technology

If certain installations are absent or need renovating, what does an installation or renovation cost? How long will the work take? Are approvals required?

- Electrical installations.
- Sanitary installations; connection to the water supply.
- Heating: What heating system is used? In the case of oil heating, it is important to note if the oil tank is outside (= environmental risk).
- Have the heating system and oil tank been regularly serviced?
- Telephone connection: Internet/ISDN/ADSL?
- Television reception: Cable TV, satellite dish?
- Swimming pool: Has it been regularly serviced? What is the condition of the pool? Can it be extended? Does this need approval? Water usage restrictions?

5 Security

- Are burglaries frequent in the area?
- Alarm system.
- Is the property sufficiently illuminated?
- Are all outer doors sufficiently secured?
- Are all windows, day shafts and balcony doors, shutters and roof windows secured against intrusion?
- Is there a need for security doors or security windows?
- Are power and communication lines secure from sabotage?
- Are there any neighbors or trustworthy persons who can keep an eye on the real estate during your absence?
- Is there a need for a private surveillance service?
- Danger of natural hazards (forest fires, flooding, storms, avalanches, etc.)?

6 Legal questions concerning the real estate and its acquisition

- In what building zone are the real estate and its neighboring properties located?
- Can construction activity be expected on the neighboring properties? If so, how extensive will it be (e.g. building height)?
- Distances between the properties.

- Is there room for extensions, and would approval for an extension/rebuilding be issued?
- Might the real estate or parts of it have been built illegally? Possibly check the building permits.
- Is the seller really the lawful owner (land register extract, proof of ownership)?
- If a real estate holding company is acquired, it should be scrutinized in detail. It may be more secure for the buyer not to acquire company shares but to buy the real estate from the company.
- Is the seller married, or is he/she cohabiting? Is approval by the spouse or cohabiting partner required?
- What rights, easements, servitudes, etc., exist that benefit the real estate?
- Are there any easements, servitudes, liens, charges or other encumbrances that burden the real estate?
- Have all duties and taxes been paid in full by the previous owner?
- Inspection of the most recent and earlier tax statements for real estate taxes and other duties.
- Do contractual pre-emption rights exist?
- Do legal pre-emption rights exist (e.g. in favor of tenants, neighbors or the state)?
- Are there any restrictions concerning environmental, nature or heritage protection?
- Could pollution of the soil constitute a hazard? If so, the real estate should be checked accordingly. A check is in any case recommended for larger real estate.
- How will the real estate be used in future? Depending on its use (e.g. as a guest house), official approval may be required (does it already exist or is it available?).
- In which name or possibly company is the real estate to be purchased?
- The real estate purchase transaction should be handled only by a competent notary or lawyer. The functions of lawyers and notaries vary in different countries, and use of a notary may be mandatory.
- After the sales agreement has been concluded, the acquisition must be entered immediately in the land or ownership register.
- In the case of condominium or other ownership which involves membership in an owners association, it is important to request copies of the statutes and all regulations, the minutes of the most recent general meeting, the most recent annual accounts or list of expenditures, the key to expenditure distribution as well as the name of the administrator. In particular, a check must be made as to the rights and obligations incumbent on the individual owners as well as on the administration and whether the meeting of the owners association has decided on building work which has not yet been carried out.
- Also verbal assurances and apparently evident matters should be confirmed in writing by the contractual partner.

- In the event that a lower sale price than the actual price is specified on the sales agreement in order to reduce the tax burden, the risks should be assessed. Such action is illegal in all countries.

7 Legal questions on structuring real estate ownership

- Should the real estate be acquired under one's own name, or should a special purpose company be used as an intermediary?
- Are other, possibly more complex, holding structures possible and useful?
- Advantages and disadvantages of using a company as an intermediary in the country in which the real estate is located.
- Advantages and disadvantages of using a company as an intermediary in the country in which the buyer is resident.
- Acquisition in one's own name or jointly with one's spouse? Note that various kinds of joint ownership rights are possible in different countries.
- Acquisition in the children's names ('skipping' of one generation)?
- In the event of acquisition in the children's names, should a right of residence be retained?
- In the event of acquisition via a company, should a local, foreign or offshore company be used?

8 Renovations and building-law restrictions

- Is reconstruction and extension permitted?
- Heritage and landmark/monument-protection regulations.
- Requirements of the fire and police services.
- What does partial or complete renovation cost?
- Are good local construction companies and reliable tradesmen available?
- Is it possible to carry out the renovation work oneself or with foreign contractors without coming into conflict with local construction companies or the law?

9 Taxes

- One-time real estate acquisition taxes.
- Recurring real estate and income taxes regarding the real estate.
- With regard to income taxes on rental income, is it possible to offset borrowing interest and other expenses against rental income?
- Inheritance and gift taxes.
- Capital gains taxes on a future sale (possible different scenarios if real estate is held directly vs through a company).

- Have all previous taxes been paid by the seller?
- In the case of change of residence: Total tax burden? Is pre-immigration tax planning advisable?

10 Inheritance law aspects

- Which inheritance law applies? Is a choice of law possible?
- What impact does the matrimonial property regime have, and can this be used in inheritance tax planning?
- International estate planning (use of wills, gifts, trusts, foundations, etc.).
- Possible acquisition of the real estate in the children's names.

11 Various

- Home-contents' insurance, possibly buildings' insurance, additional insurance policies (see section 10.1, Checklist: Insurance).
- In case of own well/spring: Can this be used privately? Do communal charges exist?
- How are foreign nationals accepted in the area? Do many foreign nationals already live in this area?
- Think of resale. From the standpoint of potential value growth, properties in areas in which the location quality is likely to improve in the future are to be preferred.

5 New buildings and purchase from a developer

Planning and building one's own house can be an extraordinarily satisfying experience, but it can also end in great frustration and disappointment. This is even truer in a foreign country. Whoever hopes to build their own house abroad must be particularly aware that special rules apply in the construction trade – and those rules are different abroad.

In every country, it is possible to find an **architect** and to commission the necessary experts to build a new property according to plans prepared by oneself or the architect. However, this approach inevitably requires relevant legal and practical advice so that the various agreements can be drawn up and mutually coordinated. It should also be noted that deadlines and costs are often overrun even in the best professionally managed building projects, leading to greater or lesser frustration for the principal. Architects are normally paid for providing their services in a reasonably competent and diligent manner. Unless agreed otherwise, the principal normally has the responsibility to review the designs and report any errors or requirements for redesign unless the agreement with the architect or general contractor clearly stipulates that the architect or contractor guarantees for the design and proper execution or it was agreed to deliver a turn-key construction. It is therefore important that in any agreement the risk for inappropriate design or construction clearly lies with the architect or general contractor.

In view of complex building standards and the diversity of offers in the construction trade it is often wise to engage a highly experienced architect as well as an independent **adviser** who in fact represents the interests of the principal vis-à-vis both the architect and the

various building contractors. Such an adviser may also be called in on an ad-hoc basis, i.e. merely in the event of important decisions.

It is usually much easier to **buy a new building from a developer**. However, special rules must be noted here too. The buyer essentially acquires the land from the developer together with a building which is still to be constructed. Specific contractual conditions are then mandatory in some countries. There may even be special laws aiming principally to protect the buyer of the real estate. The latter must also note various particularities, especially as regards the manner in which the purchase price is paid, questions of warranty, release from encumbrances (such as the mortgage used to finance the development) and the risk involved in completing the buildings. Key factors include the building schedule and the **securing of the purchase-price payment**.

It is usual for the purchase price to be paid in accordance with the progress of the building work, for example as follows:

- 10% as a deposit
- 15% when the foundations have been laid
- 20% when the bearing walls have been built
- 15% when all the walls have been completed
- 20% when the roof has been completed and the windows and doors fitted
- 20% when all the work has been completed.

In some countries it is usual to retain 5% of the total price for warranty work. This is also a good idea in those places where it is not usual. Unfortunately, developers and general contractors are only rarely called to account by the courts for **overrunning deadlines**. So the risk of such delays, which may be very unpleasant for the principal, is correspondingly high.

It should also be noted that many developers, i.e. sellers of new real estate, are financially not very strong. So unless one deals with a reputable, financially sound and well-managed company the buyer may also incur a considerable financial risk from this standpoint. **If a developer becomes insolvent**, deposits may be lost and warranty claims may no longer be asserted. So here, too, it is essential to ascertain exactly what kinds of guarantees are offered, and to be aware of the worst-case scenario.

Local authorities almost everywhere have considerable freedom in **granting building permits** – this applies at least to all more or less densely populated areas. So a prospective builder will usually be bound by more or less **strict regulations**. It is obvious that building cannot begin until appropriate building approval has been granted; it makes sense, therefore, to start planning as early as possible and to submit the application for approval at an early stage. Prospective builders are also strongly advised to discuss their project in advance with the responsible authorities, as well as with any neighbors who may be affected, and to comply with their requests wherever possible. The applicable legal situation must also be considered. Some countries require the use of a qualified architect. In any case, it will be impossible to dispense with the services of an architect as well as other specialists in order to deal with all the questions and problems arising in connection with the project.

Successful claims for the correction of real estate defects and regarding warranties require accurate **documentation of the progress of the building work** as well as a comparison of the initial order with the successful completion of the work. Disputes often result from

insufficiently documented supplementary orders which had been awarded without any separate cost estimates and, in some cases, without being clearly drawn-up.

6 Reconstruction and renovation of old properties

Most buyers acquire used real estate. This may be in a good or very good condition and the new owners might be able to move in immediately. However, real estate with an old structure may need, or could benefit from, reconstruction or renovation before the new owners can reasonably be expected to live in it.

It is often possible to acquire a substantial old house with considerable land around it surprisingly cheaply. However, such properties have their price when it comes to renovating them and making them comfortably habitable again. In most cases, such renovation work not only takes up a lot of time but also a lot of money. The cost of retiling a large roof alone might easily amount to the entire initial purchase price of the real estate. Nor should the costs of laying a damp course, renovating the electrical installations and plumbing, assuring thermal insulation, renewing the windows, floors, etc., be underestimated.

So when buying an old property that needs renovation, it is absolutely necessary to call in a surveyor, architect or construction engineer to prepare a report assessing the condition of the building. Besides a general evaluation of the structure, walls, roof, etc., issues such as possible asbestos contamination in old tiles and insulation, or lead contamination due to decaying paints, plumbing, etc., should be carefully addressed. Often in older houses wooden structures such as the roof, beams, etc., are affected by xylophagous insects (e.g. termites). Although such checks cost money, it often saves unpleasant and expensive surprises.

The **availability of reliable tradespeople** and other specialists needed for a reconstruction or renovation job is often a major concern for a foreign real estate owner. In many countries, especially in the south of *Europe*, artisans are good and relatively inexpensive. There are also well-qualified and experienced architects and other specialists who may have to be called in for particular projects. Although tradespeople may also be available elsewhere, they can be relatively expensive (for instance in *Switzerland*), or very scarce (as in the *USA* or *Sweden*) and, consequently, owner-occupied properties tend to be maintained and renovated by their owners. Tradespeople everywhere are happy to do work without an invoice and get **paid in cash**. Especially in countries such as *Italy*, *Spain* or *Greece*, but elsewhere as well, a considerable proportion of privately commissioned artisan work is carried out without payment of VAT, which is usually considerable. Quite apart from the fact that this practice counts as tax evasion, it also involves disadvantages for the customer. If no invoice is issued, the expenditures cannot be accounted to the value of the real estate in the event of a later resale and the capital gains tax works out correspondingly higher. This is obviously unimportant in the case of maintenance work and smaller renovations but could well be relevant for larger rebuilding projects.

7 Rental and tenancy

For a prospective buyer, it is a very good idea to rent a similar property in a comparable location for a period before purchasing. Local and internationally specialized agencies offer

a broad range of vacation apartments and houses which may be rented on a daily, weekly or monthly basis.

Many second homes are rarely used and remain empty for many months of the year. So for an owner of a second home it is obvious to ask whether it might not make sense to rent out such real estate, at least for limited periods. The answer has to be a firm negative. **Temporary rental is not worth while in most cases.** Firstly, because the time and costs involved are relatively large (administration, cleaning, wear and tear of furniture by careless tenants, etc.), and, secondly, because the revenue obtained usually compares poorly with the outlay and is subject to substantial tax in most countries, *The Bahamas, St Kitts & Nevis* and *Croatia* being notable exceptions.

Whereas some countries have almost no relevant **tenants' protection legislation**, and a tenant can be evicted from a rented real estate at any time (for example, in *Florida*), other countries have tenants' protection laws which may be very rigorous. In some circumstances, they may offer tenants a **position almost as secure as that of owners** (e.g. in *Sweden, France, Spain* and some other European countries). So it is wise to check carefully before renting how extensive the local tenants' protection laws are. In many cases, this alone may be a good reason not to pursue a rental option. On the other hand, rental agreements not designed for permanent residence, especially those relating to **vacation homes**, usually come under the category of general conditions of rentals and are not subject to rigorous tenants' protection regulations for normal residential real estate. Before deciding to rent, it is in any case wise to find out exactly what legal stipulations would apply to the tenancy and, especially from a practical standpoint, what ways exist of terminating the lease against the tenants' wishes and of evicting the tenants from the rented property.

Standard form contracts are often used to conclude rental agreements, and specific forms are sometimes mandatory for giving notice. Payment of rental security amounting to between one and six months' rent is usual and also makes a lot of sense from the landlord's standpoint. The security sum is often paid to the landlord or into a special rental security account at a bank.

7.1 Checklist: Rental and leasing agreements

The following list sets out the key points and clauses which should form part of every rental agreement:

- A precise description of the real estate, its location plan, including all buildings, parking spaces, interior fittings, living area, etc. Separate plans may also be annexed to the rental agreement.
- Prepare house rules when renting out residential real estate.
- Key data (signature date, start of rental, start of payment, expiry date).
- Time of handover of possession.
- The agreed rent and an itemized list of all costs, such as taxes, to be borne by the tenant.
- Regulation of insurance policies and insurance costs.
- Regulation of cases of damage (deferment of rental payments; obligation to carry out repairs).

- Tenant's liability.
- Repairs and maintenance.
- Regulations concerning subletting.
- Provision of security by the tenant.
- Contract extension/options.
- Possible formula for calculating the rent.
- Notifications (method, addresses).
- Lawyers' costs (in favor of the prevailing party in litigation – this is particularly important in the *USA*, where the prevailing parties normally have to bear their lawyers' fees themselves).

8 Succession and gifts

The ownership of real estate abroad also involves questions of international law and taxes relating to inheritances and gifts. Depending on the country in which the assets are located, different rules concerning inheritance and various taxation laws will apply. In earlier times, a foreigner's estate fell automatically to the state in some countries (such as in *France* up to 1819). This is obviously no longer the case. Nevertheless, cross-border inheritance and gifts are often relatively complicated matters, and international inheritance law is one of the trickier legal domains. Thus French inheritance law continues to make life difficult for foreign owners of real estate because real estate located in *France* is subject exclusively to French inheritance law. There is no possibility of choice of law. This means, among other things, that inheritance contracts are recognized only to a limited degree if at all, and that a surviving spouse may be considerably disadvantaged. However, such a disadvantage may be mitigated or even avoided by suitable legal instruments such as a **will**, a **gift** or other arrangements **during the testator's lifetime**. In contrast, other countries such as *Italy* and *Spain* permit real estate located there to be inherited on the basis of the laws of the testator's country of citizenship (*lex patriae*), i.e. according to, for example, English law if the deceased was an English subject.

The applicable rules will depend on the country concerned. Before acquiring real estate abroad, a prospective buyer is well advised to check a number of points: exactly which law is applicable, whether a choice of law is permitted, what taxes are payable in the case of inheritance and whether there are any ways of reducing or even avoiding inheritance taxes by means of suitable legal instruments or holding structures. By being aware of these questions even before the purchase, one can take appropriate steps to make favorable arrangements in terms of inheritance law and possibly save considerable taxes and costs. A detailed check of the relevant circumstances is always worth while. Two **central questions** arise in such cases:

1. **Applicable law** What inheritance law is applicable to the foreign real estate – can the applicable law be determined by a choice of law or by the intermediary of a suitable holding structure?

2. **Inheritance taxes** Where and to what extent is inheritance tax payable in the event of a testator's death – can this tax be reduced or even avoided by suitable measures?

8.1 International inheritance law

In the case of cross-border real estate ownership, i.e. when the owner lives in a different country from that in which the real estate is located, the laws of both countries must be considered. This applies especially to inheritance law. The interplay and delimitation between various national inheritance laws is the province of international inheritance law. Two questions are of primary importance: **which authorities or courts are responsible** for handling an inheritance case, and **which law is to be applied?** The question also arises as to which law should apply to the form of a testamentary disposition. In order to answer these questions, the relevant national laws that regulate national and international private law must be consulted. But **international conventions** must also be considered, especially the *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*. This stipulates that a testamentary disposition shall be valid **as regards its form** when it has been drawn up to comply either with the law of the testator's home country, of the place where it is drawn up, or, in the case of real estate, of the place where the real estate is located. Other conventions which may be relevant are the *Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons*, the *Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition* as well as the *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*. For more information about these conventions, see the homepage of the *Hague Conference on Private International Law* at www.hcch.net.

The inheritance law of many countries is based on the principle that an estate cannot be divided (**principle of unity of the estate**), i.e. if the testator is a foreign national and owned local real estate, then foreign inheritance law applies. However, some legal systems make the application of local law mandatory to real estate located in their national territory (e.g. in *France*, where French law applies exclusively and necessarily to all immovable property located in *France*, and a choice of law is excluded). This may lead to a **division of the estate**, i.e. the estate being divided or split in different ways according to the applicable national laws. This **principle of scission** is followed by most common law as well some civil law jurisdictions. One part of the estate (movable property) is then subject to the law of one country, and the other part (immovable property, e.g. the house in *France*) to that of another. Where one owns real estate in a state that applies the principle of scission, separate wills should be made for the different parts of property. In many cases, however, the problem may be bypassed by setting up a suitable company structure. If a property is held through a company, the company shares count as **movable property** (just like cash, bank accounts, jewelry, etc.), and are subject to the law of the testator's last domicile.

In some circumstances, **a choice of law is possible** (e.g. in *Spain*). In many countries (e.g. in *Italy*), however, the *lex patriae* of the testator generally applies, i.e. the law of the country whose citizenship the deceased possessed. So, if an Australian decedent leaves a property in *Italy*, Australian inheritance law will also apply to it. If a **will** exists, its contents will take precedence: if no testamentary disposition exists, the inheritors to be designated on the basis of Australian inheritance law will inherit. For the transfer of ownership of real estate abroad, however, legal procedures require the application of the foreign law, and

relevant responsibility rests with the foreign authorities and courts. The foreign authorities may consequently be confused by unfamiliar documents. In general, land-registry officials, notaries and even judges are sometimes bewildered if they are suddenly confronted in the course of their daily work with the law of another country and foreign documents. So it is often advisable to draw up a suitable will for the foreign real estate which satisfies the legal requirements of the country in which it is located. **Intestate succession** applies if the testator has left no, or an invalid, testamentary disposition, the entire estate was not divided up in the will, or if the testamentary inheritor has predeceased the testator, has renounced his/her inheritance or is deemed unworthy of receiving it. It is always advisable, therefore, to make a testamentary disposition. As already mentioned, its specific form will depend on the requirements of the relevant legal system.

Inclusion of the property or parts of it in a property-holding company, a **trust** or a **family foundation** may in certain circumstances offer a suitable means of efficient succession planning. In any event, expert advice should be sought in these matters to avoid costly complications in case of an international inheritance situation.

8.2 Matrimonial property regime and inheritance law

Questions of inheritance law may also involve issues of matrimonial property law and in particular questions as to which matrimonial property regime applies. The matrimonial property regime that the spouses selected when they got married or at their first matrimonial domicile is recognized in most countries. This has a corresponding effect on the situation of married testators with respect to inheritance law. As the spouses are subject to a specific property regime according to their national law, the law applicable at the time of the marriage or the law of their first matrimonial domicile, this property regime is given priority in case of an inheritance. This means that the assets that are actually to be included in the estate will depend on the relevant matrimonial property regime. It follows that a careful selection of a suitable matrimonial property regime may allow succession planning in favor of the surviving spouse, which might not have been possible purely from the standpoint of the applicable inheritance law.

8.3 Forced heirship provisions

Whereas on the civil-law dominated **European continent** the testamentary capacity of the testator tends to be more or less restricted by forced heirship rules which provide for reserved portions of close relatives (generally children), testators in the common-law **Anglo-American legal sphere** are largely free to order their estate as they wish, having regard, however, to the rights of surviving spouses. However, foreign real estate located in a country with no forced heirship can be inherited with exclusion of the forced heirship of the testator's home country – which remains valid – only under certain preconditions. This is particularly the case when the **main residence** has been moved abroad specifically for this purpose. In many cases, an international change of domicile is the only way of bypassing forced heirship provisions in a legally effective way. The same end may in some cases be achieved with the aid of suitable structures, such as **private foundations** or **trusts**. However, this involves a very sophisticated area of international estate planning. It should be approached only by suitably qualified and experienced specialists, as all too often structures are set up in this context which cannot hold up against challenges in a court.

8.4 Gifts

Real estate may also be transferred as a gift, and here too corresponding formalities must be observed (the written form being the minimum requirement in most cases). However, higher transfer taxes (gift taxes) often apply for transfers as gifts. So where this is allowed it may make more sense to arrange a transfer between living persons as a sale rather than a gift. In this context it should be noted, however, that a purchase at an intentionally low purchase price is known as a mixed gift, which may have tax consequences. If the purchase price is purely symbolic, the contract is normally considered as a pure gift and taxed that way (see Table 2).

9 Taxes and charges

The principle that **real estate is taxed where it is located** applies on an international level. However, the asset value or any income from real estate may additionally be taxed at the owner's domicile. In the worst case, **double taxation** may be incurred. This may mean that, for example, wealth taxes are charged on the real estate in country A where it is located, and that the real estate is included – instead of being exempted – in the calculation of the net wealth of the owner resident in country B, where he/she is being taxed on the total worldwide wealth, including the real estate located in country A.

9.1 One-time taxes and charges on purchase

The purchase of real estate generally involves considerable **transfer taxes** (in the form of land or document transfer taxes, stamp duties, etc.) which may well exceed 5% of the purchase price and in some countries even more (for instance up to 11% in *Greece*). The purchase of new real estate normally incurs no transfer tax, but is subject to a sales tax or **value added tax (VAT)** in many countries. *VAT* rates are usually higher, around 20% in most European countries, but lower *VAT* rates often apply for new buildings.

In general, land transfer taxes are charged only on the price of the land and buildings, i.e. exclusive of any movable property. If a furnished house is sold, it is in most cases permissible to list the price of the furniture separately in the contract so that only the part of the purchase price relating to the land and buildings is specified in the taxable property sale. This often allows the total purchase price and the associated land transfer taxes (as well as other fees depending on the purchase price, such as notary fees) to be legally reduced to some extent.

As a rule, in civil law jurisdictions **notary and registry fees** are also payable. However, both their structure and amount vary greatly in different countries. Whereas registry fees, and often notary fees too, are specified by the law, in some countries notaries have considerable discretion in setting their fees. Consequently, notary fees for real estate of a particular value may vary greatly. By **requesting a cost estimate from the notary**, the prospective buyer can obtain a clear idea of the costs involved and avoid unpleasant surprises later. If a lawyer is also called in, **lawyers' fees** will also be due. Here too it makes good sense to obtain an estimate in advance. In some countries, lawyers work strictly on the basis of hourly fees plus out-of-pocket expenses. However, in many cases a one-off fee can also be arranged, which usually comprises a certain percentage (as a rule 1% to 3%) of the transaction value. In most common-law countries (such as in the *USA*, *The Bahamas* and *England*), real estate

Table 2 Succession laws and inheritance taxes in selected countries

Country	Uniform inheritance law ³	Divided inheritance law ³	Applicable inheritance law based principally on		
			Actual domicile	Nationality	Legal domicile
Austria	x			x	
Bahamas	x		x		
Canada		x	x		
Croatia	x			x	
France		x	x		
Germany	x			x	
Greece	x			x	
Hungary	x			x	
Ireland		x			x
Italy	x			x	
Malta	x		x		
Monaco		x		x	
Portugal	x			x	
Spain	x			x	
Sweden	x			x	
Switzerland	x		x	x ⁷	
UK/England		x			x
USA/Florida	x		x		

Notes on the table:

- ¹ Renvoi: The applicable law makes provision for remission to the referring law or further remission to a different foreign law.
- ² Relatively broad terms are used for the sake of legibility. As a rule, however, it can be assumed that the term 'nearest relatives' refers to children and spouse and the term 'other relatives' to parents and siblings.
- ³ Uniform inheritance law = the same law applies to movables and real estate; divided inheritance law = different laws apply to movables and real estate.
- ⁴ Children, spouse, direct descendants or forebears, adopted children and parents.
- ⁵ In the case of both tax-free inheritance and the donation of real estate, certain taxes are payable for the transfer from testator to inheritors or from donator to donees as recorded in the land register. If this does not involve the main residence, these mortgage and land-register taxes do not exceed 3%.

transactions are handled exclusively by lawyers and almost no notary costs are involved. However, the lawyers' costs are then correspondingly higher.

9.2 Annually recurring taxes and charges

In addition to unavoidable annual **real estate taxes**, which are levied in some form or other in most countries (except, for example, in *Malta* or *Monaco*, which have no annual charges of any kind on real estate), any **revenue** is also regularly taxed as income if the real estate is rented. As a rule, however, maintenance and similar costs can then be set off against the taxable income. Some countries levy income tax on what is known as an **imputed rental value**, i.e. an income is calculated which would be obtainable in the event of rental, and this fictitious income is then taxed. Some countries additionally levy **wealth taxes**, which can constitute up to 1.5% and more of the value of the real estate. In *Spain*, for instance, the maximum tax rate on larger assets is 2.5%, which is very high in an international comparison. In contrast, many countries have no general wealth tax, but merely charge such taxes on property in the form of land or real estate taxes.

Need a renvoi be considered? ¹	Is there a forced heirship?	Maximum tax rates in % on inheritance for ²			Country
		Spouses and closest relatives	Other close relatives	Unrelated persons	
Yes	Yes	15	50	60	Austria
No	No	0	0	0	Bahamas
No	No	0	0	0	Canada
Yes	Yes	– ⁴	5	5	Croatia
Yes	Yes	40 ⁴	45	60	France
Yes	Yes	30	40	50	Germany
No	Yes	20	30	40	Greece
No	Yes	21	30	40	Hungary
Yes	Yes	20	20	20	Ireland
Yes	Yes	0 ⁵	0 ⁵	0 ⁵	Italy
Yes	Yes	5 ⁶	5 ⁵	5 ⁵	Malta
Yes	Yes	0 ⁴	8	16	Monaco
Yes	Yes	0	10	10	Portugal
No	Yes	40.8 ¹¹	64.8 ¹¹	81.6 ¹¹	Spain
No	Yes	30	30	30	Sweden
Yes	Yes	0 ⁸ –11 ⁹	0 ¹⁰ –23.1 ⁸	0 ⁹ –54.6 ⁸	Switzerland
No ¹⁴	No	40	40	40	UK/England
Yes ¹²	Yes	55 ¹³	55 ¹²	55 ¹²	USA/Florida

⁶ Only on real estate. Movables are not taxed.

⁷ If the foreign national domiciled in *Switzerland* expressly stipulates application of the law of his/her home country.

⁸ Most cantons, including the canton of *Schwyz*.

⁹ Canton of *Geneva*.

¹⁰ Canton of *Schwyz*.

¹¹ These are progressive rates (starting at 7.65%) depending on the size of the inheritance (here over Euro 797,555.08) and of the inheritor's prior assets in Spain (here a max. of Euro 4,020,770) and the multiplier referred to them.

¹² Florida law allows renvoi to be legally excluded.

¹³ Tax-free allowances of up to US\$ 1,000,000 for spouses of US residents.

¹⁴ The *UK* does, however, have legislation providing for dependants who have not been adequately provided for.

9.3 Capital gains tax

In most countries, the owner of real estate is liable to pay taxes on any **value increase** or **capital gains** resulting from the sale. These **capital gains taxes** often decline in proportion to the time during which the real estate is held. Sometimes different tax rates are applied depending on whether the real estate is held or sold by a private person or a company. This will have to be considered where holding structures are set up.

It is advisable to carefully retain all invoices and receipts for costs incurred during the period of ownership for renovation and maintenance work, as any expenditures for value-increasing investments can usually be deducted in calculating the capital appreciation.

9.4 Inheritance and gift taxes

Whereas US real estate is taxed at a rate of up to 55% at transfer to the inheritors, countries such as *The Bahamas*, *Italy* and the canton of *Schwyz* in *Switzerland* charge no **inheritance taxes** at all. Except for *Italy*, which has abolished inheritance taxes altogether, rates of inheritance tax can be very high in the *EU*. Even if the inheritance takes place between spouses and close relatives, if the testator is the direct owner of the property, inheritance

taxes can quickly rise to 20 or 30% of its market value. In the event of inheritance to unrelated persons, they can easily reach 60% (*France*) and in extreme cases even over 80% (in *Spain*, for example, where the highest tax rate for inheritance to wealthy unrelated persons is 81.6%). The higher the value of the estate and the more distant the kinship, the higher is the inheritance tax. *Spain* also has the interesting peculiarity of taking into account not only the value of the estate and the degree of relationship, but also the wealth of the inheritor. This may in certain circumstances lead to the enormous maximum tax rate of 81.6%. So it should always be determined before buying who is to be the legal owner of the foreign real estate. Depending on the circumstances, various options are available before a purchase, such as setting up a holding structure or direct acquisition of the real estate in the names of the children.

Even for real estate in the medium price range, it already makes sense to make suitable legal arrangements to reduce or avoid foreign inheritance taxes within the framework of **international estate planning**. This can often be done, and it is worth while carefully checking out each case individually.

9.5 Other taxes and charges

In most countries, various **lesser taxes and duties** are payable at acquisition, but also annually. They include smaller stamp duties for documents, sewage connection charges (which can be considerable, for instance in *Switzerland*), garbage removal charges, and connection charges for cable TV which, in some countries, can also have a tax-like character.

Other charges may include costs for fire or building's insurance. These are not mandatory in many countries, so taking out such a policy or not is at the discretion of the owner. In other countries, however, every real estate owner is obliged to conclude such an insurance policy.

If the activities of a private real estate investor exceed the limits of 'normality', in many countries there is a risk of being considered as a **real estate dealer** for tax purposes. In such a case, all revenues from the real estate inclusive of sales profits count as earned income and are liable to the usual income tax, which may be very high. In addition, there may also be value added tax implications. However, this will obviously not apply to a one-time purchase of a privately used real estate.

9.6 Incorrect (lower) statement of sale price on the sales agreement

The basis for calculating real estate transfer taxes and capital gains taxes is normally the **purchase price documented in the purchase deed** (such as a sales agreement authenticated by a notary). This offers a tempting way of 'saving' taxes by stating a lower sale price on the sales agreement. However, such action constitutes tax fraud and can lead to considerable sanctions, depending on the country concerned. Nevertheless, it continues to be common practice in countries such as *Spain* and *Italy* and in some cases the other party to the agreement will even insist on it.

This practice not only evades part of the real estate transfer tax usually payable by the purchaser, but the seller also 'saves' taxes on the appreciated value of the real estate. In addition, the difference to the real purchase price not declared in the sales agreement is often paid in untaxed money, which represents another motive for this practice.

Sometimes – for instance in *Spain* and *Italy* – it may even be quite impossible to acquire certain real estate without such illicit payment, as the seller is only willing to sell to someone who is prepared to pay part of the purchase price illicitly. This preference on the part of the seller may also be linked to the fact that he/she had also paid part of the price illicitly and would now have to pay considerably higher capital gains tax if the true sales price were put on the agreement.

Quite apart from the fact this practice is illegal and may lead not only to fiscal but also in some cases to considerable criminal sanction, depending on the country concerned, it in any case involves **more disadvantages than advantages, above all for the buyer.**

A particular problem, which should not be underestimated, concerns the handover and **time of transfer of the cash.** Should the money be transferred when the preliminary contract is signed, at the notarial authentication of the main agreement or only when the property changes hands? If the sales agreement is not fulfilled, any illegal subsidiary arrangements can be unfortunate for both buyer and seller. A purchase in which the declared price does not correspond to that actually paid is generally considered a **fictitious transaction**, which is invalid in most countries, and leads to corresponding complications if any contractual claims are asserted. Thus, if the buyer should wish to pursue litigation against the seller, either for building defects or in connection with the title, the responsible court will, as a rule, at most sentence the seller to reimburse the documented and registered purchase price. Normally no evidence is admitted which shows the purchase price to be any other than the official one. The buyer should also note that an officially lower purchase price leads to a **higher capital gain** at a later resale and thus to correspondingly higher capital gains tax – unless the seller finds another prospective buyer who is willing to pay part of the sale price illicitly.

In the case of **acquisition from a legal entity, such as a company**, this illegal practice can also be risky in the event of the latter's bankruptcy. In most countries, if the purchase price specified in the official sales agreement differs significantly from the market value of the real estate, the receiver can contest the sales contract and possibly even reclaim the real estate. In the worst case, the buyer would have to register his/her bankruptcy claim at the price specified in the official sales agreement, or alternatively consider the option of notifying the tax authorities of his/her own tax evasion, because the buyer actually paid a higher purchase price.

9.7 International taxation and avoidance of double taxation

Any tax liability is always based on the **tax law of individual countries**, i.e. a specific country will always assert its **right to impose tax** with respect to a particular matter (such as property, income, license earnings, etc.) within its borders. As long as the person concerned does not cross the borders of a particular country and maintains no tax-relevant relationships beyond its borders, only the tax laws of that country are applied.

However, by crossing national borders – for instance, by acquiring real estate in another country – a buyer also becomes liable, at least in part, on the basis of the fiscal laws of the other country. The question then immediately arises of the **delimitation of the rights to impose tax** between these two countries, and double taxation then becomes a threat. The buyer can be taxed firstly by the tax authorities of the country of his/her residence,

which in most countries means unlimited tax liability based on global income and (in some countries) value of net assets. But he/she can also be taxed by the country in which the real estate is located on the basis of the limited tax liability that comes with ownership of real estate. So it often happens that parts of the assets (such as the real estate in the other country), or of the income, will in principle be taxed by two countries, i.e. the same part of the assets or income is subject to double taxation unless limits are imposed. This can be done on the basis of national law (by means of **provisions in the law limiting tax liability**). For instance, although *Switzerland* basically taxes the global income and assets of persons who have their tax residence in *Switzerland*, real estate assets located abroad are exempt from Swiss taxation. However, such national regulations are relatively rare, and to avoid double taxation in an international context as far as possible, double taxation agreements (known as DTAs) have been concluded between many countries.

Double taxation agreements

Double taxation agreements are bilateral treaties that delimit the tax-imposition rights between two countries and take precedence over national legislation. The aim of such treaties is to **avoid double taxation** by preventing incomes, assets and, in some treaties, also inheritances and gifts from being taxed twice. An extensive worldwide network of agreements exists regarding income and wealth taxes. In contrast, relatively few agreements concern inheritance and gift taxes.

For real estate, DTAs generally apply the following **taxation principle**: real estate is taxed as an asset and any revenue deriving from it is taxed as income in the country in which the real estate is located. The other contracting state (in this case the country of residence of the real estate owner who is liable to unrestricted taxation there) must either exempt the real estate from its own taxation or credit the taxpayer with the taxes imposed by the other country.

Imputation method/tax credits

The DTAs of relevance here often apply the imputation method. The real estate located abroad is then subject to taxation in both countries, i.e. in the state of residence and the state in which the real estate is located, although the former credits the taxpayer with the tax already collected in the latter. This means that the taxpayer will **always be liable to the higher tax rates** applicable. For example: a person resident in state A who is liable to unlimited tax owns real estate in state B which he/she lets. The net revenue from the rental is 100, which is taxed in state B at 25%. State A levies a tax of 35% on the same income of 100, but credits the 25 already paid, so that only the additional 10 of the income derived from the rental revenue is taxed in state A. The taxpayer is consequently not taxed twice on the same income, but ultimately pays the higher tax rate of state A. However, if the tax rate in state A was also 25%, then state A would impose no further tax on the relevant income.

Exemption method

In the exemption method, the taxation right is assigned exclusively to the state in which the property is located and the residence state must exempt the corresponding income or assets from taxation. However, in most cases a saving clause as to tax progression (**exemption**

with progression) is applied. This means that in the overall taxation of the taxpayer, the residence state may apply the tax rate that would be applicable to the taxpayer's income or assets if his/her income or assets located in the treaty state were to be added to these. This saving clause thus affects only those taxpayers whose taxable income or assets are not already subject to the highest progression bracket of income or wealth tax. It is irrelevant to those who already pay at the top tax rate.

Debts and debt interest attribution

The DTAs do not deal with the question of attribution or **splitting the debts and debt interest encumbering a real estate** between states. Almost all states accept debts and debt interest on the basis that the mortgage and debt interest encumbering a particular real estate are subtracted from the corresponding market value or revenues and only the respective net asset value or net income is taxed. *Switzerland* is an exception to this rule, as it applies a quota-based exclusion of global debts and debt interest (as a ratio of Swiss to global assets), so that double deductions or deduction gaps can naturally result with respect to *Switzerland*.

Combating tax evasion

In addition to avoiding double taxation, DTAs increasingly also serve to **combat tax evasion**. The contracting states thus agree on extensive exchange-of-information clauses. It is worth noting that some of the countries that interest us here have introduced special taxes or reporting requirements on foreign companies that hold local real estate (e.g. *France, Spain*). Exemption is usually possible only if the foreign company is domiciled in a country that has concluded a DTA containing extensive information-exchange clauses with the country in which the real estate is located.

The *Organization for Economic Cooperation and Development (OECD)* has published a **model double taxation agreement** which acts as a reference for most DTAs applicable between contracting states. After various partial revisions between 1992 and 2000, the *OECD Steering Committee* has now ratified a further update of this agreement. A significant and relevant change is that *Article 13* now includes a stipulation about the sale of shares of a **company whose main asset(s) is real estate**. Also, *Article 27* was added; it concerns mutual help between states in collecting tax.

The new stipulation in *Article 13(4)* is as follows: '*Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other state.*'

This new stipulation will be considered in future double-taxation agreements or in re-negotiations of existing agreements and should accordingly be borne in mind. If real estate is acquired abroad via a company, it is certainly advisable to consult the domestic law both of the country in which the real estate is located and of the owner's country of residence, and in particular any relevant double taxation agreements. These agreements may diverge from the *OECD* model agreement in significant points concerning these issues. An overview of personal taxation in selected countries is presented in Table 3.

Table 3 Overview of personal taxation in selected countries

Country	Maximum tax rates in %				Number of double taxation agreements concluded	Assessment ¹
	Income	Capital gains	Wealth	Inheritance/gifts ²		
Australia	47	47 ³⁴	0	0	42	***
Austria	50	50 ²³	0	15–60	61	**
Bahamas	0	0	0	0	–	*****
Belgium	54.55 ³	33 ⁴	0	30–90 ⁵	81	**
Canada	46.41 ¹⁶	23.20 ¹⁷	0	0 ¹⁸	55	***
Cayman Islands	0	0	0	0	–	*****
Croatia	45	0 ¹⁹	0	0–5	33	****
Cyprus	5 ³⁰ –30	20	0	0	37	*****
Finland	56	28	0.8	16–48	64	*
France	49.6	26 ⁸	1.8	40–60	108	*
Germany	44.31 ⁶	51.17 ⁷	0	30–50	76	*
Greece	40	0	0.8 ⁹	40	35	***
Hong Kong	17.5	0	0	15/0	1	*****
Hungary	38	20	0	21–40	54	***
Ireland	42	20	0	20	42	*****
Italy	12.5 ¹¹ –45	27	0	0 ¹² /15 ¹³	71	***
Japan	50 ¹⁴	52 ¹⁵	2.1	70	45	*
Jersey	20	0	0	0	1	*****
Malta	35 ²⁰	35	0	0 ²¹	34	*****
Mexico	34	34	0	0	27	***
Monaco	0	0	0	16 ²²	1 ³²	*****
Netherlands	52	0	0	27–68	79	*
New Zealand	39	0	0	0/25	27 ³³	***
Portugal	40	20	0	0–10	33	**
Singapore	22	0	10	10/0	47	****
Spain	45	15 ²⁸	0.2–2.5%	40.8–81.6	41	*
Sweden	60	30	1.5	30 ³⁵	83	*
Switzerland	23.5 ²⁴ –45.5 ²⁵	0	0.4–0.7 ²⁶	0–54.6 ²⁷	52	****
UK	40 ¹⁰	40	0	40	118 ³¹	****
USA	39.6	20 ²⁹	0	55	64	**

Notes on the table:

¹ Assessment of the total tax burden on foreign nationals taking up residence, including all tax planning options: * = Tax desert, ***** = Tax paradise.

² The first number designates the maximum tax rate for spouses and children, the second number the maximum tax rate for unrelated persons. If different tax rates apply for inheritances and gifts, the figures before the slash refer to inheritance, after it to gifts.

³ Plus additional taxes at municipal level from 0 to 9.1%.

⁴ Certain private capital gains are tax free.

⁵ Depending on the region; for close relatives, the maximum tax rate is 30%.

⁶ Maximum tax basis for 2005 is 42%; however, a 5.5% solidarity supplement is additionally imposed on income tax.

⁷ Only 50% of capital gains from share sales by natural persons are taxed; capital gains from the sale of real estate are tax free after 10 or more years.

⁸ Various rates apply depending on the situation. Tax rates of up to 50% apply to certain capital gains from the sale of options.

⁹ Only on real estate assets.

¹⁰ For foreign nationals under certain conditions only on UK income.

¹¹ On interest earnings from foreign bonds.

¹² In the case of tax-free inheritance or donation of real estate, certain taxes are payable for entry of the transfer in the land register from the testator to the inheritor, or from the donor to the donee. If this is not the testator's main residence, these mortgage and land register taxes total 3%.

¹³ Gifts between spouses and relatives of up to fourth degree (cousins) are tax free.

¹⁴ Total of national, regional and municipal taxes.

¹⁵ If the real estate is resold five years after acquisition.

¹⁶ Ontario.

¹⁷ Capital gain: 50% of appreciation according to tax progression or 21.46% for non-residents.

¹⁸ There is no inheritance tax, but capital gains tax is charged as per the day of death.

10 Insurance

Incidents involving new and reconstructed buildings can lead to considerable liabilities for the principal. The latter is normally liable for any damages that may be caused by his/her building project – that is, even if there is no fault. If the principal wishes to shift liability to the causal agent, he/she will first have to find the latter and then prove negligent conduct. The **principal's liability risk** must consequently be covered by a suitable insurance policy. It is also advisable to consider cover for unpredictable damage during the building phase, as unfinished buildings are at particular risk. Damage to the building itself is covered by the **builders' liability insurance**. In addition, cover can be arranged for existing buildings and movables as well as for costs for clearance, inspection for damage and reconstruction.

Upon completion of the building work or acquisition of a completed building, **building damages insurance** is absolutely necessary and is even mandatory in many countries. Suitable cover must also be arranged for the **owner's liability** associated with the real estate. It must furthermore be ensured that the **household effects** contained within the building are sufficiently insured – against damage by fire, water, etc., as well as burglary. Normal household effects' insurance does not cover rare or expensive objects such as jewelry or works of art sufficiently, if at all. Special valuables or art cover should therefore be arranged for them. Finally, the risk arising from financial obligations should not be neglected either. Life or loss-of-earnings insurance may also be advisable to provide security in the event of **death** or **disability**.

10.1 Checklist: Insurance

The following risks should be checked and suitably insured:

- Liability consequences of the principal: principal's liability insurance.
- Damage by the elements to the still incomplete building: buildings' insurance and builders' liability insurance.
- Damage by fire, water, etc., to the completed building: building damages insurance.
- Liability of real estate owner: homeowner's insurance.

¹⁹ If the real estate was used as the domicile of the owner or his/her family, or was sold three years after its acquisition. If more than three properties of the same type were sold within a period of five years, this is seen as a business activity and is thus liable to standard income tax.

²⁰ For foreign nationals with permanent residence permits: taxation limited to 15% of income transferred to *Malta*.

²¹ However, 5% stamp duty is charged on real estate and 2% on shares (except shares listed on the Maltese stock exchange) at donation or death.

²² Only on assets in *Monaco*.

²³ Tax free after the real estates have been held for 10 or 15 years.

²⁴ Cantons of *Zug* and *Schwyz*.

²⁵ Canton of *Geneva*.

²⁶ Wealth taxes vary between the cantons.

²⁷ Canton of *Geneva* (unrelated persons).

²⁸ Applicable to capital gains over more than a year.

²⁹ On short-term capital gains 39.6%.

³⁰ Option for foreign pensions, special tax rate of 5% on income exceeding CYP 2,000.

³¹ Some countries have more than one DTA with the *UK*, 118 represents the number of countries that have any form of DTA with the *UK*.

³² One agreement with *France*.

³³ Three agreements not yet in force.

³⁴ Individuals will usually only be taxed on 50% of the capital gains, with no indexation of the cost base of the capital asset.

³⁵ It is proposed that taxation of gifts and inheritances is abolished as per 1 January 2005.

- Household effects contained in the building: household effects' insurance.
- Particularly expensive objects, jewelry, objets d'art: valuables or art insurance.
- Financial obligations of the owner (especially with regard to bank loans): whole or term life insurance, loss-of-earnings/income replacement insurance.

11 Financing

Real estate is generally considered as an asset retaining its value over the long term, so that building societies, banks and other financial institutions usually grant **mortgages** of up to 80% of the current market value, in some countries even up to 100%, against corresponding collateral. As a rule, however, this applies only to real estate buyers or owners living in the same country who can demonstrate sufficient income. Foreign buyers of real estate often find that opportunities for local financing are severely restricted. Depending on the country concerned, few lenders are willing to grant foreign real estate owners corresponding loans. On the other hand, banks in some countries (for example in *Spain*) grant relatively generous mortgages to foreign owners too. However, banks in the buyer's home country tend to be even less willing to finance real estate located abroad.

Property can also be financed by means of **leasing**. However, this is far more usual for commercial properties such as office buildings, industrial premises, etc., than for private houses and apartments. In a leasing transaction, the owner of the real estate acts as the lessor who lets the lessee have the use of the real estate in return for remuneration. The latter may obtain 100% financing for this purpose. As a rule, leasing agreements can be concluded with a buy option.

Regarding vacation homes it should be pointed out that they should be seen essentially as consumer goods and should consequently be largely financed from one's own funds wherever possible. On the other hand, financial planning and tax aspects may often make some degree of borrowing advisable.

11.1 Checklist: External financing

- Amount, currency and specific conditions.
- Amount of own funds required.
- Interest rate: The interest rate can be arranged to be either fixed or variable, and multi-currency. Various interest-stage and interest-plateau models are also available.
- Bank charges and other ancillary costs.
- Term, amortization and other conditions. In some countries it can make sense from a tax viewpoint to maintain a high mortgage and amortize it indirectly.
- To secure the loan, there are usually several different ways of setting up a suitable lien or mortgage on the property which acts as collateral.
- Some countries (such as the *USA*) require title insurance.
- In some countries, the payout of loans is taxable.
- Currency risk.

12 Special real estate

12.1 Timeshares (timesharing)

Instead of acquiring a vacation home as a sole owner, and then letting it stand empty much of the year, it can make good sense to share the property with other interested parties. Although this is basically a good idea, many providers of timesharing services have acquired a bad reputation, and not without reason. In most cases, this is because they offer **over-priced projects** and often market them by using **aggressive sales methods**. Acquirers of timeshares are frequently swindled out of their money as a result of false information about the possible utilization to be expected and excessive maintenance fees. They may even lose their entire investment if a vacation resort remains unfinished. It is frequently suggested that timesharing rights are a kind of capital investment which appreciates in value and can be resold. And yet no entry is often made in the land or ownership register, in which case the buyer has no security in the event of bankruptcy, and in most cases no real resale market exists. Great care must accordingly be taken by prospective acquirers.

For this reason, various countries – in the *USA*, the state of *Florida* is exemplary in this respect – have introduced regulations aimed at preventing such exploitation of the timesharing concept. Thus providers of timeshares in *Florida* are liable to extensive **disclosure requirements**, so that the risks of a purchase must be made apparent and the buyer is clearly informed that he/she has a 10-day right of withdrawal from the contract. The *American Resort Development Association (ARDA)* has also published a *code of ethics* for the *USA*. In *Europe*, an **EU timesharing directive** has been in existence since 1994, but has not been implemented in all countries. It stipulates that sellers must provide comprehensive information and make provision for withdrawal rights for the buyer as well as for additional protective regulations.

Forms of timesharing

There are several different forms of timesharing. In most cases, a share is acquired in an ownership association in conjunction with a temporary utilization/occupancy right which is entered in the land or ownership register. This may also be called **deeded or real timesharing**. In some timesharing agreements, however, no such utilization right is entered in the ownership register but a right to a timeshare is secured merely by contract. This is known as **non-deeded or contractual timesharing** and is in reality closer to a long-term rental or accommodation contract with full prepayment of the rent. In a number of countries (for example in *Switzerland*) real timesharing is not possible because the law does not actually allow real estate ownership to be divided up into various periods of use calculated over the year. However, arrangements to this effect in contract and company law are usually permitted. This leads to another form of timeshare that consists of the acquisition of company shares or participation rights in a similar legal entity which, in turn, permits utilization of real estate held by that legal entity. This form of timesharing is often called **cooperative timesharing**, vacation club or incorporated timesharing. The companies can, for example, be organized as stock corporations whose shareholders acquire shares or other participation units for which residential-rights points are distributed. Also worth mentioning are the **trust structures** not infrequently set up as a complement to real timesharing arrangements. Trusts play an important role above all in the English-speaking world which

generally knows various forms of trusts. In trust structures the acquirer is a trust beneficiary and not a holder of real estate ownership.

The costs of timesharing

Even if a provider is operating legitimately, the question must be asked whether timesharing is really worth while, as it almost always works out to be much more expensive than a hotel stay or package tour. Equally, it fails to offer the comfort of one's own four walls assured by full ownership or the option of using the property at any time.

A utilization right in a timeshare is usually acquired by paying a certain **initial purchase price**. Its amount depends on the most diverse factors, such as the location and facilities of the property and the season for which the utilization right applies. It has no upper limit but usually costs up to some US\$ 25,000 per week. However, regular annual **maintenance fees** must be paid in addition to this. These can be quite considerable, depending of course on the real estate. It should also be noted that such fees are regularly increased in line with cost-of-living criteria. If services such as final cleaning are retained, **service charges** are also incurred. If a client does not wish to take his/her vacation in the same place every year, he/she should consider membership of an exchange network. There are two main providers in this market, both based in the *USA*: *Interval International* and *RCI*. In most cases, membership is acquired right at the start with the rest of the package and is also used as a sales argument. However, exchange-pool membership also incurs annual **membership fees** which must be added to the running costs.

The best way of obtaining a timeshare under relatively attractive conditions is via the **second-hand timeshare market**. Agents specializing in this business can be found especially in the *USA*, but also for example on the Caribbean island of *St Martin*. Elsewhere, especially in *Europe*, there is almost no real market for second-hand timeshares. Shares of incorporated timeshare companies that distribute dividends in the form of residence-rights points for vacation properties can also be acquired second-hand rather than new. Such shares are even offered via newspaper advertisements. As a rule, the price obtainable on the open market is well below the initial sales price, which is also a clear indication that timesharing tends to be over-priced.

12.2 Historical real estate

A chateau in *France*, a historical country estate in *Andalusia* or an apartment in the old center of *Venice* is the ultimate dream of many. And residential properties with a long history are indeed something special, with their own charm and romanticism. Old walls, wooden beams and floors of natural materials often hold great appeal for many prospective buyers.

However, **old masonry** in particular can give rise to considerable problems and costs. Dampness, poor insulation, rotten attic timbers, a leaking roof, antiquated electrical and sanitary installations and much else can mean expensive renovation and maintenance work.

In an extreme case, a house may be beyond repair because of insalubrious conditions – such as excessive decay and mold or asbestos contamination – and should really be pulled down. However, this need not be the case, and solidly built dwellings, such as all-wood chalets in the Alps, are often exemplary in terms of **building quality** and **biological factors**.

In any case, historical properties should never be bought until they have been examined by a specialized architect or construction engineer. Surprises lurking in the attic, cellar, or even behind a newly painted wall, may be just too major and unpleasant. The fee charged by the architect for an assessment (usually between US\$ 2,500 and US\$ 15,000 depending on the real estate) is very reasonable in comparison.

In most countries that are of interest here, historical real estate is protected in some way, and **preservation regulations** may even encumber the real estate with major restrictions. Every item of renovation or alteration work, no matter how minor, may require approval from the relevant authorities. This can be a very laborious procedure in some countries. However, that need not be the case. For example, hundreds of historical buildings in *France* are not protected. Before acquiring historical real estate, however, it is important to check exactly what restrictions apply. On the other hand, the owner may well be able to claim state subsidies for (usually very expensive) renovation work. In any case, the legal framework conditions and restrictions should always be examined carefully and should be completely clear to the prospective buyer **before buying**.

12.3 Rural and agricultural real estate

Rural real estate such as a farm or an olive grove usually suffer from the same problems as historical ones in terms of masonry, preservation orders and similar factors. However, prospective buyers of such real estate should be aware of many other points. They include the question of their earlier **use**. Thus buildings that were formerly used as animal stalls or as shelters for shepherds or farm laborers, and are sold today as *rustici*, were never designed for residential purposes. **Access** is often difficult and maintenance of a track leading across rough ground may be troublesome and expensive. Other points to consider are a supply of **fresh water** and a means of **removing sewage**, as remote properties are rarely connected to the public water supply and sewage systems. It can also be difficult to obtain a **telephone line** and **electricity supply**. Real estate located in agricultural zones is practically always subject to relatively extensive **building prohibitions or restrictions**, and any utilization rights by neighbors and other questions of **neighbors' rights** must be additionally clarified before a purchase is made. Nor should **safety aspects** be neglected in the case of remote real estate. Poorly secured properties that are not under surveillance in the absence of their owners are preferred targets for burglars. Finally, it should not be forgotten that agricultural land must be suitably tended. This may be done by the neighbors in many cases, but such arrangements must be organized and usually have to be supervised.

Although the acquisition of agricultural real estate – such as *olive groves* in *Andalusia*, a *vineyard* in *Piedmont* or a country estate in *England* – is essentially comparable to the purchase of any other real estate, special care must be taken due to the peculiarities of **agricultural use**. In political terms, agricultural land has long been treated as a special case in almost all countries, but especially in *Europe*, and this largely continues to apply. Laws passed in favor of farmers frequently encroach upon the rights of residential and commercial tenants. A buyer of agricultural real estate must take this particularly into account. Long-standing rights of neighbors, such as grazing rights, are often in place. They may not be recorded in any register but nevertheless have full validity and can be enforced if necessary. Special tax allowances or state subsidies are often available for farmed land. Not infrequently, restrictions on acquisition by foreign nationals continue to apply.

The purchase and sale of agricultural real estate may involve contact with **unfamiliar stipulations of the local laws**, often with deep roots in the history of the country. Agricultural real estate may also be subject to various regulations, such as hunting and fishing rights, which may be important in a particular case. Accordingly, the purchase and sale of such real estate usually takes much more time than other real estate, and such transactions often require special knowledge and experience.

Moreover, particularly larger agricultural estates may be regarded as enterprises and there are often employees that permanently work and sometimes live on the estate. The buyer would then need to consider **employment law aspects** and may have to assume an employer's liability to continued wage payment, pension contributions, insurance payments and the like. He/she would then have to decide whether to keep employees on after the acquisition and may even have an obligation to do so under local employment law. Such cases must be examined on the basis of the relevant legal stipulations as well as concrete employment contracts and agreements so that the obligations passing to the buyer can be evaluated from a legal standpoint.

12.4 Vineyard properties

As a special form of agricultural real estate, vineyards require particular knowledge in viticulture and oenology. Accordingly, at least for the purchase of larger vineyard properties, vineyard experts, oenologists, specialized architects and surveyors, nursery gardeners and vineyard planners should be involved.

Regarding the vineyard in general, in a number of countries, **permits** are required for vineyards above certain acreage. Classification of origin is available in countries such as *France, Spain* and *Italy* and may be of interest for the prospective buyer. For example in *France*, the *INAO (Institut National des Appellations d'Origine)* issues certificates which will confirm the *AOC (Appellation d'Origine Contrôlée)* classification of wines.

A land survey controls the exact planted surface area before the sale. The resulting computerized document is also used for the day-to-day running of the vineyard (for example, spraying). The sanitary condition of the vineyard is checked to detect possible diseases and problems, and the **climatic risks** (in particular, hail, frost and flooding) are estimated via empirical data and maps identifying sensitive areas.

Regarding the **buildings and installations** on the property, such as vinification plants, cellars, offices, shops or houses, there are normally specific regulations in most countries. Regulations include provisions regarding asbestos and other pollutants, surface area of the building and possibility to enlarge existing facilities, the water quality of wells in case the property is not connected to the public water supply, termites and other xylophagous insects, etc. When the buildings are large, it is important for a surveyor to carry out a check of the main structures.

Regarding the **vinification plant** in particular, attention must be given to the conformity of the installations to local regulations, especially concerning work safety and electrical installations. Appropriate conformity certificates and reports must be attached to the sales agreement. Also the constantly changing regulations concerning the treatment of effluents and the growing problem of chloroanisoles must be verified. A comprehensive **list of**

equipment mentions its condition as well as the possible securities, guarantees, leasing agreements, etc.

Where the vineyard produces significant quantities of marketable wine, in other words in those cases where the vineyard is operated as a real business, the **goodwill of the business** is the most delicate factor to measure in the estimation of the overall value of the real estate. Very often, the quality and reliability of the business will depend on the owner. Therefore no guarantee can be made on the value of the business. It is nevertheless essential to check the sound protection of the trademarks sold, in this case the trademark of the estate or the château.

As wine is a living product, a complete **qualitative control** (wine-tasting coupled with laboratory analysis and maturing tests) is essential in all transactions. Although a contradictory evaluation does not free the seller completely, it increases the security and clarifies the operation. In addition to the stock, the standing crops correspond to the expenses engaged by the seller with a view to the future harvest which will be to the benefit of the buyer.

Unless there is a special agreement, the takeover of the estate usually implies the takeover of all existing staff. On the day of the sale, the legal situation of the employees must be up to date (remuneration, bonuses, sick leave and paid holidays) and any risk of litigation clearly announced to the buyer.

Often, when an estate contracting to a cooperative cellar is sold, the buyer may not wish to carry on this contract. In this case, the buyer's position must be clearly and precisely stipulated in writing before the sale at the risk of having to pay cancellation fees in conformity with the regulations of the cooperative cellar. A written agreement before the sale enables the minimization of financial consequences.

Because of comprehensive tenant protection regulations in many countries, a **leased estate with a tenant** is normally difficult to sell. In the case of a sale, the owner must pay attention to the deadlines and the form of the notification for the ending of the lease in order to be disengaged from his/her tenant farmer without financial consequences (compensation for the tenant farmer) because, in the case of a sale, in many countries a considerable amount (for example in *France*, up to 30% of the value of the real estate) can be allocated to the tenant farmer as an indemnity for termination. The calculation is determined by the quantity and nature of the investments carried out by the tenant farmer on the estate.

With the purchase and sale of a vineyard, the **purchase price calculation** and the allocation of the prices between the various assets sold, the interests of the seller are usually very different from those of the buyer. For example, the buyer will want to optimize the redeemable values (equipment, plantation) whereas the seller will want to reduce them as these assets are often already depreciated. On the other hand, the seller may aim to maximize the value of his/her main residence, whereas the buyer may prefer to minimize it.

A vineyard purchase transaction, from the provisional sales agreement to the signature of the final contract, usually takes four to six months. The transaction must be formalized by experts qualified in their respective fields of competence. Lawyers, accountants and bankers must verify and validate, among other things, the title deeds, the release of mortgage and other encumbrances, the notifications to neighbors and organizations benefiting from a pre-emption right (government, commune, etc.), easements, the annual accounts and balance

sheets of the vineyard operation, the guarantees of assets and liabilities (when there is sale of company shares) and the execution of contingency clauses.

12.5 Real estate located near water

A location close to or with a view of water is often preferred for vacation homes, which may also be required to directly adjoin the sea, a lake or river. However, properties located close to water are liable to particular problems. Especially in the case of stagnant waters such as lakes, considerable nuisance from **gnats and midges** must be expected in the summer months or in warmer climate zones throughout the year, and the vicinity of such waters generally encourages pests. A pleasant summer's evening lounging about in the garden can be considerably disturbed. Certainly there are various mechanical and chemical ways of limiting this nuisance, but their use is not always pleasant. Water can also be a **danger** from various standpoints. Rivers and lakes can burst their banks during **floods**, and **coastal flooding** as well as **hurricanes** in certain subtropical and tropical regions can be a serious hazard to buildings and people. The possibility of sudden devastating **waves** caused by earthquakes must also be considered. In some countries, such as *New Zealand*, the danger of *tsunamis* is very real and is taken seriously. In many parts of the world there were good reasons not to build directly next to the water in the past, but rather to seek out more elevated locations further inland.

In areas **close to the sea** it should also be noted that salt air tends to ravage building materials. Metal parts in particular **corrode** very quickly. Window fittings which function perfectly when a new owner moves in can be defective after only a short time. Prospective builders of a property in the vicinity of the sea should ensure that appropriate materials are used. In most cases, certain types of wood should be preferred, special paints are required and the appropriate architecture is also important. It is essential to call in an expert familiar with local building traditions, irrespective of whether a new house is being built or an existing one acquired.

13 Private islands

By Farhad Vladi, PhD, Vladi Private Islands, Hamburg

The thought of a private island conjures up dreams and wonderful fantasies: your own untouched piece of land completely surrounded by water where you can enjoy the isolation and beauty of nature. In earlier centuries islands were perceived as hostile isolated places, utilized as sites for prisons or remote locations of exile and banishment. The only other 'positive' purpose they served was to save shipwrecked sailors from drowning.

Then with the paintings of Paul Gauguin which captured the enchantment of distant tropical islands and with Stevenson's book *Treasure Island*, islands signified places of freedom, exoticism and secret desires. Today for people under modern-day stress, islands symbolize a further desire: a longing for peace and fulfillment and a retreat to pure nature and the rhythm of the simple life without all the worries of modern-day life. In today's civilized world, the desire for a private island is becoming very popular.

Due to technological progress, islands are no longer cut off from civilization. On the contrary, islands are becoming much more accessible. Through development of technology such as

solar energy, prefabricated homes, desalination systems as well as mobile phone networks and the internet, the advantage of mainland property as opposed to island real estate has almost disappeared.

Many celebrities have taken the initiative and have secured their own oasis of tranquility: for example, the shipping magnate Aristoteles Onassis with his island *Scorpios* in the *Ionian Sea* in *Greece*, John Rockefeller with island groups in the *Caribbean*, which he then devoted to nature conservation, actors such as Nicolas Cage (*The Bahamas*) or Tony Curtis (*Canada*), artists such as Diana Ross (*Pacific Ocean*) or entrepreneur Richard Branson who offers his *Necker Island* in the *British Virgin Islands* for rent.

Although some private islands for sale, for example in the *Caribbean*, have been developed into luxury refuges (and have corresponding price tags), not all private islands represent extreme wealth. The sales of most private islands take place in the region of US\$ 150,000 to US\$ 350,000. Despite different budgets, all island buyers have two characteristics in common: they are individualists and lovers of nature.

Irrespective of the fact that certain countries such as the *Philippines*, *India* or the *Seychelles* restrict or forbid the purchase of private islands by foreigners, the following criteria have proven to be important when considering the purchase of a private island.

13.1 Key criteria to note when buying a private island

Infrastructure on the mainland

The distance to the mainland or to another inhabited island should not be too far, for example, 1 km to a maximum of 5 km. The mainland should offer the necessary infrastructure such as roads, parking areas, access to a grocery store, services, and road connections to the next airport, electricity and telephone connection possibilities. For some islands the journey by boat from the island to the mainland is often easier than that on land from a remote ranch or forest property to the next village. The owner of a private island should be aware that good infrastructure on the nearby mainland is an essential prerequisite.

Absolute ownership essential

The investment in a private island is a capital investment for which maximum security is imperative. The private island owner must ensure that he/she receives the documentation in his/her own name from the property registry or registry of deeds and that the ownership title is free and clear. Only good ownership titles are insurable and give the potential to earn profit through possible appreciation. This does not apply to leasehold titles.

Construction possibilities on the island

Islands, as most other real estate, have value only if they can be used. Potential owners should avoid islands designated as conservation area for birds or any other nature reserve. Instead, the island must have a planning and building permission. It is therefore important before signing an agreement to buy the island that the buyer is assured that a building permit is readily available or that a building permit is attainable before the conclusion of the purchase and sale transaction. The buyer should request for this to be one of the conditions

for purchase outlined in the agreement. Local legal experts can provide advice on applying for, and obtaining, a building permit.

Appearance of the island

Of course the island must have natural appeal and offer such features as woodlands, beaches, cliffs, and several coves, one of which should be protected and of suitable depth to anchor a boat. Drinking water must be available on the island and a healthy flower, plant and tree vegetation must also be apparent so that the overall appearance is positive.

Geographical location

A private island should be bought only in areas which are politically stable, in countries where a safe legal system and reliable judiciary is in place. Also a pleasant climate is important. These criteria help to narrow down the choice and also determine the price.

13.2 The cost of a private island

For US\$ 12,000,000 you can buy 1.4 square kilometers of a tropical island in the *Caribbean* with an airstrip for your private jet, a large luxurious villa and staff accommodation. For approximately US\$ 7,500,000 you could acquire an island in the *Mediterranean* near *Monaco* with a large harbour for your yacht and a medieval tower. US\$ 5,000,000 will buy a large, 22 square kilometer island in *New Zealand*, somewhat isolated but with a sheep farm and lodge with magnificent views. For US\$ 700,000 you could purchase an undeveloped island in the *Caribbean* off the coast of *Belize* in one of the best diving areas in the world. For US\$ 350,000 you could savor the views from the terrace of your own island home on the famous castle of *Gripsholm* in *Sweden*. For US\$ 200,000, one of the prettiest islands off the east coast of *Canada*, only a few minutes by boat from a popular tourist resort, can be acquired. And for US\$ 20,000 a small private island with a summer cabin, also off the east coast of *Canada*, could be yours.

13.3 After the purchase

There is more to the purchase of an island than just a carefully thought out transaction. Like every other real estate, an island must also be managed and properly maintained in the future. In this respect one can retain a property management company or one can manage the real estate oneself. The annual costs that need to be considered depend on such factors as taxes, insurance, and the costs of a caretaker. However, in the case of most privately owned islands, the employment of a caretaker who would reside on the island is not necessary. In most cases, a manager can be found on the nearby mainland. One can often employ a fisherman who sails by the island daily and can keep an eye on the real estate for a reasonable monthly salary. Additionally, an hourly wage is paid for actual work done. Such a person normally also acts as the local contact person.

If an island is uninhabited and is held solely as an investment for future development or resale, then almost no other expenses are incurred. In such cases, nature is the best and most convenient manager.

In the case of a construction, one must ensure that a valid **building permit** is granted, in which case the availability of electricity must be determined. This is possible either via underwater cable, generator or by solar or wind-generated power on the island itself. A careful cost analysis prior to implementation is normally advisable.

In many areas prefabricated houses are also available. Often, prefabricated houses on an island are only 10% more expensive than those on the mainland. They have the advantage of being structurally approved, and the parts are delivered and, circumstances permitting, helicopters can also help to transport them. The costs of prefabricated homes are less than one may think, often around US\$ 1,000 per square meter.

Drinking water is an important issue. In most cases, there is rainwater underneath the surface of an island, i.e. groundwater which has seeped through and floats on top of the lower-lying salt water. If this amount of water is not sufficient – for example, because more than one home or even a hotel requires a supply – then one must purchase a desalination system. For the smallest desalination system one would need to spend approximately US\$ 50,000.

In addition, one should definitely include in one's budget a **boat, a car or small truck on the mainland** and a **small site on the mainland** with a boat house, storage and garage.

14 Citizenship through real estate acquisition – St Kitts & Nevis

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St Kitts & Nevis, also known in the country's constitution as *Saint Christopher and Nevis*, has been independent since 1983 and forms part of the group of islands known as the *Lesser Antilles*, located some 2,000 km to the southeast of *Miami*. The Federation comprises two islands: *Nevis* with an area of some 93.2 km² and *St Kitts* with 168.4 km². The official and business language is English. The Federation is a member of the *United Nations (UN)*, of the *Organization of American States (OAS)* and of the *British Commonwealth*. The *Eastern Caribbean Central Bank* has its headquarters on *St Kitts*. It maintains the stability of the *Eastern Caribbean dollar (EC\$)*, the national currency of most eastern Caribbean countries, which is tied to the *US dollar*. The head of state is the Queen of the *United Kingdom*. *St Kitts & Nevis* is a well-functioning democracy based on the British parliamentary system.

Although tourism plays a smaller role than on some other *Caribbean* islands, the twin island Federation offers very fine beaches and an outstandingly attractive mountainous landscape. The climate is tropical and close to perfect. Differences in altitude and corresponding differences in soil types make it a paradise for tropical plants. *St Kitts* has a very well designed championship golf course laid out between the *Caribbean Sea* and the *Atlantic Ocean*, with a second golf course presently being constructed in *Sandy Point* some 10 miles from *Basseterre*, the capital. There is also a very attractive golf course on *Nevis*. The truly appropriate motto of the local tourism authority is: *Two islands – one paradise*.

14.1 Acquiring real estate on St Kitts & Nevis

A foreign national who wishes to acquire real estate on *St Kitts & Nevis* will need an **authorization** known as an *alien land holding license* as stipulated by the *Alien Land*

Holding Regulation Act, Cap. 102. However, the acquisition of real estate with the aim of obtaining citizenship is in any case limited to developments which possess a corresponding special authorization issued by the government.

St Kitts & Nevis has **two different systems of transferring and showing proof of ownership** to real estate. Under the British **deed system** inherited from the colonial period, title to property can be transferred with a *deed* in accordance with the *Conveyancing and Law of Property Act*, which requires a search at the *Registry of Deeds* for upwards of 35 years. A second option is to acquire property by means of a *Certificate of Title* based on land surveying plans and subsequent entry in a title register on the basis of the *Title by Registration Act*. The acquisition of title to property via a *deed* is less secure because the *deed* applies only to the seller and buyer and does not preclude a third party from asserting a better title. A valid property title can be acquired only if the basis of the current property title can be demonstrated to go back 35 years by submitting proof of an unbroken ownership chain. A *Certificate of Title* is preferable to a *deed*. A title certificate gives the buyer a government guarantee and a right *in rem* or **title insurance**, and such a title is valid with respect to everyone. A title certificate also displays all encumbrances, such as mortgages, on the property. If real estate is acquired by means of a *deed*, the buyer or owner may subsequently request registration under the *Title by Registration Act* at any time by applying to the *Registrar of Titles*. *St Kitts & Nevis* is a small country in which lawsuits concerning disputes of ownership title to real estate are very rare. Before every acquisition, a lawyer will naturally check whether the ownership title is correct and unencumbered, and any problems will always come to light in the course of these enquiries and can be cleared up in advance.

Various **acquisition costs** are payable when buying real estate. Thus the government levies stamp duty of 6% of the purchase price, and another 0.5% contribution must be made to the national *Assurance Fund*. These are contributions to a title assurance which is a legal requirement on *St Kitts & Nevis*. The preparation of plans costs about another US\$ 300 and the mandatory lawyer will charge a conveyance fee of about 2.5% of the purchase price. Accordingly, the total real estate acquisition costs amount to approximately 9% of the purchase price.

The *Comptroller of Inland Revenue* assesses the annual rental value of the property and a 5% **land tax** is levied annually on this rental value. No other running taxes are due. If the real estate is rented, any **rental income is tax-free** for the owner. In the event of a sale, there is no capital gains tax to pay. The tax system on *St Kitts & Nevis* is also financially interesting to those who wish to become resident there. This is because **income is not taxed** and there are **no wealth taxes**. So also from a tax viewpoint, one can live very well on *St Kitts & Nevis*.

14.2 Acquisition of citizenship

Since 1984, the *St Kitts & Nevis Constitution* and *Citizenship Act* has allowed foreign investors to acquire citizenship. This makes it the oldest existing *citizenship-by-investment program*. Other countries too, such as *Grenada*, *Ireland*, *Dominica*, *Austria* and *Belize*, have, or had, similar investment programs which permit suitably qualified investors to acquire citizenship. However, the *citizenship-by-investment program* of *St Kitts & Nevis* is currently the only one in the world, apart from that of *Austria* and *Dominica*, to permit the acquisition of citizenship

and consequently the right to carry a passport without a prior need to take up residence in the country.

In order to apply for citizenship, one must **invest a minimum** of US\$ 250,000 in real estate. A house or condominium unit must be acquired from a developer who holds a suitable authorization issued by the government. However, almost all projects relevant to foreign investors have this authorization, and in addition only a few projects appear to be really attractive and make a corresponding investment advisable. All furniture and fittings can additionally be imported **duty-free**. One must expect to spend at least around US\$ 300,000 for quality-built property in a well-tended residential estate. And some US\$ 400,000 already buys a substantial villa with its own swimming pool on *St Kitts* – in contrast to the real estate prices on most other comparable Caribbean islands, which can be very high. Like everywhere, prices have no upper limit, and if one is prepared to spend several million US dollars, a luxury property containing all conceivable comforts and conveniences may be acquired next to a golf course.

Apart from this real estate investment, **various formalities** still have to be satisfied. In addition to comprehensive application forms, the most varied documents such as birth certificates, authenticated copies of identity papers, bank references and other letters of recommendation as well as a clean police record (extract from the register of criminal convictions) of one's home country and country of residence must be submitted. In addition, **government fees** of US\$ 35,000 are payable for the main applicant as well as US\$ 15,000 for the spouse and each child under 18 included in the application. For children over the age of 18 but still living in the same household, the fee is US\$ 35,000. The documents of all applicants are scrutinized carefully – a procedure known as **due diligence**, the cost of which is US\$ 2,500 for each adult. In addition to some minor charges (such as for issuing the passport), there is also a **fee** for preparing, submitting and processing the citizenship application. The **costs associated with acquiring the real estate**, which total about 9% of the purchase price, must also be considered.

The whole procedure from submitting the application up to its conclusion, i.e. the issue of the *Citizenship Certificate* and a passport, takes usually about **three months**. The applicant does not need to travel to *St Kitts & Nevis* for this purpose. He/she is subsequently issued with a **passport** like any other citizen, permitting entry to about a hundred countries without the requirement of a visa.

14.3 Advantages of alternative citizenship

Dual citizenship and thus a second passport offer various advantages, particularly in terms of **personal freedom, security and flexibility**. As a citizen of two different countries, one has a 'second homeland' to which one can 'return' at any time. Citizens of *St Kitts & Nevis* can of course travel, work and settle there whenever they wish. *St Kitts & Nevis* are among the most beautiful islands of the *Caribbean*. They are politically and economically stable and practically free of crime – thus offering an ideal environment for a second residence. Citizenship secures the right to move to one's second home at any time and set up one's main residence there. This is open to every citizen at any time, without the need for a visa or residence permit, by right of settlement.

A citizen of *St Kitts & Nevis* belongs to a *Commonwealth* country, a fact which still offers certain advantages in some other *Commonwealth* countries, including the *United Kingdom*.

A *St Kitts & Nevis* passport allows one to travel **without a visa** to around a hundred countries, including the *United Kingdom, Ireland, Canada, Switzerland* and many others. It may well be asked why a holder of a US or EU passport, which allows visa-free entry to many countries around the world, should additionally acquire a passport of *St Kitts & Nevis*. There are several answers to this question. In the first place, geopolitical constellations repeatedly arise which may make it difficult or impossible for a US or EU citizen to obtain a visa for a particular country. Increased terrorist activities also imply the danger of attacks and kidnappings, especially of tourists who are citizens of certain EU countries, the *USA* and some other countries. So holding a second citizenship and a passport of a small country which is insignificant in terms of world politics may even save one's life. Barriers to entry and leaving, aircraft hijackings, armed conflicts and terrorism are all situations in which a second passport can be extremely useful if not vital. Dual nationality is a kind of **insurance**. One hopes that it will never be needed, but if the insured event occurs, the insurance must already have been concluded, as it would be too late to take it out after the event. It may also happen that one's passport is unavailable, perhaps because it has been submitted for extension, has been lost or had to be sent off to a consulate for a visa application. If one wants or needs to travel urgently to another country in such a situation, this would be impossible without a second passport.

For good reasons, many wealthy individuals, important personalities and international business people who are active world wide have opted for a second citizenship and passport. In an unsettling, ever-changing world, acquiring an alternative citizenship is a wise decision and an investment for the future. Making an active decision with regard to citizenship and residence options gives more personal freedom, privacy and security. It also returns countless other benefits for life.

15 International change of residence

Owners of real estate abroad sooner or later consider the option not only of using it occasionally as a vacation home or second residence, but of possibly setting it up as their **principal residence**. Anyone thinking seriously about moving their main residence abroad faces a series of questions which are not always easy to answer. At the outset, it should be clarified whether it makes fundamental sense in view of one's **personal situation** to transfer one's residence, i.e. the center of one's activities, to another country. In view of the **oppressive fiscal and increasingly burdensome regulatory environment** in some high-tax countries such as the *USA, Canada, Germany, France, the Netherlands, the UK* and others, a move of domicile to a country with a milder tax regime appears to be an interesting option for many people. It often offers the only alternative to reducing their tax burden significantly in a legal manner. However, one is well advised not to move abroad for tax reasons alone.

15.1 Immigration law and tax residence

With some exceptions, such as *Switzerland* or *Croatia*, many countries (including *France, Spain, Canada, the UK, the USA, etc.*) allow foreign nationals to acquire real estate with no restrictions or special formalities. However, the acquisition of real estate in most countries does not imply a right of residence or permanent settlement. In fact, such investments have

little if any relevance to immigration requirements. Thus any foreign national may easily acquire real estate in the *USA* and anyone with sufficient funds and of good character may enter the *USA* (with or without a visa depending on their citizenship). However, anyone wishing to live and settle there must first obtain a **residence permit**. Unlike most countries, the *USA* does not allow financially independent persons who wish to simply spend their retirement in, say, *Florida*, to obtain such a permit on this basis. The alternative is to seek out other ways, in particular via a business visa, which is more or less difficult to obtain depending on the situation.

However, it is relatively easy for financially independent persons who do not need to work, but live from their investments or a pension, to obtain a residence or settlement permit in most countries. For example the *Bahamas*, *Malta*, *Monaco*, but also *Australia*, *Croatia*, *Panama*, *Switzerland* and *Cyprus* grant financially independent foreign nationals a **residence permit as non-employed persons**. They merely need to demonstrate that they have sufficient funds – ranging from around US\$ 25,000 in *Panama* or *Croatia* up to US\$ 500,000 and more in countries such as *Bermuda* or *Switzerland* – and of course that they have no criminal record. To prove the latter, they must submit a police certificate of good conduct or an extract from a central criminal register confirming that they are not recorded in it. Some countries also insist on proof of suitable accommodation before they issue a residence permit, whereas this is not important in others, as it can be arranged after the permit has been issued.

EU citizens have the freedom to settle anywhere **within the European Union** with no restrictions. So anyone who holds EU citizenship and consequently an EU passport can move within the *EU* – for instance, from the *United Kingdom* to a country such as *Portugal*, *Spain* or *Ireland* without any immigration restrictions. Since June 1, 2002, the same also applies to financially independent EU citizens who wish to reside in *Switzerland* (see the explanations in the country chapter on *Switzerland*) and vice-versa.

Americans (and Canadians, Australians, etc.) in most cases have traceable ancestry in *Europe*. If the ancestry is not too far back, it may be possible for them to reacquire the citizenship of their ancestors. For example, an Irish-born grandparent, or a grandparent from *Poland* or *Lithuania*, may be the basis for a successful claim to Irish, Polish or Lithuanian citizenship and – as a result – to an EU passport. In *Croatia*, to reclaim citizenship it is even sufficient to have any kind of Croatian ancestry. Although *Croatia* is not yet an EU country, it is expected to join the *EU* in only a few years from now and therefore will certainly also be of interest. And, as was pointed out above (see section 14.3), dual or multiple citizenship in any case offers numerous benefits beyond the possibility to take up residence in the country of citizenship (and in case of citizenship of an EU country, to take up residence throughout the *EU*).

15.2 Change of residence under tax law

Tax residence

The location of a main or secondary residence can have considerable effects, particularly in the sphere of fiscal and inheritance law. This question will not concern those who use their real estate in the south only for a few weeks during the year. But anyone who wishes to live regularly for half a year in another country must look seriously into questions of legal domicile and especially of **tax residence**. For those who do not need to work for a living and

have sufficient funds, the right of residence presents no problem in most countries, as already pointed out. But whoever spends more than three months in a particular country without working should at least be aware of the question of tax residence. Whoever regularly spends more than six months of the year in their second home will practically always be considered as tax domiciled there and will thus normally be **liable to pay tax on an unlimited basis**, which in most countries means taxation of worldwide income. By choosing a country with a mild tax climate for a main residence, a taxpayer can considerably reduce his/her burden quite legally and effectively without the need for complex tax planning. *Monaco, Panama, the Bahamas*, but also *Malta, Switzerland, the United Kingdom, Ireland* or *Croatia* are attractive destinations in this respect. So a change of residence may well be worth while not only for climatic reasons but also from the standpoint of taxation.

Exit taxes and extended income taxes

The main problem with moving one's tax domicile to another country, especially one with low taxation, is that some high-tax countries have taken steps to discourage such moves, namely by introducing a form of **exit tax** such as in *France*, or an **extended income tax regime**, or a combination thereof. *Germany* is an interesting example. Its *Foreign Transactions Tax Act (Aussensteuergesetz)* lays down special tax rules to make moves abroad fiscally less attractive. Thus significant (>1%!) participations in companies held by German citizens are almost inevitably taxed upon emigration, and unrestricted German tax liability may continue to apply despite a move abroad, although the taxes payable in the country of domicile (if any) are then credited. The result is that, besides the payment of an 'exit tax', the higher German tax level is ultimately retained, at least during a certain period (usually between five and 10 years). Many other high-tax countries impose similar conditions. It is possible to mitigate – or in some cases even completely bypass – such taxation by appropriate structuring before, during and after a move abroad. However, this almost always requires the taxpayer to make a clean break with the former country of residence and to strictly avoid any links with it, such as maintaining a second home there, making frequent visits or longer stays on its territory, etc. These conditions can be tough for many expatriates and should be carefully weighed against the tax advantages such a radical change in one's life will bring.

In this context it should be noted that on March 11, 2004, the *European Court of Justice* rendered an interesting and potentially very significant judgment concerning the exit tax that is imposed in *France* on holders of substantial participations who give up their residence and move abroad. The court ruled that these French tax provisions restrict the freedom of movement (*Art. 43 of the EC Treaty*). Given this decision regarding *France*, it is foreseeable that, for example, *Germany's* even stricter exit tax rules will also be qualified by the *EU* as contrary to the principle of freedom of movement. This decision – together with other recent and pending decisions by the *European Court of Justice* – will in all likelihood have a significant impact on the continued existence of exit taxes provided for in the legislation of many other EU countries, and opens a new perspective with regard to emigration from European high-tax countries to lower-tax countries within the *EU*.

Double taxation agreements

It was already noted in the context of international tax law with regard to real estate that bilateral agreements to avoid double taxation of persons resident in contractual states

exist between many countries. These agreements are particularly relevant to a taxpayer who moves abroad, as they concern the determination of his/her tax residence. Whereas ownership of real estate abroad usually implies limited tax liability as a result of ownership of this real estate in the foreign country, a move abroad always affects **tax residence** and has considerable consequences on tax liabilities. Inheritance and gift taxes, which depend primarily on the testator's last residence, may also be relevant. If a taxpayer who moves abroad has considerable income and assets, experience shows that the tax authorities concerned are particularly interested in where he/she is tax resident, as this leads in most countries to unrestricted tax liability.

It may happen that two countries – according to their respective tax laws – simultaneously consider a particular taxpayer as fiscally resident and unrestrictedly tax liable. This could result in the taxpayer being taxed on his/her global income and possibly also on his/her assets by both countries on the basis of their domestic tax regimes. But if a double taxation agreement exists between the two countries, it will decide where the taxpayer is fiscally resident and thus liable to unrestricted taxation, and which country is to merely apply restricted taxation – namely on any assets or income located within its territory.

Residence in one of the two contractual states is the precondition for the application of the relevant double taxation agreement and all claims on its protection. The agreement lays down precise rules to determine in which of the two contractual countries a taxpayer is deemed to be fiscally resident. They are known as *tie-breaker rules* and in the majority of double taxation treaties they follow the *OECD Model Convention*. Accordingly, most double taxation agreements define the country of fiscal residence as the place where the taxpayer has his/her **permanent home**. If the taxpayer has homes in both countries, the crucial point is where **that person's personal and/or economic activities are centered**. The taxpayer's **habitual place of sojourn** is then in third place, and **citizenship** is considered only in fourth place. If the tax residence cannot be determined on the basis of these criteria, it is decided by **mutual agreement** between the countries concerned.

Double taxation agreements can also be useful in terminating tax residence in the country of emigration more quickly. So if someone no longer wishes to count as a UK tax resident – for instance, to avoid paying capital gains tax – UK domestic law stipulates that certain taxes apply up to five years even after moving abroad. But if the person moves the tax residence to a country that has a suitable double taxation agreement with the *UK*, such as *Belgium*, he/she can bypass such domestic tax regulations and reduce the period during which certain UK taxes still apply after a change of residence.

However, in the absence of a double taxation agreement between the previous and the new country of residence (such as when moving, for example, from the *Netherlands* to *Monaco*), only the respective domestic fiscal regulations apply. These are as a rule stricter – at least for high-tax countries – i.e. it is more difficult to terminate one's former fiscal residence. In order to avoid continuing to pay tax on one's global income and possibly assets there too, often all links to one's former country of fiscal residence must be severed, and even then sometimes certain extended taxation applies for some time after emigration.

15.3 Inheritance law and inheritance taxes

Moving permanently to another country can also have considerable effects on the **applicable law** regarding inheritance, and on **inheritance taxes**. Depending on the country in which

one sets up one's new residence, this can bring either advantages and tax savings or disadvantages and a higher tax burden. Other jurisdictions permit different asset dispositions in the event of succession to the estates of deceased persons (e.g. no forced heirship, greater testamentary freedom, but in other cases stricter forced heirship regulations, etc.). As inheritance taxes are in many countries only charged if the **decedent had his/her last or primary residence (domicile)** there, a change of residence of a person expecting to bequeath substantial wealth may lead to considerable tax savings for the heirs. Other countries, however, charge inheritance taxes if the inheritors are residents, and some countries, for example *Germany*, combine both systems. Thus German regulations consider not only the decedent's last place of residence; it is sufficient if the heir lives in *Germany*. So any inheritors living in *Germany* and wishing to avoid paying tax on the inheritance they receive would also have to consider moving their own residence to somewhere offering more favorable tax conditions. A similarly difficult situation exists for US citizens, who are subject to inheritance (estate) taxes on the basis of their citizenship regardless of their place of residence; in other words, even if a US citizen moves his/her residence abroad, this does not change anything with regard to his/her US inheritance tax liability. Moreover, a US citizen is subject to gift taxes on gifts of assets made during his/her life in excess of the applicable lifetime and annual exemptions. For a US citizen, the only possibility to escape US Federal estate and gift tax liability is to relinquish US citizenship. Finally, it should be noted that, as a principle of international tax law, real estate is generally subject to inheritance tax where the real estate is located. Therefore, if one's wealth primarily consists of real estate located in countries that have high inheritance tax rates, a change of residence may have little or no effect on the inheritance tax due.

15.4 International health insurance

International health cover is an **extremely important topic** for anyone thinking of moving abroad, and yet it is scarcely considered by many people and in particular hardly mentioned at all by advisers. Admittedly, it is not the job of a lawyer specializing in international inheritance law or an international tax adviser to know all about insurance as well – and especially about international health insurance. Consequently, relatively little specialist competence in this sector is available to private clients. Most advisers and insurance brokers world wide with such expertise merely represent a single insurer. Only very few offer more than a small number of products and are able to provide really comprehensive advice.

Trying to find ideal health cover is no easy task even without moving abroad, but it is of particular importance when moving to another country or even staying there for a limited period. The risks of sickness and accident must be covered comprehensively in an international context in order to avoid unpleasant surprises. A few important points must be considered in view of the wide choice of diverse solutions and different insurance products.

Anyone who lives or works abroad, runs a company or retires there should arrange insurance cover that is as extensive as possible and applicable around the world. Health insurance in particular should allow the patient to choose his/her preferred doctor and hospital with as few restrictions as possible, and ideally none at all.

A question of residence

In the event of a temporary stay abroad with no change of residence, basic state insurance usually assures at least minimum cover within *Europe* in emergencies. In addition, almost

all local health insurers offer the option of comprehensive cover for sickness and accident via private supplementary policies, even for temporary stays abroad. Before moving abroad definitely, however, it is useful to check out the insurance options in detail, from free choice of doctor and hospital to medication cover. Previous health policies normally terminate with a move abroad, and continuing insurance cover must be assured during the actual process of moving.

Comprehensive cover with a **free choice of doctor and hospital world wide** is strongly recommended in most cases. This is because even in many developed countries the public healthcare system satisfies only minimum requirements and it is essential to seek out private hospitals to ensure competent medical treatment. And there is no alternative to comprehensive insurance cover for anyone thinking of moving to, say, the *USA* or the *Bahamas*, or to a developing country. Many countries have good local private health insurers, and some of them also offer international cover and a free choice of doctor and hospital. Although such a local insurer usually represents the least expensive solution, it is rarely the best one. It should be stressed that almost all insurers with a local or national scope of activity in the relevant country will only accept policyholders who are actually resident in the country. Anyone who **leaves the country again will normally lose his/her insurance cover**, which can become an insoluble problem with increasing age. It is also difficult to obtain a truly international and unrestricted free choice of doctor and hospital in many places. So the ideal insurance policy will be independent of residence and duration of stay and will also guarantee fully comprehensive cover as far as possible. Most local insurers offer only unsatisfactory solutions if at all, and very few offer private health insurance that can be concluded or retained even when the policyholder lives abroad. So it is vital to check these important aspects, and in most cases it is worth while consulting an independent insurance adviser specializing in international health insurance.

Free choice of doctor and hospital, worldwide cover

Although an extensive choice of private health insurance schemes with an international scope is available world wide, only very few can really be recommended. When comparing the various offers, it is important not merely to look at a specific insurance product but also at the financial soundness and reputation of the insurer as well as the latter's experience in international health insurance. The insurance product that best satisfies the individual requirements must then be considered.

Private health insurers are not obliged to accept everyone. So anyone who is already over 55 years of age and/or is not perfectly healthy has little chance of obtaining private health insurance and still less comprehensive insurance with international cover. For this reason in particular, it is advisable to check out the insurance situation in detail before moving abroad. It may make sense to change over to an international health insurance scheme several years before a planned or possible move abroad in order to be assured of the necessary flexibility later on. Even if no transfer of residence is planned, but one wishes to be optimally insured against sickness and accident, a detailed check of all options is worth while. It may even be of benefit to take out international health insurance in this case.

Anyone staying abroad frequently or planning to move abroad permanently should arrange insurance cover **independently of residence and sojourn** – i.e. inclusive of any subsequent moves abroad or even a return home at a later stage. Such cover will ideally permit an unrestricted choice of doctor and hospital world wide.

15.4.1 Checklist: International health insurance

In selecting suitable health insurance, care should be taken to consider the following points:

- Worldwide cover at attractive premiums. It is also important to consider premiums in higher age brackets.
- Free choice of physician and hospital world wide without restrictions.
- No restrictions on the policyholder's residence and duration of stay, even in the event of a later permanent return to the home country.
- Guaranteed lifelong policy renewal, even in the event of a later change of residence, or illness of longer duration, etc.
- Efficient processing in the event of a claim.
- Multilingual emergency telephone service manned around the clock throughout the year.
- Choose an insurance company that is well known and has a good reputation as well as broad experience in the domain of international health insurance.

15.5 Other types of insurance

Many of the factors that apply to health insurance are also relevant to other kinds of insurance. However, they are less critical for the latter because property, personal liability and similar cover can be arranged or modified at almost any time irrespective of the age and state of health of the policyholder, i.e. also at a later stage. And in complete contrast to health insurance, it is often best to conclude this kind of insurance policy directly with a local insurer. However, it makes sense to clarify certain issues before actually moving in this case too.

For every insurance policy, it is important to check whether the cover continues to apply indefinitely after a move, only for a short time or expires immediately. It should also be checked whether any kind of restrictions apply, for instance in a geographical sense (motor vehicle insurance!). It is always advisable to **clarify these matters in writing** via letters to the respective insurers. Then, in the event of damage claims later on, the insurer's comments or commitment can be demonstrated without a question. An individual confirmation on the insurer's letterhead is also better than mere reference to the insurance conditions, as these may change and will always offer scope for discretionary interpretation. A policyholder is best assured by an unequivocal inquiry addressed to the insurer and an unequivocal reply which can be insisted on.

As already mentioned, it usually makes sense or may even be mandatory to conclude insurance policies for items such as household effects, motor vehicles, private liability, jewelry or objets d'art locally in the new country of residence. In some cases, however, such as for vacation homes, art collections or jewelry it may also be wise to arrange insurance in one's home country or via an international insurer. Special insurers with worldwide operations are particularly relevant for items such as larger and expensive furnishings or objets d'art.

15.6 Financial and estate planning

Anyone transferring their residence abroad will find that various parameters of their personal financial and estate planning will also change. Having previously been oriented to the legal and fiscal situation and general framework conditions prevailing in the home country, these must now be extended to cover conditions abroad.

So whoever moves to a part of the world dominated by the Euro should be aware that this is now the local **reference currency** rather than the US dollar, Sterling, Australian dollar, etc., and vice-versa. But it may still make good sense to retain investments in other currencies. As a rule, however, a move of a person's regular activities to a new currency area will also lead to different weighting of the currencies in their personal investment portfolio and will require a rethink of their financial planning and asset management arrangements. It may well be wise to consult a specialized investment adviser familiar with questions of clients with cross-border issues.

A move abroad also offers the opportunity for more flexible **pension planning**, as capital tied to government-regulated pension funds can often be released. Previous retirement provisions may have to be reorganized, liquidated or taken out prematurely (e.g. life insurance policies, pension claims, tied-up assurance funds, etc.). It is particularly important to consider **withholding taxes** when receiving payouts from pension institutions and any tax concessions when drawing any benefits in the form of pensions or capital payouts. As a rule, different costs of living also change the provision requirement and usually make it necessary to adapt one's **cash planning strategy**.

A move will also require careful examination of previous **estate planning or succession structures** (partnerships, foundations, trusts, family holding companies and the like). Here, too, considerable scope may be available for optimization depending on one's destination. Thus anyone moving for example to *Malta*, the *United Kingdom*, *Ireland*, *St Kitts & Nevis* or the *Bahamas*, can structure their assets by means of suitable succession structures so that they – or lifetime enjoyment thereof – are transferred without restrictions and in many cases also in tax-neutral form to freely designated heirs. The situation will be quite different when moving to a country such as *France* or *Spain*, although here, too, various opportunities for optimization usually exist. In any case, existing estate-planning strategies should be checked and their adaptation to the new conditions and opportunities examined. Professional support is usually indispensable in this domain too.

It is also important to include the aspect of **asset protection**, especially in the *USA*. In view of the peculiarities of the American legal system, which is characterized by a relatively low threshold of civil litigation, suitable measures to avoid excessive exposure of one's personal assets are indispensable. But when moving to other countries too, it may make sense to structure at least part of one's assets – perhaps including real estate – so that they are safe from seizure. Suitably designed **asset protection trusts** as well as specially structured **Swiss annuities** and **life insurance policies** are available for this purpose.

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Useful Websites

The CIA World Factbook

Country information from the US Central
Intelligence Agency
www.odci.gov/cia/publications/factbook

The Economist Intelligence Unit

Political, economic, business
analysis/forecasts for 180 countries
www.eiu.com

CountryWatch

Up-to-date information and news on the
countries of the world
www.countrywatch.com

US State Department

Information on visas requirements, consular
information, etc.
www.travel.state.gov

Map directory

Excellent maps available online
www.mapquest.com

Internet Portal of the European Union

www.europa.eu.int

Worldwide Chamber of Commerce Guide

www.chamberfind.com

Law.Com

A leading international legal directory

www.law.com

Hieros Gamos

International law and legal research center

www.hg.org

Tax-News.Com

News on international tax issues, offshore jurisdictions and more.

www.tax-news.com

Currency Converter

www.oanda.com

Bentley International Property Awards

www.propertyawards.net

FIDICdirect

International Directory of Consulting

Engineers

www.fidicdirect.com

International Real Estate Directory

One of the world's largest real estate directories

www.internationalrealestatedirectory.com

Reals.Com Real Estate Directory

Offers links and information on real estate related sites

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A source for independent real estate information

www.ired.com