

BRIDGING BORDERS

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ABLEGAL has been working for several years in the field of property law and offers legal assistance to Italian and foreign clients intending to invest in buying or renting residential and commercial property and hotels in Italy and abroad.

The Law Firm supports clients in all the phases of property investment. In particular in:

- the negotiation phase,
- drafting pre-contractual documents (for example, letters of intent, confidentiality agreements etc.),
- execution of legal *due diligence* on the property,
- negotiating and drafting the preliminary contract,
- assistance with the final deed before a notary.

Furthermore, they offer assistance with negotiating and drafting lease contracts.

ABLEGAL is able to offer its services both in Italy and abroad thanks to partnership agreements with Italian and foreign legal firms.

Investments in the Italian real estate sector

LEGAL OVERVIEW

The purchase of real estate in Italy, be it residential, business or in the tourism or hotel sector, is currently undoubtedly an excellent and secure investment. An ever-increasing number of foreign private and business investors are in fact focusing their attention on this market, attracted by beautiful locations, an extraordinary artistic heritage, wonderful cities, the warmth and charm of the people and last but not least, the considerable opportunities that exist to make a return on real estate intended for business use or the tourism and hotel sector.

That said, it is important to bear in mind that foreign investors who are keen on purchasing real estate in Italy should not do so without engaging the services of a capable lawyer who will handle the entire purchasing procedure: from the negotiations right through to the notarial deed. It should be emphasized, moreover, that given the distinctive nature of the Italian legal system, this procedure can at times prove somewhat complicated, above all from a fiscal perspective.

This brief, non-exhaustive outline is designed to give some idea of the legal issues associated with the purchase of real estate in Italy.

Parties (those who can buy)

The Italian legal system allows real estate to be bought both by a natural person as well as a legal person or entity. This principle is taken from Article 2 of the Constitution of the Italian Republic, which states that: "The Republic recognizes and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality", as well as for the natural person, from Article 1 of the Civil Code, in which it can be understood that the possibility of buying or selling is acquired at the moment of birth. Therefore, said actions can also be undertaken by minors or those who are incapacitated, clearly with the particular precautions that the law provides for these cases.

As mentioned above, real estate can also be acquired by a legal person and in particular a company, where this has been granted legally recognised status. The most important problems that might arise during the purchase of real estate by a company concern the organisation profiles of the company itself and they relate in particular to the representation or management. It is necessary, therefore, to carefully identify the body authorized to take decisions on behalf of the company as well as the body that has to outwardly demonstrate corporate will. Said investigations must be conducted on a case by case basis in accordance with the requirements of Italian law with regard to the type of company.

A piece of real estate in Italy can also be purchased by a foreign party, be it a natural person or a company. When it comes to a foreign natural person, Italian law sets out three different instances:

a) a citizen of a State belonging to the European Union: in this case the purchase can take place without any restrictions;

b) a citizen of a State not belonging to the European Union (a non-EU citizen) and not regularly settled in Italy: in this case the purchase can only take place if an international treaty allows it or, on the basis of the "principle of reciprocity", if an Italian national is allowed to purchase real estate in the purchaser's country of origin (the condition of reciprocity can be easily checked by visiting the Ministry of Foreign Affairs' website) www.esteri.it/MAE/IT/Ministero/Servizi/Stranieri/Elenco_Paesi.htm;

c) a non-EU citizen regularly settled in Italy: the possession of a residence permit or a residence card allows the purchase to take place and the foreign national is not subject to the restrictions outlined in section b) above. A foreign national is considered "regularly settled" in Italy if he or she is in possession of a residence permit for specific reasons, or a residence card. Everything highlighted above also applies to foreign companies intending to purchase real estate in Italy. In general, a foreign company is understood to be a company that was not set up in Italy (Art. 25 of Law 218 of 1995).

Therefore, in accordance with the aforementioned criteria, if a company was set up in an EU country, it may purchase without being subject to any restrictions. On the contrary, a non-EU company will be subject to the principle of reciprocity mentioned previously.

The direct purchase of a piece of real estate and the purchase of the company owning the property.

Normally an investor will purchase a piece of real estate from the vendor (asset deal). However, situations may arise where the vendor is a company. In this case, instead of purchasing the real estate directly, the investor could buy all or the majority of the property owner's shares (share deal). It is clear that the decision about the decision about which type of purchase is to be carried out cannot overlook the agreement with the vendor, who might have decided beforehand about what form the sale of the piece of real estate to be offered to the investor should take.

Often, however, the investor is free to decide which the most convenient form of sale is. This decision must be taken on a case by case basis, assessing a variety of reasons which, at times, will depend more on business objectives than issues of a strictly legal nature.

Broadly speaking, however, it is fair to say that the propensity to opt for one or other of the aforementioned purchase types depends above all on the fiscal benefits that could be derived from the operation.

It is necessary to advise the reader that it is not only the fiscal options that come into play when choosing the type of purchase. In fact the investor might, for example, prefer to purchase the piece of real estate directly, because in this case the purchaser will only be liable to third parties for any debts associated with the property incurred after the purchase date. On the contrary, in the case of the purchase of a company, the purchaser takes on all the actual or potential debts associated with the real estate and, generally speaking, all of the company's assets, even in relation to the period prior to the purchase of the property.

A typical purchasing procedure

Usually, the purchase of a piece of real estate is broken down into a number of successive stages that together form an actual procedure. The transition through these different stages is not however compulsory, given that the vendor and the purchaser can meet in the presence of a notary and draw up a deed of sale.

As mentioned previously, however, the actual deed of purchase is, in general, preceded by at least four stages and this is due to the ever increasing complexities of the operations of purchasing real estate.

Stage one: the negotiation and drawing up of letters of intent or expressions of interest, that must be both comprehensive in their content and yet concise and have a non-binding effectiveness.

Stage two: the carrying out of legal and technical due diligence. Due diligence consists of the investigative activities required for the purpose of acquiring all the material needed for assessing:

- I) the expediency of the investment;
- II) the suitability of the price;
- III) the appropriate setting out of the wording of the contract with the inclusion of the specific clauses);
- IV) all the situations of potential risk.

The activity of due diligence in relation to an investment in real estate, even though it may be always broken down differently, in general consists of the following assessments:

- legal
- fiscal
- technical
- urbanistic
- administrative
- environmental

Stage three: the negotiating and signing of the preliminary sale agreement, which must be comprehensive, detailed and effectively binding. The purpose of the preliminary agreement is not just of "holding" the deal, but also that of immediately anticipating appropriate negotiated guarantees to the benefit of the investor - like for example the specific guarantees about the administrative regularity of the property - which will remain in effect following the drawing up of the notarial deed.

Stage four: the drawing up, before a notary (generally chosen by the purchaser), of the final contract of sale.

With regard to the notarial deed, it is important to point out that this is not compulsory. Indeed, under Italian law, the ownership of a piece of real estate can be transferred by the signing of a private agreement between the vendor and the purchaser. Normal practice, however, is that in almost all cases a notary's deed of sale is drawn up, in order to subsequently record the agreement with the real estate registry for the purposes of safeguarding the purchaser against a possible further sale of the same property by the vendor to other parties.

As required under Article 1475 of the Civil Code, the costs of the sale and any other additional costs will be paid for by the purchaser. These costs include the notary's fee, the registry fees or the value added tax. Any other brokerage expenses will be divided equally between both parties.

The Price

The deed of sale must contain details of the price, that is to say it must specify the sum of money that the purchaser will pay. Where such information does not appear, the deed will be invalid. However, in order for a deed of sale to be valid it is not required that the sale price be determined, but what is sufficient is that the same may be determined, on condition that such determination is based on criteria, references or preconstituted objective parameters that are contained in the contractual document.

A 'sale by size' occurs when the contract specifically indicates the units of measurement for the property and the price is determined on the basis of a certain sum to be paid for each unit of measurement (Article 1537 of the Civil Code, Paragraph I).

In this case, if the actual size of the property is less than that established, the purchaser will be entitled to a reduction in price; if, however, it is greater, then the vendor is entitled to receive a supplementary payment, but the purchaser has the option to withdraw from the contract if the oversize exceeds one twentieth of the size stated (Article 1537 of the Civil Code, Paragraph II).

More often than not the sale price is determined with reference to the asset as a whole. In this case, it is referred to as a 'bulk sale' which, in accordance with what is laid down in the Civil Code, exists when, even if the size of the asset has been indicated, the price is set as a fixed total sum, in relation precisely to the property as a whole and not its size.

The situation changes when the company owning the property is being purchased. In this case, the purchase price is established by making reference to the company's assets, that is determined following the due diligence process and the subsequent negotiations between the parties. In particular, for the purpose of establishing the purchase price, it is necessary to carefully assess the company's net asset value, its financial structure and its prospective earnings.

It should be noted that payment is only allowed by non-transferable check or by bank transfer and not cash down.

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Please note: The contents of this brochure do not constitute, nor are they to be considered legal advice. With regard to these, the writer accepts no liability.

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