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# Property investment and development finance in European jurisdictions: France

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## Abstract

This paper looks at legal and practical issues which may arise for prospective lenders in relation to secured property loans concerning property in France. While the issues discussed are necessarily subjective, and appropriate legal advice should be taken in all cases, it is hoped that the paper will provide initial guidance in respect of transactions undertaken in France, relative to the typical expectations of a lender in respect of a similar UK deal.

## Keywords:

property finance, secured lending, investment property, France

## INTRODUCTION

This is the fifth and last in a series of papers on property, investment and development finance in certain continental European jurisdictions, previous papers having dealt with Holland, Italy, Spain and Germany. This paper deals with the position in France, and, in the interests of space, it is confined to investment property transactions.

## FRENCH REAL ESTATE LAW

As with other jurisdictions considered in this series of papers, France is a civil law country where the law is largely governed by the French Civil Code and several other codes such as the Commercial Code, the Urbanism Code, and the Construction and Inhabitation Code (the most relevant of which will, for the purposes of this paper, be referred to as 'the Code').

Under the Code, absolute ownership of property (*pleine propriété*), in the same sense as a freehold under English law, is recognised, and ownership extends to the surface and the space above and below it, together with all fixtures.

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**Land Register as evidence of title**

**REGISTERED LAND SYSTEM**

An owner will evidence ownership of the relevant land by entry at the Land Registry (*Centre des Impôts Fonciers* and *Conservation des Hypothèques*).

As with other continental European jurisdictions, the Register is not, as such, a state guarantee of title as in England and Wales, but it does constitute evidence of ownership and may therefore be relied upon by all parties acting in good faith. Any interested third party has the right to challenge the validity of an owner's title in court, but the Land Registry itself cannot be held liable for inaccurate information on the Register.

Information on the Register is public and, as in England and Wales, copy entries (*Fiche parcellaire*/*Fiche d'Immeuble*/*Fiche de Propriétaire*) can be obtained upon application within two or three weeks upon payment of a fee. Information available includes the identity of current and past owners, date of acquisition, price paid, easements and encumbrances (including financial mortgages, which will identify the mortgagee and the amount secured) and leases of over 12 years (see below). This information would be expected to be discovered and reported on by the Notary (*Notaire*) engaged in relation to the property acquisition (see below). The copies of entries provided should not be more than two months old at the time of the relevant transaction.

Note that title insurance is not currently a feature of the French system. This is due to the fact that the role of the *Notaire* is to verify and certify title to real estate.

**OTHER TYPES OF TENURE**

**Construction leases and other non-freehold tenure**

Apart from freeholds, long-term leases might be granted, including in particular construction leases (*Bail à Construction*). This is for a term of between 18 and 99 years, under which the tenant is obliged to erect buildings which will ultimately revert to the landlord. Much like the 'derecho de superficie' in Spain (see previous paper in this series, in *Briefings in Real Estate Finance*, volume 3, issue 3). Other forms of ownership might include a form of real estate concession (*Concession Immobilière*) for a term of between 20 years and 99 years and certain forms of co-proprietorship.

**'Volumes'**

In particular, French law accommodates what is known as ownership of 'volumes'. Given that freehold ownership includes everything above and below the surface, an owner could create an interest analogous to 'flying freeholds' under English law, whereby different tranches of the land ('volumes') may be allocated different owners, who would each have a proprietary interest in their respective 'volumes'. For example, an area beneath the surface could be allocated as underground parking space in that manner, and individual floors of a large office block could also be so allocated. The relationships between the various proprietors of volumes can be organised in 'co-ownerships' (which include shared services) or through reciprocal easements and rights (in which event a matrix of

reciprocal easements and rights as between the various volumes should be constructed). Each volume is a mortgageable interest in land.

## MECHANICS OF PROPERTY ACQUISITION

### The notary

As is the case in all jurisdictions considered in this series, there will generally be two stages, namely, contract and completion, and the *Notaire* is central to the process. (*Notaires* have a monopoly over conveyancing transactions in France.)

As with other continental jurisdictions, the *Notaire* is a public officer, technically independent so far as both parties are concerned, unless each of the parties is assisted by its *Notaire*. For larger, more complex transactions, the parties are usually also assisted by their respective solicitors (*Avocats*). The vendor often requires that it chooses the *Notaire*, although his fees are paid by the purchaser, but the parties may agree otherwise. There is a scale of fees but, above a certain price, they are effectively negotiable, in particular when external lawyers are involved.

In cases where the parties wish to involve their own *Notaires*, eg when a lender is involved, the lender might be keen on having his own *Notaire*, or perhaps the vendor might have one *Notaire* and the purchaser/mortgagee another. The overall fees relating to each specific act drafted by several *Notaires* are split in accordance with terms agreed by the parties involved.

### Subject to contract?

A prospective purchaser could make an in-principle offer for a property (*Offre d'Achat*). Alternatively, a vendor may make an offer (*Offre de Vente*). Great care must be taken to avoid a binding contract at that stage. The familiar 'subject to contract' regime under English law is rather tighter in France and, if he is not careful, a purchaser (or a vendor) could find himself bound under contract to purchase (or sell) if the purported offer accurately identifies the subject matter of the proposed contract and price payable and the other party then accepts such an offer. The purchaser should seek legal advice, even at that stage, to avoid undesired consequences, in particular to ensure that he has not inadvertently made an unqualified offer capable of acceptance.

At contract stage, two instruments are common, namely (i) the *Promesse de Vente* (option to purchase granted to a potential purchaser) and (ii) the *Compromis de Vente* (bilateral contract between vendor and purchaser). Under the *Promesse de Vente*, the vendor would grant the purchaser an option to purchase within a certain time period, usually two or three months, and the purchaser would pay, typically, a 10 per cent deposit, which is non-returnable if the purchaser fails to exercise the option within the option period. The conditions would include, for example, proof of title, satisfactory planning, freedom from pre-emption rights (see below) and obtaining of finance by the purchaser. (It is also possible to issue a *Promesse d'Achat* — whereby a potential purchaser grants to a vendor an option to sell — but they are rarer in practice.)

Note that, unlike the position under English law, for a condition precedent to be valid, it must not be dependent on the unilateral act or omission of only one party to the contract. It should also be noted that, while most forms of contracts relating to property rights should be drafted by a *Notaire* (see below) in the form of an authenticated deed (*Acte Authentique*) and be registered at the Land Registry in order to be valid, a *Promesse de Vente* does not necessarily have to be in the form of an authenticated deed and registered at the Land Registry (see below).

## Diligence items

Before entering into a contract, as well as advice concerning the structure of the transaction generally (eg asset or share purchase, tax implications, etc, particularly for foreign investors), the following minimum information must be assembled, whether through the offices of the *Notaire* and/or the use of external lawyers:

- Perusal of all title documents;
- Perusal of plans, specifications and technical documents;
- Planning (see below);
- Examination of all occupational leases (see below, in regard to lease terms), which would typically be done by an external lawyer in conjunction with the prospective purchaser's valuer, rather than the *Notaire*;
- All applicable Land Registry searches, in particular to identify existing mortgages and other encumbrances, which would be undertaken by the *Notaire*.

Note in particular that, since 1996, property owners must carry out investigations to establish whether asbestos is present at the property and, if asbestos is discovered, specific proposals regarding its removal must be put in hand.

The Code provides for various conditions applicable to sales of property, but these can be contracted out of, and, in a similar way to the standard conditions of sale in relation to English law conveyancing, the parties to the French property acquisition would be able to vary most of the Code provisions.

The contract documents do not of themselves confer good title on the purchaser and are not the documents that are ultimately submitted to the Land Registry. They are mere contracts, that is, conferring rights *in personam* rather than *in rem*, in the same way as an English law contract would confer a right which might either be enforceable by specific performance or, more likely, allocate damages for breach.

Care must be taken in cases where it is desired to incorporate a provision entitling the purchaser to require the conveyance of the relevant property to be made to a third party nominee of the purchaser, rather than the purchaser himself. Unless these provisions are carefully worded, it could result in a 'double transfer', whereby, particularly from a tax/registration duty perspective (see below), the authorities might claim that there have been two dispositions.

## 'Double transfer' avoidance

## Completion

There is then a completion process involving a formal transfer, conveyance or like assurance and payment of the balance of the purchase price after, typically, payment of a 10 per cent deposit at contract stage. The *Notaire(s)* would draft the relevant conveyance (*Acte de Vente*) and deal with the formalities of registration. In cases where a lender is involved, he would also ensure that the terms of the secured loan were contained in the conveyance itself, even if a separate loan agreement and mortgage were executed and notarised.

The contractual conditions of sale originally contained in the contract document would need to be reflected in the conveyance itself, so that, if one party had difficulty with the contractual terms and wished to rectify it at conveyance stage, this could not be achieved. Hence, it is important that the *Notaire* is fully involved at both contract and completion stages.

The *Notaire*, in the course of carrying out his obligations in relation to the transaction, would have undertaken various searches at the Land Registry, in particular to establish that the vendor is the current registered owner. When drafting the conveyance, he would need in principle to be able to recite 30 years of title ownership, so that the conveyance itself reflects the chain of title in such recital. Note, however, that the conveyance of title to the purchaser will not be perfected until registration at the Land Registry (as is the case under English law).

Completion usually takes place at the office of the vendor's *Notaire* and the purchase price is often paid into the *Notaire's* account, which would mean that a lender's advance would be so paid, along with the balance of the price paid by the borrower, and the *Notaire* would release the funds when it is confirmed that all conditions precedent thereto have been satisfied. *Notaires* are insured against misapplication of funds. The *Notaire* would also be responsible for the discharge of any existing mortgages and the application for appropriate deletions of the relevant entries in respect thereof to be made from the Land Register.

In order to register title, the *Notaire* retains the original conveyance. Registration is usually completed within six months, whereupon an official copy of the title document (*Copie Authentique*) is made available to the purchaser. (Other copies can be obtained afterwards against payment of approximately €1,200 per copy to the *Notaire*.) In the meantime, the *Notaire* would provide the purchaser with an appropriate certificate, confirming that he is the new owner of the property, in order for the purchaser to produce such evidence to tax or other authorities.

## PLANNING

- (i) A *Certificat d'Urbanisme* (town planning certificate) should be obtained at contract stage in order to provide the purchaser with information concerning any applicable planning restrictions and confirming, for example, the ability to build on the land and whether any particular zoning regulations apply to

## Planning

it. The information in such planning certificate is valid for one year and, in relation to any planned development, the purchaser should obtain a pre-development certificate which is in the nature of an outline planning permission, which will state expressly its duration (which may not exceed 18 months).

- (ii) In situations where demolition is involved, a specific demolition permit will need to be obtained.
- (iii) Within the Paris region, a special licence is required for commercial offices or industrial developments when new construction occurs or when existing premises are to be renovated or extended (with limited exceptions).
- (iv) A special retail premises permit ('CDEC') is required in relation to the opening of certain retail premises (in excess of 300 square metres) and certain hotels, cinemas and petrol stations.

Detailed consideration of the above is not possible in this paper, and specific advice should be taken in all cases.

### **PRE-EMPTION RIGHTS**

#### **Local authority pre-emption rights**

In most areas in France, the local authority has a right of pre-emption in relation to proposed sales of property, which enables the local authority to have the opportunity to purchase the relevant land instead of the prospective purchaser, in particular where the land might be required in relation to an urban project, local housing proposals, promotion of the local economy, etc.

Prior to selling the property, a vendor must declare his intention to sell by serving a notice called a *Déclaration d'Intention d'Aliéner* ('DIA') to the local authority, in the absence of which, any purported sale would be null and void.

The *DIA* must contain, *inter alia*, the following information:

- (i) The proposed price (including any interest, specific charges, broker's fees etc);
- (ii) All conditions of payment of the price;
- (iii) Description of the property (relevant Land Registry references, use, state of occupation, existing charges);
- (iv) Applicable conditions precedent to the sale.

If the name and details relating to the purchaser are included in the *DIA*, any waiver by the local authority of its pre-emption right would be valid only if the sale was completed in favour of the named purchaser. Any purported transfer to another purchaser would require service of a new *DIA*.

The *DIA* can be submitted, with the relevant details completed, even though a formal contract (see above) might not at that stage have been signed, but this is not considered advisable in case the terms of the transaction change. Furthermore, in a recent transaction, the parties simply waited until the local authority's pre-emption right expired (see below), and then proceeded immediately to simultaneous contract and conveyance.

Regarding the operation of the right of pre-emption, the local authority may expressly waive its right, and will be deemed to have done so if no response is forthcoming after two months. Alternatively, it may exercise its right on the same conditions as those of the proposed sale by the vendor, in which case the vendor must sell on those terms to the local authority. The local authority might, however, exercise its right, but on the basis of a price to be determined by the court, if necessary.

**Statutory requirements for leases**

**LEASES**

Commercial lease law is governed by the Code. In principle, commercial leases must have a nine-year minimum term and the tenant has statutory renewal rights, except in certain circumstances, such as intention to redevelop by the landlord (which has a parallel under English landlord and tenant law). The landlord also might offer compensation to the tenant in lieu of renewal or offer alternative premises in certain circumstances.

**Rent**

The parties may freely negotiate the initial rent, which can include a turnover element. The rent is then adjustable (upwards or downwards) on an annual or three-year basis, having regard to indexation provisions built into the lease. The review is supposed to be at market rental value, but is capped to the variation of the *INSEE* (the French State Statistical Institute) cost of construction index. Any increase or decrease in the three-yearly basis aforesaid cannot exceed the variation in the cost of construction index for the three-year period, except where, during such period, there has been a *de facto* change in the local economic circumstances resulting in a variation of more than 10 per cent in rental value. At the end of a commercial lease agreement, the lessee has a right of renewal of his lease on the same conditions as the original lease at a revised rent, capped by reference to the increase in the *INSEE*'s national construction cost index. Such a cap does not apply in the following specific cases:

- where the original lease term exceeds nine years (or where a nine year lease is tacitly extended to twelve years or more), the rent shall be at market rent;
- where the demised premises are used as offices (where the rent shall be at market rent) or for a single purpose (such as a hotel, in which event the rent is fixed according to the rent that would be payable by similar lessees for similar premises at that time);
- where the rent is fixed according to specific criteria such as turnover or profit made by the lessee at the demised premises;
- where the lessee's activity or the demised premises has changed and/or local economic circumstances have noticeably improved since the original lease was signed (eg by the introduction of an enhanced transport system or creation of a pedestrian zone), the rent reviewed shall be at market rent.

Hence, for a retail lease not exceeding nine years where no turnover rent is included, the rental increase upon expiration may be fairly limited, and may not necessarily be the market rent. It is possible to encounter retail leases signed ten or twenty years ago where the rent is relatively low. This would not occur where turnover rents have been included, or to office premises.

## Assignment

The Code prohibits a landlord from forbidding assignment when the lease is being assigned to a purchaser of the tenant's business. That apart, most leases prohibit assignment without consent and it should be noted that, where consent is granted, invariably the terms are such that the outgoing tenant is jointly liable with the assignee for performance of the tenant's covenants.

Tenants are generally responsible for the cost of repairs. Rent deposits are common. Sub-letting and change of use are usually restricted unless consent is given, and tenants will pay a service charge contribution as appropriate.

Shopping centre leases are usually for a term exceeding nine years, with a fixed rent or lease and turnover rent in order to avoid limitation on variation of the rent in accordance with the cost of construction index referred to above. Often, they include a turnover rent and a landlord's pre-emption right in respect of any proposed assignment.

At the expiration of a nine-year retail lease, the rent upon renewal must be at then passing rent upon expiration unless local economic circumstances have changed (eg the introduction of an enhanced transport system), so that in cases where the original lease may have been signed ten or 20 years ago, the passing rent will be relatively low. That is another reason why retail leases in general are at least 12 years long, so that such restrictions will not apply. This is in contrast to a nine-year office lease, where, upon renewal, the rent can be reviewed to then market rent.

## Forfeiture

In respect of forfeiture, purchasers and lenders should check occupational leases to make sure that they have a specific termination clause (*Clause Résolutoire*) allowing termination by the landlord in the event of non-payment of rent or breach of tenant's covenants. Upon breach, a bailiff must serve a one-month notice on the tenant to remedy, although the court might order a grace period upon terms in appropriate circumstances. Note that if there is no such termination clause, the landlord must originate formal termination proceedings in court, which could easily take a year or more.

Hence, as with many continental European countries, the standard English 25-year lease with five-yearly upwards-only rent reviews is not the norm. The tenant has the right to determine the lease on a three-yearly basis, although it is possible specifically to contract out of that provision, whereby the tenant waives the right to determine the lease for a certain period.

Note that leases extending for over 12 years must be registered at the Land Registry, which can be costly, depending on the rent. They are usually created by notarial deed.

## Contrast French and English law security

### SECURITY OVER PROPERTY

In previous papers, the author has discussed some basic principles which are common to civil law jurisdictions, in particular the fact that security is asset specific rather than, for example, taking a debenture with full fixed and floating charges as in the UK. In particular, floating charges are not a recognised concept under French law. In addition, there is also no concept of ‘all monies’ security. The mortgage must specify a maximum amount secured, which will include an amount in relation to enforcement expenses/default interest.

There are no specific regulatory requirements for foreign banks wishing to lend and take security over commercial property in France, but banking transactions generally may only be carried out in France by authorised foreign banks, of which there is a list published by the *Banque de France*.

### Types of security available

Security is usually granted over French property in one of two ways:

## Hypothèque and PDD

#### (i) *Hypothèque conventionnelle* — *Mortgage*

This can be created at any time by contract while the mortgagor is owner of the relevant property (as compared with the *Privilège du prêteur de denier [PDD]* — see below). This will invariably be governed by French law when the property in question is situated in France (pursuant to French conflict of law rules), irrespective of the law which governs the accompanying loan documentation. As with most French law-governed documents, and certainly those requiring notarialisation, the documents will need to be in French, although foreign parties will usually want to have effective translations.

The deed creating the *hypothèque* must in particular:

- be drafted in French and executed before a *Notaire*;
- describe the specific property to be mortgaged;
- state the amount of the debt created under the accompanying loan and the amount actually secured by the mortgage; and
- be registered in order to be binding on third parties.

Under French law, there is no restriction on the number of mortgages that may be created in respect of a single property.

Registration is therefore also important in order to establish the priority of the charge, as against any pre-existing and subsequent security. Ranking is established as at the date of registration. The *Notaire* will provide a certified copy of the deed (*copie exécutoire*), which, together with the certificate of registration from the Land Registry, represents the mortgagee’s title to the security.

## Registration

## PDD

#### (ii) *Privilège du prêteur de deniers* — *Lender’s lien*

This type of security, although similar in nature to the *hypothèque*, is a French specificity that may only be granted at the same time as the

loan facility is entered into, to facilitate the acquisition of the relevant property. In order to be valid, the main terms of the loan must be recorded simultaneously with the acquisition of the property (in practice, these are recorded in the same document) and the loan must be made directly to the entity giving the security.

Alternatively, in cases where it is not intended or possible that the entity giving the security be party to the loan agreement, it is possible to structure the transaction as a debt pushdown through inter-company loans and to assign under French law the benefit of the security interest(s) to the lender.

The document must:

- be drafted in French and executed before a *Notaire*;
- be accompanied by a certificate (*quittance*), executed by the seller of the property, confirming that the acquisition of the property was made through the borrowed funds; and
- be registered within two months of completion (again, to be binding on third parties and establish its ranking on the date of acquisition as against other security).

## Loan under French law

The accompanying loan should be governed by French law because there is some debate as to whether lenders' liens securing loans governed by foreign law are valid. From a practical point of view, the *privilège du prêteur de deniers* should be favoured when possible.

### Complexity/time taken

The timetable will vary greatly, depending on the size and complexity of the transaction in question, although an overriding factor, as in the UK, will be the speed with which each or all of the purchaser, seller and lender wishes to proceed. It is unlikely that a single transaction would take less than a few weeks and could take considerably longer.

### OTHER SECURITY

The other forms of security referred to in previous papers in this series can also be taken under French law. In addition, the *Privilège de Vendeur d'Immeuble* (see below) arises by operation of law:

## Vendor's lien

- **Privilège de Vendeur d'Immeuble:** this charge over real estate is created by operation of law. It is for the benefit of a vendor in order to secure payment of the purchase price by the purchaser. It is a form of lien which entitles the vendor to rescind the property disposition if the price is not paid in full in accordance with the sale agreement. Provided that the agreement comprises certain conditions, it can be registered at the Land Registry.

Such *Privilège* is effectively a vendor's lien over the property, securing payment of any portion of the price which is outstanding at completion; however, it may be transferred to the lender.

In cases where the agreement refers to the fact that the

purchase price was financed by a lender, the practical effect is that it confers an additional remedy (in addition to the mortgage granted by the borrower — see above) in that, if a borrower fails to repay the loan, the lender could demand that he be made direct owner of the property, subject to the lender reimbursing the borrower the balance of the purchase price contributed by the borrower, in addition to the lender's loan. The lender may then dispose of the property as he wishes.

A conventional mortgage (as above), on enforcement, would only entitle the mortgagee to a *saisie-immobilière* (see below), which is effectively an order for judicial sale by public auction. This is a rather longer and more complicated procedure than is the case when the property is simply being vested in the name of the lender, much like traditional forfeiture proceedings under English law. The possible downside to the lender is in relation to his potential responsibilities as owner of the property.

A well-advised lender would seek to have the benefit of both a conventional mortgage and a vendor's lien (through a delegation of the vendor's rights to the lender).

As for the *Privilège de Prêteur de Deniers*, the vendor's lien must be evidenced by executed deeds, duly stamped, notarised and registered within two months.

## Rent assignment

- **Assignment of rent and other receivables (Cession créances professionnelles — loi Dailly):** this form of security would arise when the borrower transfers, as security, all his interests, rights and entitlements in and to present and future receivables to the lender through a special form of transfer. The *Cession Dailly* (ie assignment of debts payable in accordance with the 'Dailly' law) may only be granted for the benefit of a 'credit institution'. The same form of charge might also apply, for example, to insurance proceeds. Joint insurance is possible, but unusual. In the event of damage or destruction of the mortgaged property, the tenant(s) will not be expected to pay rent. Therefore, as well as buildings insurance, loss of rent insurance would need to come into play.

Insurance proceeds generally would need to be applied in or towards reinstatement of damage or destruction, and it cannot be assumed that the mortgagee would simply be entitled to appropriate the insurance proceeds in or towards repayment of the secured loan.

Such assignment of receivables would come into effect on and from the date specified on the relevant transfer form and would be valid against the underlying debtor from that date.

## Receivables

- **Charge over cash collateral (eg in specified rent or other deposit accounts) — Gage-espèces:** the lender would have transferred to him by way of security all of the interests, rights and entitlements in and to the charged cash of the borrower. Upon default, the lender would be entitled to set-off all amounts owed by the

## Cash

borrower to him against the cash subject to such security. Note: the *Gage* results in the cash being blocked and being unavailable to the borrower, which is not always practicable from the borrower's point of view. It is also possible to take a pledge over sums standing on credit on a current account, but the disadvantage of such a pledge is that the security is only of value if there is money standing to the credit of the account at the time of enforcement.

## Shares

- **Share pledge:** over the issued share capital of the borrower granted by the shareholders of the borrower. This provides the lender with an alternative method of enforcement by way of taking control of the borrower company. A notice of the pledge is required to be served on the company whose shares are pledged. Often, the acquisition of property is achieved via the transfer of the share capital of the owning company. In such a case, a lender would no doubt request a charge over such shares. But potentially difficult issues in relation to financial assistance by virtue of the requisite upstream guarantee and security in support may well apply, and specific advice should be taken, as French law is more stringent than English law with respect to financial assistance, and there is no equivalent of the 'whitewash procedure'.

## Guarantees

- **Guarantees:** Shareholder or other third party guarantees usually granted within the framework of business relations can also be granted (first demand guarantees from a parent company or shareholder, guarantees providing for joint — or several — liability of the guarantor and the guaranteed party, etc). They are usually made in writing for evidence purposes. They do not require notarisation and there are no registration requirements. It is not usual but it is possible, in specific cases, to have them registered either with a notary or with the tax administration.

## SYNDICATED LOANS

## No trusts

As in other continental European jurisdictions, the English law concept of holding security on trust is not recognised in France; therefore, syndicate banks (other than the lead bank) would not be in the position of secured creditors by virtue of their beneficial interest under the trust.

In the case of a syndicated loan, therefore, what usually happens is that all the banks benefit from the security. Payments are made by the borrower to the agent (which is usually the lead bank) and are distributed *pro rata* among the syndicate members in accordance with their respective interests.

## TRANSACTION COSTS

## Costs

Notarial fees are subject to VAT (as to which, see below) and are payable in accordance with a statutory scale. The fees are 0.825 per cent (excluding VAT) of the purchase price for the property in

addition to €290.85 (for fixed costs). Fees in relation to security interests are dealt with below. In the case of larger transactions, when the *Notaire's* fees are in excess of €80,000 per agreement, the amount chargeable in excess of €80,000 is generally negotiable. In addition to the *Notaire's* fees, a fee is payable to the Land Registrar at 0.1 per cent of the higher of the purchase price and market value.

The taxes and fees incurred on each type of property security referred to above are as follows:

(i) *Hypothèque conventionnelle*

- Real estate registration tax rate (*taxe de publicité foncière*) amounting to 0.615 per cent of the mortgage value (plus related expenses) to be paid to the tax authorities
- Real estate registrar's fee (*conservateur des hypothèques*) amounting to:
  - 0.05 per cent of the amount mentioned in the mortgage registration form for registration of the mortgage (plus related expenses); and
  - 0.10 per cent of such amount for the release; and *Notaire* fees representing a percentage of the recorded amount of the mortgage, corresponding to 0.55 per cent of such amount, increased by €193.90 for fixed costs.

*Notaire* fees represent a percentage of the recorded amount of the mortgage, corresponding to 0.275 per cent of such amount increased by €71.28 for fixed costs.

(ii) *Privilège du prêteur de denier*

This does not generally incur as much in terms of costs as the *hypothèque*, as it escapes the *taxe publicité foncière* and therefore only entails the following costs:

- Real estate registrar's fee; and
- *Notaire's* fees.

In a recently completed transaction relating to the leveraged acquisition of an office building in Paris for approximately €50m, if a *hypothèque* had been taken, the registration fees would have been about €350,000 higher than for a *Privilège du prêteur de denier*.

In addition to the above fees, VAT (in France '*TVA*') at the current rate of 19.6 per cent is payable on acquisitions of new buildings or buildings not less than five years old, although subsequent sales, even during such five-year periods, will not attract VAT. VAT will also not apply in relation to a sale, even during the five-year periods, to a property dealer (*Marchand de Biens*). Such VAT may also apply to a substantially renovated building, even if it is not a new

building. In addition to such VAT, a 'land publicity tax' of 0.615 per cent will also be payable.

A purchaser should check whether rent is subject to VAT. Note that there is no link, as in the UK, between the acquisition of a property subject to VAT (see above) and whether or not an option in relation to VAT has been made in relation to rent. An option to charge VAT on rent may have been made even if the purchase of the building is not liable for VAT.

When VAT does not apply (eg in the purchase of old buildings), registration duty is payable. This currently comprises a *Droit Departemental* of 3.6 per cent, on which an additional 2.5 per cent is payable for other registration taxes (*frais de recouvrement et d'assiette*), and a *Taxe Locale* of 1.2 per cent, totalling 4.89 per cent. In addition thereto, stamp duties of €12 per sheet (recto/verso) are payable.

As stated above, a property acquisition might often occur by way of acquisition of the shares in the owning company. Generally, a sale of a *société anonyme's* (public company's) shares only attracts a 1 per cent registration duty, limited to €3,049 (per transfer). When the shares being acquired are in a company which simply holds the relevant real estate, however, a higher registration duty of 4.8 per cent on the sale price or market value, whichever is higher, will apply, thereby rendering the share acquisition device, from the point of view of registration duty, no more economical.

## ENFORCEMENT OF SECURITY

This paper does not deal with insolvency law in terms of the circumstances whereby the lender's security might be challenged in an insolvency situation on the basis of insolvency law-related issues (such as transactions at an undervalue, preferences, fraud on creditors etc under English law).

Under English law, if an event of default arises, the lender could make immediate demand for payment and, in the event of not receiving immediate payment, appoint a receiver or administrator, or take possession. As with other continental European jurisdictions, in France the procedure is more protracted.

The enforcement procedure centres around putting the relevant property up for sale by public auction, and certain procedures have to be followed. Generally, where a creditor in relation to an unpaid debt has an 'enforceable title' (*Titre Exécutoire*), that is, the relevant loan agreement or other debt instrument is created by notarial deed, or the creditor has an enforceable court decision, the creditor may proceed to seize and freeze assets belonging to the debtor.

The principal types of seizure (*Saisies*) are:

- (i) the *Saisie-Vente*, which applies to all tangible assets;
- (ii) the *Saisie-Immobilière*, which specifically applies to real estate and which requires a civil court (*Tribunal de Grande Instance*) order. The order will involve the court taking control of

## Enforcement: Auctions

- realisation of the property by way of sale (*Placement de l'Immeuble sous main de Justice*). This will be followed by a formal public auction in order to sell the property; and
- (iii) the *Saisie-Attribution*, which relates to the seizure of intangible property, for example, claims for the payments of money. This involves the freezing of money belonging to the debtor held at his bank or by another third party.

Note that certain reforms in relation to bankruptcy law in France are expected to be enacted in the near future. Nevertheless, typically, the period from default to public auction of the property would, not unusually, take nine to 18 months.

### REITS

#### REITS

Finally, a word on Real Estate Investment Trusts (REITs), given the discussion in the UK at the present time concerning Property Investment Funds (PIFs). The equivalent in France is the SIIC (*Société d'Investissements Immobiliers Cotées*). This vehicle was adopted under French legislation in 2003, ostensibly to promote the development of French real estate funds and in particular to strengthen their position against German, Belgian and Dutch funds by aligning the French tax regime with other continental jurisdictions whose regulations already accommodated vehicles affording fiscal transparency to investors.

Under the regime, a company electing SIIC status (with a share capital of at least €15m) would be exempt from tax on rents, capital gains and dividends received provided that:

- (i) at least 85 per cent of rental income is distributed annually to investors; and
- (ii) at least 50 per cent of capital gains are distributed within two years.

To date, it is understood that all listed French real estate companies have gone for SIIC status, albeit subject to an 'entry tax' on the accrued capital gains of the relevant companies electing to convert. Such tax was set at 16.5 per cent, approximately 50 per cent of the current rate of 35 per cent. Such tax is payable in equal annual instalments over four years.

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