

RUSSIA

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Good news for embattled market

The Russian real estate market is suffering like many others, but at least there is some good legal news.

Recent court decisions may have answered a controversial question regarding lease agreements; namely, whether preliminary lease agreements for unfinished buildings are enforceable.

Doubts over the validity of pre-lease agreements for new developments have long been a problem for developers and their financiers.

In the rising market, tenants had no cause to challenge pre-leases, but now things have changed. Until recently, Russian court decisions on the validity and enforceability of pre-leases were inconsistent. In April 2009, however, in a case involving the international retailer IKEA, the highest arbitration court of Russia confirmed that pre-leases were valid and binding and that any other interpretation 'created significant difficulties for the civil turnover'.

We therefore expect that the presidium of the highest arbitration court will adopt

a unified approach. Although the Russian civil law system is not based on binding precedents, Russian courts tend to follow the decisions of the highest arbitration court. This decision should help develop property finance and investment in Russia once the market recovers.

In 2007, the Russian authorities gave owners of buildings the right to acquire the freehold to their sites at a discounted price. Developers had to apply for this before 1 January 2010. Obviously this was beneficial, but many lacked the cash to acquire their freeholds.

To provide developers with more opportunities, the Russian authorities are now considering prolonging the discounted period. The State Duma (Russian Parliament) is considering two acts that would prolong it until 2012 or 2013. This is good news for the market.

Despite disturbances to the economy, the economic crisis may in some ways prove beneficial if it provides opportunities to clarify the law and stimulate the market.

SWITZERLAND

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Harmonisation of Swiss real estate transfer taxes

The Swiss Merger Act came into force on 1 July 2004. The Merger Act foresees, inter alia, that after a five year transitional period no cantonal real estate transfer tax shall become due in the event of a reorganisation under the Merger Act. This period, granted to the Swiss cantons for adapting their cantonal tax laws will expire on 30 June 2009. Based on this, the cantonal Swiss real estate transfer taxes are now abolished for qualifying reorganisations.

In Switzerland, taxes are levied on three levels, the Federal, the Cantonal and the Communal level. Each level has its own tax laws. The income taxes on the Federal and

the Cantonal/Communal level are to some extent harmonised by the Tax Harmonisation Act, this also includes real estate capital gains taxes. Real estate transfer taxes are not subject to the Tax Harmonisation Act and have now been harmonised by the Merger Act.

A transfer of real estate located in Switzerland generally triggers (beside the real estate capital gains tax) a real estate transfer tax, depending on the canton where the property is located within Switzerland. The real estate transfer tax amounts generally to some one to three per cent of the value of the transferred property.

Based on the Federal and cantonal tax

laws, transactions are supposed to be tax neutral, if such transactions qualify as tax exempt reorganisations. The classical forms of such reorganisations (mergers, de-mergers, conversions and transfers of assets and liabilities) have been defined in the Merger Act.

It is evident from recent real estate transactions that, despite the harmonisation, the Federal and Cantonal corporate income tax laws have adopted a broader interpretation of reorganisations than the Merger Act. It is common sense (and in principle covered by the tax laws) that a 'share to share deal', in German called Quasifusion, where a merger is economically performed by a shareholder exchanging his

shares in the target company for shares in the acquiring company, qualifies as a tax neutral reorganisation for income tax purposes. Some tax authorities, however, tend to qualify share to share deals differently for income tax, real estate capital gain tax or real estate transfer tax purposes. This can result in a situation where a share to share deal qualifies as a tax neutral reorganisation in one canton for all taxes, whilst another canton could deny the tax neutrality for the real estate transfer tax. Even though the real estate transfer taxes should be abolished for qualifying reorganisation as of 1 July 2009, it is strongly recommended to investigate the tax situation and consequences prior to the transaction.

UKRAINE

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Commissioning Act

According to the legislation of Ukraine for the owner of completed new buildings it is not enough only to complete the construction. The law provides special procedures for the owner to certify his property rights and enable him to dispose of his new property (in this case, completed building) in full.

The Commissioning Act is a very important final document of the new construction. It is a technical/permission document, but not a title document to real estate or land. The title document to new construction is the certificate on property right (the title certificate), which can be issued by the City Council on the grounds of the Commissioning Act, and subject to obligatory registration in the Bureau of Technical Inventarisation (BTI).

As of 1 January 2009 the new order is in force. It is envisaged by the Resolution of Cabinet of Ministers of Ukraine dated 8

October 2008, No 923. Before, approving new buildings for use was the competence of so-called 'working boards', which assessed the readiness of buildings for use, its compliance with technical engineering fittings, design documentation, etc. Now the board is required only to confirm the building's readiness. After the approval board confirms the building is ready for use, the inspectorate of State Architectural Construction Control should issue the certificate on compliance of the construction with design documentation, requirements of state standards and construction norms and rules within ten days. The building is considered to be approved and ready for use from the date such certificate is issued.

Thus, the procedure and time schedule for the commissioning of new buildings in Ukraine are considerably amended.