

THE REAL ESTATE  
LAW REVIEW

NINTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

THE REAL ESTATE  
LAW REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd  
This article was first published in March 2020  
For further information please contact [Nick.Barette@thelawreviews.co.uk](mailto:Nick.Barette@thelawreviews.co.uk)

**Editor**  
John Nevin

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Martin Roach

SUBEDITOR

Robbie Kelly

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK  
© 2020 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at February 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed  
to the Publisher – [tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

ISBN 978-1-83862-496-5

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & OVERY SCS

AUMENTO LAW FIRM

BELLWETHER GREEN

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

BIRD & BIRD

CHIOMENTI

CORDATO PARTNERS LAWYERS

DE PARDIEU BROCAS MAFFEI

DLA PIPER NEDERLAND NV

ESTUDIO BECCAR VARELA

GUZMÁN ARIZA

HENGELER MUELLER

HERBERT SMITH FREEHILLS CIS LLP

KIM & CHANG

MAPLES GROUP

N. DOWUONA & COMPANY

NISHIMURA & ASAHI

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU STOICA & ASOCIAȚII

SHARQ LAW FIRM

SLAUGHTER AND MAY  
SOŁTYSIŃSKI KAWECKI & SZŁĘZAK  
TSMP LAW CORPORATION  
URÍA MENÉNDEZ  
WALKERS

# CONTENTS

PREFACE.....	vii
<i>John Nevin</i>	
Chapter 1 BREXIT AND REAL ESTATE.....	1
<i>John Nevin</i>	
Chapter 2 ARGENTINA.....	5
<i>Pedro Nicholson and Delfina Calabró</i>	
Chapter 3 AUSTRALIA.....	15
<i>Anthony J Cordato</i>	
Chapter 4 AUSTRIA.....	26
<i>Tibor Fabian and Markus Uitz</i>	
Chapter 5 BRAZIL.....	35
<i>Franco Grotti and Guilberme de Toledo Piza</i>	
Chapter 6 CAYMAN ISLANDS.....	45
<i>George Loutas</i>	
Chapter 7 DENMARK.....	53
<i>Torben Mauritzen</i>	
Chapter 8 DOMINICAN REPUBLIC.....	66
<i>Alfredo Guzmán Saladín and Fabio J Guzmán Ariza</i>	
Chapter 9 ENGLAND AND WALES.....	73
<i>John Nevin</i>	
Chapter 10 FRANCE.....	88
<i>Pierre Gebarowski and Alexandre Blestel</i>	

## Contents

---

Chapter 11	GERMANY.....	106
	<i>Jan Bonhage and Thomas Lang</i>	
Chapter 12	GHANA.....	119
	<i>NanaAma Botchway</i>	
Chapter 13	HONG KONG .....	128
	<i>Dennis Li</i>	
Chapter 14	IRELAND.....	139
	<i>Rachel Rodgers, Robert Upton, Aisling Burke and Ronan McNabb</i>	
Chapter 15	ITALY.....	151
	<i>Umberto Borzi</i>	
Chapter 16	JAPAN.....	161
	<i>Norio Maeda, Takuya Shimizu, Akihiro Shiba, Yujin Gen and Yuto Tokoro</i>	
Chapter 17	LUXEMBOURG.....	176
	<i>Serge Hoffmann and Philippe Eicher</i>	
Chapter 18	NETHERLANDS.....	186
	<i>Max van Drunen, Leen van der Marel and Kirsy Corten</i>	
Chapter 19	POLAND.....	197
	<i>Janusz Siekański and Radosław Waszkiewicz</i>	
Chapter 20	QATAR.....	207
	<i>Josias de Salles and Moawiah Milbem</i>	
Chapter 21	ROMANIA.....	217
	<i>Valentin Creața</i>	
Chapter 22	RUSSIA.....	231
	<i>Sergey Kolobov</i>	
Chapter 23	SCOTLAND.....	242
	<i>John Bingham</i>	
Chapter 24	SINGAPORE.....	254
	<i>Jennifer Chia, Yvonne Lian and Lena Yeo</i>	

## Contents

---

Chapter 25	SOUTH AFRICA .....	270
	<i>Pieter Hugo Niehaus and Chloë Merrington</i>	
Chapter 26	SOUTH KOREA .....	280
	<i>Hyoung Soo Kwon, Jin Ho Song and David H Pyun</i>	
Chapter 27	SPAIN.....	288
	<i>Diego Armero and Belén Simbor</i>	
Chapter 28	SWEDEN.....	298
	<i>Jan Berg and Carl-Magnus Uggla</i>	
Chapter 29	UNITED STATES .....	307
	<i>Meredith J Kane</i>	
Appendix 1	ABOUT THE AUTHORS.....	323
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	339

# PREFACE

The ninth edition of *The Real Estate Law Review* is testament to the book's success and the continued significance of real estate as a global asset class. A great deal has happened since the first edition appeared in 2012. *The Real Estate Law Review* has proved its worth by providing readers with an invaluable overview of how key markets across the globe operate and how they have evolved in the context of world events. It is no longer possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of the global investment market, and *The Real Estate Law Review* seeks to help its readers to do just that.

This edition extends to 28 key jurisdictions around the world and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effect on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of the client's own jurisdiction.

In the year that the UK was expected to leave the EU, Brexit and the associated economic and political fallout has continued to be the dominant issue for UK real estate markets. Although there has been a drop-off in investment volumes, continued interest from a wide range of investors from around the world underlines the need to see each issue in the context of world events. A growing cache of investment capital is likely to prompt a surge in investment activity once some degree of certainty is finally achieved. The UK, and London in particular, seem certain to remain attractive to overseas investors troubled by matters of greater significance than Brexit.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this ninth edition of *The Real Estate Law Review*. I would also like to thank the members of the Law Review team for their sterling efforts in co-ordinating the contributions and compiling this edition.

**John Nevin**

Slaughter and May  
London  
February 2020

# RUSSIA

*Sergey Kolobov*<sup>1</sup>

## I INTRODUCTION TO THE LEGAL FRAMEWORK

### i Ownership of real estate

Under Russian law there are two main legal interests in real property:

- a* ownership: full title allowing possession, use and disposal of the property, including leasing it out to tenants. It is in some respects similar to freehold, although Russian law recognises separate ownership of land and of the buildings and other fixtures erected on land. Ownership rights to land extend to the surface (soil) layer of the land plot as well as to water (with some restrictions) and plants on the land plot. The subsoil is entirely state-owned; and
- b* lease: an interest allowing possession and use of the property for a specified or an indefinite term.

The most common ways to acquire ownership rights to real property are as follows:

- a* sale and purchase, exchange or gift;
- b* privatisation of state-owned or municipal-owned real property (especially land plots);
- c* by operation of law (e.g., if a legal entity is going through a reorganisation, the reorganised entity is deemed to have acquired ownership rights to the relevant real property by operation of law);
- d* development of real property; and
- e* inheritance.

Real property may be co-owned. There are two types of co-ownership: shared ownership (where the shares of co-owners are determined) and joint ownership (where the shares of co-owners are not determined). Shared ownership is a default option for co-owning real property unless the law provides otherwise (e.g., community property (i.e., property owned in common by husband and wife) is deemed to be a joint ownership) or it is not feasible to determine the shares of the co-owners.

The most common shared ownership is co-owners having shared ownership of the common areas in trade centres, shopping malls and office buildings. Usually, such co-owners have also been co-investors in the development of the relevant building. Co-owners may conclude a co-ownership agreement and govern the manner of use, maintenance and disposal of the co-owned real property.

---

<sup>1</sup> Sergey Kolobov is a senior associate at Herbert Smith Freehills CIS LLP.

Russian law also recognises a hereditary land plot right, which is in many respects similar to absolute ownership but may be acquired only through inheritance. Previously this right was granted only to individuals, and state and municipal authorities have now ceased to grant such a right.

Certain rights to property, which are at present primarily reserved for state institutions (such as 'permanent use'), still exist. These rights are no longer granted to individuals and private entities, and are non-transferable.

In Russia, it is not possible to separate the legal interest in property from the beneficial interest.

## **ii System of registration**

The ownership right and other rights in rem over real estate, most encumbrances and restrictions of such rights (such as long-term leases, mortgages and liens), and their accrual, transfer and termination, are subject to state registration in the Unified State Register of Real Estate. Those rights and encumbrances are deemed valid and effective once registered.

Most agreements under which rights in rem and registrable encumbrances arise are not subject to state registration (e.g., sale and purchase agreements, mortgages) and become valid and enforceable once executed by the parties. However, the law still requires registration of long-term lease agreements, as well as registration of encumbrances established by those agreements, in the Unified State Register of Real Estate. As a general rule, if a long-term lease agreement is not registered, it is valid only for the parties to it meaning that if a bona fide purchaser has not been aware of such lease when acquiring the property such non-registered lease has no effect on it and the tenant can be lawfully evicted.

The Unified State Register of Real Estate is, for the most part, a matter of public record, and any person may request an extract from it in relation to a particular property. The extract will contain a description of the property (type, address, area) and set out the type of registered rights to the property, the holder of the rights, as well as encumbrances and restrictions of the registered rights as at the date of the extract.

It should be noted that starting from 1 January 2017 the Unified State Register of Real Estate was merged with the State Real Estate Cadastre. Prior to this, before the merger, a piece of property had to be registered in the State Real Estate Cadastre to become real estate as a legal matter, then title to it was registered in the Unified State Register of Real Estate. Now both registrations can be done simultaneously in a single state register – the Unified State Register of Real Estate, which simplifies the overall procedure for registration of a real property and title to it.

## **iii Choice of law**

Russian law provides for a strict rule that any transaction involving real property is subject to Russian law, effectively applying the principle of *lex rei sitae*. This means that any agreement in relation to the disposal of real property located in Russia (e.g., lease agreement, mortgage agreement, agreement establishing an easement or any other agreement under which real property located in Russia is encumbered) must be governed by Russian law.

However, it is possible for the parties to enter into a framework agreement in relation to real property that provides for certain general obligations of the parties, covenants, warranties and representations, and to choose the law applicable to this framework agreement. Usually a framework agreement is used in conjunction with a Russian law-governed agreement in relation to real property that regulates the actual transfer or encumbrance of real property.

## II OVERVIEW OF REAL ESTATE ACTIVITY

In the boom years, Russia was one of Europe's largest property markets, with investment volumes of US\$8 billion to US\$10 billion annually. The figure briefly decreased during the 2008–2009 financial crisis.

Despite significant decline of the Russian real estate market during 2014–2016 due to economic instability, Rouble volatility and apprehension of new round of sanctions, 2017 and 2018 were relatively successful years for Russian real estate: in 2017 the market showed a double growth in real estate investment transactions (65 per cent of the total real estate investments were made for the purposes of receiving rental income) reaching US\$4.7 billion. This trend continued in 2018 however, the focus of investments shifted from office and retail to housing property being the most active sector with the share of 28 per cent of the total market volume, while office and retail sectors accounted for 26 per cent and 25 per cent correspondingly. In 2018 the share of foreign investors remained relatively high at around 45 per cent.

The reports of JLL, Knight Frank and Colliers for three quarters of 2019 suggest that Russian real estate market remained relatively stable. Volume of investment transactions for the three quarters of 2019 is 36 per cent higher than the volume of transactions for the same period of 2018 and already amounts to US\$2.5 billion, and is expected to reach US\$3.5 billion by the end of the year.<sup>2</sup> On the other hand, the share of foreign investors has decreased by more than two times (nearly 20 per cent as compared to 45 per cent in 2018).

Housing property remains the most active sector with the share of 30 per cent of the total market volume, while office and retail sectors account for 23 per cent and 18 per cent correspondingly. The warehouse property amounts to 15 per cent showing slight growth. Saint Petersburg which was very attractive for investors in 2018 (29 per cent share in 2018) lost more than 20 per cent with only 9 per cent share on the market.<sup>3</sup> Moscow realty remains the leader with the share of 81 per cent.<sup>4</sup>

According to preliminary results of the year, the major real estate transactions include the sale by Rostelekom of its share in the building of the Moscow Central Telegraph located in the heart of Moscow to a company connected to O1 Properties (which is allegedly affiliated with Russian oil giant Rosneft) with estimated value of US\$55 million, and the purchase of Maxi shopping malls chain by Central Properties for approximately US\$78 million. Another notable transaction of 2019 is a build-to-suite office project for Raiffaisenbank with estimated budget over US\$93 million. The biggest development transaction was acquisition of land plots for development by Ingrad from Liral amounting to US\$160 million.<sup>5</sup>

## III FOREIGN INVESTMENT

Subject to the following restrictions, real property can be purchased or leased by foreign individuals and companies for their own use or as an investment:

- a* foreign individuals and entities are not allowed to own land in areas adjoining the borders of Russia or land located within the boundaries of a seaport; and

---

2 Jll.

3 Knight Frank.

4 Knight Frank.

5 Knight Frank, RBC.

- b* foreign individuals and entities, as well as Russian entities with over 50 per cent foreign participation, may not own agricultural land (which is a specific category of land under Russian law).

There are no specific restrictions that apply to the lease of land, or the ownership or lease of buildings and facilities by foreign nationals.

## **IV STRUCTURING THE INVESTMENT**

### **i Acquisition structures**

There are two main structures for the acquisition of real property: asset purchase (acquisition of real property directly from its owner) or share purchase (acquisition of a holding company that owns relevant real property).

#### ***Asset purchase***

Where a deal is structured as an asset transfer, the target's liabilities, including tax liabilities and penalties, should not (subject to careful structuring) transfer to the purchaser.

An asset purchase is not, however, a perfect solution for the following reasons:

- a* there remains a risk that the Russian tax authorities could recharacterise the asset transfer as a 'sale of an enterprise' under which historic liabilities would be treated as transferring to the purchaser; and
- b* the authorities may attempt to establish that an asset transfer constitutes a fraud against creditors if it is proven that it was designed to evade historic liabilities.

In addition to these risks described, the key disadvantages of a sale of assets are as follows:

- a* administratively, they are more cumbersome than an acquisition of shares;
- b* the acquisition may require obtaining new licences and permits, novation or assignment of contracts; and
- c* the acquisition may lead to Russian VAT being payable.

A typical sale and purchase transaction is a two-stage process involving the execution of a sale and purchase agreement and registration of the transfer of title in the Unified State Register of Real Estate. The sale and purchase agreement must be a single written document.

The handover of the property is effected by completing a document that formally conveys the property from the seller to the buyer (an act of transfer and acceptance).

As a general rule, if a building or other immovable facility and the underlying land are owned by the same person, a sale of the building without the underlying land (and vice versa) is not allowed. If the land is owned by someone other than the owner of the building, the building can still be sold, and the new owner will enjoy the same rights to use the respective part of the land plot underlying the building as the previous owner of the building.

#### ***Share purchase***

Share purchases are still a very popular way to acquire real property in Russia. The major risk of a share acquisition is, of course, that a buyer will also assume all of the target's existing liabilities (subject to any contractual apportionment and post-acquisition risk mitigation strategies). This means that thorough due diligence of the historic activities of the target are crucial.

There are, nevertheless, numerous advantages in a share purchase structure, chief among which are avoiding the need to reapply for licences and permits, a less complex and burdensome acquisition process, no Russian VAT and the avoidance of business interruption.

## **ii Acquisition vehicle**

If the target company does not have a dedicated offshore holding company, it may be advisable to set up a holding company to make the acquisition or, in the case of an asset transfer, to create an offshore holding company with a wholly owned Russian subsidiary (the latter being the recipient of the transferred assets). The choice of jurisdiction will largely be driven by tax issues and corporate considerations.

## **iii Tax implications of acquiring an interest in property**

Generally, commercial property transactions are subject to VAT (at rate of 20 per cent). Currently, the sale of land and residential property transactions are not subject to VAT.

The sale of shares of a company by its foreign parent entity is subject to withholding tax in Russia if the assets of this company directly or indirectly consist of more than 50 per cent of real estate located in Russia and of derivative financial instruments from these shares, with the exception of shares in circulation.

# **V REAL ESTATE OWNERSHIP**

## **i Planning**

Planning and zoning in general are regulated by the Land Code and the Urban Planning Code, although the more technical aspects are set forth in regional and municipal legislation.

The Land Code and the Urban Planning Code operate with two main terms related to planning and zoning: the land category of the land plot; and the permitted use of the land plot. These terms determine how a particular land plot may be used.

There are seven land categories that attribute a land plot for certain general use (e.g., agricultural land, industrial land, urban land). Permitted use of the land plot is assigned to a particular land plot in accordance with zoning plans approved at each level, starting from the general zoning plan of Russia and ending with a zoning plan of a particular land plot. In comparison with the land category, the permitted use of the land plot is much more specific and determines what kind of building, structure or fixture may be erected on the land plot, or what activity may be conducted on the land plot (e.g., whether a land plot may be used for growing crops or for the development of a trade centre).

If a land category or permitted use (or both) prohibit a party from developing the relevant land plot, such a party must apply to the relevant authorities for a change of land category or permitted use; otherwise, the party will not be granted the appropriate construction permit.

## **ii Environment**

As the contamination or misuse of real property is a matter of public concern, the relevant authority may conduct an inspection of the property and issue a clean-up order to the party responsible for the contamination or misuse. Normally, the liable party would be an owner or

a tenant. Russian law also provides that if the owner of the land plot uses it in gross violation of its permitted use, the state authorities may confiscate the land plot (with compensation of its value to the owner).

The party responsible for contamination or misuse may also be subject to civil liability for damages caused to third parties.

The matters of environmental protection become especially significant if one considers using land plots for industrial development. Construction of an enterprise that may have negative impact on nature may require implementation of special protection measures (e.g. the obligation to apply for establishment of sanitary protection zones around the facility).

### iii Tax

#### *Property tax*

As a general rule, Russian companies are liable to pay property tax on the average annual net book value (cadastre value for trade and business centres and non-residential premises) of the fixed assets on their balance sheet.

However, movable fixed assets acquired after 1 January 2013 (other than those acquired from related parties or in the course of liquidation or reorganisation) are exempt from property tax. This narrows the application of this tax to immovable fixed assets and movable fixed assets acquired before 1 January 2013.

Starting from 1 January 2019, the property tax on movable fixed assets has been abolished. Immovable property<sup>6</sup> (other than land) will remain subject to property tax.

Land is exempt from property tax and may be subject to a separate land tax.

The standard property tax rate is 2.2 per cent; special rates apply to property taxable on its cadastre value. Regional authorities may reduce the tax rate or, in some cases, provide a full exemption for all or certain categories of taxpayers, or based on the type of property.

#### *Land tax*

Land tax is payable by landowners at a rate determined by the municipal authorities. Land tax is assessed on the cadastre value of the land, which used to be substantially lower than its actual market value; however, recently this difference has decreased or even been eliminated, and in some cases the cadastre value may even exceed the market value of the land, thus giving grounds for numerous disputes with the authorities.

Land tax rates may not exceed 0.3 per cent of the cadastre value of agricultural and residential land. With respect to other land plots, the maximum rate is 1.5 per cent of the cadastre value.

The Russian Tax Code permits municipal authorities to establish tax incentives for certain categories of taxpayers.

Businesses leasing land are not subject to land tax. Instead, they are liable for the land lease payments established by federal, regional or local authorities, or other landowners.

---

<sup>6</sup> Note that criteria to define property as immovable for tax purposes is slightly different from the criteria established by the Civil Code of Russia. This fact often raises arguments between tax authorities and payers, although the Federal Tax Service makes efforts to clarify and unify the criteria.

#### **iv Finance and security**

Usually, financing for the acquisition or development of real property is provided by banks. The most common security in relation to real property is a mortgage, which may be established over real property, lease rights and certain rights to property that are at present primarily reserved for state institutions.

A mortgage as an encumbrance becomes effective upon its state registration and, in the absence of such a registration, is considered to be null and void. The parties may enforce a mortgage without recourse to the courts (unless a limited number of exceptions apply).

The enforcement options for mortgagees include a public sale and taking possession of the secured asset (this option is not available if the mortgage is granted by an individual).

Where a land plot is mortgaged, all buildings and structures erected or to be erected on the land plot and owned by the mortgagor will be mortgaged by operation of law in favour of the mortgagee. Similarly, if a building or structure is mortgaged, the underlying land plot (if owned by the mortgagor) will be automatically mortgaged by operation of law in favour of the mortgagee.

## **VI LEASES OF BUSINESS PREMISES**

Leases can be granted for an indefinite period (terminable by either party on three months' notice) or for a specified (fixed) term. A fixed-term lease can be long-term (i.e., one year or longer) or short-term (i.e., less than one year). Commercial leases are commonly long-term (five to 10 years). In almost all parts of Russia, the maximum lease term for state-owned land is 49 years.

As noted above, long-term lease agreements must be registered with the state to be effective. Short-term lease agreements and lease agreements for an indefinite term do not need to be registered. However, following liberalisation of court practice, a long-term lease that has not been registered may still be considered effective if the relevant agreement contains all material terms and conditions, and both parties have been performing their obligations under the lease (using leased real estate, paying rent, etc.).

Commercial leases are treated very much as a matter of private concern, with a limited number of mandatory rules and restrictions. While most of Russia's land is still state or municipally owned, commercial property is predominantly privately held. Accordingly, commercial lease terms tend to deviate from the default statutory position of equal treatment of the parties, and to favour the landlord or the tenant depending on their respective economic strength and negotiation leverage and the market situation in the relevant location. Before 2014, the lease market in developed regions of Russia, such as Moscow, has been heavily in favour of landlords, and leases have, therefore, tended to benefit the landlord (e.g., landlords having the right to terminate without recourse to the court for the most minor breaches by the tenant, with no corresponding rights for the tenant). However, as a result of the continuing economic downturn, the position of landlords has weakened, and tenants have increased their negotiating power in these regions.

Under the general rules governing leases, the tenant has a right of first refusal to renew the lease on its expiry, unless the agreement provides otherwise, but the parties are free to alter the terms and conditions of the new lease. If the tenant continues to use the property after the lease has expired and the landlord does not object, the lease is deemed to be renewed on the same terms and conditions as the old lease for an indefinite period. As such, the new lease is, therefore, subject to termination by either party upon three months' notice.

In the case of state or municipally owned land, subject to certain exceptions, the tenant has a statutory pre-emptive right to purchase the land plot if it is put up for sale, though in very limited circumstances. Where land is privately held, a tenant also has a statutory pre-emptive right to purchase the land plot if it is put up for sale, provided that the tenant owns a building or facility located on the leased land plot. Where the tenant does not own such a building or facility, the issue will be determined by the terms of the lease as negotiated between the parties.

In the event that the owner sells the leased real estate, the lease survives in full. The new owner assumes the rights and obligations of the landlord by virtue of law.

Proprietors of buildings or other immovable facilities that are situated on a land plot owned by another person are entitled by statute to rights of use as regards the land located underneath the buildings or facilities. If the land in question is state or municipally owned, the owner of the buildings or facilities is entitled to either lease or privatise (purchase) the land (effectively, 'the land follows the building').

As a general rule, the assignment, subleasing or mortgage of land leased by the tenant does not require the landlord's consent, unless otherwise stated in the lease agreement. Leases of state and municipal land concluded for a term of over five years cannot, as a matter of law, require the landlord's consent for their assignment, sublease or mortgage. Conversely, the assignment, sublease or mortgage of real estate other than land is subject to the consent of the landlord unless the lease provides explicitly that consent is not required. This consent may be given directly in the lease agreement.

Most of the commercial leases contain rent indexation provisions. Depending on the negotiating leverage of the tenant, rent may be increased automatically each year in line with inflation or in line with inflation plus another index (e.g., London Inter-bank Offered Rate or by a fixed percentage). The landlord may review the rent no more than once a year.

## **VII DEVELOPMENTS IN PRACTICE**

### **i Forward agreements**

Due to amendments to the law introduced several years ago, a new concept of forward agreements became available to the market. These agreements may be entered into in relation to future real estate (either existing but not yet acquired by a party, or yet to be constructed). Currently it is possible to enter into forward leases, forward mortgages and forward sale and purchase agreements. In each case, the agreement must contain a detailed description of the future real estate to be encumbered or transferred.

This concept allows developers and investors to form a pool of anchor tenants, obtain financing from banks by mortgaging the future building and sell the building on to third parties before it is fully constructed.

### **ii Registration formalities**

In most instances, a real property agreement is valid and enforceable once executed by the parties. However, to transfer a title or establish an encumbrance, the parties must still register the transfer or encumbrance.

As previously mentioned, following changes in court practice, a long-term lease that has not been registered may still be considered effective if the relevant agreement contains all material terms and conditions, and both parties have executed it.

Despite the fact that the courts have applied the above rule only to the registration of long-term leases, the same logic may be applied to other registrable real estate agreements (real estate trust management agreement and agreement on shared participation in housing construction).

This position is further strengthened by the entry into force of amendments to the Civil Code on 8 March 2015, whereunder a party that accepted full or partial performance of a contract, or otherwise affirmed it, may not claim in court that it was not concluded, if such a claim were to contravene the principle of good faith. In other words, after performing or accepting performance of a lease, a party is estopped from claiming it was not concluded through lack of state registration.

### **iii Changes in regulation of unauthorised constructions**

An unauthorised construction is a building or other fixture erected on a land plot not provided for construction in accordance with the established procedure, or on a land plot, the permitted use of which does not permit the construction of a given property on it, or erected without obtaining necessary permits or with violation of town-planning and building norms and rules. Generally, these constructions shall be either demolished or brought into compliance with the applicable law.

In 2018, amendments were introduced in respect of unauthorised constructions. First of all, a direct prohibition on using an unauthorised construction and a right to seize a land plot with an unauthorised construction built on it were added. Apart from that, the regulation of these constructions was generally relaxed: the definition of the term ‘unauthorised construction’ has been narrowed by excluding certain fixtures from the group of unauthorised constructions but more importantly, a more detailed procedure permitting the legalisation of these constructions with a possibility of acquiring the ownership title to them was introduced.

### **iv Ongoing legislative reform of shared participation in housing construction**

A shared participation in housing construction agreement is entered into between a developer wishing to attract external financing for housing construction and a number of private investors (mainly individuals) wishing to buy flats or apartments (mainly for accommodation). Starting from 2004, when legislation on shared participation in housing construction was enacted, the problem of deceived private investors arose because relevant laws had not provided for effective guarantees and collateral in favour of the investors securing developers’ obligation to put an apartment building into operation and transfer relevant flats and apartments to the investors. As this is a socially sensitive issue, in 2017–2018 the legislator introduced major amendments to the relevant law that mainly shift risks of developers’ insolvency and negligence from private investors to the banks providing financing for development, and a newly created insurance fund that accumulates regular contributions from all accredited developers to cover the mentioned risks.

The new amendments that became effective on 1 July 2019 stipulate that if a developer wishes to pre-sell apartments to individuals it can only do so through the escrow accounts meaning that until the development is complete the developer cannot use money held on this account and shall finance ongoing construction with its own funds or attract project financing from the banks.

## VIII OUTLOOK AND CONCLUSIONS

More significant changes to the legal framework are forthcoming. Russian civil law is undergoing a major reform, which started in 2012, in relation to changes made to the general provisions of the Civil Code, including changes to, *inter alia*, civil law principles, and the validity of transactions, pledge and objects.

The draft law on amendments to the Civil Code includes a separate section regarding real property, and the current section of the Civil Code in this regard will be completely redrafted. It was expected that the amendments to the real property section of the Civil Code would have been adopted by 2018. However, as of December 2019, the Presidential Council on Codification and Improvement of Civil Legislation is still discussing the draft. The most notable changes envisaged by this draft law are the following:

- a* the introduction of a new concept of ‘actual possession’ of real property, which generally means that any person that has actual possession over real property may defend this actual possession, even if the possession is unlawful. The procedural rules that must be adhered to while defending actual possession will be simpler and require only proof of actual possession, in comparison with the general procedural rules that require proof of title to real property. This new concept is intended to protect bona fide owners of real property; and
- b* new rights in rem, including the following:
  - building leasehold, which may be provided for at least 30 years but not more than 100 years, and allows a person granted this right to develop a land plot (currently all developments on land plots are carried out under long-term lease agreements, which are considered to be a less secure right to a land plot than a building leasehold);
  - emphyteusis or perpetual lease granted for an indefinite term or, if a term is envisaged, such a term may not be less than 50 years, with the purpose to use natural characteristics of the land plot (e.g., for agricultural activity, forestry, fishing);
  - independent mortgage, which may be established and become effective even if there is no obligation to secure at the time the mortgage is established (currently, a mortgage becomes effective only once the relevant underlying obligation that is secured by the mortgage is created);
  - usufruct or social lease, which may be granted to an individual or non-commercial organisation for the use of real property (land plot, premises, etc.) for a fixed term or for life (in the case of non-commercial organisations, the term must not exceed 21 years);
  - right to acquire real property owned by a third party, which is an independent right of a person to purchase relevant real property on agreed terms. The maximum term for such a right is 10 years; and
  - right to secure provision of consideration by the owner of real property, which gives an entitled individual the right to receive certain consideration (money, goods, etc.) from an owner of real property and, in the event of the owner’s failure to provide such consideration, to levy execution on real property. This right may be provided for life or for a fixed term (but not for more than 100 years).

Most of the above rights in rem are expected to replace lease arrangements, which are currently used for the same purposes as those rights in rem and to provide more security to the person entitled to such rights.

Other material amendments are brought forward by the draft law clarifying the notion of the term 'real estate' in Russian law. Currently this term is defined rather broadly, stating that real estate includes land plots, subsoil plots and other structures permanently connected to the underlying land plot and that cannot be moved without substantial damage to them. The draft law provides for a more exhaustive list of objects that can be considered real estate:

- a* plots, subsoil plots, buildings;
- b* structures permanently connected to the underlying land plot and that cannot be moved without substantial damage to them, that have independent commercial value and can participate separately in civil transactions; and
- c* facilities under construction meeting certain conditions.

The main purpose of these novelties is to specify the meaning of the term 'real estate' to avoid numerous disputes relating to the legal nature of the object, especially in the tax area.

# ABOUT THE AUTHORS

## **SERGEY KOLOBOV**

*Herbert Smith Freehills CIS LLP*

Sergey Kolobov is a Russian-qualified senior associate specialising in general corporate law, including private equity and M&A, as well as having significant experience of work on real estate projects, financing of commercial construction projects, acquisitions and disposals of commercial properties. He graduated from the international law department of the Moscow State Institute of International Relations (MGIMO). He joined the firm in 2011.

## **HERBERT SMITH FREEHILLS CIS LLP**

10 Nikolskaya Street

Moscow 109012

Russia

Tel: +7 495 363 65 00

Fax: +7 495 363 65 01

[sergey.kolobov@hsf.com](mailto:sergey.kolobov@hsf.com)

[www.herbertsmithfreehills.com](http://www.herbertsmithfreehills.com)

an LBR business

ISBN 978-1-83862-496-5