

# The Importance of the Contract in the Acquisition and Sale of U.S. Real Property

Neal S. Litman, Esq.  
Neal S. Litman, P.A.  
800 Brickell Avenue, Suite 1501  
Miami, FL 33131  
Telephone: (305) 579-0074  
Facsimile: (305) 579-0205  
[NEAL@LITMANLAWYER.COM](mailto:NEAL@LITMANLAWYER.COM)

## **Introduction And Overview**

The contract which is referred to in this article, and set forth in its entirety elsewhere in this publication, is the Residential Sale and Purchase Contract (version FAR 9), (“Contract”) which generally also contains certain Paragraphs from the Residential Sale and Purchase Contract: Comprehensive Addendum (version FAR 10). The Residential Sale and Purchase Contract and Residential Sale and Purchase Contract: Comprehensive Addendum may sometime be referred to individually or collectively as the Contract. The Contract and all rights associated with the Contract are the property of the Florida Realtors® formerly known as the Florida Association of REALTORS®. The Contract is utilized in residential transactions throughout the entire State of Florida.

In a real estate transaction the most important single document is the contract for sale and purchase, because it sets forth all the terms and conditions and defines the obligations and responsibilities of the parties to the Contract. Therefore, utilizing the Contract, assuming that all blanks have been properly filled out and completed, will help assure that the transaction contemplated will occur in the manner desired by the parties.

This article will outline the salient provisions of the Contract and matters that should be taken into consideration when preparing the Contract. Limitation in the length of this article do not allow for a discussion of all areas. The author believes that the Contract constitutes a comprehensive form that has taken into consideration almost all of the factors that should be addressed in connection with the sale and purchase of real property in the State of Florida. It is well suited for the purchase by U.S. citizens and residents, as well as a foreign investor. Notwithstanding this fact, particularly when dealing with a foreign investor, there may be issues involved that require additional considerations, and therefore, it is usually wise to consult with an attorney experienced in this area before the Contract is finalized. In instances where the parties feel compelled to execute a contract without prior attorney review, a provision may be inserted into the Contract allowing for a short period in which the parties attorneys may review the Contract and approve it subsequent to its execution.

There are some professionals that believe that an individually drafted contract is necessary when dealing with foreign investors. The author does not agree with this assumption and believes that the Residential Sale and Purchase Contract and Comprehensive Addendum are sufficient (sometimes with minor revisions) to meet the needs of foreign investors, as long as the considerations set forth in this article are completed prior to finalizing the Contract.

Wherever possible, the author will attempt to refer to specific Paragraphs and line numbering in the Contract. Also note, that any sentences or paragraphs which are italicized and contained in quotes in the article, indicate that they are taken directly from the Contract, unless they are defined specifically in the article.

Some estate planners may recommend the use of a trust or “Florida Land Trust” under certain circumstances. Most trusts grant the power to hold, manage and convey the property to one or more trustees who must perform their duties in the best interest and for benefit of the beneficiaries of the trust. Under certain types of trusts, the trustee(s) may also be beneficiaries of the trust (grantor trusts). Depending on the language of each trust agreement, the powers of trustees can be more or less restricted to fit the specific intent and purpose of the individual(s) creating said trusts. There are several types of trust agreements (revocable, non-revocable, land trusts, etc.). The choice of a specific type of trust should only be made after consulting a specialized professional.

#### Conclusion

When selecting a form or method of real estate ownership, foreign investors should seek professional advice, and should not only consider the tax and estate planning ramifications of their choice, but also consider the short- and long-term costs which will result from their choice (facilities in obtaining).

**Residential Sale and Purchase Contract**  
**FAR-9 04/07 ©2007 Florida Association of REALTORS® All Rights Reserved**

**Paragraph 1. Sale and Purchase:**

**Line 2, (“Buyer”):** The Buyer may be an individual, corporation, limited liability company, trust or another form of entity. In many instances, the Contract is executed before the Buyer has had sufficient time to determine if the Property should be purchased in the name of an individual or an entity. If this decision has not been made when the offer is submitted, provision should be made in the Contract, allowing the Buyer to assign the Contract. Many times the Buyer is listed as John Smith and/or assigns; however, this language is not sufficient to provide for assignability since Paragraph 14 requires the Seller=s written consent for an assignment to be effective. Paragraph 14 can be deleted or in the alternative, language may be inserted in (1) Paragraph 21, under Additional Terms, (2) an individually drafted Addendum providing for assignability, or (3) in Paragraph “U” of the Comprehensive Addendum, which will be discussed more fully, later.

The entity in which Buyer takes title is extremely important when a foreigner is purchasing United States real estate, due to the various factors that should be considered, including but not limited to: (1) Foreign or United States Income tax considerations, (2) Foreign or United States estate and gift tax considerations, (3) a desire for anonymity, (4) objectives in directing property ownership at the death of the Buyer or a principal of the Buyer if Buyer is an entity.

**Line(s) 8 to 11, Improvements and Attached Items (“Personal Property”):** The contractual language automatically includes all built-in furnishings and major appliances. In many instances the parties disagree, at closing, as to what items of Personal Property are included in the sale. Frequently, there are issues over heirloom chandeliers, statues, audio/visual equipment, multiple dryers, washers, and refrigerator and freezer combinations. It is important to be specific in listing which items are included, and if, any items are to be excluded, to list those on line 14, which provides for the exclusion of certain items which are set forth.

**Paragraph 2. Purchase Price:**

The Purchase Price is payable in U.S. currency; therefore, it is important to understand that any fluctuation in rates to convert from foreign to U.S. currency are borne by the Buyer who is the party responsible for paying the Purchase Price.

The Purchase Price is normally payable in the form of an initial deposit, an additional deposit and the balance at closing, assuming that there is no financing involved. It is always recommended, when setting forth the deposits, to utilize a percentage of the Purchase Price rather than a fixed dollar amount. The reason for this is that during the negotiation of the Contract, the Purchase Price in the offer and subsequent counter offers may change. It is inconvenient to continually change the deposit amounts during negotiations, and often errors are made in computing the deposit amounts which may cause disputes during the pendency of the transaction. When percentages are used, the amounts for the contract deposits automatically change since they are based on a percentage of the Purchase Price.

**Paragraph 2(c): Total Financing:** In the event the Buyer is obtaining a loan to finance a portion of the Purchase Price, the amount of the loan is entered on line 28. Percentages should be used to determine the amount of the loan, as opposed to a fixed amount. In underwriting loans, Lenders take into consideration the ratio of the loan to the Purchase Price. By utilizing a percentage, the ratio desired will remain constant without having to reinsert a new loan amount.

While the general rule above is to utilize percentages instead of fixed amounts for deposits and amounts of financing, in some instances there may be exceptions to that rule.

**Paragraph 2(e): Balance to Close:** Rather than attempting to compute the amount, which again, may change during the negotiations, it is preferable to write in the word **ABalance@** on line 30.

### **Paragraph 3. Financing**

This Paragraph provides two options:

Line 31: 3(a) provides that the Buyer will pay cash for the Property with no financing contingency;

Line 32: 3(b) provides that the Buyer will apply for financing.

It is important to understand that when a Buyer indicates that he will pay cash for the Property, he is not prohibited from seeking financing. In this instance, if the Buyer does not obtain financing, the Buyer is still required to close on the transaction. In the event the Buyer fails to close, the Buyer will be in default under the terms of the Contract.

If the Buyer will be applying for financing, it is important that the Buyer become familiarized with the financing process; particularly if the Buyer has no previous experience in obtaining financing for the purchase of United States real estate. The entire loan process and loan documentation at closing is very different from the process utilized in almost all foreign countries. In general, the paperwork is more voluminous, more detailed, and there are various requirements and costs that a foreign investor has not been exposed to outside the U.S. In addition, when a foreign individual or entity seeks financing, the time it takes to apply, be approved and ultimately obtain or not obtain financing is a more cumbersome and lengthy process than for a U.S. resident. For this reason, it is very important that the Buyer understand the process, requirements and time lines provided for in the Contract and by the lender. It is advisable for the Buyer to speak with a competent banker or mortgage broker to familiarize himself with this process.

The Contract provides a blank space which should be completed which sets forth the amount of days the Buyer has to apply for financing. There is an additional blank space that sets forth the outside time when the Buyer must obtain a commitment from the lender ("Commitment Period") and the time when the Buyer must receive an approval for the financing ("Commitment"). The time allowed to apply and receive the Commitment should usually be extended to provide sufficient time to allow a foreign investor to meet the deadline. If the days have not been filled in the blank provided the Contract provides that the Buyer has five (5) days to apply for financing and thirty (30) days to obtain the Commitment. In the current financing climate these periods should be extended. Please note that when computing days under the Contract, all days are computed in what is defined as a business day, which is considered to be "every calendar day except Saturday, Sunday and national legal holidays. If any deadline falls on a Saturday, Sunday or national legal holiday, performance will be due the next business day". If the Buyer fails to obtain financing during the Commitment Period, Buyer must notify the Seller of Buyer=s inability to obtain a Commitment within the Commitment Period. Lines 41 and 42 provide that failure to furnish this notification will result in a forfeiture of Buyer=s deposits. Deposits are defined in the Contract on line 295 as *All deposits paid and agreed to be paid@*. Therefore, if the Buyer defaults in this regard he will be subject to forfeiture of deposits he has already paid and any additional deposits to be paid set forth in Paragraph 2 of the Contract.

In addition, it is important to understand: *"Once Buyer provides the Commitment to Seller, the financing contingency is waived and Seller will be entitled to retain the deposits if the transaction does not close by the Closing Date unless (1) the Property appraises below the purchase price and either the parties cannot agree on a new purchase price or Buyer elects not to proceed, (2) the property related conditions of the Commitment have not been met (except when such conditions are waived by other provisions of this Contract), or (3) another provision of this Contract provides for cancellation".*

### **Paragraph 4. Closing Date; Occupancy**

There is a blank on line 49 to insert the number of days from the Effective Date or a specific date that will be the Closing Date. It is recommended to state a specific number of days from the Effective Date to determine the Closing Date. If a fixed date, such as March 15<sup>th</sup> is inserted, it is possible that due to the back and forth process of offers and counter offers and the fact that the parties may be negotiating in different time zones, the fixed Closing Date could turn out to be a date which does not give sufficient time to complete other requirements such as those related to financing, Inspection Periods, etc.

**Line 49 provides,** *Athe Closing Date shall prevail over all other time periods including but limited to inspection and financing periods@.*

**Paragraph 5. Closing Procedure; Costs**

**Line 56 provides:** *"Closing will take place in the county where the Property is located and may be conducted by mail or electronic means".*

In many instances, closings are conducted electronically, without the need for a physical closing, especially when the Seller or Buyer will be out of the country. In the absence of financing, an individual, or the attorney representing the Buyer, generally can execute all required documents on behalf of the Buyer with the use of a Power of Attorney or an entity resolution. There may be a need to have some documentation executed by the Buyer, but this can usually be completed in advance to avoid the Buyer having to attend the Closing (assuming Buyer does not wish to attend). The same can be accomplished for the Seller; however, there are some documents that custom requires the Seller to execute in front of witnesses and a notary public, and therefore, these must be provided for well in advance if the Seller will not be attending the closing. This is because execution of these documents outside of the United States will require notarization which generally takes place at the U.S. Consulate, in the country where the Seller will be signing. Notaries in foreign countries generally have greater authority than the notaries in the U.S and this should be explained to a foreign investor, since they may think they can utilize the services of their notaries, which is not the case.

The Seller and Buyer costs are set forth in this Paragraph. In general, since most transactions are "as is" transactions (which will be dealt with in greater detail subsequently) most of the costs and services will be arranged through the Buyer's or Seller's attorney, respectively. It is usual and customary in most counties for the Buyers' attorney to represent the Buyer, and issue the owner and lender title insurance and to provide for, and obtain, a property survey and other necessary items. Generally inspections of the Property will be handled and facilitated through the REALTOR®, and casualty and liability insurance will be handled by an insurance agent, who will probably be recommended, if desired, by the REALTOR® or attorney.

**Paragraph 5(c) Title Evidence and Insurance:** Title insurance is a form of insurance which insures that the owner of the Property has insurable and marketable title to the Property. It is recommended that a Buyer obtain a title insurance policy to guarantee that the Buyer acquires marketable and insurable title to the Property. The process of issuing the title insurance is generally accomplished by working through a recognized national title insurer ("Title Insurer"). It is normal for the attorney representing the Buyer to function as the agent issuing the title insurance for the Title Insurer. It is the responsibility of the Seller to furnish certain evidence to the Buyers' attorney to enable the Buyers' attorney to issue the title insurance. The process involves the title agent issuing a title insurance commitment, which sets forth the requirements the Seller must meet in either clearing certain issues and/or furnishing the closing documentation required to insure that the Buyer acquires marketable and insurable title. The responsibility as to whether Buyer or Seller pays for the title insurance policy is based on the usual and customary procedures followed in the state and county where the Property is located. In general, the Buyer pays the premium for the title insurance policy in Miami-Dade County and in most other counties; however, in some counties, such as Palm Beach, and some counties in northern Florida and the Florida Keys, it is usual and customary for the Seller to pay for the title insurance. In some counties, the party responsible for paying the title insurance premiums may be negotiated. The attorneys' involved in the transaction will be familiar with the usual and customary procedures; however, in general when in Miami-Dade County, and other counties which follow the Miami-Dade County format, lines 78 and 80, Buyer should be checked. In Palm Beach and other similar counties, line 81, Seller should be checked.

**Paragraph 5(d) Prorations:** This Paragraph provides for the proration and allocation between Buyer and Seller of certain charges; one of the most common being, the proration of real estate taxes. In Florida, real estate taxes are paid for in arrears. Real estate taxes, are due for the period of January 1 through December 31<sup>st</sup> of each year; however, the real estate tax bill for the current year is not due until November of the current year and may be paid, without penalty, through and including March of the following year. Practically speaking, the real estate taxes will not be paid, if closing takes place prior to November of the current year. The Seller is responsible for the portion of the real estate taxes accrued from January 1 through the date of closing; and therefore, since the real estate taxes

have not been paid for the current year, the Buyer will receive a credit from the Seller. If the real estate taxes have been paid for the current year, the Seller will receive a credit from the Buyer, for the real estate taxes paid in advance. In the event that the tax bill has not been issued for the current year prior to the closing, the parties will utilize the real estate taxes from the previous year, for purposes of proration. In the event the actual real estate tax bill when issued is either higher or lower than last year's real estate taxes, which were utilized in determining the prorations on the Closing Statement, then the parties at the demand of either will re-prorate and any difference owed will be paid from one to the other. There are certain other intricacies involved in connection with prorating of real estate taxes that arise when the Property is new construction. Special attention is also required in a new development when there is one tax bill for the entire development, without yet being divided by the county into a new folio number, which results in an individual bill. The attorney handling the transaction will be prepared to deal with this matter. It is important to note that provisions contained in the Contract do not survive the Closing. This means that once the Closing has occurred, the parties will then rely on the documentation delivered at closing, and the Contract will no longer be applicable. The exception to this rule is where the Contract specifically contains a provision indicating that this provision will survive the Closing. Because the re-proration of real estate taxes is a common occurrence, line 95 specifically provides: *"this provision shall survive closing"*.

**Paragraph 5(e) Special Assessment by Public Body:** Many times, a public body, such as the municipality in which the Property is located, will pass a special assessment upon all property owners in the municipality to pay for certain improvements for the common benefit of all properties in the municipality or area. An example of this would be a special lighting district which requires lighting or other improvements. All property owners who receive the benefit will pay a share of the cost through a special assessment. These special assessments can be paid in full or in installments. Line 99 provides whether the Buyer or Seller should be responsible to pay the installments before and after the closing. Unless the Buyer is aware of the special assessment, and the parties have discussed and come to a decision with respect to same, the Contract will generally be prepared providing that the Seller will pay any installments due after Closing Date.

**Paragraph 6. Inspection Periods and  
Paragraph 8. Maintenance, Inspections and Repair**

These Paragraphs primarily deal with inspections of the Property in a transaction where the Seller is responsible to make certain repairs to the Property .if discovered during the Inspection Period. In most real estate transactions in Florida, to avoid haggling and to foster a clean and smooth transaction, the Buyer and Seller usually opt for what is called an "as is" transaction. This means that after the Buyer has had an opportunity to inspect the Property, the Buyer has the right to either cancel the Contract or to accept the Property in "as is" condition. If the parties agree that the transaction will be "as is", the parties will utilize Paragraph H. As Is With Right To Inspect of the Comprehensive Addendum, which is one of the numerous Addenda referred to in Paragraph 20 of the Contract and contained in the Comprehensive Addendum.

Since the "as is" transaction is the most common, the writer will not delve into the intricacies of the inspections and what is/is not the responsibility of the Seller to repair, as set forth in Paragraphs 6 and 8. In the event Paragraphs 6 and 8 are utilized, a competent REALTOR® and/or attorney will be able to advise what needs to be considered.

Whether the transaction is "as is" or not, the number of days allowed to conduct the inspections should be considered in light of the items that need to be inspected, and the size and type of Property involved. Generally, condominiums do not require as much time to inspect as a free standing single family dwelling. If the Buyer does not reside in the United States, and wishes to attend the inspections additional, time should be allowed, as is the case with all other deadlines when dealing with someone who must travel to be available. The inspections are usually conducted by professionals who hold an occupational license to conduct inspections and the REALTOR® and/or attorney will generally be familiar with competent home inspectors which may be utilized.

**Paragraph 7. Real Property Disclosures**

The disclosures contained in this Paragraph in connection with radon, flood zone, and coastal construction line may be applicable, depending on the type and location of the Property. If they are, the attorney should discuss these issues with the Buyer, since the ramifications could be significant.

**Paragraph 9. Risk of Loss**

Because of the possibility of damage to the Property through some form of casualty, (including, but not limited to damage caused by a hurricane) the Contract provides if the Property is damaged and the Seller can restore the Property by the Closing Date or within forty-five (45) days after the Closing Date to substantially the same condition it was on the Effective Date, then the Seller will be required to do so. If the restoration can be completed within the forty-five (45) days, then the Closing Date may be extended in order to close the transaction. If the restoration cannot be completed in time, then the Buyer has the option of cancelling the Contract or the Buyer may accept the Property in "as is" condition. If the Buyer elects to go forward and accept the Property in "as is" condition, the Contract provides that the Buyer is entitled to receive an assignment of any insurance proceeds and a credit in the amount of the deductible contained in the insurance policy.

**Paragraph 11. Effective Date; Time; Force Majeure**

**Paragraph 11(a) Effective Date:** *"The "Effective Date" of the Contract is the date on which the last of the parties initials or signs and delivers the final offer or counteroffer."* Delivery is an essential element in determining the Effective Date, and, delivery to an agent of either the Seller or Buyer, which would include an attorney or Broker, constitutes delivery. Also included in this Paragraph is a statement that ***"time is of the essence for all provisions of this Contract"***, which means that in the absence of an "act of God" or "force majeure", that the parties are responsible to meet all deadlines.

**Paragraph 11(b) Time:** *"All time periods will be computed in business days (a "business day" is every calendar day except Saturday, Sunday and national legal holidays). If any deadline falls on a Saturday, Sunday or national legal holiday, performance will be due the next business day. All time periods will end at 5:00 p.m. local time (meaning in the county where the Property is located) of the appropriate day."*

**Paragraph 11(c) Force Majeure:** This Paragraph provides that if an *"act of God or force majeure such as a hurricanes, earthquakes, floods, fire, unusual transportation delays, wars, insurrections and any other cause not reasonably within the control of the Buyer or Seller and which by the exercise of due diligence the non-performing party is unable in whole or in part to prevent or overcome."* In the event of an act of God or force majeure, time periods, including the Closing Date, will be extended; however not to exceed thirty (30) days from the time the force majeure or act of God is in place. In the event the act of God or force majeure continues beyond the thirty (30) days, either party may cancel the Contract by delivering written notice to the other party.

**Paragraph 12. Notices**

Notices must be in writing and may be delivered by mail, personal delivery or electronic media. Failure to deliver notice in a timely manner regarding any contingency set forth in the Contract will render the contingency, null and void. This emphasizes the fact that if a party has an available contingency such as the right to cancel, failure to furnish proper notice will waive the contingency, and the party will not have the contingency available to them. This Paragraph also provides: ***"Any notice, document or item delivered to or received by an attorney or Broker (including a transaction broker) representing a party will be as effective as if delivered to or by that party."***

**Paragraph 13. Complete Agreement**

This Paragraph clearly provides that any agreement of Buyer and Seller, to be binding, must be in writing and signed or initialed and delivered to the party to be bound. This is important because there are many oral representations which are made or misunderstood between the parties and in a Contract for the sale and purchase of real estate, these must be in writing and delivered to be effective.

**Paragraph 14. Assignability; Persons Bound**

*"Buyer may not assign this Contract without Seller's written consent."*

**Paragraph 15. Default**

Paragraphs 15(a) and 15(b) provide the normal remedies that a Seller and Buyer would have in the event of a default. In addition, there is a provision that *"if Buyer fails to perform this Contract within the time specified,*

including timely payment of all deposits, Seller may choose to retain and collect all deposits paid and agreed to be paid as liquidated damages". This is important to note because a Buyer who places a small initial deposit may not take into consideration that if he fails to move forward with the transaction, that he may not only be liable for the deposit that the Buyer has made, as well as, any additional deposits that the Buyer has agreed to pay.

**Paragraph 18. Professional Advise; Broker Liability**

This Paragraph emphasizes and directs the Buyer and Seller "to consult an appropriate professional for legal advice (for example, interpreting contracts, determining the effect of laws on the Property and transaction, status of title, foreign investor reporting requirements, the effect of property lying partially or totally seaward of the coastal construction control line, etc.) and for tax, property condition, environmental and other specialized advice." This statement is appropriate for all Sellers and Buyers; however, even more so for a foreign investor, since there are various additional considerations brought about by foreign ownership.

**Paragraph 20. Addenda**

This Paragraph refers to the following Addenda listed below which are contained in the Residential Sale and Purchase Contract: Comprehensive Addendum, which may be utilized if appropriate.

- |                       |                                |                                   |                           |
|-----------------------|--------------------------------|-----------------------------------|---------------------------|
| A. Condo. Association | H. As Is w/Right to Inspect    | O. Interest-Bearing Account       | V. Prop. Disclosure Stmt. |
| B. Homeowners' Assn.  | I. Inspections                 | P. Back-up Contract               | W. FIRPTA                 |
| C. Seller Financing   | J. Insulation Disclosure       | Q. Broker - Pers. Int. in Prop.   | X. 1031 Exchange          |
| D. Mort. Assumption   | K. Pre-1978 Housing Stmt.      | R. Rentals                        | Y. Additional Clauses     |
| E. FHA Financing      | L. Insurance                   | S. Sale/Lease of Buyer's Property | Other: _____              |
| F. VA Financing       | M. Housing Older Persons       | T. Rezoning                       | Other: _____              |
| G. New Mort. Rates    | N. Lease purchase/Lease Option | U. Assignment                     | Other: _____              |

Depending on the type of property involved and other circumstances, some of the above listed Addenda may be incorporated in the Contract by checking the appropriate box and attaching the completed Addendum. A few of the Addenda will be discussed below which have particular importance on a regular basis and/or are particularly relevant to a foreign investor.

**Residential Sale and Purchase Contract: Comprehensive Addendum**  
**FAR-10 01/09 ©2009 Florida Association of REALTORS® All Rights Reserved**

**Association Disclosures**

**Paragraph A. Condominium Association:** This Paragraph must be utilized anytime the Property is a unit in a Condominium. The Paragraph contains disclosure of various items which the Seller is required to make under Florida law and many others which are necessary for the Buyer to fully understand about significant factors concerning the Condominium and its Association. These items include but are not limited to, whether or not approval by the Association is required, and whether the Condominium Association has a right of first refusal to purchase, prior to the Buyer being allowed to Purchase. Most condominiums do require that the Association approve the Buyer. In the event the Buyer is an entity, then the Association will generally require information about the individual who will be the principal occupant of the Unit, in order to access and evaluate whether approval will be granted or not. In addition, it is important to be sure that any other common or limited common elements that are designated for the exclusive use of the Buyer, in connection with the Property, be specifically listed. Some of these elements would, include but not be limited to, parking spaces, storage spaces, boat slips and cabanas.

**Paragraph A. Condominium Association, (6) Fees:** The amount of the current assessments, maintenance and/or association fees must be set forth. Seller must also represent if there are any pending special or other assessments in addition to the regular current assessment, maintenance and/or association fees. If a special assessment may be



paid in installments, either Buyer or Seller may be designated as the person to pay any installments due after the closing by checking the appropriate box on line 32.

Section 718.503 of the Florida Statutes specifically provides that a Seller must furnish to the Buyer who is purchasing a pre-owned Condominium, (as opposed to new construction), the following documents:

1. A current copy of the Declaration of Condominium;
2. Articles of Incorporation of the Association;
3. Bylaws and Rules of the Association;
4. A copy of the most recent Year-End Financial information; and
5. Frequently Asked Questions and Answers Document if requested in writings.

Once these documents have been provided to the Buyer, the Buyer has a statutory right to rescind the Contract, and void the transaction by delivering written notice of the Buyer's intent to cancel. Notice must be delivered within three (3) days (excluding Saturdays, Sundays and national legal holidays) after the date the Contract is executed, and all of the required documents have been delivered to the Buyer. It is particularly important that the Seller be certain that current documents are furnished. It is common practice for Sellers to furnish the documents they received when they purchased the Property. Unless the Seller purchased the Property he is selling within the last few months, the documents may be outdated and the three (3) day period will not expire until the date of closing. Obviously, this allows the Buyer the opportunity to cancel, when, otherwise, the Buyer would have no right to cancel under the terms and conditions of the Contract.

In connection with the purchase of a newly constructed condominium, commonly referred to as a developer unit, the rescission period is fifteen (15) days, rather than three (3) days, and there are various other documents that must be furnished by the Seller. This is not being dealt with at length because the FAR-9 Contract would not generally be utilized as developers who are selling new construction condominiums have form contracts which have been submitted to the State Florida in connection with the approval of their condominium project.

**Paragraph B. Homeowners' Association:** The information contained in this Addendum is similar to the information contained in the Condominium Association, except this applies to Homeowner's Associations. Florida Statutes Section 720.401 provides that the Disclosure Summary must be provided prior to executing the Contract. In the event it is not provided, the Buyer has three (3) days to cancel after receipt of the Disclosure Summary.

#### Property

**Paragraph H. As Is With Right To Inspect:** Since the majority of transactions in Florida are "as is" transactions, Paragraph "H" of the Comprehensive Addendum is utilized to document that the transaction is an "as is" transaction. Three (3) blanks must be filled in. On line 9, the number of days allowed for inspections ("Inspection Period") must be filled in. Failure to fill in the blank will automatically make the Inspection Period ten (10) days from the Effective Date. Depending on the type of property involved, the availability of inspectors, whether or not the Buyer wishes to attend the inspection and the Buyers availability, the number of days should be considered carefully, and the appropriate amount of days should then should be filled in. The second blank on line 12 sets forth how many days after the expiration of the Inspection Period the Buyer has to cancel. The third blank on line 14 sets forth a dollar amount. The repairs must exceed this dollar amount to enable the Buyer to cancel. It is not uncommon to fill in zero as the dollar amount; however, if the blank is not filled in it is automatically Two Hundred and Fifty Dollars (\$250.00). The fact that the Buyer agrees to accept the property in "as is" condition does not eliminate the responsibility of the Seller to maintain the property in the same condition as it was in on the Effective Date.

**Paragraph U. Assignment:** This Paragraph provides that the Seller and Buyer agree that the Contract may be assigned to whoever is set forth in the blank on lines 4 and 5. In a cash transaction which has no contingency for financing, a Seller will generally not have any objection to an assignment. In a sale which is contingent on financing, a Seller generally will have an objection to an assignment, because the Contract, if assigned to someone other than the original Buyer, could have a negative impact on the assignee qualifying for financing. It is not uncommon for the Seller to allow a Buyer to designate the potential Assignee as an entity to be formed. Many

Buyers, when submitting an offer, have not adequately considered the various entity choices available. This is typically the case when a foreign investor is involved, due to the various income tax, estate tax, gift tax, and other considerations. A detailed discussion of these considerations is beyond the scope of this article; however, this Paragraph, or options for assignment set forth previously, should be utilized if a firm decision has not been made as to who the appropriate ultimate Buyer should be. Line 6 provides that the original Buyer will either be or not be released from the duty to perform the Contract by checking the appropriate box. Most Sellers feel more comfortable with an Assignment when they know that the original Buyer is still liable. The Buyer has no significant liability after the closing, by not being released of the duty to perform the Contract.

**Paragraph V. Property Disclosure Statement:** Most Buyers desire to see a Property Disclosure Statement from the Seller that discloses material information about the Property. Generally, this is furnished prior to, or simultaneously, with the Contract. This Paragraph provides that the Buyer may cancel the Contract by furnishing written notice within three (3) days of receipt of the Property Disclosure Statement. Furnishing of the statement is also a benefit to the Seller, in that it provides certain protections to Seller after the closing in connection with defects that may be later discovered. A detailed discussion of these benefits is beyond the scope of this article.

**Paragraph W. Foreign Investment in Real Property Tax Act ("FIRPTA"):** If the Seller is a "foreign person" as defined by FIRPTA, Section 1445 of the Internal Revenue Code ("IRC"), then the Buyer is responsible to withhold ten (10%) percent of the Purchase Price from the sales proceeds unless one of a few limited exemptions apply. In layman's terms, a "foreign person" is an individual who is not a U.S. taxpayer. The Buyers' attorney/closing agent, will collect the ten (10%) percent withholding and forward the funds to the IRS.

The IRS requires both the Buyer and Seller to have a U.S. federal taxpayer identification number (TIN), or in the case of an entity an Employer Identification Number (EIN). In the alternative a non-U.S. taxpayer may obtain an International Taxpayer Identification Number ("ITIN") and must furnish same to the closing agent in order to facilitate the closing. Unfortunately, in many instances this is not dealt with until the last moment and will result in a delay of the closing that could have been prevented if timely application had been made.

The IRS does have a procedure where a Seller who believes that the amount of tax that he owes is less than the ten (10%) percent withholding can apply for a Withholding Certificate (Form 8288-B). This is obtained by filing an application with the IRS, together with the appropriate forms and documentation. An attorney or Certified Public Accountant generally handles this application for the Seller. In the event the Withholding Certificate has been applied for properly, the attorney/closing agent will escrow an amount equal to the ten (10%) percent withholding until the IRS determines how much tax is actually due. The IRS usually decides within a period of thirty to ninety (30-90) days, and then the attorney/closing agent will disburse from the ten (10%) percent escrow the tax due to the IRS and the balance to the Seller.

The IRS does have a procedure where if a Seller, who believes that the amount of tax that he owes is less than the ten (10%) percent withholding, may apply for a Withholding Certificate. This is obtained by filing an application with the IRS, together with appropriate documentation, which is generally handled by an attorney or Certified Public Accountant. In the event the Withholding Certificate has been applied for properly, the attorney/closing Agent will hold an escrow in the amount of the ten (10%) percent withholding and not deliver the funds to the IRS. The IRS will rule (usually within a period of thirty to ninety (30- 90) days), on how much tax is actually due, and the attorney/closing Agent will disburse from the ten (10%) percent escrow, the tax due to the IRS and the balance of the escrowed funds to the Seller.

The filing of the application for the Withholding Certificate (Form 8288-B), does not relieve the Seller from the responsibility of filing a U.S. Income Tax Return, subsequently.

**Paragraph X. 1031 Exchange:** Section 1031 of the Internal Revenue Code provides that under certain circumstances, a Seller may sell a property, and, through an exchange procedure, purchase one or more additional properties (subject to various rules set forth by the IRS). Section 1031 provides for certain income tax advantages. If the Seller wishes to take advantage of this provision, there are certain documents that will be required to be

executed by the Buyer, which will not subject the Buyer to liability or cost. In order to obligate the Buyer to execute the documents if a 1031 Exchange is contemplated, this Paragraph should be utilized. Failure to do so could frustrate the Seller's efforts to accomplish the tax advantages available through a 1031 Exchange, if the Buyer chooses to be unwilling to cooperate.

# Distressed Property Issues Affecting Foreign Buyers and Sellers

**Michael S. Tobin, Esquire**  
Rothman & Tobin, P.A.  
11900 Biscayne Boulevard Suite 740  
Miami, Florida 33181  
(305) 895-3225  
[mtobin@rothmanandtobin.com](mailto:mtobin@rothmanandtobin.com)

In the current real property market in South Florida, distressed property issues abound. Their effects are widespread and affect everyone in the market, either directly or indirectly. Foreclosures, REO, and Short sales have become common terms to most real estate professionals; however to foreign national clients, they are generally misunderstood, feared and worse, can have significant legal implications or consequences to the client.

This article attempts to briefly outline the issues that should be considered in certain situations for foreign Buyers and Sellers in this distressed market environment. It should be noted that all circumstances are different, and that each transaction has its own set of unique facts, and that this article only briefly outlines the issues at hand.

## **Section One** **Foreign Buyers of Distressed Real Property**

Given currency rates, concerns over foreign government stability, and reduced new construction prices downtown, there are many foreign national Buyers focusing on property in South Florida. While this is of course a welcome and encouraging sign, it is important to counsel Buyers looking at purchasing distressed property on the multitude of issues that can arise. These include:

(i) **SHORT SALES** - Often times, the seemingly best deals for end user and investor Buyers are purchasing real property through a short sale. In fact, in most instances it is the preferable end result for the foreclosing lender as well, and this point of negotiation is important to remember. However, as most real estate professionals these days realize, they are not without their frustration and delays. Furthermore, Buyers should be advised to retain an attorney to advise and protect them as to contract issues and title issues. Specifically, at the time of contract, even the standard FAR and FAR/BAR contracts and Short Sale Addendums present real issues for a short sale buyer to be aware of upfront at the time of contract. Particularly:

(a) Whether the Buyer has the right to cancel the deal if the Short Sale approval is not received by a certain date?

(b) Who will be responsible for past due maintenance and special assessments that have accrued since Seller stopped paying?

(c) Will the closing costs be paid by the parties normally accustomed to paying them or does contract differ?

(d) What will the Effective Date of the contract be for purposes of applying for financing, doing inspections and making deposits?

(e) Was there a Second Mortgage that was properly dealt with, as the First Lender approval does not apply to the rights of the Second Mortgage lien holder?

Of course, how to take title to the property, tax implications, including FIRPTA, and mortgage loan issues will always apply for foreign Buyers, whether in a short sale or not.

(ii) REOs - When a short sale cannot be closed, the foreclosing lender will generally take back the real property through the judicial foreclosure process as dictated by the legal system. Thereafter, once they obtain title to the property after the Clerk's Sale through a Certificate of Title (CT), they will generally list the property for sale. Foreign Buyers should be aware of several pitfalls, and as a result, strongly consider hiring a real property attorney to protect them properly. These pitfalls include:

(a) Are there open permits or code enforcement liens that did not get wiped out through the foreclosure process and may not be covered under a title policy?

(b) Were the taxes paid, as the foreclosure does not wipe these out either?

(c) Closing costs and other standard provisions that REO Sellers require Buyers to agree upon in the REO Seller's form Addendum, i.e. financing waiver, inspection limitations, and other disclaimers.

(d) Is the title agent insuring the foreign Buyer or the agent of the REO Seller, and if so, who is really protecting the Buyer at closing from exceptions to coverage that may have significant legal effects?

(e) Was the foreclosure suit properly dismissed, and the Lis Pendens released as to the subject property?

(f) Were the Florida Statute §718.116 provisions properly complied with such that the Association does not attempt to collect from the Foreign Buyer?

(iii) CONDOMINIUM RELATED CONCERNS - Even if the transaction is not a short sale or REO purchase, foreign Buyers, as well as all Buyers, should be concerned with the financial stability of the Condominium Association and the related legal and financial issues that can arise if there is an unstable Association. These include:

(a) Possible special assessments due to budget shortfalls, cuts in services to reduce budget, and increased future assessments.

(b) If there is a significant amount of delinquent owners, there may be increased legal costs to the Associations as well as problems with FNMA or FHA approval of loan applications which could affect property values.

(c) Rental restriction changes as a result of the changing marketplace.

## **Section Two**

### **Foreign Sellers of Distressed Real Property**

As we all know, many foreign nationals bought real property in South Florida during the past decade. Many of them obtained mortgage financing to purchase in these transactions. Those finding themselves grossly upside down from a debt to equity standpoint, are unsure as to their rights and liabilities given this situation, and want to proceed to selling the property, but want to ensure that all legal implications are properly resolved at closing. These issues can be difficult to resolve for foreigners. Clients should be aware of the following points of concern:

1) LIABILITY TO MORTGAGE HOLDER UNDER THE PROMISSORY NOTE - Depending on whether title is in the name of a corporation (offshore or domestic) or in a client's individual name, generally there is personal liability for the foreign individual property owner under the Note. In the case of a corporate owner, there is generally a Personal Guaranty in place. As such, a foreign owner needs to be represented as it ultimately may be difficult to negotiate a release of liability. This is important as most foreign nationals will want to preserve (and ultimately rehabilitate) their credit as much as possible to one day purchase another property through mortgage financing.

Specifically, short sale applications may be more difficult without a social security number or ITIN. It may be more difficult to put together the required financial documents generally required by a short sale lender. Perhaps the leverage that the lender or foreign owner perceives is different than originally contemplated? All these issues are better addressed earlier rather than later in a transaction.

2) FIRPTA AND SHORT SALES - At this time, most all real estate professionals are familiar with the provisions of the Foreigner Investment in Real Property Transactions Act (FIRPTA). However, it is extremely important to now understand how FIRPTA affects short sales involving a foreign Seller. In past years, a foreign Seller with equity in the real property would pay the required ten percent withholding amount from the net sales proceeds. However when the property is upside down, this is an entirely different matter. The Internal Revenue Service does not distinguish between Sellers with equity or Sellers who are upside down. Withholding pursuant to FIRPTA applies in both instances. As such, a Seller in a short sale will have to come to closing with the ten percent from his/her pocket, in order to be compliant. Further, the FIRPTA requirements apply to the Buyer and Settlement Agent, as well as to the Seller. As such, it is much better to advise a foreign Seller who is upside-down that this will be the case; rather than have a surprise at closing!

### Section Three

#### **YOU CAN'T GO TO JAIL FOR NOT PAYING A DEBT!**

Many foreign owners of real property that is upside down are worried about the long term implications of being upside down and know that it does not make good business sense to keep paying for a property that is grossly under water and costs more on a monthly basis than what a comparable rental property may cost. However, because they are foreigners, they worry about the unknowns. For instance, many think they may have immigration issues related to their green cards or visas. This is generally never the case. A debt under a promissory note and mortgage is a purely civil matter. The bank or mortgage holder can only pursue civil court remedies in collecting this debt. In fact, there are many defenses available to a foreign debtor in a foreclosure action. A real property attorney should be consulted with in order to fully cover these points. However, in conclusion, one should not panic when confronted with this situation. Workout options are available. It may be time consuming and include payment to legal and tax professionals; however ignoring the issues will not make them go away, and generally has a way of making for bigger problems in the long run! There is help out there; and in this market, experience does matter.







# Factors to Consider in Buying a Business in Florida

**Frederick Woodbridge, Jr., P.A.**

J. David Peña, P.A.

701 Brickell Avenue, Suite 1650

Miami, FL 33131

Tel: (305) 358-9414

Cell: (305) 302-1037

Fax: (305) 402-0163

Fax Paris (France): 01-72-70-30-04

Fax U.K.: 44-1395-200-120

[fwoodbridge@bellsouth.net](mailto:fwoodbridge@bellsouth.net)

## Introduction

The following discussion is geared towards foreign nationals who are purchasing a business in Florida, generally with a view to obtaining an investor's (E-2) visa. For these visa applicants, the first and foremost of the factors to be considered is the adequacy of the business being purchased for the visa. E-2 visa applications are generally analyzed by the U.S. consulates in the country of origin of the visa applicant. Because each consulate often has its own peculiarities when deciding to grant visa applications, the foreign candidate should seek out an immigration attorney who has experience with the Consulate having jurisdiction.

### Primary factor: suitability for visa.

The foreign purchaser of a business must first verify with immigration counsel that the purchase meets the requirements for obtaining an investor's visa. The principal factors are the following: price; the financial viability of the business; and the potential for creating jobs for persons authorized to work in the U.S.

Price. Immigration law does not establish a minimum price to be invested. Some practitioners ask for an investment of at least \$100,000, although visas have been obtained for investments of \$70,000. Seller financing in principle can only represent one half of the total purchase price. If the transaction is an asset purchase (see below), the parties should prepare IRS form 8594 showing the allocation of the purchase price to the various asset classes (equipment, cash, goodwill, etc.). This serves to justify the purchase price among other advantages.

Job Creation. As a general rule, Consulates deciding on visa applications want to see the potential of a business to create jobs for persons authorized to work in the U.S. As part of the due diligence process, the buyer of an existing business should obtain from the seller two or three years of federal and state employment documentation (forms 941 etc.) for existing employees (two or three employees are desirable). For business to be created, the 3-5 year business plan should justify the job creation potential.

Financial Viability of the Business. This can be determined through the due diligence process or, in the case of a business newly created, by a properly prepared business plan. Buyer's due diligence for the purchase of an existing business must include three years of tax returns and financial statements, that a buyer is well advised to have analyzed by a CPA knowledgeable of the type of business in question. Because of the prevailing financial crisis, it is possible to justify unfavorable figures to a certain extent, and a buyer can always attempt to prepare a business plan showing buyer's plans to improve results.

Once the business being purchased is determined to be suitable for the visa, other factors to be considered are similar to those an American citizen would consider when purchasing a business.

## **Form of purchase:**

-Asset Purchase or Stock Purchase: a purchaser can either purchase the stock of the legal entity (corporation or LLC) owning the business, or the assets of the business (FFE (furniture, fixtures, equipment, plus the lease). It is far safer to purchase the assets of the business, as an asset purchase allows the buyer to avoid to a large extent any hidden liabilities incurred by the corporate (or LLC) seller. Purchasing the legal entity that owns the business leaves the buyer open to those hidden liabilities that often are not discovered despite serious due diligence. It should be noted that one reason a Stock Purchases is sometimes used is to benefit from advantages that benefit the owner and that would not benefit the buyer of assets, for example prior promises to indemnify, certain administrative licenses, or even the current lease for the business premises, although generally a stock purchase generally requires the Landlord's approval.

-Directly or through a legal entity: the buyer can purchase a business in his or her own name or can form a legal entity (usually a limited liability company or LLC, sometimes a corporation). The best practice for any purchaser and in particular for a visa applicant is to use a legal entity to carry out the purchase of the business. A legal entity protects a natural person from individual liability for company liabilities and many corporate debts.

**The Human Element.** Foreign purchasers of businesses in South Florida generally work with a broker and a business attorney (as well of course as with their immigration attorney).

-Brokers: Business brokers can be independent or work with larger brokerage houses. It is better to do business with brokers who specialize in the type of business desired. Many residential brokers are able to assist with commercial purchases. Foreign buyers should note that in Miami, in almost all cases the Seller pays the broker's commission. Therefore, buyers should not avoid using a broker for financial reasons. Brokers who speak the language of the buyer can be of immense assistance to a foreign buyer who does not always know how things are done in the U.S..

-Attorneys: The purchaser's attorney generally prepares the Asset Purchase Agreement (or more rarely a Stock Purchase Agreement) that the purchaser signs and submits to the Seller as an "offer". The Buyer's attorney also does legal due diligence, checking to see if licenses are current and taxes paid and verifying that there is no pending litigation against the seller that might affect the assets or the business. The buyer's attorney also typically holds the funds for the deposit and the balance of the purchase price until closing when the funds are distributed from the attorney's trust account. The buyer's attorney also usually prepares all or part of the closing documents and organizes the closing with the Seller's attorney. For reasons of protection, it is best to use an attorney, who should Have experience in business purchases.

-CPA's: Wise Buyers always have a certified public accountant (CPA) verify the financial records of the business to be purchased. Financial documents are not always trustworthy. There have been cases where a Seller will declare more sales than those actually realized (and will pay taxes on these fictitious sales!) so as to be able to increase the asking price for the business. A good CPA knowledgeable about the area of activity in question can often uncover this type of subterfuge and explain to the buyer whether the business the buyer is purchasing is within the normal parameters of the sector of activity in question.

-Inspectors. Business purchase agreements should allow the buyer to inspect the main components of the business: restaurant or beauty salon business, machinery for small manufacturing concerns, etc. Even though most asset purchase contracts provide only that equipment will be in "working order" on the day of closing, and that seller otherwise makes no warranties as to the quality of the equipment, the buyer should nevertheless have the equipment inspected as part of buyer's due diligence. If the equipment is in poor condition, the buyer can negotiate a price reduction or can have the seller refurbish it, affirming that if this is not done, the buyer will not go through with the transaction.

-Insurance Agents: Leases for business premises in Florida always require that the Tenant (the buyer) obtain insurance of various types and coverage. A buyer who will be entering into a lease agreement as part of the business purchase should contact an insurance agent to determine the premiums the buyer will have to pay.

**Procedure and Time Considerations.** A typical business purchase involves the following steps:

-Letter of Intent: A letter of intent serves to be sure that buyer and seller are on the same wave length as to price and payment terms, dates for due diligence and date of closing, and as to any special conditions. Letters of intent often are not used and the parties proceed directly to negotiate the Asset (or Stock) Purchase Agreement. Some Sellers (but definitely not all!) will allow a potential buyer to have access to Seller's financial and business records when an LOI is signed but before the Asset Purchase Agreement is signed. A letter of intent should not be binding on the parties.

-Asset Purchase Agreement (or Stock Purchase Agreement): this document when signed by buyer and seller establishes the dates for due diligence and closing, the price and modes of payment, the contents of due diligence, the period of familiarization, the assets being sold, Sellers warranties, and other general terms. Some of the terms buyers should be aware of are the following:

-Price: the full price should be listed, together with any provisions as to seller financing or third party financing. The contract should indicate whether or not the fungible inventory of the business on hand the day of closing is included in the price, and if not, whether seller will transfer that inventory outside closing.

-Deposit: Usually 10% of the purchase price. The contract should give the buyer five or more days to constitute the deposit given delays in transnational funds transfers. We recommend that the deposit be held by the Buyer's attorney.

-Due Diligence: Due diligence refers to buyer's analysis of the business. The due diligence period is generally 10-20 days, during which the Seller must provide all relevant business and financial records relating to the business being sold. Buyer's attorney verifies the legal status of the business and Buyer's CPA analyses the financial documents. As indicated above, it is advisable to use a CPA experienced in the type of business in question, rather than letting the attorney do financial due diligence. Many small and medium-sized businesses in South Florida are not managed with the expertise one could wish: personal expenses are run through the company; seller claims that some income (often allegedly an important part!) is not declared; some balance sheet ratios do not correspond to what is usual in the type of business concerned, etc., all of which anomalies can be uncovered by a competent CPA.

-Preparation and Negotiation of Closing Documents: the Buyer's attorney prepares some (with seller's attorney) or all of the closing documents (the Bill of Sale that transfers title to personal property; buyer's and seller's company resolutions approving the transaction; non-competition agreement; indemnification agreement; Closing Statement (showing all pro rations, payment of any outstanding Seller's debts, etc.; last minute Closing Agreements)

Pre-closing inspection: It is important to have a list of all equipment being sold as part of the asset Purchase Agreement and to inspect the business immediately before closing. If consumable inventory is being sold, it is during this inspection that the items in question are verified. Not that it is not unheard of that Sellers remove part of the assets of the business before closing, claiming that they were not included in the sale (be careful with televisions, computers and so forth: items easily removed).

-Closing: sometimes done with all parties present: documents are signed and funds paid. Often closings are done by exchange of documents through couriers and wiring of funds. Note that foreign buyers **do not** have to be physically present at the Closing: powers of attorney can be used or documents can be executed in the buyer's home country and sent to the Buyer's attorney in South Florida by overnight courier.

-Visa Issuance Condition. Some sellers (those most anxious to sell!) are willing to sign a contract with a “visa issuance condition,” *i.e.*, the closing is done in escrow, buyer’s attorney holds all funds and all documents until Buyer’s visa is granted, at which time the documents are exchanged and funds distributed. If the visa is denied, buyer recovers the purchase price and seller continues as if there had never been a contract. The visa condition protects foreign buyers and should always be requested, although many seller’s will not accept it.

-Non-competition: A buyer does not want the seller to open a new establishing next door the week after closing! It is customary to include in asset (or stock) purchase agreements a non-competition provision by which the seller agrees not to compete with the business being sold for a given period (up to three years is considered valid for the seller of a business) in a given geographic area (*e.g.*, a radius of five (5) miles from the business being sold).

#### **Other factors:**

Experience of Buyer in the Sector: if a foreign buyer has worked until now as a computer engineer, that buyer should think twice before purchasing a restaurant or a beauty salon. Each type of business has its tricks that one often takes much time and effort to acquire. Tip: familiarization: be sure that the Seller agrees to spend a fair amount of time with you after the closing showing you how things function (at least 3-4 weeks).

-NB: Even if a buyer has experience in buyer’s home country in the type of business being purchased, the buyer must be aware that things are often quite different in the U.S. and especially in Miami. Even restaurateurs have discovered to their dismay that tendencies, tastes and habits of U.S. consumers are quite different from consumers in other countries. It is always a good practice to contact compatriots doing business in Florida to get ideas as to what *savoir faire* is necessary here.

Initial inquiries: internet. There are internet sites that list South Florida business for sale. Potential buyers should invest time in research, as it is possible to acquire a fair idea of availability, prices, etc. before initiating research *in situ*.

Location: prevailing financial conditions. As is the case with residential real estate purchases, location is extremely important for businesses. Certain types of restaurants, for example, do very well in a given neighborhood but fail miserably elsewhere. In Florida many businesses are cyclical: a large part of their customers are tourists, and there is a definite tourist season in South Florida (usually October through April) outside of which business can be very slow. Also, a given neighborhood in Miami will have its own financial characteristics that must be taken into account by a potential purchaser. Dollar Stores (in which everything is in theory sold for \$1.00) do quite well in certain areas, much less well in others; certain types of cuisine are well received in some parts of the city and not in others etc. It can be very dangerous for example to buy a specific type of restaurant that has been doing well in a given neighborhood with the intention of changing the décor and catering to a different type of clientele: such makeovers often do not work at all.

#### **Practical Observations and Tips:**

Condition of Assets: As indicated, Sellers generally do not give any guarantees regarding the condition of the equipment of the business, other than to warrant (= affirm) that the equipment will be in “good working order” or “working order” on the day of closing. There is no generally applicable law (as there is in other countries) that protects a buyer who purchases equipment “AS IS”. This means that if an industrial refrigerator breaks down a week after closing, the buyer generally cannot recover anything from the Seller. For this reason, in most cases a Buyer is wise to have the principal items of equipment inspected soon after signature of the contract (including the air conditioning unit if the lease requires that the Tenant maintain and replace it).

Leases: In the U.S., very few owners of small and medium sized businesses own their place of business. Rather they lease the premises by entering into a written Lease or Lease Agreement with the owner (“Landlord”). A key element of the business is thus the lease, that the buyer may acquire by assignment from the existing tenant (the seller) or by negotiating a new lease with the Landlord. As a general rule in the U.S., a lease is governed by the

terms of the document itself, there being very little legal protection other than the lease itself. It is therefore important that Buyer's attorney carefully analyze the lease document (Seller's lease or the new lease). To be noted: some leases provide that Sellers who wish to assign the lease must pay the Landlord a fee, often quite high. Buyer should be sure that the asset purchase contract provide that all such lease transfer fees be paid by Seller. The contract also should provide that a condition to Buyer's obligation to close is Buyer's obtaining an assignment of the lease (or a new lease) on conditions satisfactory to Buyer in buyer's sole discretion. If for whatever reason the buyer does not obtain a satisfactory lease, the buyer can withdraw from the transaction and recover buyer's deposits.

Employees: In the U.S. as a general rule employees do not have written employment agreements. If they do, the buyer should obtain copies and review them. Florida is an "employment at will" state. This means that an employer can dismiss an employee at will, with no notice, for any reason or no reason. It also means that an employee can leave the business from one day to the next, also without notice. Employers in the U.S. normally are required to pay a Federal Social Security tax (FICA – Federal Insurance contribution Act), Federal Unemployment Tax (FUTA), and State unemployment tax for their declared employees. Some businesses attempt to either pay employees "under the table" without declaring them or to pay them (erroneously) as "independent contractors" who are responsible for their own taxes. The buyer of a business should verify through the buyer's attorney that all such employment taxes have been paid and are current and that the employment situation of the business in general is legally correct. For businesses such as beauty salons that depend for their clientele on hair dressers who have their own habitual customers, it is important insofar as possible to be sure that the hair dresser employees will not leave the business as soon as it is under new management. Non-competition agreements with a seller can help, but if key employees decide to leave, there is not much the new buyer can do. Finally, employees in the Miami area are not always easy to manage!

Tangible personal property taxes. The counties in Florida impose a tax on "tangible personal property", *i.e.*, equipment, computers, furniture, fixtures etc. This tax is not owed for the first \$25,000 worth of property, so most small companies no longer pay it. However, for companies that have much equipment with a very high market value, it is important to be sure they have been paying this tax, since delinquent taxes follow the assets, that is, the new owner still owes the tax after a purchase of the taxable assets.

Business Tax Receipt. Every business in Florida pays a relatively inoffensive yearly business tax to the County and City where it is operating. The cost is small (rarely more than \$300) but each business must have this document and post it on the business premises.

Specialized Licenses. Florida businesses that are subject to licensing requirements imposed by the State of Florida have to apply for and obtain the licenses in question. Examples of businesses that require a license are restaurants, hotels, bars and beauty salons. Other businesses need various types of federal licenses to function. Buyers should be sure they know exactly what licenses they will need. Even when licenses are transferrable, the buyer as new owner must file documents with the state. The buyer's attorney should be able to assist with these requirements or can recommend administrative specialists who can do so. The liquor license system, for various aspects of the trade in alcoholic beverages, is complex, and usually requires the assistance of specialists.

Funds Transfer: often funds transfers by wire from foreign countries can take up to 5 or 6 days to arrive in South Florida. Often also, foreign banks (despite their representations to the contrary) take part of the amount wired in fees. It is always advisable to send \$100 more than the amount requested, to be sure that the necessary funds are available in the exact amount required.

Franchises: It can be interesting to acquire a franchise. However, it is important to verify the initial franchise fee, royalties payable to Franchisor over the life of the Franchise, training requirements, periodic expenses to be met, etc. The transfer of an existing franchise by a seller to a buyer is always subject to approval by the Franchisor and it is thus important to review the franchise agreement itself to determine what conditions must be met for a transfer. Obtaining a valid franchise, if this is contemplated, must be a condition to Buyer's obligation to close.

Credit (loans): Under present circumstances, U.S., banks in South Florida will not make loans to foreign purchasers of a U.S. business. Foreign purchasers can obtain loans in their home countries and pay cash for the U.S. purchase. In the alternative, they can try and get seller financing: they pay part of the purchase price at closing and sign a promissory note for the remainder, that is paid off over a specific period of time at a specified rate of interest. A seller giving credit generally will require a security interest (*mutatis mutandis* a mortgage) on the entire business: if the buyer fails to make a payment under the Promissory Note, the seller will in principle take back the business. It is important that Buyer's attorney analyze carefully all financing documents relating to such Seller financing.

Importance of Advertising and marketing: The United States in general and Florida in particular is a consumer society *par excellence*. The new buyer of a business in this area should be aware of the extreme importance of advertising and marketing if one is to succeed. The specific techniques to be used depend on the type of business. The use of a marketing specialist can go a long way to insuring proper promotion of the business.

**Conclusion:** A foreign buyer who has prior business experience and does the proper investigatory work can have a very satisfactory experience purchasing a business in South Florida, provided qualified and competent personnel is consulted and used for the operation. The best advice we can give to potential purchasers is *caveat emptor* or buyer beware, and the best way to be aware is to use common sense: if a deal seems too good to be true, it probably is. Finally, beware of falling into the trap of believing that it is easy to get rich in America: a large number of new businesses are not successful here. Hopefully the foregoing tips and explanations will help clear the way to resounding success!

# EB-5 Immigrant Visa

**Roger A. Bernstein, Esq.**

Fl. Bar Certified in Immigration & Nationality Law

Bernstein Osberg-Braun, LLC

11900 Biscayne Blvd, Suite 700

Miami, Florida 33181

(305) 895-0300 Tel

(305) 895-0306 Fax

[rbernstein@visaattorneys.com](mailto:rbernstein@visaattorneys.com)

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

[www.eb5investorvisa.com](http://www.eb5investorvisa.com)

Developers are quickly learning about the EB-5 visa as a mechanism for acquiring capital. Since 2008, when capital markets went dry, the EB-5 has been one of the few sources of hydration. Gone are the days when developers could easily obtain conventional financing at attractive interest rates. Securing EB-5 funding often means resuscitating projects from life support. Resourceful developers are successfully utilizing the EB-5 to create infrastructure, build hotels, office buildings, shopping centers, schools, assisted living facilities, hospitals, and so much more.

The EB-5 program has two subcategories: the traditional EB-5 program (often referred to as the “million dollar green card”) and the regional center program. The traditional program involves investing \$1,000,000.00 into a business, actively managing it, and creating ten direct jobs. The EB-5 regional center program allows developers to pool foreign investor funds into a limited partnership and invest its capital into qualifying projects approved by USCIS. As the investments are almost always within a high unemployment or rural area, the investment amount is \$500,000 and indirect job creation is permitted. Due to the lower investment amount and the relaxed job creation requirement, it is understandable that during FY 2011, 90-95 percent of foreign investors utilized the regional center as opposed to the traditional program.

Over the past five years, there has been exponential growth in the number of regional centers created in the United States. There are currently 173 approved regional centers operating in 40 states, including Guam and the District of Columbia. IIUSA, the national trade association of EB-5 Regional Centers, estimates that the program will account for over \$1.25 billion in foreign direct investment and more than 25,000 jobs created or saved in FY 2011.

What is also encouraging is USCIS’ renewed commitment to improving the program. USCIS Director Alejandro Mayorkas and California Service Center Director Rosemary Melville have recently implemented a series of reforms designed to streamline the adjudicatory process and provide more transparency and consistency in their approach.

This should be welcome news to developers who desperately need funding for their stalled projects. An EB-5 regional center allows developers to tap into foreign investment capital at a relatively low cost and use those funds to finance or supplement existing financing. The carrot for the investor is, of course, the green card. The successful approval means residence in the United States for the investor, his/her spouse, and their children under 21. Statistically, when compared to other immigrant visa categories, the EB-5 category has an extremely high success rate with 93 percent of I-829 petitions being successful thus far in FY 2011.

Getting a regional center approved, however, is not a simple task. Creating a regional center and enabling foreign investors to obtain their green card is a collaborative process that requires the close cooperation of the developer, as well as the immigration, tax, and corporate lawyers.

The application must include a private placement memorandum or offering circular, a subscription agreement, escrow agreement, marketing strategy, and a comprehensive business plan, as well as an econometric model for job creation. Qualified counsel should review the marketing materials and overall strategy to ensure that securities violations are not committed. The immigration lawyer often will quarterback the process, ensuring the business plan and offering circular are EB-5 compliant, coordinating with the economist, and acquiring the Targeted Employment Area (TEA) designation. Current processing times are averaging five months; however, USCIS Director Mayorkas has indicated a premium processing product would be forthcoming relatively soon.

The real work begins once the regional center and project have been approved. A network of agents is typically deployed to pitch the project abroad. Once investors are found, immigration lawyers must prepare foreign investor petitions clearly showing the source and trace of their investment funds. High net-worth foreign investors will also need the advice of tax counsel for pre-residency tax planning. It is the regional center's obligation to ensure the capital raised is fully invested in the project and that the requisite jobs are created.

The EB-5 program continues to gain momentum and popularity. For a project to be successful, careful planning and skilled professionals working in unison are essential. This is a win-win endeavor. The developers get sought-after capital to complete a project, the foreign investor gets a green card for himself and his family, and most importantly, struggling economies in high unemployment areas are infused with cash and jobs, stimulating local economies throughout the United States.

*Roger Bernstein is a Florida Bar-Certified immigration lawyer specializing in EB-5 regional center cases. He is a founding Partner of the Miami immigration law firm Bernstein Osberg-Braun and De Moraes, LLC, and a Partner in American Life Investments, LLC, a USCIS-designated Regional Center in Miami-Dade County, Florida.*

*Karen Caco is the only immigration attorney in the world to have visited all of the existing Regional Centers, and as a result, is extremely knowledgeable about EB-5 regional center designation applications. She is a Partner at Bernstein Osberg-Braun & De Moraes, LLC.*



# Immigration for Real Estate Investors

By **Elke Rolff, Esq.**  
Rolff Law P.A.

1. The Visa Waiver Pilot Program (VWP)
2. The B visa category
3. The E-2 Treaty Investor visa
4. The L Intra-company Transferee visa
5. The Alien Entrepreneur Immigrant visa: the \$1 million investment

This article wants to highlight some of the most utilized visa categories for foreign real estate investment and the investors or companies engaged in it.

Different visa categories are available depending on the individual's country of origin, whether the real estate investment will be passive or active, the intended duration of stay in the United States and the possibility to directly or indirectly earn money from a U.S. source.

## 1. The Visa Waiver Program (VWP)

Depending on the country of origin, no visa might be required to simply buy, sell, own, or lease real estate as an individual as long as this activity does not reach commercial proportions.

If the investor comes from a visa waiver country, he does not need a visa to enter the United States for a maximum of 30 to 90 days at a time. The only requirements are a machine readable passport and a return or onward ticket. The applicants will be photographed and fingerprinted when seeking admission. The participating countries are currently: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom. There is no black law, but if the immigration authorities deem that a person spends too much time in any given year or in a period of time in the United States, entry can be refused to that individual. Once entry on a visa waiver has been refused, the Applicant can only reenter the United States if in possession of a valid visa. Thus, the visa waiver is suitable only for short vacation or business trips.

## 2. B visas

If the investor is not a citizen of a country that participates in the visa waiver pilot program or intends to remain in the United States for up to six (6) months, a B-1 "business visitor" or B-2 "extended tourist" visa might be the right choice.

### a) B-1 Overview

The B-1 "business visitor" visa allows an individual to come to the U.S. for a short period of time for purposes that include the following:

- engaging in meetings and consultations with U.S. business associates
- attending non-productive training for the benefit the overseas company
- attending professional conferences or seminars

A B-1 visitor is not authorized to perform productive work in the U.S. and must maintain a foreign residence to which the B-1 visitor intends to return at the end of the authorized period of stay. The B-1 status may not be used as a means to accelerate a candidate's eligibility to enter the U.S. to work. The B-1 entrant will generally remain on a foreign employer's home country's payroll and cannot receive compensation from a U.S. source, other than reimbursement for incidental expenses.

The B-1 visa is applied for directly at the U.S. Embassy or Consulate. B-1 visa holders are generally admitted for the period of time necessary to conduct the business. In theory, a B-1 entrant may be admitted up to a maximum of six months. However, in practice, immigration officers typically allow business visitors to remain in the United States for no more than 30-90 days. If unexpected events necessitate an extension, individuals may apply to extend the authorized period of stay up to six (6) months. However, prolonged business visits may give rise to a presumption that the visitor is engaged in prohibited productive employment.

#### **b) B-2 Overview**

The extended tourist visa is normally issued by the foreign U.S. Consulate for ten (10) years and allows a tourist to remain in the United States for up to six (6) months at a time. This visa is used by many foreigners who own holiday residences in the United States. Typical examples are the so called "snowbirds" that leave Europe to spend the winter months in Florida. However, even if the visa holder never overstayed, too frequent visits to the U.S. may at some point become a problem and will be asked to return with a more permanent visa.

If the investor intends to engage in active real estate investments that are connected with an ongoing business activity and from which he derives revenues, the investor needs a visa category which allows longer periods of admission and the authorization to directly or indirectly earn money from a U.S. source.

The most used visa in this category is the E-2 treaty investor visa for citizens of a country that has a Treaty of Commerce and Navigation with the United States. However, many Latin American and former Soviet Union countries do not yet have such treaties in place with the U.S.

### **3. E Treaty Investor visa**

The E treaty investor visa allows an individual to come to the U.S. for the purpose of furthering a substantial investment in a U.S. enterprise made by individuals or businesses that are citizens of a treaty country.

#### **a) Requirements**

At least 50% of the U.S. entity must be owned by nationals of the treaty country in order to qualify to utilize E visas. In order for a business to qualify, the company must demonstrate that a substantial investment in the U.S. business has been made by individuals or companies that are citizens of the treaty country. In order to be considered a substantial investment, the funds must be "at risk". Whether the actual amount invested is substantial depends on the type of business and is weighed based upon a variety of factors. In addition, the investment must not be "marginal", i.e. not made solely for the purpose of earning a living.

- **Ownership.** The Principal Investor needs at least 50% ownership of the investing company and the nationality of the treaty country.
- **Active investment.** The investor must have made an irrevocable commitment of funds into an active, commercial investment.
- **Substantial investment.** Only those financial transactions in which the investor's own resources are at risk will be considered.
- **Marginality.** The investment needs to generate a return that is greater than just covering the cost of living for the principal investor and his family. The investment should create job opportunities for U.S. workers.
- **Essential role in the company.** The treaty investor must have a key position within the company, either as the investor, who will develop and oversee the investment, or as a supervisory manager, or as a specially trained, highly qualified employee necessary for the development of the investment.

#### **b) Essential Employees**

Under the E visa category, a qualifying company can employ “essential employees” from the Treaty country if this person will have supervisory and managerial functions in the company and/or “possess skills that are essential to the efficient operation of the business”. Accordingly, the candidate’s qualifications and the necessity to employ the foreign national over a U.S. worker (i.e. the availability of a U.S. worker or the possibility to train a U.S. worker) are closely scrutinized.

#### **c) The application process**

Before an individual can apply for an E visa, the company in the United States where he or she will work must become E qualified. An initial request to qualify the U.S. company for E status must be filed together with at least one individual's E application at the U.S. Embassy or Consulate that has jurisdiction over the treaty country. Once the company is E qualified, an individual who is a national of the treaty country can apply for an E visa if he or she is coming to work as an executive or supervisor, or an essential employee. The individual does not have to be employed by the company abroad in order to qualify for E status.

E visas can be issued for up to five (5) years and are renewable indefinitely as long as the company and the individual continues to qualify for E status. Upon each entry to the United States, E visa holders are generally granted two (2) years of E status on Form I-94 Arrival/Departure Record as long as the E visa is valid at the time of entry.

E Visas are generally applied for directly at a U.S. Embassy or Consulate at the non-immigrant alien’s country of citizenship or residency (visa granted for 5 years), or with the U.S. Citizenship & Immigration Services (visa granted for 2 years). Filings in the U.S. can ask for Premium Processing by paying an additional \$1,000.00.

#### **d) Spouse and children**

The spouse and unmarried children under the age of 21 may obtain a “Dependant Beneficiary” E visa. The E spouse and children can attend school in the United States and the E spouse can obtain an independent employment authorization (E children are not permitted to be employed under their dependant beneficiary status).

#### **e) Permanent Residency**

The normal procedure for an E essential employee to obtain permanent residency is the labor certification process. However, E-2 Principal Investors cannot file labor certifications because of their controlling interest in the qualifying company.

### **4. The L Intra-company Transferee visa**

For investors who are citizens of a country that has not yet entered into the required Treaty of Commerce with the United States, the International Transferee visa is an option.

This category is for international business people coming to the U.S. as intra-company transferees from a foreign parent or subsidiary of the U.S. company (51% ownership) that will engage in real estate investment and development in the United States. L-1 visas are available to people who have worked for the foreign company for at least one (1) continuous year within the three (3) years preceding the application. They must have been employed in an executive/managerial or specialized knowledge position and will be transferred to the United States temporarily to work in an executive or managerial capacity for the U.S. company.

#### **a) Duration of stay**

An L-1 non-immigrant alien will be admitted to the U.S. for the time required by the employer up to a maximum initial period of stay of three (3) years. An exception to the three (3) year initial stay exists for newly created companies in the U.S. (existing for less than one (1) year) in which case the visa will be issued for only one (1) year in order to control the new company's viability beyond the first year of operations. The visa may then be extended for three (3) years and another three (3) years up to a maximum of seven (7) years for L-1A managers and executives.

#### **b) The application process**

The U.S. employer must file a petition with the U.S. Citizenship & Immigration Services (USCIS). The application requires various supporting letters, documentation, and other materials that need to be submitted in order to give a complete picture of company's viability and the transferee's position. Once the petition is approved, the Approval is sent to the competent U.S. Embassy or Consulate where the alien can obtain issuance of the visa into the passport. If the alien is already in the United States in a different non-immigrant category, his or her status can be changed to the L-1A category. For payment of an additional \$1000.00 USCIS offers premium processing whereunder a visa application needs to be approved or denied by USCIS within fifteen (15) business days from the date of filing. As of March 2005, a \$500.00 fraud fee needs to be paid to the U.S. Citizenship & Immigration Services in addition to the basic filing fee (currently \$185.00) and the afore-mentioned premium processing filing fee.

#### **c) Spouse and Children**

The spouse and unmarried children under the age of 21 may obtain a "Dependant Beneficiary" L visa. The L spouse and children can attend school in the United States and the L spouse can obtain an independent employment authorization (L children are not permitted to be employed under their dependant beneficiary status).

#### **d) Permanent Residency**

L-1A executives and managers have the opportunity to directly file an immigrant petition without going through the labor certification process. The application can be filed once the U.S. company has been in existence for one (1) year. Under the so-called "dual intent doctrine" the applicant can maintain and extend their L-1A status during the permanent residence application process and do not need to obtain separate employment authorizations and travel permits. L-1B specialized knowledge workers have to go through the labor certification process. The L structure i.e. the relationship between the foreign and the U.S. company (at least 51% ownership) must be maintained during the whole period in L status and up to the granting of permanent residency.

### **5. Conclusion**

The U.S. government generally favors investment into the U.S. However, the investment must be into an active, commercial enterprise and, thereby, justify the presence of a foreign individual. Passive investments into vacation homes, etc. are subject to restrictions on the duration of stay in the U.S. Thus, the "simply live in the U.S." visa, i.e. own a house and live off funds accumulated outside the U.S., unfortunately, does not exist. Many other nonimmigrant and immigrant visa categories are available, but they are less used for real estate investments and would exceed the scope of this article.

*©2011 – Elke Rolff, Esq.*

# Financing a Real Estate Acquisition in the United States

**Frederick Woodbridge, Jr., P.A.**

J. David Peña, P.A.

701 Brickell Avenue, Suite 1650

Miami, FL 33131

Tel: (305) 358-9414

Cell: (305) 302-1037

Fax: (305) 402-0163

Fax Paris (France): 01-72-70-30-04

Fax U.K.: 44-1395-200-120

[fwoodbridge@bellsouth.net](mailto:fwoodbridge@bellsouth.net)

## INTRODUCTION

The credit situation in the United States and the real estate market are both characterized by unusually stressful circumstances. Foreign and domestic purchasers of U.S. real estate will find it increasingly difficult to obtain mortgage loans. For purchasers who are able to pay cash and who seek medium and long term placements, the real estate market in Florida offers very attractive investment opportunities. For anyone who needs third party financing, the landscape is at present somewhat bleak.

This being said, financing opportunities still exist. In this article, we will discuss those opportunities. While banks are undergoing a definite “credit crunch”, banks are still lending to appropriate potential buyers. The United States banking system is exceedingly complex, and at present becoming daily more so. The basic structure of the banking industry remains unchanged, however, and we will first point out the types of financial institutions that may offer financing to foreign borrowers. We then analyze the terms and conditions of a typical mortgage contract and the promissory note the mortgage secures, as well as other documents typically used in connection with the mortgage loan. Finally, we underscore the items of which the foreign borrower-buyer must be aware at and after the closing of the purchase.

## PRELIMINARY OBSERVATION: NEED TO CONSULT PROFESSIONAL ADVISERS

Our professional experience has confirmed that foreign buyers must consult two professionals when seeking to purchase real property in the United States: a qualified real estate broker and an attorney experienced in real estate transactions. In Europe and Latin America, the acquisition of real property involves different types of documents and takes place in a framework that is often so different that foreigners rely on home country knowledge when buying property in the U.S. at their peril. Obviously, the value of realty depends on many factors that a person who is unfamiliar with a region is not able to weigh properly when making investment decisions. For this reason, the input of a real estate broker experienced in the region and in the type of property to be purchased is essential. In addition, properly following local law and custom when purchasing realty is clearly the key to a successful transaction and requires the input of an attorney.

Initially, foreign purchasers should consult real estate professionals with respect to the present state of the market: areas of expansion and growth; the relationship between price and quality in the various neighborhoods; whether present economic conditions make the market more favorable to buyers or to sellers; and other practical information such as availability of schools, distance from commercial areas and possible effects of catastrophic events such as hurricanes.

Once one or more properties that correspond to the purchaser’s requirements have been found, the broker will assist the potential purchaser in deciding how best to formulate an offer, and in particular, what strategy to adopt as regards price (a buyer generally offers less – even 20 to 30% less under present circumstances - than the asking price, and negotiations continue until the parties reach an agreement). When a proposal regarding price has

been decided upon, the purchaser makes an offer to the seller by delivering a draft contract that sets forth the terms of the transaction: price, conditions, closing date, etc.

Because U.S. real property law is quite different from that of other countries, the preparation of the contract should be entrusted to an attorney. Even if the broker uses a printed contract form that the broker has assisted the buyer in filling out, the buyer should consult with an attorney before tendering the contract to the Seller, especially since the contract is not a “pre-contract” as is used in many countries, but the key document that governs the entire transaction, far more than general law. The assistance of an attorney is essential for many reasons. For example, the U.S. does not have a real property registry in the strict sense of the term, and as a result, determining whether a Seller is in fact the owner of the property being transferred requires expertise that the layman often does not possess. A purchaser of realty in the United States is protected as to title by a system of title insurance that guarantees that a purchaser will in fact be the full owner of the property and provides for the curing of any defects. Real estate attorneys help a purchaser in obtaining and understanding a title insurance policy. Foreign purchasers should be aware also that in the U.S. there are no “Notaries” as there are in the civil law countries of the U.S. and Latin America. In the U.S. real property transactions are handled by attorneys, not “Notaries” (*Notaires* or *Notarios*).

It must be noted in addition that U.S. real estate acquisitions tend to involve more documentation than is the case in foreign countries. When a buyer obtains financing, the documentation at closing is indeed voluminous and includes all the mortgage documents as well as the real estate documents that transfer title to the buyer. The number and complexity of documents are all the more reason to use an attorney. Although it is possible to close a purchase transaction through a title insurance company only, experience shows that it is advisable to hire an attorney whose job is to protect the buyer only.

The U.S. tax system also can make it advisable to purchase U.S. real property in the name of a legal entity, such as a Florida or an offshore (non-U.S.) corporation or limited liability company or both. This is another reason to consult an attorney, as it is practically impossible for a foreign national (or a broker) to assist with establishing a corporate structure for a real estate acquisition.

The cost of professional assistance consists essentially of the broker’s commission and legal fees payable to the attorney. The realtors’ commission is generally paid by the seller but at times by the Buyer. The rate of the commission and the names of the Brokers (or of the Broker if there is only one) is established in the contract. It is suggested that the potential purchaser discuss the commission question with Realtors from the beginning. As for attorneys, they can be hired in the United States on a fixed fee basis or on an hourly basis. The advantage of hiring an attorney on a fixed fee basis is the avoidance of any surprise when the time comes to pay the bill. Fixed fees for real estate acquisitions run anywhere from 0.5 percent to 1 percent of the gross purchase price of the property, depending on the circumstances. As a practical matter, attorneys in the U.S. spend much more time in assisting foreign purchasers than would be required to assist U.S. persons, simply because foreign clients are unfamiliar with the system and need lengthy explanations and generally more assistance than local clients.

In summary, the enlightened self interest of a foreign participant in a U.S. real estate transaction definitely benefits from the assistance of real estate professionals and attorneys.

## **FINANCING**

### ***TYPES OF FINANCIAL INSTITUTIONS***

In theory, a foreign purchaser of U.S. realty could obtain a loan from foreign banks or finance companies. Under Florida law, a foreign financial institution may lend money for the purchase of Florida realty and take a purchase money mortgage encumbering that realty to guarantee repayment of the loan. Some foreign purchasers mortgage real property they own in their home country and use the proceeds for the purchase of Florida property. However, foreign banks and finance companies often are not willing to make loans for the acquisition of real property outside their home countries (in this case, in the United States) for reasons of unfamiliarity with the system and the corresponding increase in costs (they must hire an attorney also!), not to mention the tax situation. The reality is that the foreign purchaser generally must consult a local lender. These lenders normally fall into two categories: mortgage, or “finance” companies, and banks.

### **ROLE OF MORTGAGE BROKERS**

Experienced mortgage brokers maintain contacts with finance companies and banks who are willing to lend to foreign buyers. They are often able to save foreign buyers considerable time in finding a program that corresponds to their needs. A mortgage broker explains the essential terms and conditions of the various loans that are offered and assist the foreign buyers in completing the documentation that each lender requires. Foreign buyers should always ask all necessary questions when dealing with mortgage brokers (and indeed when dealing with the lenders themselves). When considering certain types of mortgages, in particular those with an adjustable rate feature, they should definitely be sure they understand exactly how the interest rate adjusts.

### **MORTGAGE COMPANIES**

In Miami, several mortgage and finance companies specialize in financing the acquisition of Florida realty by foreign buyers. The situation is comparable in other states with a large foreign presence. Most real estate attorneys can direct buyers to mortgage companies dealing with foreign borrowers in their area. In addition, some foreign consulates maintain lists of such institutions. Brokers also are a good source of information in this regard. Here, foreign buyers must be aware of the primary rule in American business practices: always get more than one quote for any transaction. This is especially important when shopping for a real estate mortgage loan. The considerable differences in conditions from one lender to the next are often surprising.

At the outset, it must be noted that these companies generally require that the Buyer furnish 30 to 40 or even 45% percent of the total price as a down payment. As a general rule, moreover, given the reduced availability of credit in late 2008 and very likely throughout 2009, obtaining financing in the U.S. for foreign buyers will remain difficult for the foreseeable future, and down payments required will be in the neighborhood of 40% or 45%. Note also that most of these specialized companies charge interest rates somewhat higher than local banks lending to U.S. persons. Finally, they ask for extensive information from the Buyer regarding creditworthiness: bank references, financial statements, recommendations, etc.

Foreign buyers planning on financing their purchase must be sure that their attorney includes a financing contingency in the purchase contract, that is, a clause granting the buyer a certain time to obtain financing, and providing that if the buyer cannot get financing by a certain date, the buyer can cancel the contract and get the deposit back (often 10% of the purchase price). Note that the financing contingency section of a contract usually requires that the buyer initiate immediately the loan application process. Also, if the foreign buyer plans to take title in the name of an offshore (non-U.S.) corporation, this intention should be expressed to the potential lender during the first meeting. While most lenders finance acquisitions by foreign corporations, they usually will require a personal guarantee by the principal of the company.

Once a mortgage company is found, the application process is generally straightforward. An application form must be filled out and the closing itself prepared. Although straightforward, the application form as indicated is usually quite thorough and calls for personal and professional references, especially from bankers, and personal and professional data. One Miami mortgage company requires the following from a potential foreign borrower, for example: a letter from the borrower's accountant; two bank references; three credit references (with payment history); corporate documents if the borrower is a corporation; U.S. credit history; copy of the passport with the entry visa; and an appraisal of the real property.

Mortgage companies, like banks, assist the Buyer throughout the acquisition process, among other reasons because their security depends on the Buyer's obtaining good title. When a mortgage company provides financing, the purchase process itself is almost identical to what it would be in the case of a purchase financed by a bank, and the remarks below apply to all such financed transactions no matter what type of institution finances the purchase.

### **BANKS AND SAVINGS AND LOAN INSTITUTIONS**

Foreign purchasers seeking financing sometimes will want to contact U.S. banks, some of which are willing to lend to foreigners acquiring U.S. real estate, although at present the amount financed by banks rarely will be over 60% in Florida. There are many types of banking institutions in the U.S. and the banking regulatory system





is complex and undergoing change at present. Because of the volatility now affecting banks and other financial institutions in the U.S., foreign buyers, again, should always consult experienced professionals when seeking financing through relations with U.S. financial institutions. The following discussion will help to familiarize foreign buyers with the system.

### ***SAVINGS & LOAN INSTITUTIONS AND COMMERCIAL BANKS***

The first division one must point out is the distinction between Savings and Loan Associations and commercial banks. These are the two main types of banks that make real estate loans. Generally, it may prove somewhat more difficult for a foreign purchaser to obtain financing from a Savings and Loan institution ("S&L"), even in cities such as Miami where many such financial institutions have a "foreign" department. The reason for this reluctance on the part of S&L's to make loans to foreigners is often the perceived difficulty in properly verifying the creditworthiness of the potential buyer and in recovering any deficiency in a foreign country if the borrower defaults on the loan. Having said this, many Miami commercial banks and banks in other large cities can and do make real estate loans to foreigners. Here again, it is necessary to consult attorneys and brokers and others knowledgeable in this area to find potential lenders.

### **TERM AND CONDITIONS FOR FOREIGNER BORROWERS WHO FINANCE THEIR PURCHASE OF US. REAL PROPERTY**

Many of the financing institutions mentioned above can and do make real estate loans to foreign buyers. The terms and conditions of these loans are worthy of analysis for the foreign purchaser. We underscore that the substantive aspects of a real estate acquisition by a foreigner, such as the transfer of title by deed and the documentation of the transaction (no lien affidavit, bill of sale for personal property, inspections, purchase of title insurance, etc.), are quite similar to what they would be if the purchaser were paying cash. In other words, there is a core of common procedures and documents that one finds in all real estate transactions, whether the purchaser is foreign or domestic and whether the transaction is all cash or with a mortgage loan. What is different in a financed acquisition is the subject of the following discussion.

A purchaser who finances the acquisition of real property must consider the following points:

- Amount financed and the terms of the financing, essentially the following:
- Amount of down payment.
- Interest rates (fixed or adjustable).
- Promissory Note: terms and conditions.
- Mortgage: terms and conditions.
- Financing Fees and Costs
- Title Insurance.
- Post Closing Considerations

### **PROCUREMENT OF THE FINANCING: GENERAL**

Assuming the foreign purchaser locates a lender willing to finance the purchaser's acquisition of U.S. real property, the purchaser will be asked to fill out an application, provide references, and fulfill any other requirements the lender may have. Some buyers "pre-qualify" for a mortgage loan before signing a contract to purchase. This practice is to be recommended. Other buyers sign the contract and then begin to look for financing. Obviously, a Buyer who intends to finance the acquisition must be sure that the purchase contract provides a reasonable period of time for the Buyer to find a lender and that it permits the Buyer to recover the Buyer's deposit if after making good faith efforts to obtain a loan, the Buyer ultimately is unsuccessful.

Once the Buyer has completed the loan application and the loan is approved, the lender will give the purchaser a good faith estimate of the costs and expenses to be incurred by the Buyer in connection with the transaction, the remainder of the down payment, and the amount of cash to be provided by the purchaser at closing. The "closing" in question is the second stage of a U.S.-style purchase transaction that begins with the signature of the purchase contract and ends with the closing, a ceremony at which the payment of the purchase price by the

Buyer is made in exchange for the delivery by the Seller to the Buyer of the deed, the document that represents the ownership of the property.

#### **DOWN PAYMENT, INTEREST RATES, TERM OF LOAN**

##### ***DOWN PAYMENTS***

During the preliminary examination of the terms and conditions of the loan, the purchaser must verify that the amount financed is correctly stated and that the terms of the financing are those agreed upon with the lender. In particular, the amount of the down payment to be paid by the Buyer must be correctly indicated, and the term of the loan and the interest rates must be as agreed. As regards the down payment generally, banks or other financial institutions lending to foreigners will require that the percentage of the price paid in cash by the Buyer (in the form of a "down payment" that appears in the purchase contract and on the closing statement as a "deposit" or "deposits" if more than one) be in the neighborhood, at present, of 40 or even 45 percent. During the height of the real estate bubble in Florida, lenders would sometimes finance 100% of the purchase price of realty for U.S. buyers, whereas at present U.S. citizens or residents generally must make down payments of 20%.

##### ***INTEREST RATES***

Interest rates may be fixed or variable (in the so called "adjustable rate mortgages" or ARMs). Foreign purchasers may obtain an idea of prevailing rates in The Wall Street Journal or other financial publications or even on the internet. Here again, the foreign purchaser will be well advised to seek quotes from more than one lender and to keep in mind that loans to foreign purchasers often are made on terms that are less favorable than those governing loans made to U.S. residents.

The potential borrower will find that variable (or adjustable) interest rates are generally lower than fixed rates for the first few years, but that as their name indicates, they then may vary by reference to an agreed-upon figure such as the prime rate. Purchasers who request variable rates often need lower monthly payments in the beginning and believe that when (and it) the rates go up subsequently, they will be in a better financial situation and will have access to more funds than at the time of purchase. Finally, if opting for a variable rate mortgage loan, the foreign purchaser should ask the lender to go through and explain several scenarios including increases and decreases in the prime rate of various magnitudes. Also, if more exotic mechanisms such as balloon mortgage are used, in which the payments are lower for a preliminary period but the entire loan becomes due at the end of that period, usually fairly short, it becomes essential that the purchaser request complete explanations from the lender and from the purchaser's attorney.

Many classic calculations used by foreign buyers in the past when considering the purchase of U.S. realty have unfortunately become obsolete as a result of the bursting of the so-called real estate "bubble" in Florida and the increasing unavailability of financing for real property purchases. Foreign buyers who are able to pay cash will find very favorable transactions but they too must be aware of the rapidly evolving market conditions if they are to take full advantage of the situation. Consulting a qualified real estate broker is all the more crucial under present circumstances for a successful transaction.

##### ***MISCELLANEOUS CLOSING COSTS DUE TO FINANCING BY LENDERS***

A mortgage lender will provide the prospective purchaser-borrower a good faith estimate of all costs to be incurred by the purchaser at closing. This estimate generally takes the form of a pro forma closing statement. It should be carefully reviewed by the purchaser and by purchaser's attorney. Among the expenses, fees and charges that the purchaser can expect to see on the closing statement when bank or mortgage company financing is involved are the following:

**"Points":** Lenders often charge a certain percentage (1 percent, 1.5 percent) of the loan amount as a "loan origination fee", i.e., the cost of the loan. The actual amount of this fee is subject to negotiation and its reasonableness should be considered in relation to the interest rate being charged. The term "points" also refers to discount points that lenders use to bring the yield on their loan as close as possible to prevailing market conditions. For the borrower, this is simply another charge to be paid.

### ***APPRAISAL FEE***

Mortgage lenders require an appraisal of the property performed by a qualified professional. The cost of the appraisal, several hundred dollars generally, is often charged to the borrower, although this is subject to negotiation.

### ***ESCROW PAYMENTS FOR TAXES AND CASUALTY INSURANCE PREMIUMS***

Mortgagees (lenders) do not want to run the risk that the borrower, as new owner of the property, will not pay the property taxes or casualty insurance premiums when due. Mortgagees (lenders) thus require that the buyer pay part of those charges in advance, into escrow, for use at the proper time to pay these taxes and premiums.

### ***INSPECTIONS (TERMITE) AND INSURANCE***

A mortgage lender often requires that the purchaser have the property inspected, in particular for termites, at least in Florida, and also will require that the Buyer insure the property. Costs involved for these items are generally charged to the borrower. Of course, a Buyer paying cash also will want to keep the property fully insured.

**Lender's Attorney's Fees:** It is quite common for the borrower to have to pay the attorneys' fees incurred by the mortgage lender. As a general rule, mortgage lenders use attorneys who are highly specialized in real estate closings. Consequently, these attorneys' fees are generally reasonable. Nevertheless, they represent another item that must be considered by the Buyer.

**Mortgagee's Title Insurance:** The borrower-purchaser generally must pay the premium for the mortgagee's title insurance. As described above, title insurance provides greater certainty to the owner and other parties such as the mortgage lender having an interest in the property that their interests are as they should be, and that if problems arise, these parties, owner and mortgagee, will not suffer economic harm. The State of Florida has published minimum premium rates for title insurance. The agent of a title insurance company, often the attorney for the lender, may charge more than the minimum rate, although some charge the strict minimum. Such agent collects part of the premium as a commission. Here again, the borrower-purchaser should verify carefully the pro forma closing statement to determine what the actual premium will be.

### ***OWNER'S TITLE INSURANCE***

Because the risk is practically the same as in the case of a mortgagee insurance policy, the title insurance company usually will issue an owner's title insurance policy simultaneously with the mortgagee's policy at a much lower premium, also listed on the pro forma closing statement. This policy, also paid for by the Buyer, protects the Buyer's title as owner of the property and obviously is very important for the peace of mind of the purchaser of U.S. real property.

### ***INTANGIBLES TAX ON THE MORTGAGE***

The State of Florida levies a tax on intangibles, that is, on "intangible" evidence of indebtedness such as a mortgage. The rate is 2 mills per dollar (0.002 percent) of the principal indebtedness. This tax is normally paid by the borrower-purchaser.

### ***STRATEGIC CONSIDERATIONS***

The bank or mortgage company will be on the Buyer's side as regards title, since the validity of the Bank's security, its mortgage, depends on the mortgagor (Buyer) being truly the owner of the mortgaged property. As a result, the bank's attorneys or the attorneys or closing agent for the mortgage company will carefully scrutinize all the documents to make sure there are no flaws or errors.

### ***LEGAL DOCUMENTATION FOR FINANCING:***

#### ***NOTE AND MORTGAGE***

#### ***NOTE AND MORTGAGE: GENERAL***

The principal instruments of the financing transaction are the mortgage and the promissory note, or "note." The Promissory Note evidences the debt, that is, the promise by the borrower to repay the loan. The mortgage

secures the Note: if the borrower defaults, that is, fails to make the promised payment (or fails to comply in some other way with the requirements and conditions contained in the mortgage), the lender, or mortgagee, may foreclose its mortgage, take possession of the property and sell it. From the Proceeds of the sale, the lender recovers (hopefully) the amount of the Loan. Any excess goes to other creditors and the borrower. Any deficiency still must be paid by the borrower if the loan is a recourse loan as most mortgage loans are.

### **ASPECTS OF THE MORTGAGE AND NOTE TO VERIFY**

Because the Note and Mortgage govern the entire financing transaction, the borrower must be extremely careful when reviewing these instruments. Generally, the borrower's attorney will review the documents and negotiate any necessary modifications with the lender's attorney. As an educated buyer is better able to discuss the transaction with the other parties, we set forth below a few of the main points to verify in connection with each of these documents.

### **PROMISSORY NOTE**

The Promissory Note embodies a promise by the borrower to repay a specific amount of money over a specific period of time at a given interest rate. Promissory Notes are negotiable instruments. Unlike promissory notes in many foreign countries, notes in the United States may call for staggered repayments over very long periods (15 or 30 years being quite common) in one instrument. When reviewing the terms of the promissory note, the following items should be carefully checked:

**Principal Amount:** This must be the amount of the mortgage loan.

**Interest Rate:** All the details regarding the interest rate must be clear, fixed or variable; if variable, how it is calculated; and how and where the interest is to be paid.

**Payment Schedule:** The Note should set forth a schedule of payments, indicating what each payment consists of (usually principal and interest). If the loan calls for a balloon payment, this fact must be indicated conspicuously on the note itself. The place of payment also should be indicated.

**Grace Period:** Generally, the borrower will not want to be declared in default if a payment is one or two days late. The Note should provide for a grace period of from 5 to 10 days, at least. That is, if the payment is due on the first day of the month, the borrower has until the tenth (10th) day, for example, to pay and can only be declared in default ten days after the payment date.

**Right of Prepayment:** They will want to verify whether or not the lender permits prepayment of the outstanding balance due on the mortgage loan, and whether or not prepayment entails payment of a penalty.

**Events of Default:** The principal "event of default" is, of course nonpayment of an installment. There usually are other such "events of default," however, such as the borrower's insolvency or the filing of a judgment against the borrower, that the borrower will want to know about.

**Acceleration:** Most notes call for an acceleration of the debt in the event of borrower's default, i.e., if the borrower fails to make a payment when due, the lender may declare the entire amount of the loan immediately due and payable, and if the borrower cannot reimburse the entire amount of the loan, the lender may foreclose the mortgage. It is important that the borrower know of this consequence of a failure to comply with applicable obligations.

### **MORTGAGE**

The mortgage is a contract between the borrower and lender. Its purpose is to secure, or guarantee, the lender against loss of the loan amount in the event of Buyer's default. A mortgage creates a lien on the property in Florida and in many other states. In some "title theory" states, the mortgagee, i.e., the lender, becomes the actual owner of record of the mortgaged property, but the effect is identical and methods of foreclosure, etc. are not significantly different in "title theory" states than in "lien theory" states such as Florida.

The mortgage agreement is executed by the borrower and recorded in the real property records of the county where the property is situated. Before the mortgage can be recorded, certain taxes must be paid (in Florida, for example, the intangibles tax). Because a mortgage contains requirements affecting the use of the mortgaged property and because it also governs the foreclosure process, the prospective borrower will want to have a lawyer review the document. In particular, a borrower should ask about, and examine, the following matters:

**Legal Description:** any error in the legal description harms the lender more than the Buyer, but it nevertheless is important that this description be correct at the outset.

**Loan Amount:** Check to be sure the description of the debt being secured by the mortgage is complete and correct, including interest rates and default rates, if any.

**Special Requirements:** If the lender requires that the Buyer insure the encumbered property, for example, or fulfill other requirements (keep the property in good condition, etc.), these requirements will figure in the mortgage agreement and should be reviewed by the borrower.

**Events of Default and Acceleration Clauses:** The borrower will want to review the so-called "*Events of Default*" and the remedies provided for the lender in the event of a default (acceleration of the outstanding debt, foreclosure, etc.). Grace periods for payment of installments should be verified, and if none are provided, should be requested.

**Second (Junior) Mortgages:** Some lenders permit the borrower as owner of the property to contract for subsequent loans from other lenders and to secure such later loans by a second mortgage on the property. Others strictly prohibit any "junior" mortgages or encumbrances. The borrower will want to verify the rules governing junior mortgages if any are contained in the mortgage instrument.

## POST CLOSING CONSIDERATIONS

A Buyer who purchases real property for cash has less to worry about than a Buyer who finances the acquisition of the property through a loan provided by a financial institution. The borrower who acquires real property encumbered by a mortgage should be aware of several matters that must be attended to for as l

**Payment of mortgage installments:** Obviously, the foreign borrower will want to take steps to have mortgage payments made in a timely manner, in U.S. dollars. The easiest system is to have the borrower's bank in the U.S. make pre-authorized payments. It is most important also that the foreign owner verify from time to time that the payment arrangements in fact are being respected. Some foreign borrowers have had to defend foreclosure actions by lenders because payments on the mortgage were never made by the person charged with making them. Finally, foreign owners should be sure to get the name of the bank or mortgage company officer with whom they will be dealing in connection with the mortgage. In case of difficulty, a U.S. representative of the foreign owner will need this information before all else.

**Taxes and Insurance Payments:** Many mortgage lenders require that insurance and real property tax payments be made in advance and held in escrow so as to be sure that proper and timely payment will be made. If this is not done in a specific case, the borrower will be responsible for ensuring that taxes and insurance premiums are paid on time. The danger of not doing so is obvious. Nonpayment of real property taxes, for example, can result not only in a default under the mortgage agreement (with the attendant danger of foreclosure) but also in administrative liens being placed on the property and eventually, a tax sale of the property.

**Condition of the Property:** The foreign owner who does not travel often to the U.S. should make arrangements to have someone inspect the property periodically to make sure that nothing happens to violate any local ordinances or laws affecting any structures on it. The electrical and plumbing systems also should be checked.

**Mail forwarding:** It is extremely important to have any mail concerning the property forwarded promptly to a responsible person. In many U.S. cities, local authorities mail out administrative notices concerning the property to the owner at the address indicated on the public record. These notices can be very important insofar as the status of ownership of the property is concerned. Foreign owners must take every precaution to be sure that such mail is forwarded to the owner or to the owner's U.S. attorney or other responsible person.

## **CONCLUSIONS**

Despite present market conditions, United States real property has generally proved to be an excellent investment and financing is in fact available to potential non-resident alien purchasers.

Potential purchasers should keep in mind that speculation is no longer advisable. Buying real estate for a quick resale at a profit is no longer as feasible as it was only a short time ago, although in certain locations this remains possible. It is now more important than ever, even indispensable, to consult qualified brokers and other professionals before incurring obligations involving Florida real property.

Financing the acquisition of U.S. real property entails particularly for non-resident borrowers, much paper work and the execution of numerous documents and instruments. The above discussion underscores important precautions to be taken by a foreign purchaser who obtains financing in connection with an investment in real property. There are, of course, other issues. We conclude, therefore, as we began, by recommending that the foreign investor obtain competent professional advice regarding any transaction in the U.S. The cost of this advice almost always is minor when compared to the dangers and pitfalls it allows the investor to avoid.







# Choosing a Method of Ownership for Real Property Located in Florida

By Frederic M. Barthe, Esq.

With a strong economy, attractive beaches and numerous attractions, South Florida has, over the last years, seen a flood of foreign investors seeking, among other things, to purchase real estate for either residential or commercial purposes. In a world where many foreign currencies fluctuate greatly on a monthly, if not daily, basis, a real property investment protected by a stable U.S. economy and a strong currency justifiably appears to be a reasonably safe method to protect one's assets against the roller coaster of the world's and developing countries' economies.

Once a foreign investor has made the decision to purchase real estate in Florida, the next issue to resolve is exactly how this foreign investor will hold title to the property he intends to acquire. Unlike many other foreign countries, the United States allows foreign citizens to hold title to real estate in fee simple, i.e. personally and absolutely regardless of any immigration status and without the need for assistance from a U.S. trustee or company. This article will discuss the most common methods of ownership in Florida, which can be divided into ownership through persons and ownership through legal entities.

## Sole Proprietorship in Fee Simple

This is the simplest form of ownership. The Buyer purchases the real property in his own individual name. It should be noted that when this method of ownership is selected, the attorney or title company handling the closing will usually require the Buyer to disclose his marital status. The marriage status of the owner becomes especially important when he or she will in turn sell or mortgage the property to a third party. Because of the homestead protection from creditors pursuant to the Florida Constitution, the signature of the unnamed spouse is required in order to mortgage or sell a primary residence located within the State of Florida. If the real property is a second home, the deed or instrument of conveyance executed by the Seller must contain language affirmatively stating that the property being conveyed is not the Seller's primary residence or homestead.

The main advantage of sole proprietorship in fee simple is the fact that it can be easily conveyed without the necessity to produce the signatures of others (except for the spouse in case of homestead) or any other sort of trust or corporate formalities.

## Co- Tenancies

Co-Tenancies are created when two or more individuals or entities share ownership of real property as a whole. There are three basic forms of co-tenancies.

## Tenants In Common

A common form of co-tenancy is the "tenancy in common". The most common way of creating a tenancy in common is by conveyance or transfer to two or more persons. It may arise by a deed or conveyance of an undivided tract of land to two or more persons, in which case the new owners are tenants in common until the tract is divided by agreement or otherwise. A tenancy in common among partners may be created if a partner purchases properties out of the partnership funds where the property is not to be used for partnership purposes. If one partner conveys his partnership interest to a stranger, the latter and the remaining partners become tenants in common.

The interest of tenants in common in real property ownership is subject to the laws of descent and distribution. In the event of the death of a tenant in common, his interest in the subject real property will be included in the tenant's estate and will pass on to his heirs or beneficiaries through probate. Unless specifically described in the instrument of conveyance (or Deed), it may be presumed that the interests of tenants in common are equal. For example, if Property A is conveyed to Mr. Smith and Mr. Wilson as tenants in common, it will be presumed that Mr. Smith and Mr. Wilson each have a 50% interest in that property. If Mr. Smith and Mr. Wilson intend to split the

property otherwise, it should be specifically spelled out in the Deed. The percentile interest of tenants in common becomes really relevant only when revenues generated by the real property or sales proceeds are divided among the co-owners because an important feature of a tenancy in common is "unity of possession". Unity of possession means that tenants in common must be vested with such title as will authorize them to take and hold possession of the property.

#### Joint Tenancy with Right of Survivorship

An estate in joint tenancy can only be created through a Deed or a Will. In order to create a joint tenancy with right of survivorship, there must be unity of possession, interest, title and time. In Florida, the right of survivorship must be expressly provided for in the Deed or Will. Unity of possession, interest, title and time means that all joint tenants of a property must have acquired equal rights and an equal interest in the property at the same time.

A joint tenancy may be broken or terminated voluntarily through a partition of the property or involuntarily by conveyance of the interest of any joint tenant to a third party. Indeed, any conveyance by a joint tenant to a third party would extinguish the requisite unity of title and time. The most popular advantage of joint tenancy is that it is not subject to the laws of descent and distribution. Therefore, upon death of a joint tenant, the property passes to the surviving tenant(s) to the exclusion of the heirs of the decedent. It should be mentioned that the last surviving tenant will receive the estate in sole proprietorship and the property will pass to his heir through probate upon his death.

#### Estate by The Entirety

An estate by the entirety is basically a joint tenancy by husband and wife. As tenants by the entirety, husband and wife own and control the whole estate as if one person under the law. The estate by the entirety also features the right of survivorship. However, because of the required marital relationship between the owners, the right of survivorship does not need to be expressly described in the Deed or instrument of conveyance. Because a tenancy in the entirety is based on the marital relationship between the two owners, the general rule is that dissolution of the marriage destroys an estate by the entirety and converts the husband and wife into tenants in common as if they were never married.

While the use of co-tenancies has been justifiably recommended by attorneys advising foreign clients in connection with the estate planning aspect of their real estate acquisitions, it should be pointed out that the necessity of obtaining the signature of all co-tenants in order to convey full fee simple title to a third party can create some difficulties where the other co-tenants may be difficult to reach and/or their relationship may have deteriorated and cooperation from them may be hard to obtain. On the other hand, a tenancy by the entirety provides some asset protection to those foreigners who do not qualify for the homestead protection from creditors otherwise, as collection into such property is only possible if a judgment exists against both husband and wife.

#### Real Property Ownership Through A Corporate Entity

For estate planning or liability purposes, foreign investors may be advised by their attorney to purchase real estate in the name of a domestic or foreign corporation (or as tenants by the entirety as stated above). The advantages of owning real estate through a corporate or similar business entity has numerous advantages which are discussed in this article. It should be noted, however, that these advantages come at a cost. In addition to the annual fees and additional accounting requirements which will be required for the proper maintenance of corporate formalities, financing will be more difficult and costly to obtain (larger equity in the property required, higher interest rate, personal guarantees of foreigners) and insurance premiums for the property will probably also be higher. Consequently, the typical foreign investor, in light of his own personal situation should balance the potential advantages and costs of corporate ownership before setting up sophisticated corporate structures for real estate purposes. On the other hand, where foreigners can take advantage of double tax avoidance treaties, they might have a significant advantage exempting property from estate taxation in the United States by holding it through a corporate entity.

#### Trusts

Some estate planners may recommend the use of a trust or “Florida Land Trust” under certain circumstances. Most trusts grant the power to hold, manage and convey the property to one or more trustees who must perform their duties in the best interest and for benefit of the beneficiaries of the trust. Under certain types of trusts, the trustee(s) may also be beneficiaries of the trust (grantor trusts). Depending on the language of each trust agreement, the powers of trustees can be more or less restricted to fit the specific intent and purpose of the individual(s) creating said trusts. There are several types of trust agreements (revocable, non-revocable, land trusts, etc.). The choice of a specific type of trust should only be made after consulting a specialized professional.

#### Conclusion

When selecting a form or method of real estate ownership, foreign investors should seek professional advice, and should not only consider the tax and estate planning ramifications of their choice, but also consider the short- and long-term costs which will result from their choice (facilities in obtaining).

