

## **Acquisition and dealings with European civil law real property**

More Australians [and New Zealanders] are purchasing real property in the European civil law jurisdictions than ever before. This boom is due to the strong Australian dollar and economy, greater mobility in travel, easy access of information and communication, a myriad of uses and purposes, the export of Australian and New Zealand legal services and expatriation of Australian and New Zealand nationals, cheaper air travel and not to forget ancestral, cultural and romantic links to *la vieille Europe*.

Clients range from mums and dads to superannuation funds, syndicates, professional investment companies and corporations.

Objectives can be many, such as vacation, a place for children to live and study, rental and seasonal investment, bed and breakfast, general residential, commercial and industrial. Target investments include village houses, capital city and regional city apartments, vineyards, chateaux, rural and agricultural properties in a number of European countries, where for the most part, the restriction of Australia's Foreign Investment Review Board are unimaginable due to the pro-investment policies of most [not all] countries in the European Union and beyond.

I founded my law firm in 1985, first on a part time basis and then quickly 2 years later on a full time basis as a specialist boutique international legal practice combining my language skills [French NAATI qualified translator, native Italian, fair Spanish and some Portuguese] to concentrate on trans-national issues in the areas of real property, deceased estates, company law and mining law in francophone Africa, later coupled / complemented with notarial qualifications.

Because of this broad brush of clients and objectives, no file is identical; however there are at least a number of common themes or checklists worth a mention:

1. a practical and theoretical working knowledge of the conveyancing and transactional procedures and processes for real property acquisition, dealing and disposal in the civil law jurisdictions
2. a cross-cultural and linguistic understanding of the destination country and its notarial profession – an indispensable State-delegated monopoly in terms of authentication and perfection of the land transfer
3. pointers to clients on local market, due diligence and custom considerations
4. appreciation of comparative private international law, purchase structures [individual, Australian / New Zealand and foreign corporate entities etc.] and the dutiable and fiscal impact of the conveyancing process.

## **International legal issues**

Of course on the whole, an international property transaction can go well beyond the expertise of many Australian / New Zealand legal practitioners in property law and conveyancing.

Some of the issues which should be examined are:

1. the inherent conflict of laws between Australia / New Zealand and the European civil law country in such areas as succession, family, property, tax law as well as individual and corporate rights and obligations, to name a few
2. the manner in which a party acquires or deals with real property in Europe [as an individual, an Australian / New Zealand company, an Australian / New Zealand corporate or individual trustee, an Australian / New Zealand superannuation fund or by establishing a foreign corporation in or outside the destination country] will have impact on the future dealings with the property and devolution of deceased estates and other issues
3. in a number of European countries, the concept of trusts does not exist and mechanisms must be established to at least achieve the best results for the clients as local laws will permit
4. death and divorce will cause the major difficulties to property ownership where individuals are proprietors of European real estate. Careful advice must be given as Australian / New Zealand wills often have no effect on immovables in foreign jurisdictions.
5. similarly for divorce a number of aspects which may not be evident to a family law specialist must be incorporated in any court judgement or consent orders in Australia / New Zealand for effect
6. competence in the foreign language of the jurisdictions is more than just a useful communication tool, but will ensure the most transparent methodology in meeting the expectations of the client and a successful conveyancing transaction well beyond settlement.

### **European Notaries**

Without exception in the European civil law jurisdictions, a Notary must be engaged either by both parties to the transaction or in my opinion, better still separate Notaries for vendor and purchaser. There are no conveyancers or do-it-yourself conveyancing kits here.

It is customary for purchasers to pay all legal costs and government duties of the transaction when acquiring real estate. The vendor only pays fees attributable to personal work such as a discharge of mortgage and compliance with any disclosure requirements.

A civil law Notary conducts searches, drafts the legal instruments [preliminary contract and final deed of sale] and is the only legal officer / professional empowered by State delegation to perfect and authenticate a conveyancing transaction.

Only such authentication permits at law its publication in a style of gazette of all notarial conveyances, serving as a notice to the world.

Notarial intervention serves to limit cases of fraud, false identity, defective property title, coercion of the parties and full disclosure of their rights and obligations to the notarial act.

The civil law notary is in theory and hopefully in practice an umpire a mediator meting out advice fairly and equally to all parties or just his / her client to a transaction.

However European Notaries have no or very little concept of Australian / New Zealand law and legal history. Of course they perfect local real property transactions; but herein lies the problem. They will have no or limited international focus in terms of proactively advising Australian / New Zealand clients in terms of potential conflicts of laws in matters such as:

- o succession and matrimonial and *de facto* proceedings
- o individual or corporate vehicle acquisition for Australian / New Zealand nationals / residents

given the perspective of an Australian / New Zealand legal starting point.

The essential interface to ensure a successful international conveyancing transaction and to avoid future problems is to engage an international law firm in Australia / New Zealand to project manage or oversee or simply advise upon aspects of the transaction, from our legal perspective, meeting the needs of uniquely Australian / New Zealand aspirations. Specific notarial qualifications will assist as outlined below, given the need to collaborate with a European notary.

### **The Australian / New Zealand Notary**

Fluency or even the highest NAATI-level translation qualifications can only serve to enhance assistance to clients.

Whilst they may appreciate the culture, most of my clients do not speak the foreign language of the destination country, or at least not to the level of specialised legal vocabulary or the capacity to interpret foreign laws / practices.

Clients are often presented with deeds such as a Power of Attorney [UK] [*procuration* [Fr], *procura* [It], *poder* [Sp], *procuração* [Po] etc], deeds of change of matrimonial regime to achieve joint tenancy style property holding, certificates as to Australian / New Zealand law and even capacity for an Australian / New Zealand company to acquire real property, foreign bank mortgage instruments requiring notarisation, preliminary contracts and like instruments.

Ethically, I hold the view that if a Notary believes that his client does not understand the content or the tenor of a foreign language notarial instrument, he or she is remiss to simply interpret his or her notarial work as a mere certification of signature and identity.

At the least, a Notary should stipulate in the notarial certificate or attestation that the deed was in a language unknown to the Notary and the Notary did not advise on its contents.

At the most, The Notary must ensure that the client fully understands the nature, content and effect of all acts to which the Notary attests.

I recommend a NAATI-qualified translation from the foreign language to English with an official translator's certification. Both acts should be bound in one and notarised accordingly.

Unfortunately the first option may well invalidate the instrument in the European country, where it is tantamount to acknowledgement that the client did not indeed understand the content or effect of the notarial act – which is in breach of notarial laws and regulations in Europe. The civil law notary may reject the instrument and require a full translation.

## **Conclusion**

A short article can never cover all points, but here are a few to consider:

- If you, an Australian or New Zealand notary, are approached by a client seeking an Australian or New Zealand advisor or interface for a European property transaction and you do not have the requisite qualifications or expertise, refer it on to a competent practitioner on the understanding that your client remains your client for other matters. Your client will thank you for this recommendation and additional service that you offer.
- Conflict of laws issues mean that you cannot take the somewhat “checklist or mechanical” approach you might as an Australian / New Zealand lawyer to conveyancing. Careful consideration of the client’s status, objectives, and even business plan must be assessed in advising. Not necessarily like the Australian / New Zealand context, an Australian / New Zealand lawyer and Notary must effectively carry out a mini audit of the client’s financial and business structure situation and aspirations in the areas cited above.
- Legal, fiscal and post-settlement and property-generated income matters and processes must be covered.
- Language, cultural and local custom awareness play a major role.
- An international property transaction is no less than a minor trade transaction between Australia and the European country.

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