

Going native

As real estate investors become priced out of the UK market, many are looking to Europe. But navigating the varied legal systems can be a headache for English lawyers. By **Rhodri Pazzi-Axworthy**

UK investment into Europe is booming. In the first half of 2006 UK investors spent around €6bn (£4.09bn) on real estate in mainland Europe. This compares with investments of around €1.5bn (£1.02bn) for the same period a year earlier and €4bn (£2.72bn) in the last six months of 2005.

The forecasts for this year predict further significant growth as the UK real estate market continues to surge and investors increasingly look to Continental Europe for more affordable properties to hedge their risks.

This means that cross-border real estate work, which was previously the preserve of lawyers specialising in big-ticket cross-border M&A and European property finance transactions, is now a reality in the property investment market. Real estate lawyers involved in such deals now have to take on a more general counsel-type role as project management skills are just as, and sometimes even more, important than traditional conveyancing expertise. An understanding of the key tax and finance issues affecting the transaction in a series of jurisdictions is also key to the smooth-running of a pan-European deal.

Why look outside the UK?

As Continental Europe provides a variety of investment markets, each at differing points in their cycles, an investor who feels over-exposed to, or out-priced in, the domestic UK property market may choose to invest in markets that are tipped to rise, in the hope that growth in these markets will offset any stagnation or drop in UK investments. If it gets its investment strategy right, its ability to perform in rising markets could be significantly enhanced.

Making a first foray into offshore investment is a big step, but there are a number of factors to encourage those taking their initial steps in cross-border investment. Many investors have already had a taste of offshore transactions - resulting from the popularity of Jersey property unit trusts as tax efficient investment vehicles until the 2006 budget. You also do not have to look very far abroad - Western Europe is perceived as less daunting and more stable than parts of the world such as India and China, to which the US opportunity funds' attention has now turned.

If funds already in Europe are showing good returns, while those committed purely to the domestic market are performing less well, then the under-performing fund managers must be prepared to answer the question: "Why are you not in Europe?"

What does this mean for the real estate lawyer?

The role of the real estate lawyer has already changed significantly in the 21st century as market-leading property clients have become increasingly sophisticated and prepared to use corporate structuring and gearing to enhance returns, improve liquidity and enable collective investment. As a result we have seen the use of limited partnerships and more recently Jersey property unit trusts and similar structures. The increasing focus on Europe continues

that trend and, as English lawyers tend not to be qualified in non-English jurisdictions, propels project-management skills to the forefront for real estate lawyers.

This means UK real estate lawyers have to be more like their European counterparts, who often lead a double life as corporate lawyers, and dedicated real estate teams tend to be found only in very large domestic or Anglo-American law firms. This is in part due to the separation of the role of lawyer and notary, but is also due to the civil law nature of many Continental legal systems, which means that leases are a matter of contract rather than land law. Only time will tell whether UK and US investors' increasing interest in Europe will result in European firms providing a specialist real estate capability.

Possible structures

Type of transaction	Lawyers' role
Acquisition of pan-European property portfolio (assets) with English law overarching agreement.	<ul style="list-style-type: none"> ▪ Client interface ▪ Drafting/negotiating key commercial document (relies on input from local lawyers)- property led. ▪ Project managing local lawyers in due diligence, finance and local transfer arrangements.
Acquisition of pan-European special purpose vehicles (SPV) property companies shares with English law overarching agreement	<ul style="list-style-type: none"> ▪ Client interface ▪ Drafting/negotiating key commercial document (relies on input from local lawyers)- corporate led. ▪ Project managing local lawyers in due diligence, finance and local transfer arrangements.
Acquisition of pan-European property portfolio (assets) without overarching agreement.	<ul style="list-style-type: none"> ▪ Client interface/advice on commercial negotiation for whole portfolio. ▪ Project managing local lawyers in due diligence, finance and local transfer agreements (eg to ensure similar commercial terms and inter-conditionality).
Acquisition of pan-European SPV property companies without overarching agreement.	<ul style="list-style-type: none"> ▪ Client interface/advice on commercial negotiation for whole portfolio. ▪ Project managing local lawyers in due diligence, finance and local transfer agreements (eg to ensure similar commercial terms and inter-conditionality).
Acquisition of property or SPV company shares in single European jurisdiction	<ul style="list-style-type: none"> ▪ Client interface. ▪ Introduction of preferred local lawyers and troubleshooting.

The differing tax regimes and legal systems of each European jurisdiction means that a one-size-fits-all approach to pan-European investment does not work. There are a number of likely structures that may be adopted, each of which require a different level of involvement for the UK lawyer. The choice of these will be influenced by a number of factors, which could include:

- the manner in which the properties are currently and intended to be held;
- the number of jurisdictions involved;
- local tax issues - what is optimal for one jurisdiction may not work in another;
- the impact of local law and practice on the structure. For example, are there implied pre-emption rights, as is the case in certain areas of France and Germany;

- whether the transaction is to be geared - if so, in what jurisdiction and whether outgoing security needs to be effectively redeemed;
- notarial requirements; and
- the transaction costs.

The role of local lawyers

UK real estate lawyers cannot be expected to know the law and custom of every jurisdiction. They will therefore rely heavily on local counsel, so getting the right team of local lawyers and developing a good working and communicative relationship with the team members is vital. It is not enough to assume that the issues will be the same as in the UK. Generally they are not and a forensic questioning of local lawyers is necessary to ensure that all points are picked up.

Over time the real estate lawyer will develop a good basic knowledge of the main differences between their own and the local laws. The differences are often surprising: for example, the fact that Italian lawyers do not carry out title due diligence, leaving it to the notaries.

The moral of this is to ensure that the local lawyers are engaged in the process of writing the transaction documents and to make sure contractual deliverables are indeed deliverable. Effective and regular communication with local counsel is vital to ensure that the transaction proceeds in line with the client's expectations.

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