

LAWORLD

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The terrain in Spain ... Buying a property



Jose Antonio Suárez

Nice weather, beautiful villages and beaches, delicious food, and friendly people; these are some of the reasons which may explain why so many tourists (over 40 million per year) visit Spain (population 38 million), and why each year some of them decide to settle there. Despite the huge demand, there's still a wide range properties available in Spain.

The purchase process can vary from property to property and be adapted to suit individual circumstances and requirements. The aim of this article is to provide useful information and to give an understanding of the Spanish property market.

In Spain there is no conveyancing system; all real estate transactions can be performed directly between seller and buyer, without the involvement of a lawyer. However, in order to secure a property, the sale contract must be combined with a deed, to be signed before a notary, and the deed recorded in the Land Registry. And, by law, all deeds referring to land transactions must be

signed before a Spanish notary, or a Spanish consul who is authorized to render services as a notary.

Usually the acquisition of a property is made with the assistance of a real estate agency. Such agencies are found in most towns; they may be either independent or parts of larger organizations, integrated in franchise schemes. There are two kinds of agents: Those who use the initials A.P.I., indicating that they are part of a regulated profession;





and free agents. The A.P.I. designation is considered to infer professionalism, though this might not necessarily be the case.

Once the property has been selected, there is a procedure to follow before signing any documents.

First, a check should be made with the Land Registry to determine who owns the property (whoever appears to have in her/his favour a presumption of ownership), to confirm if the property's characteristics match those of the selected property, and if there are liens, encumbrances or mortgages on it. Note that all debts on the property that are recorded in the Land Registry stay on the property, with the new owner liable for the amounts recorded, plus interest and, if applicable, legal expenses, to the value of the property. If there are outstanding debts on the property, the

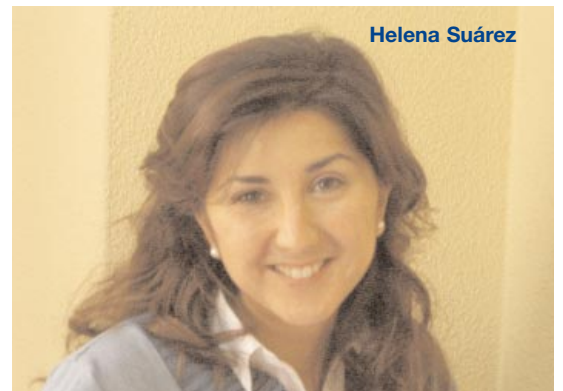
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purchaser can assume them, reducing the final price by the amounts due; this is not an unusual way to trade property in Spain.

Second, a check should be made to clarify if the property is clear of other



Helena Suárez

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debts, such as local taxes. If the property is an apartment or part of a development or similar ("urbanización"), the status of common ownership expenses ("body corporate fees") should be checked. The new owner only has responsibility for the last 12 months of local taxes and common ownership expenses.

Often at the point of signing the deed the purchaser finds that the checks have not been carried out properly. By then expenses may have been incurred — so the purchaser may feel committed to go ahead anyway.

According to Spanish legislation, once one of the parties has accepted the offer of the other, and particularly when a deposit has been accepted, the sale is considered as final and neither party can withdraw from it.

The purchaser may then sign a private agreement ("contrato privado"). In order to record the title, the ownership and property titles must be exchanged by both parties signing a contract of Purchase and Sale in front of a Notary. This document declares the identity of the parties, the location of the property and its value.

Generally, the total expenses incurred in buying a property in Spain are about 10% of the value of the property being purchased. These include taxes relating to the purchase of a property (similar to Stamp Duty in other countries). If the purchaser does not intend to become a resident in Spain the law requires that the purchaser appoint a resident as a representative before the Tax Authority. Normally a lawyer or real estate agency representative is used for this purpose. Buying a property in Spain is regarded as

a great investment. However it is easy for the dream to turn into a nightmare when purchasing in a foreign country where the language, bureaucratic systems and entire culture are completely different to those of the home country. As in any such situation, purchasers need to do their homework. Using a legal firm to assist in ensuring that the correct procedures are followed can save time and money and give peace of mind!

Article written by Jose Antonio Suárez and Helena Suárez of Suárez de la Dehesa & Sainz Dochado Abogados, LAWorld member firm in Madrid, Spain.

Madrid in May

Bill d'Apice passes on chairman role



Bill d'Apice

This issue coincides with LAWorld's AGM and Conference, hosted this year by Suarez de la Dehesa & Sainz Dochado Abogados in Madrid from 5–7 May.

At the meeting the chairman's role passed from Bill d'Apice, of Makinson & d'Apice in Sydney, Australia to Jan van der Steenhoven, of Van der Steenhoven Advocaten in Amsterdam. Bill, who has been chairman for the last two years, commented:

"It has been a privilege to have been able to make a special contribution to LAWorld as its chairman over the last two years. LAWorld is a growing organisation and I am continually impressed with the quality and versatility of legal skills displayed by the professionals in our member firms on behalf of their clients. I look forward to being part of LAWorld's continued growth under Jan's leadership and with the commitment of our hard working committee and members and our coordinator, Bruce Hill."

Maître Joë Lemmer elected First Vice President of UAE

Maître Joë Lemmer, of Etude de Maître Joë Lemmer, LAWorld member firm in Luxembourg, has been elected First Vice President of the European Lawyers' Union (Union des Avocats Européens, UAE). The UAE is an Association of lawyers established in the European Community. Based in Luxembourg, it has about 1,000 members. Jean-Pierre Spitzer, from LAWorld's member firm in Paris, Charrière-Bournazel Champetier de Ribes Spitzer, is scientific director of UAE.

Maître Lemmer will be organising the UAE's 18th Annual Convention, to take place from 17 – 19 June 2004 in Schengen (where the Schengen Treaty, opening up borders of countries in Europe, was signed in 1985) and in Mondorf-les-Bains. The theme of the convention will be "From Schengen to the Future Constitution: the Citizen in the Heart of the enlarged Europe".

For more information contact Maître Lemmer.

When in Florida ...

Supreme Court of Canada recognises and enforces default judgment

On 18 December 2003, in the case of *Beals v. Saldanha* (2003) SCC 72, the Supreme Court of Canada handed down a landmark decision dealing with the enforcement of foreign judgments. This case dealt with whether a default judgment obtained in Florida was enforceable in Ontario. It was conceded by the parties that the Florida Court had jurisdiction to grant judgment as there was a "real and substantial connection to Florida".

The Appellants were residents of Ontario. They owned a vacant lot situated in Florida, which they eventually sold to the Respondents. A dispute arose between the parties. The Respondents sued the Appellants for damages exceeding US\$5,000; the Canadians chose not to defend the action. Consequently, the Appellants were held in default. As a result, a Florida jury awarded the Respondents US\$210,000 in compensatory damages and US\$50,000 in punitive damages. When the Appellants were notified of the monetary judgment against them, they sought legal advice from an Ontario lawyer who negligently advised them that the foreign judgment could not be recognised or enforced in Ontario. They therefore took no steps to have the Florida judgment set aside. The Respondents then commenced an action in Ontario to enforce the Florida judgment which by 1998 approximated CAN\$800,000.

The Supreme Court of Canada held that what is required was a "significant connection between the cause of action and the foreign court". Here, obviously, there was such a connection as the Appellants bought and sold land in Florida. Therefore, there was "a real and substantial connection" between the Florida jurisdiction, the subject matter of the action and the Defendants.

The court held:

"It was recognised that where individuals carry on business in another provincial jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced: By tendering his products in the market place directly or through normal

distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

That reasoning is equally compelling with respect to foreign jurisdictions."

It was held that this test was the "overriding factor" in the determination of jurisdiction.

The judgment therefore must be recognised and enforced since the Florida Court properly took jurisdiction unless there were defenses to bar its enforcement.

A further question that arose before the Supreme Court was: What are valid defenses since there was a proper connection to Florida?

Extrinsic fraud goes to deceiving the issuing court that it has proper jurisdiction. Evidence of this kind of fraud, if accepted, will justify a decision to refuse to recognise the foreign judgment. There is no evidence that the

Respondents had misled the Florida court as to the facts or that it was deceived.

The defense of natural justice deals with the form of the foreign procedure as related to the process as opposed to the merits of the case. If the procedure and form are not in accordance with Canada's "concept of natural justice", the foreign judgment will be rejected. The court held that the Appellants failed to raise "any reasonable apprehension of unfairness". As they were fully informed about the Florida action, were granted a fair opportunity to participate in the case, chose not to defend the action nor to take the steps necessary to set aside or appeal the Florida judgment even though duly notified, their lack of taking the necessary steps was not due to any lack of notice but due to their "reliance upon negligent legal advice" which cannot bar the enforcement of the judgment.

In order to succeed on this defense, the Appellant would have to prove that the foreign proceedings were contrary to Canadian notions of fundamental justice. Although the court recognised that it had a "heightened duty to protect the interest of defendants" when the judgment was a foreign one, it had to be satisfied only that the "minimum standards of fairness" had been applied to the Canadian defendants by the foreign court, that they were granted "fair process". The burden of alleging unfairness rests with the party resisting recognition of the foreign judgment. Given that this was a Florida judgment, the court had little difficulty in finding that the principles of justice were fair since the defendant was given an adequate notice of the claim, was granted an opportunity to defend and knew of the "possibility of a substantial award of damages" and that triple damages were sought.

The *public policy defense* also would prevent the enforcement of foreign judgment if it is "contrary to the Canadian concept of justice and is ... contrary to our view of basic morality".

The court held that the award of damages by the Florida jury did not "violate our principles of morality that would ... shock



David Franklin

the conscience of the reasonable Canadian”.

In an article in Toronto's Globe & Mail of 19 December 2003, the day after the judgment, justice reporter Kirk Makin quite understandably stated:

“The ruling is being seen as a sharp warning to Canadian corporations that in the modern world of cross-border business, judgments issued by foreign jurisdictions will be enforced, provided fair legal procedures were followed.”

This judgment is important not only for Canadian lawyers but also for foreign attorneys. There is a valid strategy of foreign creditors suing Canadian companies in the home jurisdiction of the creditor. This will be recognised in Canada only if there is a “real and substantive connection”. Consequently, the foreign attorney embarking upon such procedures should communicate beforehand with a law firm in the jurisdiction where the Canadian resides to see if, in his assessment, the eventual judgment, presumably by default, would be recognised, i.e. whether the test of

connection was present and if the procedure followed was fair. This consequently entails greater involvement of Canadian lawyers in assisting lawyers in other countries not only on the enforcement of such default judgments but advising them in advance of the prospects of success.

Article written by David Franklin of Franklin & Franklin, LAWorld member firm in Montreal, Quebec, Canada.

LAWorld's member firm in New York, Phillips Nizer, recently hosted several strategic networking and business development events to highlight firm practice areas and targeted opportunities.

The firm held a reception to welcome David Chidekel as a new partner in Entertainment Law, a traditional practice area. The reception was a great success, drawing talent and executives from the music, film and entertainment industries.

Also noteworthy are the new Non-Profit Networking Nights hosted by partner Kenneth Fisher, who formed this group to give industry leaders an opportunity to meet periodically for networking and continuing education. The first meeting featured speaker Paula Gavin, former President of the YMCA of Greater New York, the largest “Y” in the country. The firm



L to R: Reggie Lucas, B-9 Entertainment; Ken Clinton, Sony Music; David Chidekel



Atlantic Records Recording Artists 'New Blood Revival' at the Entertainment Law reception

has also developed the Not-For-Profit Law Reporter, which just published its first issue.

Phillips Nizer's New Business Networking Group met in February to discuss “The Latino Business Explosion.” Speakers were firm client Roberto Ramos, CEO of Latin Vox Communications (a communications agency with clients such as GM, Remy Martin, EA Sports and UNICEF) and Heather Hanssen, Director of Marketing at Sesame Workshop. This group is headed by partner Peter Fields.

For further information contact Vikki Grodner at VGrodner@PhillipsNizer.com.

Strategic networking in New York

Paul Jacobs, a partner of Elkind, Lipton & Jacobs LLP, the LAWorld member firm in Toronto, Canada, has recently been designated both a Chartered Mediator and a Chartered Arbitrator by the ADR Institute of Canada. Paul is one of a small and select group of Canadian professionals who have earned this double distinction. His mediation and arbitration talents have been used for many years by counsel representing corporations, government, insurers, institutions and private parties in the resolution of domestic and international disputes.

Registering trademarks

United States joins Madrid Protocol

The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol") is an international treaty that became effective on 1 December 1995. Under the Madrid Protocol, an owner of a trademark may register its mark in any number of other Madrid Protocol member states with just one application through the International Bureau of the World Intellectual Property Organization ("WIPO") in Geneva, Switzerland. Since 1995, the number of Madrid Protocol member states, known formally as "contracting parties" (see box), has increased steadily. Of the contracting parties, Australia, China, France, Germany, Japan, Russia, Spain, and the United Kingdom, standing alone, represent a significant portion of the entire global economy. LAWorld member firms are located in 17 of the contracting parties.



James Nelson

On 2 November 2003, the United States of America ("USA") joined these countries as the 62nd contracting party to the Madrid Protocol. This move greatly facilitates trademark registration in the USA by mark owners from other member states.

Specifically, member state mark owners that have either a completed trademark registration or a pending trademark registration application at their own country's trademark office (their "Office of Origin") may now simply request in an international application that the USA also register their mark.

Such owners have already been able to file international applications at their Offices of Origin (but not for registration in the USA). Basically, an applicant's Office of Origin certifies that the international application accurately reflects the information in its database and then forwards a certified application on to the International Bureau of WIPO in Switzerland.

Next, the International Bureau registers the mark and notifies each contracting party designated by the applicant of the applicant's "request for extension of protection" to that country. Finally, each contracting party designated by the applicant conducts an examination under its own laws as to the availability of the applicant's mark for registration.

This process has not changed. But now, by simply requesting on the application that the USA also extend trademark protection, an international applicant may seek to register its mark in the USA, along with any number of the other Madrid Protocol contracting parties.

Upon receipt of a certified international application requesting USA registration, the International Bureau of WIPO

forwards the application to the United States Patent and Trademark Office ("USPTO"), the federal agency that administers patent and trademark registrations in the USA. If the USPTO determines that there are no barriers to USA registration, the mark will be registered in the United States.

The United States' recent membership in the Madrid Protocol should make it much easier for LAWorld member firms' business clients to register their trademarks in the USA and thereby to compete in the vast USA marketplace.

The 62 Madrid Protocol member states, known formally as "contracting parties", are as follows:

Albania, Antigua and Barbuda, Armenia, Australia, Austria, Belarus, Belgium, Bhutan, Bulgaria, China, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Iran (Islamic Republic of), Ireland, Italy, Japan, Kenya, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Monaco, Mongolia, Morocco, Mozambique, Netherlands, Norway, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Serbia and Montenegro, Sierra Leone, Singapore, Slovakia, Slovenia, Spain, Swaziland, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, and Zambia.

Article written by James D. Nelson, a director, and Taro Kusunose, an associate, at Betts, Patterson & Mines, P.S., the LAWorld member firm in Seattle, Washington, USA.

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