



The International Comparative Legal Guide to:

# Real Estate 2018

**13th Edition**

A practical cross-border insight into real estate law

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# Costa Rica

Hernán Cordero B.



Rolando Gonzalez C.



## Cordero & Cordero Abogados

### 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to question in Section 9.**

The main laws that govern real estate in Costa Rica are: a) the Civil Code; b) the Notarial Code; c) the National Registry Regulations; d) the National Cadastral Law; e) the Transfer Tax Law; f) the General Law of Urban and Sub-Urban Leases; g) the Adverse Possession Law; h) the Maritime Zone Law; i) the Regulatory Law of the Touristic Gulf of Papagayo; and j) the Income Tax Law.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

The impact is low. Local custom is a non-written source of our legal system, which shall only be used to make interpretations, to limit and/or integrate the recognised written sources. Judicial precedence or “jurisprudence”, as it is commonly known in our system, is not a source of our private law legal system, which is primarily based on statutory law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws are not directly relevant to real estate in our jurisdiction. However, international treaties duly approved by the Costa Rican Congress rank higher than local laws, thus they should be considered (if applicable). There are also international laws that may become relevant, especially those related to taxes.

### 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

The general rule is that there are no legal restrictions on ownership of real estate by particular classes of persons. Real estate ownership

is an individual right strongly protected by our Constitution. This same protection is also granted by the Constitution to non-resident persons and/or foreigners. The only exception to the general rule is with regards to shoreline property. The Maritime Zone Law specifically limits ownership of properties located within the first 200m adjacent to the shoreline for: i) foreigners that have not resided in the country for at least five years; ii) corporations with bearer shares; iii) corporations registered or established abroad; iv) corporations and/or entities constituted or established by foreigners; or v) corporations in which more than 50% of the stock capital is owned by foreigners.

### 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

In Costa Rica, the types of rights available are: a) ownership rights: those that have been formally registered before the Property Registry and are subject to transfer, mortgage and liens, guarantees and development possibilities such as subdivisions and condominium; b) possession rights: those acquired through an occupation of rights that can also be transferred following formalities, but which have no public effect in front of third parties. Such possession has to be proven as being public, pacific and without interruption for more than 10 years; and c) use rights: those which grant only the use and enjoyment of a property, such as i) “usufruct” in which the person that uses the property is not the owner but has a right to use and benefit during a certain defined timeframe, ii) “lease agreements” in which someone has right to use the property by means of a formal rental relationship with the owner, iii) transformation and disposition of the right, and iv) exclusion and defence rights. The usufruct and the lease right are both contractual between the parties.

**3.2 Are there any scenarios where the right to a real estate diverges from the right to a building constructed thereon?**

Yes, there are several scenarios where the right to a real estate diverges from the right to a building constructed thereon. The first example is pursuant to the “Accession Right”. This right establishes that property does not limit itself to the land, as it also extends to whatever is located above or below it. It allows the owner or a third party to build whatever is legally authorised on the land and it shall belong to the land where it was built. If a third party builds

something on such land, the construction belongs to the land on which it was built.

Another example is pursuant to a registered “Usufruct Right” over a property where the real estate diverges from the right to a building constructed. Thus the owner of the absolute fee simple title over the land may grant a third party the usufruct right in order for this third party to use and enjoy the land and/or the construction thereon as his/hers, for a specific time period or for his undetermined lifetime.

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### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split?

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Yes. In accordance with our legislation, there are two types of split between legal title and beneficial title.

The first type is known as “usufruct” and “bare ownership”. Chapter III, Articles 287–289 and 335, of the Costa Rican Civil Code, regulate these types of title forms.

Usufruct is the real right of use that someone has on the property/asset that belongs to another person for a certain period during their lifetime.

Bare ownership is the right that the person has on a property/asset in which their relationship with it is only to be the owner. As an owner, he/she has a controlling ownership over the property/asset, but does not hold the possession or enjoyment as this has been assigned on behalf of a third person in the form of a usufruct.

The bare owner will have the full property (title, possession and enjoyment) when the usufruct beneficiary dies or the timeframe lapses.

The second type is “trust ownership”, which is regulated by means of the Commercial Code under Article 633 and others.

In accordance with the trust ownership, one or more persons transfer a property/asset to another natural person or legal entity which will serve for a defined timeframe as a “Trustee”. This agent shall administer the property/asset for the benefit of the person or persons that transferred title, but shall retain an administration or guarantee on behalf of a third party called the beneficiary.

A trust ownership shall have a limited term and shall be operated by means of conditions, responsibilities and obligations, with the prerogative that upon fulfilment of the conditions it shall be returned to the original owner or follow instructions on behalf of the beneficiary.

## 4 System of Registration

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### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

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Title registration in Costa Rica is based on a Registry System. This system applies to the entire territory and therefore all properties must be registered in it. Notwithstanding the above, not all properties have been registered to this date. In order to be able to register this unregistered land, a Civil or Agricultural Adverse Possession Proceeding must be implemented.

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### 4.2 Is there a state guarantee of title? What does it guarantee?

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There is no state guarantee of title *per se*. Our Registry System operates under the principle or notion of “good faith” and is based

on a rebuttable presumption that grants the registered rights over real estate the condition of valid rights.

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### 4.3 What rights in land are compulsorily registrable? What (if any) is the consequence of non-registration?

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In general, all rights in land are compulsorily registrable to have legal effect against third parties. Article 459 of the Civil Code establishes the following rights in land as compulsorily registrable: a) titles of dominion over property; b) all liens, encumbrances or rights that limit property, such as usufruct rights, easements and any other real estate rights or limitations that affect land; c) lease agreements (may be registered); d) condominium or co-property rights; and (e) mortgages. The most immediate and significant consequence for non-registration of these rights and/or limitations to land is that they may not be enforceable before third parties.

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### 4.4 What rights in land are not required to be registered?

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Possession rights are not required to be registered, unless they need to be enforced before third parties.

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### 4.5 Where there are both unregistered and registered land or rights is there a probational period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

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Yes, there is a probational period following first registration, provided in Article 16 of the Adverse Possession Law, which is of three years, meaning that during this period any affected party can oppose and challenge such registration in front of the same Judge that handled such registration.

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### 4.6 On a land sale, when is title (or ownership) transferred to the buyer?

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Our Civil Code establishes that ownership of land is transferred upon the execution of the purchase and sales deed granted by both seller and buyer before a Costa Rican Notary Public (in Costa Rica, Notaries Public must be registered attorneys-at-law and fulfil a much more complex function than what Notaries Public usually fulfil in common law countries. For example, only Notaries Public can execute the purchase and sales deed required to formally transfer the real estate property at the Property Registry). This purchase and sales deed shall be filed and registered before the National Registry in order for it to be valid, effective and enforceable against third parties. However, upon execution of the purchase and sales deed, the transfer of ownership is enforceable by both parties.

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### 4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

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Pursuant to Title VII, Chapter I of our Civil Code, the Real Property Registry shall apply the general principle of “first in time, first in priority”. Upon registration of a document with the establishment of right (transfer or property, lien or limitation), the Real Property Registry shall provide “real time” publicity to these acts or contracts.

Notwithstanding the above, acts which obtain a first priority over others (subsequent acts or contracts) may be challenged during an

established statutory period which will depend on the act or contract being granted and registered. In addition, there are certain liens that might have a priority interest over a previously registered right, such as liens imposed due to taxes and/or condominium fees in arrears.

## 5 The Registry / Registries

### 5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.

As established in question 4.5 above, the official registration of real property is made through one centralised Registry System that is administered by the Real Property Registry of the Costa Rican National Registry. This system applies to the entire territory and therefore all properties must be registered in it.

### 5.2 Does the land registry issue a physical title document to the owners of registered real estate?

Properties are identified before the Real Property Registry through a specific real estate number (“*folio real*” in Spanish). A certification (consultation document issued by the Real Property Registry) of the real estate number will provide all the information pertaining to the property, such as, but not limited to location, current owner, boundaries, registered area, cadastre plat number, as well as all rights and liens affecting the property. This real estate number certification and the information it contains is publicly available information and can be obtained physically at the National Registry and/or electronically.

Based on the above, the Real Property Registry does not issue a physical title document to the owners of a registered real estate; however, upon request, it can issue a real estate number certification together with the above-indicated information, including the owner and relevant information.

### 5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?

Unfortunately, at this moment in time, transactions relating to the registration of real estate cannot be completed electronically. However, this is expected to become a reality soon. Some areas of the National Registry are exclusively working with electronic documents for consultation purposes only.

In order to register ownership rights before the National Registry, a true first copy of the purchase and sales deed executed by and between the parties before a Notary Public should be filed, along with confirmation of payment of the applicable transfer tax and registration fees. Court rulings or resolutions which grant ownership to a specific party are documents that also have to be filed for real estate-related rights to be recorded.

As indicated above, information on ownership of registered real estate can be obtained both physically and electronically.

### 5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?

Yes, compensation can be claimed from the National Registry if it makes a mistake. All compensation claims need to be filed through an Administrative Law Suit against the National Registry.

### 5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

There are no restrictions on public access to the information in the National Registry. A buyer can in fact obtain all the information they might reasonably need regarding encumbrances and other rights affecting real estate.

## 6 Real Estate Market

### 6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.

Other parties involved in real estate transactions are: (a) Notaries Public (which are, as indicated above, registered attorneys-at-law): responsible to execute the purchase and sales deed which is registered before the National Registry; (b) attorneys-at-law: execute the due diligence process and provide legal advice on legal matters and make disclosures that may affect the transaction. Both Notaries Public and attorneys-at-law are usually the same person and/or work together; and (c) Real Estate Brokers: assist both the buyer or seller or both, to buy or sell a property. It is customary for Brokers to provide advice and/or services related to: fair market value; inspection of the property; follow-up on closing details, etc.

### 6.2 How and on what basis are these persons remunerated?

- Notaries Public are remunerated at closing. Their legal fees are established pursuant to a pre-established table and are approximately 1% of the real estate transaction amount; and
- Real Estate Brokers are also remunerated at closing, pursuant to a previously negotiated real estate commission. Although this real estate commission is not legally established, it is normally between 5% and 6% of the real estate transaction amount. It is also customary that the Real Estate Broker receives from the parties the equivalent to 13% sales tax for the real estate commission, which he collects and pays to the Government.

### 6.3 Do you feel there is a noticeable increase in the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?

In general terms, the main sources for real estate financing are: (a) Public and Private Banks; (b) Private Lenders (not registered as banks or financial entities); and (c) Private Funds or Investors.

Yes, we believe that in recent years there has been an increase in the availability of capital to finance real estate transactions in Costa Rica. This increase has been more noticeable through the availability of funds from Private Lenders, who offer loans to buyers or developers in order to acquire the land or finance part of the acquisition of real estate. These funds from Private Lenders are usually targeted to foreigners and/or informal buyers, who do not have access to capital – readily available – through the local banking system, due to the highly strict regulations applicable to Public and Private Banks.

**6.4 What is the appetite for investors and developers in your region to look beyond primary real estate markets and transact business in secondary or even tertiary markets? Please give examples of significant secondary or tertiary real estate transactions, if relevant.**

Commercial and rental property has been more likely to sell due to a section of the population, jointly with an important foreign investment component, looking to expand their real estate portfolio abroad. The current economy encourages taking risks, turning markets like ours into a very appealing alternative. As well as Costa Rica having been known worldwide mainly for its stable democracy that abolished its army in 1948, the country has welcomed foreigners, is located three to five hours away from most major U.S. cities, has a low property tax compared to other countries, and has a very good quality of life.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

Since the crisis of 2008, the real estate market in Costa Rica has been undergoing a slow but steady recovery process. In most market subsectors, we have seen important growth in the past few years. Nevertheless, due to significant development in the Greater Metropolitan Areas where the capital of San José is located (“GAM”), specifically in the housing, commercial, office and retail submarkets, some of these areas are experiencing excessive supply and as a result, some slowdown is being perceived. This is particularly true with regards to the commercial, office and retail submarkets. Nevertheless, there is still a mild appetite for these subsectors, but with a higher dose of caution.

In areas outside of the GAM, such as the Central Pacific (“Puntarenas”) or North Pacific (“Guanacaste”), there has also been a slowdown in submarkets such as housing (second homes) and leisure (hotel and resort development). Nonetheless, this slowdown has not been due to excessive supply or lack of appetite but instead due to a lack of new products because of a lack of infrastructure such as roads, water and aqueduct systems. Thus, there is still an increase of investors from abroad looking for these products, both for investment purposes and for retirement purposes.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The minimum formalities for the sale and purchase of real estate are: both buyer and seller should have sufficient power of attorney to sell and buy, respectively; and they must execute a transfer deed before a Notary Public. The transfer deed needs to be executed in Spanish, and it shall include the following basic information: proper identification of the parties; description of the transaction; purchase price; and a complete description of the property’s information. This transfer deed shall represent both parties’ clear intent to sell and buy the property, respectively. Once the transfer deed is executed, the Notary Public shall file a copy before the National Registry. All transfer taxes and registration fees must be duly paid in order for the transfer to be recorded.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

The seller is not under a duty of disclosure. Notwithstanding the above, real estate transactions are based on a principle of “good faith” that applies to both parties of the transaction.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

Yes, the seller can be liable to the buyer for misrepresentation.

**7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?**

Sellers do not usually give contractual warranties to the buyer. Based on our civil law legal system, warranties are usually found in the law. Nevertheless, these warranties are never a substitute for the buyer to carry out their own due diligence, which begins by retaining the services of a reputable real estate attorney before entering into an agreement.

**7.5 Does the seller warrant its ownership in any way? Please give details.**

The seller warrants their ownership by confirming they are the same person or entity registered in the Registry as an owner. The Notary Public must perform a verification of identity to make sure the seller is the actual owner of the real estate.

**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**

The buyer’s only responsibility is to come up with funds for the closing to pay for the sale price. The buyer must act based on the established principle of “good faith”.

## 8 Finance and Banking

**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**

The main regulation concerning lending money to third parties for real estate purposes is the Civil Code of Costa Rica. Additionally, other parties such as SUGEF (Regulatory Bureau for Financing Entities) and the Central Bank of Costa Rica (regulator of all exchange and interest rates in Costa Rica) may also apply. There is no legislation that regulates lending specifically to finance real estate. Basic lending guidelines and regulations that SUGEF applies to financial institutions are going to apply to any type of financing. In addition, there are no specific differences in these lending guidelines (between residents and foreigners) even though during the last few years, lending institutions have tightened their internal procedures to lend to foreigners as a result of the 2008 economic crisis and increasing compliance rules and regulations. This will also apply to individual and corporate entities.

## 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

There are several ways in which a lender can take securities or collateral in Costa Rica in order to guarantee a loan. Some of the most common securities or collaterals are described as follows:

a) **Common Mortgages:** The borrower provides a property as a security for a specific loan. In the mortgage agreement, the lender and borrower agree on all terms such as: mortgage grade; lender's name; borrower's name; loan amount; term; advance payment penalty; interest; loan currency; place of payment; waiver of previous proceedings in case of an auction; and the characteristic contractual clauses that will govern the operation. The mortgage lien imposed over a registered property is also recorded before the National Registry in the Mortgage Section of the Real Property Registry. The mortgage will be recorded and it will appear on the property's real estate number certification and the recording will last until it is either: a) cancelled by the lender due to full payment from the borrower; or b) adjudicated by a Judge due to a foreclosure process in which it is legally proven that the borrower has not paid or has violated any of the loan terms.

b) **Mortgage Certificates:** A mortgage certificate has the same legal force as a Common Mortgage. The Real Property Registry issues the mortgage certificate that identifies the amount for which the certificate is issued and unlike the Common Mortgage where there is an established lender, these certificates may be transferred by mere endorsement. In such cases, the mortgage certificate will also appear as a lien on the property's ownership entry. This type of guarantee is used mainly for bank transactions due to the fact that the "Certificates" can be exchanged as commodities, meaning that any person that holds such title when the loan term expires is entitled to collect the amount owed. It is important to note that mortgage certificates have a 10-year statute of limitations, which needs to be reviewed in time in order to avoid a non-payment from the borrower. There is no limit as to the amount on a Common Mortgage or a mortgage certificate. Before agreeing to this type of guarantee, the lender usually requests a formal appraisal on the property, in order to identify the approximate value of the property. Once the lender has this information, he will be able to determine in accordance with loan politics the amount that he should lend. In any of the above-indicated securities, the lender is not allowed to take automatic possession on the assets mortgaged or pledged if the borrower is at default. In such cases, the lender has to execute the guarantee through an established judicial process.

c) **Guarantee Trusts:** According to the Costa Rican Commercial Code, all legal assets or rights that are subject to commerce may be placed in a trust. Under this structure, a third-party Trustee shall hold the title of the assets placed in trust and shall execute the Trust Agreement according to the instructions expressly indicated in such document. There are new legal guidelines that apply for Trust Guarantees, which will affect if these could be used as a guarantee on behalf of a Private Lender.

## 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

Once the lender has secured securities such as a Common Mortgage, a mortgage certificate, or a pledge over registered assets and the borrower breaches the terms and conditions established in the loan

agreement, the lender shall then execute each collateral or security according to the established procedure in the Collection Law (*Ley de Cobro Judicial*). This law establishes a summary proceeding for these types of securities in which the lender will not have the right to take direct or automatic possession over the assets given as collateral. Instead, they will have to request the execution of a public auction and shall obtain payment from the funds obtained at the auction(s). With regards to Guarantee Trusts, the trust agreement itself shall create the enforcement procedure in case a borrower breaches the terms of the loan agreement. For this purpose, the Guarantee Trust shall validly create an execution proceeding similar to that established in the Costa Rican Collection Law; however, it being executed directly by the same Trustee. This procedure shall take less time than the regular enforcement of a registered security. As mentioned above, there are recently approved legislations and guidelines that prevent all lending transactions from using Guarantee Trusts as a security. This would require a further analysis in order to verify who is the lender, who is the creditor and who is the borrower.

## 8.4 What minimum formalities are required for real estate lending?

The minimum formalities to secure a real estate loan – if formally secured – shall be according to the Civil Code and Property Registry which requires signing and constitution, in favour of the lender, a Common Mortgage, a Mortgage Certificate imposing a lien on the property offered as a first degree guarantee, or transferring the property into a Guarantee Trust guarantee that will hold such real estate in "fiduciary ownership" during the length of the loan.

Other formalities include that the owner of the property should have sufficient power of attorney to impose such lien on the property, and must execute a deed before a Notary Public as established above. The deed needs to be executed in Spanish, and it shall include the following basic information: loan amount; payment information; the lender's information; and a complete description of the property's information. Once the deed is executed, the Notary Public shall file a copy before the National Registry. All taxes and registration fees must be duly paid in order for the lien to be recorded.

## 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The real estate lender is protected from claims based on the registration proceedings and recording in the Registry. Formalisms and proper documents – when the loan is granted – are mandatory and the guarantee deeds shall be registered in order to have legal effect before third parties. This means that if the lien (Common Mortgage, Mortgage Certificate) is duly registered, the lender shall have a priority interest over any other lender. Notwithstanding the above, there are certain legal liens, which might have priority interest over a secured loan, such as liens imposed due to taxes and/or condominium fees in arrears.

## 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

The main circumstances are those directly linked with mistakes of procedure or defect of form in which the correct process is not drafted, executed or followed correctly.

In Costa Rica, all documents that need to be recorded for publicity purposes such as, but not limited, to mortgages, trust property or other warranties, shall follow formalities to comply in a form

of a public deed. If the deed is not drafted fulfilling the specific requirements that the law indicates, or if it does not comply with the correct formalities, including bad legal advice or lack of registration, these could cause the lender to proceed and claim defects, demurrer or exceptions of different kinds.

Proper notification procedures may also cause delays or even extinguishment of the right to collect or claim such security. It is recommended when lending or granting securities to foreigners to have a valid notification domicile in Costa Rica.

#### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

The main actions would be those related to procedural deferments or delays that cause an impossibility to notify the defendant, ruled by the Judicial Notification Law “*Ley de Notificaciones Judiciales Ley 8687*”.

Another action would be a defect or lack of formalities on the notification, causing the borrower to file for an invalidity or nullity of such notification, according to Article 9 of the Judicial Notification Law.

The third type of actions are those such as exceptions regulated within Article 298 of the Costa Rican Civil Code, such as prescription, payment exception, expiration, and others. These can cause a delay in any foreclosure process.

## 9 Tax

#### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

In accordance with the Transfer Tax Law, transfers of real estate are in fact subject to a transfer tax equal to 1.5% levied on the highest of: a) the fiscal value of the property; and b) the established sales price. The seller and buyer are both liable in equal parts. However, payment of transfer tax is commonly part of the negotiation between the parties.

#### 9.2 When is the transfer tax paid?

The transfer tax shall be paid within 15 business days of the date and time of the transfer deed (taxable event).

#### 9.3 Are transfers of real estate by individuals subject to income tax?

Transfers of real estate by individuals are not subject to income tax, unless the business activity of the individual is to buy and sell real estate habitually and/or that individual has taken advantage of depreciation as a deductible expense.

#### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Transfers of real estate are not subject to VAT.

#### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

No other taxes are payable by the seller on the disposal of a property in our jurisdiction.

In Costa Rica, capital gains are not taxed except when the activity that generates the income is “habitual”, or the gain is generated as a result of the transfer of assets subject to depreciation for corporate income tax purposes.

#### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

The taxation is identical if ownership of a company (or other entity) owning real estate is transferred.

#### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

When executing a due diligence, buyers, depending on their nationality, should take several important considerations, such as, but not limited to:

- In the case of Nationals of Costa Rica, they shall consider if they plan on renting (leasing) the property or not, developing it or remaining as raw land and any other possible use of the real estate. Additionally, it is important to determine if such property will generate a “deductible” expense for the owner and its implications within time, such as possible capital gains or not, repayment of the investment, expenses to be deductible – if applicable – towards income tax.
- In relation to foreigners, in addition to the above-mentioned – when applicable – it is important to understand each country’s requirements for filing tax information forms, pass through or check-the-box benefits – if applicable – topics such as repatriation of funds and capital gains, withholding taxes and dividend taxes when sending funds back to their home country.

Another topic that is important to take into account relating to taxes is a proper preparation of estate planning, as this will impact any acquisition and should be included as part of the due diligence.

It is important for foreign investors to check with their local advisors and correspond with Costa Rican attorneys to make sure that the correct acquisition vehicle is used.

## 10 Leases of Business Premises

#### 10.1 Please briefly describe the main laws that regulate leases of business premises.

The main law that regulates lease of business premises is the General Law of Urban and Sub-Urban Leases. Our Civil Code is supplementary to this law. It is important to understand and to take into consideration that there are a vast number of rules in the General Law of Urban and Sub-Urban Leases that cannot be waived, even if the parties agree to do so. Moreover, all rights granted by this law in favour of the tenant cannot be relinquished.

#### 10.2 What types of business lease exist?

The General Law of Urban and Sub-Urban Leases is applicable to commercial leases, industrial leases, etc.

**10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?**

Typical provisions for lease of business premises are: (a) length of term: a minimum three-year term in favour of the lessee (able to terminate the lease with a three-month notice); (b) rent increases: to be determined by the parties. All types of increases are authorised, always with a reasonable limit to avoid abusive increases; (c) an express authorisation from the landlord is required for the tenant to sub-lease. However, it is possible for the tenant to transfer their lease rights if they sell the business through a “commercial establishment sale”, following all the formal legal requirements established by the Commercial Code; (d) insurance: parties to the contract are allowed to determine who shall be responsible for insurance; (e) if the tenant is an entity, change of control of the entity shall not affect the lease agreement; for all legal effects, the entity remains the tenant. If the tenant is an individual, they will not be allowed to assign or sublet without the previous and express authorisation from the landlord, unless this possibility has been included as a provision in the lease agreement; and (f) repairs. The landlord has the legal duty to provide to the tenant a peaceful enjoyment of the premises and to keep it this way. All required repairs to keep this condition shall be performed by the landlord. These repairs are known as “required”. Parties to the contract are allowed to determine who shall be responsible for repairs that are required due to ordinary tear and wear but this obligation must be stated in the contract, otherwise it will become the landlord’s responsibility as well.

**10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?**

Income tax is to be paid on income generated by rent by the landlord of a business lease. The landlord must also pay property or real estate taxes.

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

Commercial leases are usually terminated upon expiration of the term and/or by either party. There are circumstances in which payment default forces early termination of a lease. Provisions related to extensions or renewals are typically included in the lease agreements.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

Yes, the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest, if they have sold following the legal procedures established by law. Nevertheless, they will be liable for pre-sale non-compliance even after the sale.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the “environmental footprint” of a building. Please briefly describe any “green obligations” commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

Green provisions are not typically part of lease agreements in our jurisdiction. However, parties to a lease agreement could include them at will. Recently, these have been included on land subject to wind and solar projects in accordance with Energy Law No. 7200.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The main laws that regulate lease of residential premises are: a) the General Law of Urban and Sub-Urban Leases; b) the Civil Code; c) Law No. 9160; and d) the Code of Civil Procedure.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the laws do not differ in cases where the premises are intended for multiple different residential occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant's rights to remain in the premises at the end of the term; and (d) the tenant's contribution/obligation to the property “costs” e.g. insurance and repair?**

- (a) Length of term: the General Law of Urban and Sub-Urban Leases contains a mandatory term of a minimum of three years. This term must be interpreted in favour of the tenant, who is allowed to terminate the contract prior to the expiration of this mandatory term with written notice given to the landlord three months in advance; and
- (b) rent increases/controls: when the rent is in foreign currency, the rent must remain the same for the whole term of the contract. When the rent is in Colones, the rent will be revised at the end of each year of the contract, based on the rules contained in Article 67 of the General Law of Urban and Sub-Urban Leases. In general terms, if the accumulated inflation rate of the 12 months prior to the expiration of each year of the term of the contract is equal to 10% or less in that country, the landlord can increase the rent up to 10% per year. If the rate is above 10%, a Government office shall determine the increase but it cannot a) be less than 10%, or b) more than the inflation rate.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

Yes, there would be rights for a landlord to terminate a residential lease. The main or principal right would be lack or non-payment of the rent. The necessary steps to achieve vacant possession if the

circumstances existed for the right to be exercised are outlined in Law No. 9160, which is a special law that contains the proceedings for small claims related to very specific matters related to leases. There are only two reasons that will allow a landlord to access this expedited process: a) expiration of the contract's term; and b) lack of rent payment, utilities and/or Condominium Owners Association fees. Other rights must be exercised based on the Code of Civil Procedure. Article 6 of Law No. 9160 indicates that once the Court has admitted the claim, the eviction order shall be issued along with the preventive retention of the tenant's assets if requested by the petitioner. Fifteen days will be granted to the defendant to present admissible, relevant and useful evidence. The tenant must continue to deposit the rent in the Court's account. The defendant will only be authorised to object to the claim based on payment, statute of limitations and non-expiration of the contractual term. Within 15 days after the objection is filed, the Court must call for an oral hearing. This is considered as a very positive change *versus* the previous "paper" hearings.

## 12 Public Law Permits and Obligations

### 12.1 What are the main laws which govern zoning/permitting and related matters concerning the use and occupation of land? Please briefly describe them and include environmental laws.

The main laws which govern zoning, permitting and related matters concerning the use and occupation of land are: the Constitution; the Urban Planning Law; the Organic Environmental Law; the Expropriation Law; the Construction Law; the Condominium Law; the Architectural Heritage Law; and local regulatory plans. In Costa Rica, the administrative organisation in charge of urbanism is the Urbanism Directorate (part of the National Institute of Housing and Urbanism) and the Ministry of Planning. These two entities have the legal power to elaborate the National Plan for Urban Development. However, the implementation of national policies is in fact developed at Municipal level.

### 12.2 Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.

Yes, the Government can force landowners to sell their land. Nevertheless, Article 45 of the Constitution includes an essential guarantee to one of the most relevant rights there is: private property. This Article reads: "Property is inviolable; no one may be deprived of its property except for a legally proven public interest upon prior compensation in accordance with the law...". The price set-up mechanism is established by law based on certain appraisals executed in accordance with the standardised price table issued by the Tax Administrator. The owner of a property, who is being expropriated by the Government, in accordance to the General Administrative Public Law and its by-law, can challenge such appraisal. Such law will also regulate the process and the way in which the landowner gets paid once the final resolution is issued. Due to the established Constitutional right, these processes normally take significant time.

### 12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

For the most part, real estate and construction departments of the Municipal Governments are in charge of controlling land/building

use and/or occupation. The National Institute of Housing and Urbanism is the entity that controls land/building use at national level. Environmental regulations are overseen by the National Environment Technical Secretariat ("SETENA") and the Ministry of Environmental and Energy ("MINAE").

### 12.4 What main permits or licences are required for building works and/or the use of real estate?

The main permit required for building works would be a building permit. Requesting and obtaining a zoning authorisation from the Municipal Government is the way to start. A water availability letter from the Water Department is also indispensable. Special licences may be required if a commercial activity is to be developed on the real estate. The Health Department must issue a sanitary permit for the Municipal Government to issue a business licence, and liquor licences are required for sale of liquor.

### 12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

Yes, building/use permits are commonly obtained in this jurisdiction and granted by the local Municipality, including zoning and final construction permits. Implied permission cannot be obtained in any way.

### 12.6 What is the appropriate cost of building/use permits and the time involved in obtaining them?

The building permit fee is 1% of the project value. The time involved in obtaining a building permit is generally within four weeks of the initial application. This timeframe extends considerably if the approval of SETENA is required.

### 12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate?

Yes, there are regulations on the protection of historic monuments in this jurisdiction. The National Museum of Costa Rica through its Archaeology Department, the National Environment Technical Secretariat and the Ministry of Environmental and Energy regulate all matters concerned with historical monuments. This can affect the transfer of real estate or the development of such property. There is a by-law that establishes the process to request an inspection from the National Museum in order to verify if the historical monument can be saved or preserved. By law, all property that is affected by historical monuments is subject to a lien and prohibited from being developed unless authorised by such entity.

### 12.8 How can e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

Information pertaining to contamination and pollution of real estate is not easy to obtain. Perhaps an Environmental Impact Assessment ("EIA") process is the proper way to obtain this kind of information. The main objective of an EIA is to determine the environmental feasibility and impact of the project. There is no public register of contaminated land in our jurisdiction.

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**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**


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According to SETENA and MINAE, any party that affects the environment is subject to strong sanctions and fines. Clean-up requirements and procedures are issued and enforced by these two entities and it is mandatory to compensate for any pollution, economically or through the restitution of damaged areas.

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**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**


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The new Code of Construction issued by the Engineering and Architectural Bureau regulates and enforces new constructions based on their environmental impact, including energy-saving measures and security patterns. Additionally, there are new electric guidelines on interconnection to the grid based on the Distributed Energy by-law, which was recently introduced, allowing net metering though self-generation of solar and wind renewable energy.

## 13 Climate Change

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**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**


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Costa Rica has adopted an Open Government Policy. The National Environmental Information System (“SINIA”) was created under

the National Geo-Environmental Information Center (“CENIGA”) of the Ministry of Environment and Energy, with the goal to promote an open data policy for all relevant climate information available for any citizen. The Paris Agreement, coming out of COP21, will be legally binding for Costa Rica starting in 2020. Under the aforesaid Agreement, our country will be part of, starting in 2016 and until 2020, a process of legal, institutional and organisational change. Costa Rica has internationally committed to have a National Adaptation Plan ready by 2018.

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**13.2 Are there any national greenhouse gas emissions reduction targets?**


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Yes, there are national reduction targets for greenhouse gas emissions. On September 30<sup>th</sup>, 2015, under the United Nations Convention framework for Climate Change, Costa Rica submitted its Intended Nationally Determined Contribution with an unconditional target to keep net greenhouse gas emissions below 9.37 MtCO<sub>2</sub>e emissions by 2030. Costa Rica reconfirmed its aspirations to become carbon neutral by 2021.

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**13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**


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Yes, there is a new Code of Construction issued by the Engineering and Architectural Bureau which regulates and enforces new constructions based on their environmental impact, such as energy-saving measures, water consumption components, waste treatment plant requirements and the possibility to reuse water through recollection of rainwater procedures.

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Hernán joined *Cordero & Cordero Abogados* in 1994 and is currently the Managing Partner of the firm. His experience in directing transactions ranges from of-counsel legal work for international banking institutions to transactional work with foreign investors dealing with the tourism and real estate industry. Recently, he has been actively involved on renewable energy, joint ventures, free trade zone parks and general corporate law. He is an active member of the Energy Committee at AMCHAM. From 2000 to 2002, he was appointed by the President of the Republic as General Consul and Commercial Advisor to the Ambassador in Madrid, Spain.

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Rolando joined *Cordero & Cordero Abogados'* Guanacaste Office in 2005. He is one of the Senior Associates who has strengthened the Liberia Office Real Estate and Corporate Practices. Before joining the firm, Rolando had experience practising law as an attorney in Liberia, where he also worked as General Manager for an important Hotel and Tourism Group. He was also the Head In-house attorney for a hotel, tourism and agricultural entity in Guanacaste. He has been involved in several Guanacaste real estate and hospitality developments as well as: I.C.T. concession land; day-to-day legal advice to real estate and commercial developers; providing legal advice to U.S. companies doing business in Costa Rica; and conducting highly complex real estate transactions.

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