

## ARGENTINA

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# Argentine Unified Civil & Commercial Code: impact in the real estate market

**F**rom the 1860s until 2015, two codes ruled the daily lives of Argentine citizens, as well as the existence and activity of the companies doing business in Argentina: the Civil Code and the Commercial Code.

Many attempts to unify the two codes have been made in the last few decades, though without success. However, on 1 October 2014, Law 26,994 was enacted, which derogated both the Civil and Commercial Codes, and ‘created’ a new Unified Civil and Commercial Code (the ‘Unified Code’), which came into force as of 1 August 2015.

This new Code is having a huge impact on Argentine legislation and especially in law practice because together with the derogation of the two codes, more than 150 years of jurisprudence and doctrine were derogated as well. In other words, until last year, any decent corporate lawyer in Argentina knew the Civil and Commercial Codes almost by heart, and knew not only what the jurisprudence had interpreted on any specific article, but also what the most knowledgeable experts had written and stated about any specific matter. With the enactment of the new Unified Code, we lawyers are carefully analysing and discussing the impact of this new code, the scope of which – as said – is key to everyone’s lives. And further, we are all waiting to hear how judges shall interpret its regulations. We understand that a ‘new jurisprudence’ will be generated within the next five to ten years, and in the meantime, we lawyers will be key to that interpretation.

The purpose of this article is likewise to mention just a few of the changes that the new Unified Code shall have on the regulations applicable to the real estate market:

- The new Unified Code created a new ‘right of surface’, which will no doubt be a very attractive tool to develop projects where a construction capacity is available and subject to be commercialised (ie, not only in pieces of land, but also in buildings already built).

- Some new property rights were further created, among them, the condominium right (ie, *propiedad horizontal*), which amended the rules existing before regarding those types of rights. Such a new ‘condominium right’ is the one to rule on the development of all closed neighbourhoods, no matter whether they are plain gated communities (ie, *barrios cerrados*) or country clubs (ie, *clubes de campo*). Further, the new Unified Code foresees that all closed neighbourhoods not priorly organised as per the rules of the new condominium right, shall have to adapt their legal structure accordingly (ie, there is not much information available yet regarding the compliance to this requirement).
- Trusts: real estate trusts have been the most popularly vehicle for structuring real estate projects during the last 15 years. With the new Unified Code, the structure of these trusts shall have some amendments that shall not affect their existence nor application, but nevertheless shall have to be borne in mind. Among others, we may find the following:
  - Trust agreements shall be registered before a registry to be developed by each jurisdiction. However, there is no further information available about this obligation.
  - Trustees may be beneficiaries of the trust (which in the prior regime was subject to discussion).
  - Trustees shall retain civil responsibility insurance to cover damages caused by the goods under trust. This, among other facts, shall cause the ‘creation’ of an insurance that still does not exist.
  - If the trust shall be offered to the public, the trustee shall be a financial entity. This has not been the case in the majority of real estate projects in the last few years in Argentina, although having, in fact, been offered to the public.
  - The trust may be revoked by the trustor, if that possibility is expressly foreseen in the agreement. The revocation shall cause the

extinction of the trust (ie, this possibility did not exist in the law in force before).

- Companies with just one shareholder shall be accepted (ie, they were forbidden in the prior system). These companies shall be organised as corporations (ie, '*sociedad anónima*').
- Lease agreements shall have a maximum term of 20 years for residential purposes, and of 50 years for all other purposes. This amendment is very positive, because the maximum ten-year term of the prior law had proved to be insufficient in many cases (eg, when a future lessee had to make a big investment, the ten-year term usually turned out to be very short and inadequate to amortise the capital invested).
- In construction agreements, the owner shall be able to amend the project without the constructor's agreement, as long as those amendments do not affect 'substantially' the nature of the work. We can imagine the

inconvenience that may be faced here on the definition of what would be 'substantial' and what would not.

- Before, the constructor (together with certain professionals, such as the architects involved) was the only one responsible for the total ruin or destruction of the work. However, with the new Unified Code, the developer shall also have responsibility. We gather that new insurance policies will have to foresee the coverage of these new responsibilities.

As described, the new Unified Code has brought many amendments to the laws and regulations that applied to the real estate market (ie, the ones described above are just a few of them). This will no doubt impact on the way real estate projects are instrumented in the future, and it will be a great challenge for us lawyers to be innovative on the new legal scenario that will appear before our eyes.

## Foreign vendors and purchasers stung by new tax withholding regime for Australian property transfers

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**F**rom 1 July 2016, a new foreign resident capital gains tax (CGT) withholding regime will be in effect in Australia.

Under the regime, introduced by the Tax and Superannuation Laws Amendment (2015 Measures No 6) Act 2016, purchasers of certain property assets from foreign resident vendors must withhold an amount equal to ten per cent of the purchase price and remit it to the Australian Tax Office (ATO). The purchaser must remit the withheld amount on or before settlement.

In general terms, CGT is a tax paid on capital gains as opposed to income. A capital gain (or loss) on an asset is determined by calculating the difference between the price paid for the asset and the price it is sold for. A capital gain is included in a person's assessable income for the relevant tax year. The amount of gain to be included varies for different types of taxpayers.

The new withholding regime is a response to a lack of compliance with the existing CGT liability regime for foreign residents. Voluntary compliance with the existing regime, which requires foreign residents to pay tax on capital gains made when selling Australian property assets, is very low.<sup>1</sup> The ATO has had significant difficulty collecting CGT from foreign residents under the existing regime, and says the new legislation will 'protect the integrity of the foreign resident CGT regime'.<sup>2</sup>

The regime is broad and wide reaching. It applies to all Australian real property including land, buildings, commercial and residential property, and leases. It also applies to indirect Australian real property interests, where an asset is an interest in an entity whose major assets consist of Australian real property. The withholding regime also applies to options or rights to acquire any of the above assets.