

PROPERTY IN USA

Buying residential property in New York City (Part I)

Maurizio Gardenal, partner, Studio legale internazionale Gardenal & Associati Milano, and Anthony Bruozas, Attorney at Law

[Consulta la traduzione in Italiano: clicca qui](#)

The purchasing of residential properties in the USA by foreigners, notably in New York City, has always accounted for a significant part of the whole turnover of this industry.

In recent years, more remarkably than in the past, Europeans have shown more interest in investing in this business due to the increasingly more beneficial exchange rate between the Euro and the Dollar.

Manhattan, in particular, keeps on appealing to a growing number of investors due to its limited supply along with more stable prices in spite of the financial crisis.

According to a recent survey, New York is the 15th most expensive city in the world, behind Moscow and London among others.

However, the execution of a property deal in New York requires that the investor be fully aware of the legal and fiscal framework in force in the USA which is essentially different from that of other countries which are not recipients of the same common law system.

Further, more specific issues have to be taken into account in light of the fact that the "Big Apple" is subjected to the laws in force in the New York State.

In New York City there are mainly two types of residential buildings: cooperative and condominium apartments which are submitted to two different sets of regulations.

Hereunder is a brief analysis of the two main categories.

THE COOPERATIVES (Co-ops)

In New York City, eighty-five percent (85%) of the apartments available for purchase are in cooperative buildings, while the remaining fifteen percent (15%) are in condominiums.

This means that the prices, in general, are more attractive for cooperatives on the basis of the simple supply and demand logic, and there is more inventory to choose from if the buyer includes co-ops into the mix of properties.

Indeed, the nature of the sale agreement quite varies between co-ops and condos.

In a co-op, the buyer purchases the shares of a corporation which entitle him to a long-term proprietary lease. The corporation owns the building and each sale has to be approved by the board of directors which is elected by all the tenant owners of the co-op and has the role to verify and check any potential owner.

In many cases, the board of directors interviews the prospective owners since the former have the sole responsibility to protect the interests of their fellow tenant-owners by selecting well-qualified candidates.

Likewise, the sublease of a co-op has to be approved by the board of directors.

Generally speaking as regards Manhattan, the amount of money that may be financed is determined by each cooperative and the required down payment for prospective foreign investors may be up to 40% of the purchase price.

The corporation pays the total amount of the building's mortgage along with the real estate taxes, employee salaries and the other expenses for the upkeep of the building.

The tenant-owner, in turn, pays a share of these expenses as determined by the number of shares which the tenant owns in the corporation.

Share amounts are dictated by apartment size and floor level.

Needless to say, it is highly crucial to check out in advance the rules governing the co-op to better plan the implementation of the sale transaction.

THE CONDOMINIUMS ("Condos ")

The purchase of an apartment in a "condo" is much more similar to a traditional transaction for purchase of property known in the civil law countries.

Indeed, the subject of the sale agreement is not a share participation but the real property itself.

Therefore, the buyer executes a deed and becomes the owner of the real estate. As a result of this, he will have to comply with the general condominium regulations. In any case, it is advisable for a prospective purchaser to review the condo's rules before setting about the transaction process.

Anyway, condos seem to be the ideal choice for non-U.S. citizens or for those holding assets outside the United States because many co-ops are unlikely to approve a buyer whose funds are not in the U.S.

In a "condo" the owner has to pay the common charges on a monthly basis, which do not include real estate taxes or the mortgage costs since these are paid separately by each owner.

Most people see "condos" as attractive purchases also for financial- planning purposes.

Financing the purchase of a condominium apartment is far more flexible than in a cooperative and generally a buyer can finance up to 90% of the purchase price.

Instead, the financing in a "co-op" is managed by the corporation and must be implemented within the limits which are determined by the corporation itself.

On the other hand, as pointed out before, the prices for an apartment in a "condo" are typically higher than in a "co-op".

© RIPRODUZIONE RISERVATA

P.I. 00777910159 - © Copyright Il Sole 24 Ore - Tutti i diritti riservati

PROPERTY IN USA

Buying residential property in New York City (Part II)

Maurizio Gardenal, Avvocato, e Anthony J. Bruozas, Attorney at Law

A CURA DELLA REDAZIONE DI LEX24

Non sei ancora abbonato a **LEX24**?

Per scoprire come farlo [clicca qui](#)



Consulta la versione in italiano dell'articolo: [clicca qui](#)

This second part of this article focuses on the negotiation and purchase of the real estate ([the first part: clic here](#)).

When one has found the right property, a "bid" or "offer" is going to be placed, usually through one's real estate broker ("agent"). Thus, while the property may have a listed price, a prospective purchaser may offer less and see if the seller accepts the offer, counters it, or simply rejects it outright. If the seller provides a counter-offer lower than the listing price but higher than the prospective purchaser's offer the negotiation process has begun which will eventually lead to a meeting of the minds.

It is worth noting that in New York City most property deals are carried out through brokers or agents who specialise in residential real estate.

In New York, agent fees are usually paid by the seller in the form of a percentage of the selling price. The seller's agent will split the fees with the buyer's agent according to the 'broker listing agreement'. The buyer's agent will convey the offer to either the seller's agent or to the seller directly.

One should not be hesitant about negotiating every aspect regarding the apartment as in the Big Apple most everything is negotiable.

Therefore, it is recommended that one inquire about assessments, fixtures, windows replacements, air conditioners, rugs, floors, curtains, appliances, working fireplaces, dryers along with their working conditions, just to name a few.

Once a meeting of the minds has occurred the parties will memorialize their agreement in a contract. Every purchase contract sometimes referred to as an "earnest money agreement" or a "residential offer" should include some essential terms and conditions such as:

- 1) **The purchase price one is offering;**
- 2) Amount of the down payment (sometimes called "earnest money" or "deposit");
- 3) The time-period for which the offer will remain open;
- 4) The date the sale will be finalized or "closed" and the date they buyer will move in;
- 5) Which party holds the deposit money (usually referred to as the "escrow agent") and who will be the closing agent and/or escrow agent for the closing;
- 6) Items to be included in the purchase price, such as carpeting, lighting, fixtures, appliances and so forth;
- 7) A legal description of the property;
- 8) A guarantee that the seller will provide clear title to the home through an abstract of title, certificate of title, or a title insurance policy;
- 9) A provision that the seller is responsible for paying utility bills, property taxes, insurance and other house-related expenses through the closing date;
- 10) provisions that requires the return of the purchaser's deposit if the sale isn't completed due to lack

of financing or some other contingency of the sale;

12) An inspection clause that allows the buyer to have the home inspected by a professional inspector, usually within a few days prior to the closing. This provision should make the purchase offer contingent on receiving a satisfactory inspection report;

13) Language that states a set date upon which the purchaser can do a walk-through inspection before the closing date to make sure everything is in order according to the stipulations contained within the contract;

14) A provision that requires the seller to pay a certain amount of money for every day beyond the date of occupancy that the house is not available for the buyer to move into (often called a "liquidated damages clause").

15) A provision that allows the buyer to withdraw from the contract should the governing board of the property deny the buyer's application.

The transaction is consummated at the closing when the offer is finalized and all the contingencies are fulfilled.

It is quite common and convenient for the party who is unable to go the USA for the closing to be represented at the closing through a power of attorney of an appointed person who will have the right to close the deal on their behalf.

A New York style closing is a "sit down" closing where the parties or their attorneys meet in the physical presence of each other to close a real property or real property-related transaction.

It is necessary to distinguish between two legal instruments in such a procedure. On the one hand, the purchase agreement describes the respective rights and obligations of the parties. On the other hand, the property deeds are legal instruments that are used to assign ownership of real estate rights.

Usually, words used to convey property transfer may be "grant", "assign", "convey", or "warrant", but they basically all do the same thing, they transfer the interest of the person selling the property to the person buying it.

In the New York County courthouse there are some books where the history of all owners and related matters such as loans and releases of those loans are recorded.

Today, of course, transfers are recorded electronically but all titles are recorded from the day the US patent was issued in those books.

There are two kinds of books: the "Grantor" containing information about the seller and the "Grantee" containing information about the buyer.

If one buyer travels to New York it would be helpful to look up these books to find out the conditions of the real property, the potential loans and any other appropriate investigation related to it. Property documents are also maintained online using the Automated City Register Information System (ACRIS). This is a digital storage and retrieval system for personal and real property-related documents in Manhattan, the Bronx, Brooklyn, and Queens. This online system, however, is not available for Staten Island. ACRIS provides online access to documents and associated data. One can use ACRIS to search for property record indexes and view document images back to 1966. Documents prior to 1966 must still be viewed on microfilm and microfiche at the City Register's offices in each of the four boroughs except Staten Island which is provided by the Richmond County Clerk's office.

© RIPRODUZIONE RISERVATA

PROPERTY IN USA

Buying residential property in New York City (Part III)

Maurizio Gardenal, Avvocato, e Anthony J. Bruozas, Attorney at Law

A CURA DELLA REDAZIONE DI LEX24

Non sei ancora abbonato a LEX24?

Per scoprire come farlo [clicca qui](#)*[Consulta la versione in italiano dell'articolo: clicca qui](#)*

How can I best protect myself if I plan on leasing my property to someone else?

To minimize the risk associated with renting one's condo to someone else, one should consider holding the title to the property through an artificially created entity. It is prudent that one transfer one's personal ownership interest into a corporate entity whereby a corporate shield is created such that it is more difficult for an injured party to reach one's personal assets. For instance, if one's tenant slips and falls in the shower during the course of his lease of the condo, he may claim that his injury was not due to the consumption of too many martinis but rather, due to a defective or unreasonably dangerous condition associated with the shower stall. Thus the property owner who has leased his condo is at risk of being sued by his tipsy tenant. To minimize this risk, the owner should transfer his personal interest in the real estate into a corporate entity.

In the United States, among other things, the limited liability company ("LLC") is such a device one should consider. Unless fraud can be demonstrated, when one's ownership interest is in the form of an LLC, the extent of the liability can be limited to the amount of value associated with the property. In other words, it is very difficult for an injured party to "pierce" the shield that is created with the establishment of an LLC or of a corporation.

Before transferring the property's deed into an LLC, the LLC itself must first be formed. To transfer a deed to an LLC, the deed will need to be prepared in the LLC's name and filed and recorded in the appropriate municipal office located in the jurisdiction in which the property is located (usually the county's recorder of deeds office). The deed must be signed by the person or entities transferring the property, and will of course require a duly-authorized notarization.

There are different types of deeds that may be used to transfer the title to the property. For example, some deeds may contain warranties purporting to protect the grantee-purchaser from possible defects in the title of the property. The type of deed used to transfer the property to an LLC generally will depend on the particular property at issue and the individuals or entities involved. Also, a property owner's ability to transfer the deed to an LLC may depend on whether the property is subject to a mortgage. Unless the underlying loan is paid in full prior to or at the time of the transfer, the deed will only transfer subject to the mortgage. Moreover, the loan and/or mortgage documents may prohibit a transfer of the property unless the loan is paid in full or the lender consents.

Whether or not the lender holding the mortgage permits the deed and the mortgage to transfer to the LLC, will depend on the circumstances. For example, the lender may allow the LLC to assume the loan and mortgage, either with or without changes to their terms. Alternatively, the lender may require that the LLC obtain a new loan in the name of the LLC, and that the existing personal loan be paid off with the proceeds of that new loan. In either case, because the loan is being made to an entity and not to a

private individual, the lender may request personal guarantees from the members of the LLC or additional collateral.

If it otherwise qualifies, the LLC can obtain a loan from a mortgage company. Before applying for a loan or mortgage, it is important to determine the proposed amount of the loan, how the loan proceeds will be used by the LLC, and the expected source of the funds necessary to repay the loan. Typically, lenders will grant loans only if they are satisfied that the borrower has the ability and resources to repay the loan. One should also keep in mind that the real estate purchased by the LLC typically must be pledged as collateral for the loan.

Thus, it is wise to use an LLC to hold one's US real estate in order to protect one's personal assets and property from claims that might occur during the term of the leasehold of the real estate. If the LLC is formed and managed correctly, Europeans should be able to limit their potential liability in the event of a claim being filed against the LLC.

When a foreign buyer dies, his estate will be taxed by the US government at a rate close to 46%. This is easily avoided if the foreign buyer does some upfront planning and sets up the LLC and a foreign corporation. The LLC would own the property, the foreign corporation would own the LLC, and the buyer would hold shares of stock in the foreign corporation. Under this scenario, since the property is "owned" by the foreign corporation, the US government would receive nothing upon the death of the foreign buyer. This is a great tax savings for foreign buyers and is not very expensive to implement. This structure also allows for the easy transfer of the property from one party to another by the selling of shares of the corporation rather than the sale of the property that might trigger a taxable event.

If I have properties in several states, where should I incorporate?

Many investors establish the physical location for their LLC in the state where they conduct their business. However, in deciding where to form a company, there are many factors to consider, such as the cost of formation, tax laws, and general laws governing the actions and liabilities of the LLC or corporation within each state.

Business owners typically choose to incorporate in the state of Delaware. Delaware has no minimum capital requirement, no sales tax, no personal property tax, a relatively low franchise tax, and advanced and flexible laws governing corporations and LLCs. Also, Delaware is one of the few states that permits "series LLCs," which may be an attractive option for investors with multiple properties.

One factor investors should consider when forming a company in a given state is that the company may also have to qualify to do business in other states where it owns properties or otherwise conducts business. The LLC is often referred to as a "foreign" LLC in states other than the state in which it was formed. Generally, qualifying a company to do business in a state other than its state of formation is similar to the formation process, and the LLC or corporation may be required to pay filing fees and provide certain information and documentation to the state.

The costs of forming and qualifying a company to do business may be an important factor to consider in determining where to form the company. For example, if investors are considering forming a company in Delaware but all of the properties to be owned and operated by the company are located in New York, then the investors may elect to form the company in New York, *not* Delaware, and avoid the dual costs associated with forming the entity in Delaware and then qualifying that entity to do business in New York. However, the costs associated with forming and qualifying a company are only one of many factors to consider when forming and qualifying a company. Also, if a company is required to qualify to do business in a state but fails to do so, it may be subject to penalties.

What is a series LLC?

A series LLC is an umbrella entity consisting of one LLC with multiple "series" or "cells." Series LLCs are generally of interest to individuals who have several large assets (such as multiple properties) for which they desire to maintain separate liability protection. To best understand how an LLC and a series LLC differ, a typical non-series LLC (if properly formed and maintained) will generally protect its owner's personal assets from the LLC's business obligations. However, it will *not* protect one asset owned by the LLC from being used to satisfy a judgment relating to another LLC asset.

Under a *non-series* LLC, all assets owned by the LLC are potentially subject to any claim or lawsuit against the LLC. For example, assume that a typical non-series LLC holds several properties. If a person is injured at one of the LLC's properties and sues and wins, then all of that LLC's assets - even the other properties that it owns - can be used to satisfy the judgment obtained against the non-series LLC. The LLC could potentially lose all of its properties based on a lawsuit or claim that is related to only one of its properties.

A properly formed and maintained series LLC will treat each created series as a separate entity, with its own rights and obligations. Theoretically, under a series LLC, if someone is injured at Property no.1 (which is an asset of Series no.1) and sues the LLC and wins, then only the assets of Series no.1

should be at risk with regard to the claim.

The series LLC originated in Delaware, but the laws of some other states (such as Illinois and Oklahoma) also allow for series LLCs. In states such as California, Texas and New York that require high fees to maintain separate companies, the series LLC may be registered as a single foreign entity, thus allowing one to save on annual filing fees. The "Delaware Series LLC" needs to qualify only once as a foreign company doing business in the state where the property is located.

© RIPRODUZIONE RISERVATA

P.I. 00777910159 - © Copyright Il Sole 24 Ore - Tutti i diritti riservati

PROPERTY IN USA

Buying residential property in New York City (Part IV)

Maurizio Gardenal, Avvocato, e Anthony J. Bruozas, Attorney at Law

A CURA DELLA REDAZIONE DI LEX24

Non sei ancora abbonato a **LEX24**?

Per scoprire come farlo [clicca qui](#)



[Consulta la versione in italiano: clicca qui](#)

This final part focuses on some key taxation and related fiscal issues which a foreign investor should keep in mind when investing in real estate in the US.

A) What are my taxes?

Real property transactions are taxed on the difference between the owner's original purchase price and the amount of the sale. The resulting difference is considered either a loss if the owner's sale is less than the purchase amount, or conversely a profit, or 'Capital Gain' if the sale price is greater than the purchase amount. Depending on the state in which the home is located, the total tax on the sales transaction varies. The taxes also vary between US residents and non-residents.

There are other charges which must be taken into consideration when calculating the total costs associated with the purchase and sale of real estate. The closing costs, points paid for the loan (usually required by the mortgage broker as a condition to providing a lower interest rate on the amount of money loaned), and loan application fees would be deducted from the capital gain or loss. The current US (federal capital gain tax rate is 15% for US residents. However, within the state of New York and the city of New York, there is an additional 10% in taxes which must be taken into consideration when contemplating buying and later selling real estate located in New York.

When selling one's primary residence it is possible for an individual to avoid paying any tax on a Capital Gain. If the home sold was the owner's primary residence for at least two years out of the past five, the single income tax payer is allowed a profit (gain) of \$250,000 before any Capital Gain tax is applied. Married couples are allowed up to \$500,000 in profit before they are taxed on their Capital Gain.

There are significant advantages when purchasing real estate for investment purposes, one of the most important being that interest paid on one's mortgage is deductible. However, the immediate downside is the "points" that one may have paid to the mortgage broker in order to receive a lower interest loan rate. Other fees paid on the closing when the property is subject to a mortgage, such as loan origination fees are also not deductible.

B) What are the Taxes due on sale for a Non-US Resident?

Taxes on the proceeds of sale for non-residents are 30% for foreigners on properties held longer than

one year. Double taxation treaties may also apply on the issue.

The United States created the Foreign Investment in Real Property Tax Act in 1980 which requires withholding taxes directly from the proceeds of the sale in order to guarantee payment of taxes from non-residents. The Internal Revenue Service withholds 10% of the sales price and the state of New York withholds an additional 6.85% in taxes. Either the seller or the buyer upon the sale of real estate must file the IRS form called "Statement of Withholding on Disposition by Foreign Persons of United States Real Property Interests." Other states require similar filings. To avoid taxes placed upon the sale of real estate, foreign investors can use the protection of an LLC to buy and sell New York City real estate.

When filing personal income taxes with the IRS, the "Schedule D" is used to report Capital Gains. If the individual owned the residence for one year or less, the Capital Gain is reported on the Schedule D as a short-term Capital Gain. If the residence was owned longer than a year, it is reported on the Schedule D as a long-term Capital Gain. The time of ownership is crucial to the period for reinvesting the Capital Gain in the future. If an individual can delay selling the residential home until he has lived in the home for over two years, then he will have longer to reinvest any Capital Gain from the sale of the home.

The US government requires that the foreign national "elect" to pay US income taxes on any net income (rental revenues less expenses) derived from rental property. If this election is not made in a timely fashion (i.e., US income tax returns not filed), a tax of 30% of the gross rental income will be assessed. Under this scenario, the investor would not be able to deduct any expenses such as depreciation, interest, property taxes, common charges, etc. Even if the foreign investor is experiencing tax losses in the beginning years of their investment, and, therefore, doesn't owe any taxes to the government, he must file his tax returns on a timely basis to make the election.

A foreign buyer's overall tax liability may be different than that of a US resident depending upon the buyer's home country tax treaty with the US, if any. Therefore, it is best to consult a local tax adviser that is familiar with the tax treaty. For instance, the capital gains rate for US residents is 15% (if the property was owned for more than one year). Foreign nationals, however, could be required to pay a higher rate, depending upon their home country's tax treaty with the US.

Most troubling for the foreign investor is the following: it is possible to become a resident in the United States for income tax purposes without any deliberate intent to acquire that status. Under the "Substantial Presence Test", which counts the number of days a person is physically present in the United States, income tax residency would be acquired by an individual who regularly conducts business or otherwise maintains a physical presence in the United States and who does not engage in very deliberate planning to avoid exceeding the limit on days spent in the United States, even if that person's permanent home is outside the United States.

It should be noted that a foreign person will be considered a U.S. Resident for Tax Purposes if he/she meets the Substantial Presence Test for the calendar year. The test must be applied each calendar year that the individual is in the U.S. To meet the test, a foreign person must:

1. Be physically present in the U.S. for at least 31 days during the current year, and
2. Be physically present 183 days during the 3 year period that included the current year and the 2 years immediately before that, counting:
 - a. All the days the individual was present in the current year, and
 - b. 1/3 of the days the individual was present in the 1st year before the current year, and
 - c. 1/6 of the days the individual was present in the 2nd year before the current year.

Once the foreign real property owner is considered to be US resident, her worldwide income is subject to US income tax.

C) Conclusion

While most Americans still are wary about real estate and are preoccupied with concerns over the overall economic climate, foreign investors are keeping US real estate brokers busy with their eagerness to buy up New York condo and co-opts. The number of foreign buyers has doubled in the last two years. In just the last 18 months, foreigners have bought one-third of all new condos that were for sale in New York City. Foreign buyers are helping shield Manhattan from the housing slowdown that has continued to plague the rest of the nation and are providing a ready market for thousands of newly built condominiums. Foreigners seem to prefer condos for the amenities and flexible rules that allow renting the unit as investments. That many units are in neighborhoods that are not traditionally residential does not seem to bother the foreign shopper. They deem it beneficial that such neighborhoods are well-known.

Foreign buyers often purchase quickly because they largely view buying an apartment as similar to acquiring a bond or a stock. Buying a condo in Manhattan, however, should not be crammed into a shopping day in the Big Apple. Two factors important to international clients when purchasing property in the U.S. are proximity to their home country and the convenience of air transportation. International buyers were reported in 39 states in 2010, but a slight majority of the total buyers are concentrated in

Florida, California, Arizona and Texas. These four states account for 53% of purchases and have remained the top destinations for the past three years, with Florida and California remaining the top two destinations. The median price paid by international buyers in 2010 for a home in the U.S. was \$219,400, a decrease from 2009's median price of \$247,100. However, the median price paid by foreign buyers was significantly higher than the overall US median market price, which was \$172,500 in 2009. On average, foreign buyers tend to purchase closer to the upper end of the market; 16% of the total international purchases were for homes priced at more than \$500,000. Wherever the foreign investor tends to buy, she/he should remember that a US experienced real estate attorney is deemed essential in order to secure the right kind of property while minimizing future risk and to make sure that the deal is ultimately consummated on terms favorable to the foreign investor.

© RIPRODUZIONE RISERVATA

P.I. 00777910159 - © Copyright Il Sole 24 Ore - Tutti i diritti riservati