

## **Due Diligence and Property Sale Contracts - Key points to consider**

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Due diligence processes are extremely important in all types of acquisitions, real estate properties included. During the due diligence process, the buyer decides whether to proceed to the acquisition or not, whilst due diligence findings formulate to a large extent the terms and conditions of the sale agreement. The most common scope for lawyers when drafting and negotiating real estate sale agreements is the liability of the seller towards the buyer for defects or lack of specifications of the sold property. Such liability is regulated by the general law of sale; nevertheless, it can be extended or restricted by way of agreement.

According to Greek law, the seller is obliged to deliver the sold property free from defects and with the agreed specifications. Failure of the seller to perform such obligation can lead to a reduction of the purchase price, compensation by the seller, revocation of the sale contract, or even annulment thereof. The seller is exonerated from liability if the buyer at the time of conclusion of the sale contract knew that the sold property is defective or lacks a specification. Such knowledge should be actual knowledge and the buyer does not lose its

protection by law for defects or lack of specification that the buyer ought to be aware of. Hence, in principle, the buyer is not penalized by law for non-thorough due diligence. However, if a piece of information is included in the disclosure list of the due diligence report, actual knowledge thereof by the buyer is established. Actual knowledge of the buyer is also presumed to the extent the respective information is available in the local public land records. On the other hand, the seller has a general duty of disclosure of data to the buyer according to good faith and business usages principle. Generally, it is for the buyer to determine the extent and the type of information required for the due diligence provided, and any data is assessed on its own responsibility. The seller could be held liable for pre-contractual expenses and losses of the buyer for a behaviour during due diligence, which would contravene the good faith principle, e.g. when the seller intentionally conceals from the due diligence important information, which is capable of preventing or discouraging the buyer from acquiring the property.

Following the due diligence stage, the parties regulate their relations by way of agreement based on the findings of due diligence. The parties can deviate from the provisions of law. For example, the seller may be held, by way of a contractual provision, liable for a defect of the property of which the buyer has acquired full knowledge during the due diligence process. Typically, a problematic finding in the due diligence process may result to the seller providing a particular representation and warranty regarding a particular feature of the property. Depending on the balance of negotiation power between the seller and the buyer the representations may be qualified in the sense that they are given “ to the best of seller’s knowledge”. In this way, the burden of proof is reversed, and the buyer is compelled to prove the knowledge of the seller regarding a particular breach of representation. Additional mechanics are commonly used to further safeguard the interests of the buyer: retention of part of the consideration to secure the buyer’s claims for any breach of the warranty given by the seller. On the other hand, some findings of the due diligence might additionally or alternatively result in a reduced price which will compensate the risk assumed by the buyer.

The focus areas of legal due diligence of properties indicatively and not exhaustively include:

- ownership titles with the local public land records going back to more than 20 years, including review of the ownership history, possible encumbrances, mortgages, other in rem restrictions or in rem claims;
- urban planning restrictions/liens;
- land-use restrictions;
- forest and archaeological restrictions;
- seller’s and/or buyer’s exemption from special property tax of Greek law 3091/2002;
- buyer’s eligibility and or relative permitting for the acquisition of properties situated in the border areas and islands of the country;
- tax compliance of the property;
- tax and social security clearance of the seller.

In any case, successful customization of a due diligence process and a property sale agreement requires advice adjusted in the specific circumstances.

Acquisition of properties by way of compulsory public auction being quite common in a market with large portfolios of non-performing loans and distressed businesses’ assets should also be considered. The auctions are conducted online, in a simple and transparent procedure, allowing

prospective buyers to bid from anywhere provided that they possess a Greek Tax Identification Number. Auction is a sui generis sale that is not subject to an agreement. It is the law (Greek Civil Code and Code of Civil Procedure) that regulates the rights of the successful bidder who acquires the property and the acquisition procedure and formalities. Namely, the successful bidder does not enjoy protection for factual defects of the property. The only remedy available in a case of a factual defect would be the claim for unjust enrichment of the party against whom enforcement is sought (previous owner and debtor). The successful bidder acquires the property free from any encumbrances and seizures. Furthermore, the successful bidder has claims against the creditor that has initiated the auction for legal defects of the property, e.g. an easement that reduces the value of the property but only to the extent that the creditor has actual knowledge of such legal defect. In the absence of such knowledge, the protection of the successful bidder is limited to claims for unjust enrichment of the previous owner and debtor. Accordingly, regarding acquisitions by way of public auction due diligence has a different scope, being limited to the review of the public land records and the information disclosed by the initiating creditor, the valuation report, etc to establish ownership and technical status of the property. Practically, due diligence findings in

acquisitions through public auction allow practitioners to advise the investor, either to proceed to the transaction or abstain therefrom, since there is no room for negotiation and any liability issues are prescribed by law.

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