

What You Need To Know About Title Insurance In International Real Estate Transactions

J. Carmichael Calder and S.H. Spencer Compton

Title insurance has at last gone global.

GLOBALIZATION IS AFFECTING even the practice of commercial real estate law, and the availability and extent of title insurance in international real estate transactions is a matter of growing interest to commercial real estate lawyers. This article will explain what international title insurance is, when you might need it, and how to use it.

WHAT IS INTERNATIONAL TITLE INSURANCE? • Modeled after the American Land Title Association policies sold in the United States, international title insurance policies protect insureds against both known and unknown defects in a property title, including:

- Boundary disputes;
- Restrictive covenants;

J. Carmichael Calder is Vice President of International Underwriting for the First American Title Insurance Company, based in Santa Ana, California. **S.H. Spencer Compton** is a vice president and special counsel at First American Title Insurance Company of New York in New York City. An earlier version of this article appeared in the September 2004 issue of *Briefings in Real Estate Finance* and is republished with permission of Henry Stewart Publications.

- Right-of-way issues;
- Adverse possessions;
- Lost deeds; and
- Leasehold defects.

In addition, these policies:

- Confirm that property title is good and marketable;
- Insure against costs or legal expenses necessary to defend title; and
- Provide coverage against a range of other problems such as fraud, forgery and mortgage invalidity.

How Much Does It Cost?

The premium for an international title insurance policy is generally \$3.50 per \$1,000 of liability plus the cost of searching and examining the real property records. Unlike the practice in the United States, the title insurance company will often require that the proposed insured pay a non-refundable initial charge before any work is undertaken. This charge, to cover the out-of-pocket costs of local attorneys and searchers, is usually calculated as a percentage of the proposed premium, and is typically less than \$10,000. In the Caribbean and Latin America, including Mexico, the premium rate can be slightly higher (\$5.00 per \$1,000), although it does drop to \$3.50 per thousand above \$10 million of liability. Nonetheless, in countries where a title insurance company has a local operation, the rates are set locally and are generally well below the \$3.50 per \$1,000 rate. In these countries, an upfront deposit is usually not required.

WHAT ARE THE OBJECTIONS TO INTERNATIONAL TITLE INSURANCE?

• In the United States, title insurance is accepted as a necessary part of any real estate finance transaction. But this is not yet the case internationally. In many countries, the answer to the question

“Is title insurance available?” is likely to be some version of the following:

- “You don’t need it; we have a perfect registry system”;
- “We rely on attorney opinion letters”;
- (Best of all) “What’s title insurance?”

Needless to say, the added cost of a title insurance premium is also an issue. Each of these objections arises out of longstanding custom and use—an “if it isn’t broken, don’t fix it” mentality—as well as unfamiliarity with the process and the product.

Why Can’t I Rely On Registry Systems And Government Guarantees?

Every country has some sort of property registry system. Some registry systems are much better than others. However, no registry system is perfect and no registry system is backed by a no-fault, 100-percent government guarantee. More typical is the registry system that has some shortcomings, or a governmental guaranty that is available after all other recourse has been exhausted, and in amounts much less than the property value. For many transactions, these registry systems and government guarantees might be sufficient. But in a high-value transaction, the assurance of a strict liability insurance policy backed by a U.S. Fortune 300 company may be necessary, not only from a risk-avoidance perspective, but from credit-enhancement and marketing points of view as well, especially when the ownership of the fee or mortgage later will be syndicated or securitized.

At a minimum, when a lender agrees to rely on a registry system and a government guarantee, instead of title insurance, the lender should fully understand the limitations, if any, to the guarantee and the process and cost of enforcement.

What's Wrong With Legal Opinion Letters?

In certain U.S. jurisdictions, title diligence is established by a lawyer's opinion letter, which in turn is backed up by a title insurance policy. Why in the United States marketplace isn't the opinion letter on its own considered sufficient? A lawyer's opinion letter may be of little help. If an investor or lender has relied on an opinion and later has a title problem, the lawyer might not assist in its resolution. A lawsuit against the lawyer would have to show that he or she was negligent in failing to follow the local standard of care—an uncertain and costly process, particularly when no title insurance company is contractually obligated to supervise and pay for the litigation.

What's The Local Standard Of Care?

Now picture the same difficult process in a foreign country where few investors, lenders, or their counsel (who may not be nationals of that country) even know the local standard of care. For example, in some parts of Mexico, the standard of care may involve searching no more than seven years of registry records, even though interests older than that may still be good. A lender relying on such an opinion might have difficulty proving negligence by the lawyer who failed to address a 10-year-old mortgage. In any event, that lender would be financing the litigation or trying to collect its costs from the borrower. By contrast, if title insurance were in place and a mortgage had been overlooked, the title insurer would be contractually obligated to defend the claim at its expense and, if unsuccessful, pay the insured lender's losses.

How Easily Can I Collect On A Damage Award?

Even if negligence in connection with a lawyer's opinion letter is proven, determining and collecting damages is difficult. Professional indemnity insurance is not always required of

lawyers in foreign countries, and few carry it in amounts like those in the United States. Some foreign lawyers have access to local law society indemnity funds, but many of these have problems, too. The fund in the U.K. became insolvent and closed a few years ago, and the fund in Hong Kong was diminished when its primary reinsurer became insolvent. It is difficult to quantify the number of claims against attorneys over their title opinion letters because presumably a number of such claims are dropped or settle without ever reaching a courtroom. Nonetheless, even if there are relatively few such claims each year, the potential barriers to restitution may be unacceptable in a high-value commercial transaction.

When a lender agrees to rely on an opinion letter, instead of title insurance, the lender should first determine that the local attorney rendering the opinion carries liability insurance and in what dollar amounts.

OTHER ADVANTAGES OF INTERNATIONAL TITLE INSURANCE • Besides providing insurance coverage, international title insurance performs a number of practical functions.

Insurer As Expediter

On a very practical level, title insurance can be a solution to delays or problems in following traditional local title examination practices, especially in multi-site and cross-border transactions. Some recent examples:

- A UK property company obtained a loan from a UK lender to be secured by a ground rents portfolio. To avoid a due diligence exercise in which solicitors would have had to examine over 90,000 titles that made up the portfolio, a title insurance policy insured the lender against title losses. The policy saved large amounts of time and expenditures of legal fees;