EC and International Tax Law Series

Volume 12

Immovable Property under Domestic Law, EU Law and Tax Treaties

Guglielmo Maisto / Series Editor

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Immovable Property under Domestic Law, EU Law and Tax Treaties

Why this book?
Immovable Property under Domestic Law, EU Law and Tax Treaties, comprising the proceedings and working documents of an annual seminar held in Milan in November 2014, provides a thorough analysis of the taxation of immovable properties. The analysis starts from a survey of the concept of "immovable property" in common and civil law jurisdictions and then considers how different approaches affected taxation of income deriving therefrom.

EU tax law issues are then taken into consideration, both from an income tax and VAT viewpoint. In particular, the income tax analysis provides an extensive examination on how taxation of immovable property applied by EU Member States may affect fundamental freedoms.

The book then moves to selected tax treaty issues. In particular, the analysis examines: (i) the relationships between tax treaty law and national law; (ii) the interaction between articles 6, 7 and 21 of the OECD Model Convention; and (iii) the concept of "enterprise" in the context of article 6 of the OECD Model Convention and its possible implications. Finally, the evolution of article 6 of the OECD Model Convention with respect to income from agriculture, forestry and mining is reviewed.

Individual country surveys provide in-depth analyses of the above concepts and issues from a national viewpoint in selected European and North American jurisdictions, as well as in Australia. As a presentation of a unique and detailed insight into the taxation of immovable properties in both domestic and international contexts, this book is an essential reference source for international tax practitioners.

Title:	EC and International Tax Law Series Volume 12: Immovable Property under Domestic Law, EU Law and Tax Treaties
Editor:	Guglielmo Maisto
Expected date of publication:	September 2015
ISBN:	ISBN 978-90-8722-327-4
Type of publication:	Print book
Number of pages:	600
Terms:	Shipping fees apply. Shipping information is available on our website
Price:	EUR 110 / USD 130 (VAT excl.)

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Table of Contents

Acknowledgements v

Foreword vii

Part One
Civil vs Common Law Systems

Chapter 1: Taxation of Immovable Property from a Civil Law Perspective 3
by Daniel Gutmann

1.1. General remarks 3
1.2. The distinction between movable and immovable property 6
1.3. Rights pertaining to immovable property 8
1.4. Conclusion 10

Chapter 2: Taxation of Immovable Property from a Common Law Perspective 11
by Jonathan Schwarz

2.1. Introduction 11
2.2. Legal rights over immovable property 12
2.2.1. Non-tax law definition of immovable property 12
2.2.1.1. Classification as movable or immovable 13
2.3. Taxation of immovable property under domestic law 14
2.3.1. Application of income and corporate income taxes to immovable property 14
2.3.1.1. Definition of immovable property 14
2.3.1.2. Cross-border aspects 16
2.4. Taxation of immovable property under tax treaties 16
2.4.1. Definition of immovable property 16
2.4.2. Capital gains 20
2.4.3. Estate and gift tax treaties 20
2.5. EU law 21
2.5.1. Fundamental freedoms 21
2.5.2. VAT 22

Chapter 3: Taxation of Immovable Property: EU Law Direct Tax Aspects 25
by Pasquale Pistone

3.1. Introduction 25
3.2. Tax implications of the EU Charter and the protection of immovable property 26
3.3. The compatibility of national tax rules with primary EU law 31
3.3.1. General issues 31
3.3.2. Tax obstacles arising in connection with immovable property situated in another jurisdiction 33
3.3.3. Tax obstacles arising in connection with the personal nexus of taxpayers 37
3.4. Conclusions and future outlook 40

Chapter 4: Immovable Property under EU VAT Law 43
by Andrea Parolini

4.1. VAT regime of immovable property in EU law 43
4.2. Comparison between the EU VAT system and the OECD Model 46
4.2.1. Definition of "immovable property" 46
4.2.2. Immovable property companies 49
4.2.3. The definition of "services connected with immovable property" for VAT purposes and its interaction with article 5(3) of the OECD Model 51

Part Two
Selected Issues in Tax Treaty Law

Chapter 5: The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model 57
by Michael Lang

5.1. Income from immovable property 57
5.2. The importance of national law for the interpretation of treaties 59
5.2.1. Interpretation solely on the basis of treaties 59
5.2.2. Article 3(2) OECD Model 61

5.2.3.	Other references to national law	63
5.3.	The reference to national law in article 6(2) OECD Model	64
5.3.1.	"Property situated in the Contracting State"	64
5.3.2.	The law of the contracting state	66
5.3.3.	Other limits to the relevance of national law?	69
5.4.	The positive and negative list of article 6(2) sentence 2 OECD Model	71
5.4.1.	Interpretation solely on the basis of the treaty	71
5.4.2.	The positive list	73
5.4.3.	The negative list	75
5.5.	Outlook	76
Chapter 6:	**Income from Immovable Property of an Enterprise in Triangular Cases: The Relationship between Articles 6, 7 and 21 of the OECD Model** *by Nicola Saccardo*	77
6.1.	Introduction	77
6.2.	The arguments so far	79
6.3.	Article 21(2)	80
6.3.1.	The preparatory works leading to article 21(2)	80
6.3.2.	The additional distributive rule hidden under article 21(2)	82
6.3.3.	The reference to the definition of immovable property under article 6(2)	85
6.4.	Conclusion	86
Chapter 7:	**The Concept of "Enterprise" in the Context of Article 6 and its Possible Implications** *Elena Variychuk*	87
7.1.	Introduction	87
7.2.	Relevance of the tax treaty concept "enterprise" for article 6 OECD Model	88
7.3.	Implications for application of the PE non-discrimination clause in the context of income from immovable property	90
7.4.	Implications for application of the separate entity approach for the purposes of article 6 OECD Model	93
7.4.1.	Separate entity approach under the OECD Model	93

7.4.2.	Extension of application of the separate entity approach to article 6	95
7.5.	Conclusions	98
Chapter 8:	**The Evolution of Article 6 of the OECD Model with Respect to Income from Agriculture, Forestry and Mining** *by Jacques Sasseville*	99
8.1.	Introduction	99
8.2.	Application of the existing versions of articles 6 and 7 to agriculture, forestry and mining	100
8.2.1.	Article 6 is not limited to "income from immovable property"	100
8.2.2.	Application of articles 6 and 7 to mining	101
8.3.	Work of the League of Nations	104
8.3.1.	The four economists' report (1923)	104
8.3.2.	The work of the technical experts (1922-1925) and the 1927-1928 models	108
8.3.3.	The Mexico (1943) and London (1946) Models	111
8.4.	Work of the OEEC (Organisation for European Economic Cooperation) and OECD	113
8.4.1.	Working Party 9 and the Fiscal Committee of the OEEC	113
8.4.2.	Subsequent work of the OECD	118
8.5.	Conclusion	124

Part Three
Country Reports

Chapter 9:	**Australia** *by Alex Evans*	127
9.1.	Legal rights over immovable property	127
9.1.1.	Non-tax law definition of immovable property	127
9.1.2.	Types of rights over immovable property	131
9.1.3.	Characterization of foreign legal rights over immovable property	134
9.2.	Taxation of immovable property under domestic law	137

9.2.1.	Application of income and corporate taxes to immovable property	137
9.2.1.1.	Definition of immovable property	137
9.2.1.2.	Taxation of immovable property	139
9.2.1.2.1.	Relevance of buildings and land registries for income/corporate income tax purposes	139
9.2.1.2.2.	Imputation of the income (including capital gain) from immovable property	139
9.2.1.2.3.	Computation of the income (including capital gain) from immovable property	140
9.2.1.2.4.	Tax rates applicable to income from immovable property	152
9.2.1.2.5.	Tax incentives for agricultural immovable property and for immovable property of cultural/historical significance	153
9.2.1.3.	Cross-border aspects	153
9.2.1.3.1.	Taxation of foreign (as compared to domestic) immovable property	153
9.2.1.3.2.	Tax case law/administrative guidelines/literature (if any) regarding the tax treatment of foreign legal rights over immovable property	154
9.2.1.3.3.	Taxation of non-residents (as compared to domestic residents) on domestic immovable property	154
9.2.1.3.4.	Conditions for local immovable property to qualify as PE and related consequences	154
9.2.2.	The application of wealth, inheritance, estate and gift taxes to immovable property	155
9.2.3.	The application of VAT/GST and transfer taxes to immovable property	155
9.3.	Taxation of immovable property under tax treaties	162
9.3.1.	Definition of immovable property	162
9.3.2.	Allocation of taxing rights over immovable property	167
9.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	170
9.3.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	174
9.3.5.	Non-discrimination tax treaty issues regarding the taxation of immovable property	174
9.4.	Taxation of immovable property under EU law	175

Chapter 10: Austria 177
by Jasmin Kollmann and Draga Turic

10.1. Introduction 177
10.2. Legal rights over immovable property 178
10.2.1. Civil law definition of immovable property 178
10.2.2. Types of rights over immovable property 180
10.2.2.1. Property under Austrian civil law 180
10.2.2.1.1. Definition of property 180
10.2.2.1.2. Types of property rights 181
10.2.2.2. Restrictions of property rights 182
10.2.2.2.1. Servitude 182
10.2.2.2.2. Legal servitudes 182
10.2.2.2.3. Land charge 182
10.2.2.2.4. Right of lien 182
10.2.2.2.5. Right to build on another's land 183
10.2.2.2.6. Pre-emption right 183
10.2.2.2.7. Right of repurchase 183
10.2.2.2.8. Sales and burden prohibition 184
10.2.2.2.9. Tenancy and leasehold right 184
10.3. Taxation of immovable property under Austrian domestic law 185
10.3.1. Application of income and corporate income taxes to immovable property 185
10.3.1.1. Types of Income 185
10.3.1.2. Definition of immovable property 185
10.3.1.3. Taxation of immovable property 187
10.3.1.4. Cross-border aspects 192
10.3.2. Application of wealth, inheritance, estate and gift taxes to immovable property 193
10.3.2.1. Real estate tax 193
10.3.2.1.1. Definition of immovable property 193
10.3.2.1.2. Agricultural and silvicultural property 194
10.3.2.1.3. Real estate 194
10.3.2.1.4. Business real estate 194
10.3.2.1.5. Taxation 194
10.3.2.1.6. Cross-border aspects 196
10.3.2.2. Inheritance, gift and wealth taxes 196
10.3.3. Application of VAT/GST and transfer taxes to immovable property 197
10.3.3.1. VAT 197
10.3.3.1.1. Definition of immovable property 197

10.3.3.1.2.	Taxation	198
10.3.3.1.2.1.	Supply of immovable property	198
10.3.3.1.2.2.	Builder-owner	199
10.3.3.1.2.3.	Foundation of condominium	199
10.3.3.1.2.4.	Letting of immovable property	200
10.3.3.1.2.5.	Mixed-used buildings	200
10.3.3.1.3.	Cross-border aspects	201
10.3.3.2.	Real estate transfer tax	201
10.3.3.2.1.	Definition of immovable property	201
10.3.3.2.2.	Taxation	201
10.3.3.2.3.	Cross-border aspects	203
10.4.	Taxation of immovable property under tax treaties	204
10.4.1.	Definition of immovable property	204
10.4.2.	Allocation of taxing rights over immovable property	206
10.4.3.	Relationship between treaty provisions on immovable property income and other types of income	208
10.4.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	209
10.4.4.1.	Deductibility of secured debt	209
10.4.4.2.	Proof of taxation	209
10.4.5.	Non-discrimination tax treaty issues regarding the taxation of immovable property	210
10.4.5.1.	Further requirements for limited taxpayers	210
10.4.5.2.	Agricultural and silvicultural income	211
10.4.5.3.	Friendly societies	211
10.5.	Taxation of immovable property under EU law	212

Chapter 11:	**Belgium** *by Joke De Bruycker and Emilie Maes*	213
11.1.	Legal rights over immovable property	213
11.1.1.	Non-tax law definition of immovable property	213
11.1.2.	Types of rights over immovable property	217
11.1.3.	Characterization of foreign legal rights over immovable property	220
11.2.	Taxation of immovable property under domestic law	221
11.2.1.	Application of income and corporate income taxes to immovable property	221

11.2.1.1.	Definition of immovable property	221
11.2.1.2.	Taxation of immovable property	222
11.2.1.2.1.	The cadastral revenue	222
11.2.1.2.2.	Rented or non-rented immovable property	224
11.2.1.2.2.1.	Private individual	224
11.2.1.2.2.2.	Professional individual	226
11.2.1.2.2.3.	A company	226
11.2.1.2.3.	Rights in rem	227
11.2.1.2.3.1.	Private individual	227
11.2.1.2.3.2.	A professional person and a company	230
11.2.1.2.4.	Capital gains	230
11.2.1.2.4.1.	Private individual	230
11.2.1.2.4.2.	Professional individual and company	231
11.2.1.3.	Cross-border aspects	232
11.2.2.	Application of wealth, inheritance, estate and gift taxes to immovable property	232
11.2.2.1.	Wealth tax	232
11.2.2.2.	Gift tax	232
11.2.2.3.	Inheritance or estate tax	234
11.2.3.	Application of VAT/GST and transfer taxes to immovable property	236
11.2.3.1.	Definition of immovable property	236
11.2.3.2.	Transfer of immovable property	237
11.2.3.2.1.	Interaction between VAT and registration duties	237
11.2.3.2.2.	Absence of look-through provision	238
11.2.3.2.3.	Contribution of immovable property to company (raising of capital in kind) and extraction (capital reduction)	239
11.2.3.2.3.1.	Contribution	239
11.2.3.2.3.2.	Extraction – acquisition of immovable property by shareholder of its company	240
11.2.3.2.4.	Different legal rights and co-ownership	241
11.2.3.2.4.1.	Transfer of rights in rem – periodical payments	241
11.2.3.2.4.2.	Division of immovable property held in co-ownership	242
11.2.3.3.	Income and expenses	243
11.2.3.4.	Special rates and advantageous regimes	243
11.3.	Taxation of immovable property under tax treaties	244
11.3.1.	Definition of immovable property	244
11.3.2.	Allocation of taxing rights over immovable property	245

11.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	246
11.3.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	247
11.3.5.	Non-discrimination tax treaty issues regarding the taxation of immovable property	248
11.4.	Taxation of immovable property under EU law	249
11.4.1.	Immovable property located outside Belgium – individual income tax	249
11.4.2.	Roll-over capital gains tax on disposal of immovable property	251
11.4.3.	Transfer of a new immovable property and the accessory land	252
11.4.4.	Taxation of the letting of immovable property: Active versus passive rent	254
11.4.5.	Tenant pays renovation works in return for lower rent – taxable service?	256
Chapter 12:	**Canada** *by Geoffrey Loomer*	257
12.1.	Legal rights over immovable property	257
12.1.1.	Non-tax law definition of immovable property	257
12.1.1.1.	Real property in the common law provinces	257
12.1.1.2.	Immovable property in Quebec	259
12.1.2.	Types of rights over immovable property	260
12.1.2.1.	Real property rights in the common law provinces	260
12.1.2.2.	Immovable property rights in Quebec	263
12.1.2.3.	Aboriginal title	264
12.1.3.	Characterization of foreign legal rights over immovable property	265
12.2.	Taxation of immovable property under domestic law	266
12.2.1.	Application of income and corporate income taxes to immovable property	267
12.2.1.1.	Income tax definition of real or immovable property	267
12.2.1.2.	Income from property, income from business and capital gains	268
12.2.1.3.	Absence of imputed income rules	271

12.2.1.4.	Specific exemptions: Principal residence, farm land and ecologically sensitive land	271
12.2.1.5.	Specific rules applicable to resource industries	273
12.2.1.6.	Taxation of non-residents earning income from immovable property	273
12.2.2.	The application of wealth, inheritance, estate and gift taxes to immovable property	276
12.2.2.1.	Provincial probate fees	277
12.2.2.2.	Provincial and municipal real property taxes	278
12.2.3.	Application of VAT/GST and transfer taxes to immovable property	279
12.2.3.1.	Goods and services tax	280
12.2.3.2.	Property transfer taxes	283
12.3.	Taxation of immovable property under tax treaties	284
12.3.1.	Definition of immovable property	284
12.3.2.	Allocation of taxing rights over immovable property	286
12.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	288
12.3.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	289
12.3.5.	Non-discrimination tax treaty issues regarding the taxation of immovable property	289
12.4.	Taxation of immovable property under EU law	290

Chapter 13:	**France** *by Mathieu Daudé*	291
13.1.	Legal rights over immovable property	291
13.1.1.	Legal definition of immovable property	291
13.1.1.1.	Immovable property by nature	292
13.1.1.2.	Immovable property by destination	292
13.1.1.3.	Immovable property by the object to which it applies	293
13.1.2.	Types of rights over immovable property	293
13.1.2.1.	Substantive components of ownership	294
13.1.2.1.1.	Right to use the property: Usus	294
13.1.2.1.2.	Right to enjoy the property: Fructus	294

13.1.2.1.3.	Right to dispose of the property: Abusus	295
13.1.2.2.	Split of ownership	295
13.1.2.2.1.	Usufruct and bare ownership	295
13.1.2.2.2.	Servitudes	296
13.2.	Taxation of immovable property under domestic law	296
13.2.1.	Individual and corporate income tax	297
13.2.1.1.	Individual income tax	297
13.2.1.1.1.	Rental income	297
13.2.1.1.1.1.	The régime réel d'imposition	298
13.2.1.1.1.2.	The régime micro-foncier	299
13.2.1.1.1.3.	Imputation of real estate losses	300
13.2.1.1.2.	Taxation of capital gains	301
13.2.1.1.2.1.	Non-professional capital gains on immovable property	301
13.2.1.1.2.2.	Professional capital gains on immovable property	307
13.2.1.1.2.3.	Tax incentives	308
13.2.1.1.3.	Cross-border aspects	308
13.2.1.1.3.1.	Rental income	309
13.2.1.1.3.2.	Taxation of capital gains	311
13.2.1.2.	Corporate income tax	316
13.2.1.2.1.	Corporate income tax on income derived from immovable property	316
13.2.1.2.1.1.	General definition of income	316
13.2.1.2.1.2.	Real estate revenues	316
13.2.1.2.1.3.	Deductible real estate expenses	317
13.2.1.2.1.4.	Depreciation	317
13.2.1.2.2.	Corporate income tax on capital gains	318
13.2.1.2.3.	Cross-border aspects	318
13.2.2.	Wealth tax and inheritance/gift tax	319
13.2.2.1.	Wealth tax	319
13.2.2.1.1.	Internal law	319
13.2.2.1.1.1.	Taxable assets	319
13.2.2.1.1.2.	Calculation of the wealth tax	320
13.2.2.1.2.	Cross-border aspects	321
13.2.2.2.	Inheritance and gift tax	321
13.2.2.3.	3% tax	322
13.2.3.	VAT and registration duties – local taxes	325
13.2.3.1.	VAT and registration duties	325
13.2.3.2.	Property and dwelling taxes	327
13.2.3.2.1.	Property tax (taxe foncière)	328

13.2.3.2.2.	Dwelling tax (taxe d'habitation)	329
13.2.3.3.	Tax assessment	329
13.2.3.4.	Additional taxes and direct debits	330
13.3.	Taxation of immovable property under tax treaties	330
13.3.1.	Definition of immovable property	330
13.3.2.	Allocation of taxing rights over immovable property	332
13.3.3.	Tax treaty issues regarding application of inheritance, estate and gift taxes to immovable property	333
13.4.	Taxation under EU law	335
Chapter 14:	**Germany** *by Stefanie Baur and Sophia Piotrowski*	337
14.1.	Legal rights over immovable property	337
14.1.1.	Non-tax law definition of immovable property	337
14.1.2.	Types of rights over immovable property	339
14.1.2.1.	Ownership	340
14.1.2.2.	Limited real property rights	341
14.1.2.2.1.	Rights of sale and exploitation	341
14.1.2.2.2.	Rights of use	341
14.1.2.2.3.	Purchase rights	343
14.1.3.	Characterization of foreign legal rights over immovable property	344
14.2.	Taxation of immovable property under domestic law	345
14.2.1.	Application of income and corporate income taxes to immovable property	345
14.2.1.1.	Definition of immovable property	345
14.2.1.2.	Taxation of immovable property	346
14.2.1.2.1.	Personal tax liability	346
14.2.1.2.2.	Types of income from immovable property	347
14.2.1.3.	Third-party rights	351
14.2.1.4.	Cross-border aspects	351
14.2.1.4.1.	Taxation of foreign (as compared to domestic) immovable property	351
14.2.1.4.2.	Taxation of non-residents on immovable property	353
14.2.1.4.3.	Local immovable property as permanent establishment	353
14.2.2.	Application of wealth, inheritance, estate and gift taxes to immovable property	355

14.2.2.1.	General overview	355
14.2.2.2.	Definition of immovable property	356
14.2.2.3.	Personal tax liability and personal circumstances of the receiver	357
14.2.2.4.	Material tax liability	358
14.2.2.4.1.	Taxable acquisition	358
14.2.2.4.2.	Tax exemptions	359
14.2.2.5.	Valuation of immovable property	360
14.2.2.5.1.	Domestic immovable property	361
14.2.2.5.2.	Foreign immovable property	362
14.2.3.	Application of VAT/GST and transfer taxes to immovable property	363
14.2.3.1.	General overview	364
14.2.3.2.	Leasing and letting of immovable property	366
14.2.3.3.	Sale of immovable property	367
14.2.3.4.	Construction work of immovable property	369
14.3.	Taxation of immovable property under tax treaties	370
14.3.1.	Definition of immovable property	370
14.3.2.	Allocation of taxing rights over immovable property	372
14.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	374
14.3.4.	Tax treaty issues regarding application of inheritance, estate and gift taxes to immovable property	376
14.3.5.	Non-discrimination tax treaty issues regarding the taxation of immovable property	378
14.4.	Taxation of immovable property under EU law	379
14.4.1.	Income taxation	380
14.4.1.1.	Limitation on the deductibility of losses, section 2a (1)(1) EStG and negative tax progression clause section 32b EStG	380
14.4.1.2.	Deductibility of special expenditures (Sonderausgaben), section 50(1)(3) EStG	381
14.4.1.3.	Tax advantages for immovable property	381
14.4.2.	Inheritance and gift taxation	383
14.4.2.1.	Tax exemptions, section 13 et seq. ErbStG	383
14.4.2.2.	Valuation of foreign immovable property vs domestic immovable property	384
14.4.2.3.	Special rules on limited tax liability	385

Chapter 15:	**Italy** *by Michele Gusmeroli and Paolo Ruggiero*	387
15.1.	Legal rights over immovable property	387
15.1.1.	Non-tax law definition of immovable property	387
15.1.1.1.	General remarks	387
15.1.1.2.	Per se immovable property under article 812(1) Civil Code	388
15.1.1.3.	Constructive immovable property under article 812(2) Civil Code	389
15.1.1.4.	Particular assets	390
15.1.2.	Types of rights over immovable property	392
15.1.2.1.	Full ownership	392
15.1.2.2.	Other rights in rem	393
15.1.2.2.1.	Superficies	394
15.1.2.2.2.	Emphyteusis	395
15.1.2.2.3.	Usufruct, use and habitation	395
15.1.2.2.4.	Encumbrances	396
15.1.2.3.	Joint ownership	396
15.1.3.	Characterization of foreign legal rights over immovable property	396
15.1.3.1.	Property rights under article 51(1) Law 218/1995	397
15.1.3.2.	Property rights acquisition under article 51(2) Law 218/1995	398
15.2.	Taxation of immovable property under domestic law	400
15.2.1.	Application of income and corporate income taxes to immovable property	400
15.2.1.1.	Definition of immovable property	400
15.2.1.2.	Taxation of immovable property	401
15.2.1.2.1.	Immovable property unrelated to a business activity	401
15.2.1.2.2.	Immovable property related to business activity	405
15.2.1.3.	Cross-border aspects	407
15.2.2.	Application of wealth, inheritance, estate and gift taxes to immovable property	409
15.2.2.1.	Wealth tax	409
15.2.2.1.1.	Definition of immovable property	409
15.2.2.1.2.	Taxation of immovable property	410
15.2.2.1.3.	Cross-border aspects	410
15.2.2.2.	Inheritance and gift tax	411
15.2.2.2.1.	Definition of immovable property	411

15.2.2.2.2.	Taxation of immovable property	411
15.2.2.2.3.	Cross-border aspects	413
15.2.3.	Application of VAT/GST and transfer taxes to immovable property	414
15.3.	Taxation of immovable property under tax treaties	417
15.3.1.	Definition of immovable property	417
15.3.2.	Allocation of taxing rights over immovable property	419
15.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	421
15.3.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	423
15.3.5.	Non-discrimination tax treaty issue regarding the taxation of immovable property	424
15.4.	Taxation of immovable property under EU law	425
15.4.1.	Rental income substitute tax (cedolare secca)	425
15.4.2.	Capital gains substitute tax	426
15.4.3.	Inheritance tax	427
15.4.3.1.	Tax basis calculation	428
15.4.3.2.	Cultural value exemption(s)	429

Chapter 16:	**Netherlands** *by Lonneke van Moorselaar*	433
16.1.	Legal rights over immovable property	433
16.1.1.	Non-tax law definition of immovable property	433
16.1.2.	Types of rights over immovable property	436
16.1.2.1.	Ownership	436
16.1.2.2.	Long Lease	436
16.1.2.3.	Servitude/easement	437
16.1.2.4.	Right of superficies	437
16.1.2.5.	Usufruct	438
16.1.2.6.	Mortgage	438
16.1.2.7.	Apartment right	438
16.1.2.8.	Co-ownership	438
16.1.2.9.	Personal rights	439
16.1.3.	Characterization of foreign legal rights over immovable property	439

16.2.	Taxation of immovable property under Netherlands law	440
16.2.1.	Application of income and corporate income taxes to immovable property	440
16.2.1.1.	Definition of immovable property	440
16.2.1.2.	Taxation of immovable property	440
16.2.1.2.1.	Income tax	440
16.2.1.2.1.1.	Box 1 income (taxable income from activities and homeownership)	441
16.2.1.2.1.2.	Box 3 income	447
16.2.1.2.1.3.	Personal allowances for historic buildings	448
16.2.1.2.2.	Corporate income tax	448
16.2.1.2.2.1.	Participation exemption	449
16.2.1.2.2.2.	Fiscal investment institution	450
16.2.1.3.	Cross-border aspects	451
16.2.1.3.1.	Residents of the Netherlands with foreign immovable property	451
16.2.1.3.2.	Non-residents with Dutch immovable property	452
16.2.2.	Application of wealth, inheritance, estate and gift taxes to immovable property	452
16.2.3.	Application of VAT and transfer taxes to immovable property	455
16.2.3.1.	Main principles of VAT and immovable property	455
16.2.3.1.1.	Supply of immovable property	456
16.2.3.1.1.1.	Supply of a newly developed or redeveloped building	456
16.2.3.1.1.2.	Supply of building land	457
16.2.3.1.1.3.	Option for a taxable supply	458
16.2.3.1.1.4.	Transfer of going concern	458
16.2.3.1.1.5.	Transfer of beneficial ownership	458
16.2.3.1.2.	Letting and leasing of immovable property	458
16.2.3.1.2.1.	Letting plus/service charges	459
16.2.3.1.3.	Recovery of input VAT/revision rules	459
16.2.3.1.4.	Overlap of VAT and real estate transfer tax	460
16.2.3.2.	RETT	460
16.2.3.3.	Compatibility of RETT with Capital Duty Directive 2008/7/EC	462
16.3.	Taxation of immovable property under tax treaties	463
16.3.1.	Definition of immovable property	463
16.3.2.	Allocation of taxing rights over immovable property	463
16.3.2.1.	Article 6	464

16.3.2.2.	Article 13	465
16.3.2.3.	Article 22	466
16.3.2.4.	Method of avoidance of double taxation	466
16.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	467
16.3.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	469
16.3.5.	Non-discrimination tax treaty issues regarding taxation of immovable property	470
16.4.	Taxation of immovable property under EU law	470
Chapter 17:	**Spain** *by Eva Aliaga Agulló and Juan Benito Gallego López*	473
17.1.	Legal rights over immovable property	473
17.1.1.	Non-tax law definition of immovable property	473
17.1.2.	Types of rights over immovable property	476
17.1.3.	Characterization of foreign legal rights over immovable property	479
17.1.3.1.	Preliminary questions	479
17.1.3.2.	Rules of international jurisdiction: Court on immovable property located in Spain	479
17.1.3.3.	Determination of the applicable law: The law governing property rights/issue of "characterization"	480
17.2.	Taxation of immovable property under domestic law	483
17.2.1.	Application of income and corporate income taxes to immovable property	483
17.2.1.1.	Definition of immovable property	483
17.2.1.2.	Taxation of immovable property	485
17.2.1.2.1.	Relevance of building and land registries for tax purposes in personal income tax or corporate tax	485
17.2.1.2.2.	Imputation of income from immovable property	486
17.2.1.2.3.	Computation of income deriving from immovable property	487
17.2.1.2.3.1.	Income deriving from the ownership of immovable property	488

17.2.1.2.3.2.	Income deriving from the transfer of immovable property	490
17.2.1.2.4.	Tax rates applicable to income from immovable property	492
17.2.1.2.5.	Tax incentives for agricultural immovable property and for immovable property of cultural/historical interest	492
17.2.1.3.	Cross-border aspects	493
17.2.1.3.1.	Taxation of foreign (as compared to domestic) immovable property	493
17.2.1.3.2.	Tax case law/administrative guidelines/literature (if any) regarding the tax treatment of foreign legal rights over immovable property	494
17.2.1.3.3.	Taxation of non-residents (as compared to residents) on immovable property	495
17.2.1.3.4.	Conditions for local immovable property to qualify as a PE and related consequences	498
17.2.2.	Application of wealth, inheritance, estate and gift taxes to immovable property	499
17.2.2.1.	General perspective	499
17.2.2.2.	Definition of immovable property in wealth, inheritance, estate and gift taxes	500
17.2.2.3.	Taxation of immovable property	501
17.2.2.3.1.	Importance of the buildings and land registries for wealth tax and inheritance, estate and gift tax/ imputation of immovable property	501
17.2.2.3.2.	Quantification of taxes	501
17.2.2.3.3.	Tax rates	503
17.2.2.3.4.	Tax incentives for immovable property destined for farming and immovable property of cultural interest	504
17.2.2.4.	Cross-border aspects	505
17.2.2.4.1.	Taxation of foreign immovable property	505
17.2.2.4.2.	Tax treatment of foreign legal rights over immovable property	506
17.2.2.4.3.	Differences in taxation treatment between residents and non-residents	506
17.2.3.	Application of VAT/GST and transfer taxes to immovable property	507
17.2.3.1.	Definition of immovable property	507
17.2.3.2.	Taxation of immovable property	510
17.2.3.2.1.	Computation	510

17.2.3.2.2.	Tax rates	511
17.2.3.2.3.	Tax incentives for agricultural immovable property and for immovable property of cultural/historical interest	511
17.2.3.3.	Cross-border aspects	512
17.2.3.3.1.	Taxation of foreign immovable property and of foreign legal rights over immovable property	512
17.2.3.3.2.	Conditions for local immovable property to qualify as a PE and related consequences	513
17.3.	Taxation of immovable property under tax treaties	514
17.3.1.	Definition of immovable property	514
17.3.2.	Allocation of taxing rights over immovable property	516
17.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	518
17.3.4.	Tax treaty issues regarding application of inheritance, estate and gift taxes to immovable property	520
17.3.5.	Non-discrimination tax treaty issues regarding taxation of immovable property	521
17.4.	Taxation of immovable property under EU law	522
17.4.1.	Introduction	522
17.4.2.	Taxation of income	523
17.4.3.	Taxation of wealth and inheritances, estates and gifts	524

Chapter 18:	**United Kingdom** *by Justin Hamer*	529
18.1.	England and Wales	529
18.1.1.	Legal rights over immovable property	529
18.1.1.1.	Non-tax law definition of immovable property	529
18.1.1.1.1.	Freehold estate	531
18.1.1.1.2.	Leasehold estate	531
18.1.1.1.3.	Commonhold	532
18.1.1.1.4.	Easements	532
18.1.1.1.5.	Security over land	533
18.1.1.1.5.1.	Legal mortgage	533
18.2.	Taxation of immovable property under domestic law	536
18.2.1.	Introduction	536

18.2.2.	Taxation of individuals	536
18.2.3.	Interest	538
18.2.4.	Capital allowances	540
18.2.5.	Other expenses	541
18.2.6.	Relief for losses	541
18.2.7.	Investment vs trading	541
18.2.8.	High-value residential property	543
18.2.9.	Future changes	544
18.2.10.	Application of wealth, inheritance, estate and gift taxes to immovable property	545
18.2.11.	Business property relief	547
18.2.12.	Agricultural property relief	548
18.2.13.	BPR and APR restrictions on the deductibility of debts	550
18.2.14.	Woodlands	550
18.2.15.	Heritage assets	551
18.2.16.	VAT and transfer taxes	551
18.2.17.	SDLT	554
18.3.	Taxation of immovable property under tax treaties	555
Chapter 19:	**United States** *by Monica Gianni*	559
19.1.	Legal rights over immovable property	559
19.1.1.	Non-tax law definition of immovable property	559
19.1.2.	Types of rights over immovable property	560
19.1.2.1.	Concurrent ownership interests	562
19.1.2.1.1.	Tenancy in common	562
19.1.2.1.2.	Joint tenancy	563
19.1.2.1.3.	Tenancy by the entirety	563
19.1.2.1.4.	Community property	563
19.1.2.2.	Scope of rights in immovable property	564
19.1.2.3.	Effect of encumbrances	564
19.1.2.3.1.	Easements and profits	564
19.1.2.3.2.	Covenants that run with the land	565
19.1.2.3.3.	Licences/leases	565
19.1.2.3.4.	Zoning regulations and ordinances	565
19.1.3.	Characterization of foreign legal rights over immovable property	566
19.2.	Taxation of immovable property under US law	566
19.2.1.	Application of income and corporate income taxes to immovable property	566

19.2.1.1.	Definition of immovable property	566
19.2.1.1.1.	Real estate investment trusts	566
19.2.1.1.2.	FIRPTA	567
19.2.1.2.	Taxation of immovable property	570
19.2.1.2.1.	Relevance of buildings and land registries for income/corporate income tax purposes	570
19.2.1.2.2.	Imputation of income from immovable property	570
19.2.1.2.3.	Computation of income from immovable property	570
19.2.1.2.3.1.	Computation of rental income	570
19.2.1.2.3.2.	Computation of gain/loss on disposition	574
19.2.1.2.4.	Tax rates applicable to income from immovable property	576
19.2.1.2.5.	Tax incentives for agricultural immovable property and immovable property of cultural/historical interests	577
19.2.1.2.5.1.	Soil and water conservation	577
19.2.1.2.5.2.	Land conditioning expenditures	578
19.2.1.2.5.3.	Reforestation expenditures	578
19.2.1.2.5.4.	Rehabilitation credit	578
19.2.1.2.5.4.	Charitable contributions	579
19.2.1.3.	Cross-border aspects	579
19.2.1.3.1.	Taxation of foreign immovable property	579
19.2.1.3.2.	Tax case law/administrative guidelines/literature regarding the tax treatment of foreign legal rights over immovable property	580
19.2.1.3.3.	Taxation of non-residents on immovable property	580
19.2.1.3.3.1.	Dispositions of USPRIs	581
19.2.1.3.3.2.	Distributions of USRPIs	582
19.2.1.3.3.3.	Withholding	583
19.2.1.3.4.	Conditions for local immovable property to qualify as permanent establishment and related consequences	587
19.2.2.	Application of estate and gift taxes to immovable property	588
19.2.2.1.	General US federal estate tax rules	588
19.2.2.2.	General US federal gift tax rules	589
19.2.2.3.	Computation of estate and gift tax	589
19.2.2.4.	Special rules for US immovable property	590
19.2.2.4.1.	Qualified personal residence trust	590
19.2.2.4.2.	Qualified conservation easement	591
19.2.2.4.3.	Land used in a farm or business	591
19.2.2.4.4.	Foreign-owned US immovable property	591

19.2.3.	Transfer taxes	592
19.3.	Taxation of immovable property under tax treaties	593
19.3.1.	Definition of immovable property	593
19.3.2.	Allocation of taxing rights over immovable property	594
19.3.3.	Relationship between treaty provisions on immovable property income, business profits and other income	595
19.3.4.	Tax treaty issues regarding the application of inheritance, estate and gift taxes to immovable property	596
19.3.5.	Non-discrimination tax treaty issues regarding the taxation of immovable property	598

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Sample chapter

Italy

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15.1. Legal rights over immovable property

15.1.1. Non-tax law definition of immovable property

15.1.1.1. General remarks

The definition of immovable property in the Italian Civil Code is provided under article 812 (subtitled "Distinction as to property"), which states as follows:[3]

> The soil, water sources and water courses, trees, buildings and other constructions, even if joined to the soil for a temporary purpose, and in general everything that is artificially or naturally annexed to the soil are immovable property.
>
> Mills, baths, and other floating buildings are also considered immovable property when they are securely attached to the bank or the bed and are destined to remain so permanently for their utilization.
>
> All other property is movable.

Article 812 of the Civil Code identifies two categories of immovable property: (i) per se immovable property in the first paragraph and (ii) constructive immovable property in the second paragraph. The third paragraph defines movable property on a residual basis and will not be dealt with further in this report. The rationale behind the distinction between immovable and movable property is that of providing specific tracking rules for the former, while the latter circulates more freely.[4]

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3. The following translation (as all subsequent translations from the Civil Code) is taken from M. Beltramo et al., *The Italian Civil Code and Complementary Legislation* (Oceana/Oxford University Press 2007); the present authors amended this article's translation by inserting the missing reference to trees (which is indeed present in the original Italian text).
4. O.T. Scozzafava, *Dei beni (commentaries to Articles 810 to 821 of the Italian Civil Code)*, in *Commentario al Codice Civile* (P. Schlesinger ed., Milan, Giuffré 1999).

15.1.1.2. Per se immovable property under article 812(1) Civil Code

Soil is the quintessential immovable property. The scope of this definition should not be limited to the topsoil, but should extend both below (underground, with all the contents thereof)[5] and above (e.g. airspace).[6] Soil is considered immovable property only to the extent it remains fixed: once detached, all parts of the soil become movables (e.g. fertile topsoil, rocks and minerals).

Water sources and water courses mean natural streams of flowing water: brooks, creeks, rivers and lakes.[7] They must be (i) natural and the water must be (ii) flowing. Artificial streams such as e.g. channels and penstocks may very well be immovable property in their own right, but the water flowing through or into them is considered as movable property. Still water as well is considered as movable property,[8] whether naturally or artificially contained. In principle, the landowner may use the water on his land;[9] however, special legislation has effectively made most water public.[10]

Trees are only considered immovable property when they are fixed to the soil:[11] the tree does not need to be alive, as long as it is standing on its roots and does not fall; fallen trees become movable property. Small and

5. Under article 840 of the Civil Code, ownership of the soil extends to the subsoil, with all that is contained therein, and the owner can perform any excavation work that does not cause harm to a neighbour. However, this principle has several exceptions (for mines, *see* section15.1.1.4.).
6. M. Petri, *Article 812*, in *Commentario al Codice Civile* (P. Rescigno ed., Milan, Giuffré 2014).
7. Under article 822 of the Civil Code, rivers, streams and lakes belong to the state and are considered public domain.
8. There is indeed a paradox: flowing water is immovable property, still water is movable property; in much the same way, the double tax treaty definition of immovable property includes livestock, while dead cattle are movable property. This shows that juridical definitions sometimes have little to do with common experience and should be considered in their own right.
9. Article 909(1) of the Civil Code (right to water existing in land) provides that "the owner of the ground has the right to use the water existing in it, subject to the provisions of special laws on public waters and subterranean water". This rule provides as to the right to use the water, rather than as to the property thereof; *see* M. Caprio, *Article 909*, in *Commentario al Codice Civile* (P. Rescigno ed., Milan, Giuffré 2014).
10. Water was first made public property under Law 36 of 5 January 1994 (so-called "Galli" law). The matter is now dealt with by Law 152 of 3 January 2006, which supersedes the Galli law and provides that both surface and underground water belong to the state.
11. Case law has expanded the scope of the term "trees" to encompass any vegetable growing on the soil; G. Bruno, *Article 812*, in *Commentario al Codice Civile* (G. Alpa & V. Mariconda eds., Milan, Ipsoa 2005).

medium-size plants can be considered movable property, to the extent they are kept in vases: once transplanted onto the soil, they become immovable property.

Buildings and other constructions are joined to the soil by their very nature, but their property can circulate separately from that of the underlying soil due to the right of superficies (*see* section 15.1.2.2.1.). Any construction may qualify, irrespective of the materials it is built with: e.g. a gas station[12] or an olive mill. Hydroelectric power plants include dams and penstocks, but there used to be an issue as to whether or not Penton wheels (water turbines) should also have been included: from a civil law perspective, they should not since they are simply bolted and screwed in place;[13] from a tax law perspective, however, they were eventually included in the relevant taxable base (*see* section 15.2.2.1.1.).

15.1.1.3. Constructive immovable property under article 812(2) Civil Code

These goods – mills, baths and other floating buildings – are not always considered immovable property: they become so due to their artificial connection to the soil (i.e. riverbanks or riverbeds) and only for the time such a connection remains in place.[14] Such requirement also applies to mills and baths and not only to other floating buildings.

The connection must be both actual (unattached property is still considered as movable) and prospective (the goods are destined to remain connected permanently for their utilization): once attached, the item is no longer an autonomous good and cannot be separated without its being disrupted or substantially altered. The connection must be stable and secure:[15] bolting and screwing an item in place is not considered stable enough in order for the item to become immovable property, let alone simply leaving the item in place without any connection whatsoever.

Under article 812(2), "mills" are floating river mills only: windmills and land watermills fall within the scope of article 812(1) and are considered per se immovable property. Floating buildings as well must be solidly connected to the soil (an anchored item does not qualify) and permanently

12. IT: Supreme Court, Case 2200 (1977).
13. IT: Supreme Court, Case 17933 (2004).
14. Scozzafava, *supra* n. 4.
15. The original Italian word is "*saldamente*", which conveys both meanings.

destined to remain so for their utilization. Since the goods are destined to remain connected permanently for their utilization, items not utilized for whatever reason should qualify as movable goods (even if permanently fixed to riverbanks).

15.1.1.4. Particular assets

"Ships" is defined as follows under article 136 of the Navigation Code:[16] "[A]ny construction destined for water shipment, also for the purpose of towing, fishing, pleasure or for other purposes." The rules provided for ships also apply to floating buildings, to the extent they are considered as movable property (i.e. unless they are considered as constructive immovable property under the above rules). The term "boats" is not defined as such under the law:[17] in non-technical language it is commonly understood to refer either to (some) minor ships[18] or to a ship (or any floating building) destined for sport or recreation.[19] A ship has two main features: it (i) floats and (ii) is suitable to navigate. Therefore, a ship comes into existence with the launch: only upon being launched does a ship effectively float and become suitable to navigate. Registration in the Italian Naval Register takes place either (i) if the majority[20] of the ship belongs to Italian/EU individuals/entities, or (ii) if the ship is managed by an Italian permanent establishment (PE) of the non-EU owner, directed by an Italian/EU individual/entity (domiciled where the ship is registered).

"Aircrafts" is defined as follows under article 743 of the Navigation Code: "[A]ny machine destined for airborne transportation of people or goods." Remote-controlled flying objects (e.g. drones) are also considered as aircrafts. Aircrafts fall within two main categories: state aircrafts (military ones and those which are both state owned and used for institutional state services) and private aircrafts (all others). In order [to be allowed] to fly, aircrafts must be registered in the National Aeronautical Register; this is granted if the nationality requirements are met under article 756 of the Navigation Code. The aircraft must fully or mainly belong to: (a) an Italian

16. IT: King Decree 327 of 30 March 1942.
17. "Ship" translates as "*nave*", which is defined under article 136 of the Navigation Code; "boat" translates as "*barca*", which is not a juridical term.
18. Major and minor ships are distinguished under the Navigation Code: major ships are built for the open seas; minor ships are built for coastal navigation, harbour service and inland waterway navigation.
19. IT: Legislative Decree 171 of 18 July 2005.
20. The Navigation Code states "more than twelve carats": a "carat" (as in a golden alloy) is one twenty-fourth of the ownership of a ship, so that this means more than 50%.

or EU public administration; (b) an Italian or EU individual; (c) companies incorporated or established in Italy or in the EU, provided that (i) their capital fully or mainly belongs to Italian/EU individuals or to Italian/EU companies with a similarly Italian/EU shareholder base and (ii) their chairman, managing director and the majority of directors are Italian/EU individuals. Upon registration in the National Aeronautical Register, an aircraft becomes subject to Italian law. Registered ships and aircrafts are "registered assets": any contract transferring their ownership (as well as other deeds) must be in written form, under penalty of being considered null and void.

"Mines" and "quarries" are defined under the Mining Law,[21] which provides for the research and extraction of mineral substances and underground energy suitable for industrial use. The legal distinction is different from the common language meaning[22] and is based on the substances being extracted, rather than on how and where the extraction activity is carried out. A "mine" deals with the research and extraction of (a) metal ore, either to be smelted or directly usable; (b) graphite, fuels (solid, liquid and gaseous), asphalt and bituminous rocks; (c) phosphates and similar minerals; (d) precious stones and similar minerals; and (e) radioactive substances, mineral and thermal waters, steams and gas. A "quarry" deals with the research and extraction of (a) peat; (b) construction materials; (c) earth pigments, diatomaceous earth, quartz and similar materials; and (d) other materials suitable for industrial use, which are not extracted in mines. A mine cannot be privately owned: it belongs to the state (or to autonomous regions) and the right of extraction therefrom is granted under a concession regime. A quarry, on the other hand, as a general rule is managed (directly or indirectly) by the landowner; however, if the landowner does not exploit the quarry in a suitable way, the relevant public authority can grant a third party the concession to exploit the quarry: in this case, arm's length compensation is paid by the concession grantee to the landowner.

"Railways" are considered public domain (if belonging to the State) under article 822 of the Civil Code. However, railways no longer belong to the state (and hence are not public domains): national railways were first established as a public entity[23] and later incorporated as a company.[24] As a result,

21. IT: King Decree 1443 of 29 July 1927.
22. In non-technical language, "mine" is generally understood as involving any extraction activity carried out underground (open-pit mines being the exception confirming the rule); "quarry" involves the same activities carried out on the ground surface.
23. IT: Law 210 of 17 May 1985.
24. IT: Law Decree 333 of 11 July 1992, converted into Law 359 of 8 August 1992, and Inter-Ministerial Committee for Economic Planning resolution of 12 August 1992.

railways today are private property (albeit destined for public service). Consequently, they may be rented out to private tenants under private law and any relating litigation is subject to ordinary jurisdiction.[25] The term "railways" includes railway stations, electrical substations and all pertinences necessary to the functionality and preservation thereof; the term does not include trains.

15.1.2. Types of rights over immovable property

15.1.2.1. Full ownership

The content of the full ownership right is defined as follows under article 832 of the Civil Code:

> The owner has the right to enjoy and dispose of things fully and exclusively, within the limits and with observance of the duties established by the legal order.

The ownership right can therefore be distinguished in two basic sub-rights: (i) the right to enjoy and (ii) the right to dispose. Both these rights are full (with no limits, apart from those explicitly provided for) and exclusive (meaning that only the owner has such rights and nobody else);[26] however, both rights are subject to the general limits and duties provided by the legal order, which implement the social purpose principle under the Italian Constitution.[27]

The right to enjoy means both (i) the right to use economically the property and (ii) the right to modify its productive organization (this latter also being termed *ius abutendi*).[28] As the ownership right is basically granted *erga omnes* (i.e. towards anyone), property law mainly deals with the limits to such right. The owner may therefore enjoy the property in any way that is not explicitly forbidden, but such right of enjoyment should not be exercised "badly". Indeed, property law provides for certain rules, which are based on an underlying judgement of what "good" behaviours are to be allowed

25. IT: Supreme Court, 27 Feb. 2006, No. 4269.
26. Exclusivity therefore means that the owner can forbid others to enter the property: this is acknowledged by article 841 of the Civil Code (enclosures), under which "the owner can enclose the land at any time."
27. Article 42(2) of the Constitution provides that private property is acknowledged and warranted under the law, which provides as to its origination, enjoyment and limits in order to ensure its social purpose and make it accessible to anyone.
28. M. Costantino, *Proprietà (diritto civile)*, in *Enciclopedia Giuridica Treccani* (loose-leaf).

and what "bad" behaviours are to be forbidden: the prohibition of emulative acts[29] derives from the moral principle of "*neminem laedere*" (thou shalt not damage anyone); the scope limitation in the power to exclude third parties from the enjoyment of the property[30] follows from economic considerations (what economists would term "Pareto efficiency" or "Pareto-optimal"); the duty to respect legal distances in constructions[31] is a consequence of "good neighbour" policies and so on.

The right to dispose is principally the right to sell, mortgage, donate or bequeath the full property; the owner may sell, mortgage, donate or bequeath any partial property right as well (*see* section 15.1.2.2.) and retain the residual right. The owner has the right to raze the building to the ground and the right to rebuild it; volume building rights also belong to the landowner, who might use them on another adjacent property of his or sell them to other adjacent landowners. However, the building right as such (*ius aedificandi*) no longer belongs to the landowner: while building had always been subject to some kind of local authorizations (granted for free), following the Bucalossi law[32] this was changed into a concession procedure (which requires payment of the relating fees); the building right was thus carved out from the ownership right and the landowner is only left with a legitimate interest.

15.1.2.2. Other rights in rem

Rights in rem are characterized by being (i) "absolute", as they can be enforced towards anyone (rather than towards a specific person); (ii) "immediate", as no cooperation is required from another person (as with obligations) and (iii) "typical", as they are set and new ones cannot be created.[33]

A distinction should be made between (a) rights *in re propria* (on the own property, i.e. full ownership) and (b) rights *in re aliena* (on the property of someone else). The latter are rights that limit the original ownership

29. Under article 833 of the Civil Code, the owner cannot perform acts that have no other purpose than that of harming or causing annoyance to others.
30. Under article 840(2) of the Civil Code, the owner of the soil cannot oppose the activities of third persons that take place at such depth in the subsoil or at such height in the space above it that he has no interest in excluding them.
31. Articles 873-908 provide for mandatory distances, lights and views and drainages.
32. IT: Law 10 of 28 January 1977; the matter is now dealt with by Presidential Decree 380 of 6 June 2001.
33. In this respect, *see* M. Comporti, *Diritti reali (diritto civile)*, in *Enciclopedia Giuridica Treccani* (loose-leaf).

right, subtracting certain of its particular features; rights *in re aliena* may be further distinguished as (i) guarantee rights in rem and (ii) enjoyment rights in rem.

Guarantee rights in rem are pledges[34] (for movable property) and mortgages[35] (for immovable property): they both grant their holder the right to sell the debtor property and take precedence over any other creditors on the sale proceeds, in the event the debtor defaults on its obligation. These guarantee rights will not be dealt with further in this report. Enjoyment rights in rem will be surveyed in the following sections dealing with superficies, emphyteusis, usufruct, use, habitation and encumbrances.

15.1.2.2.1. *Superficies*

The landowner may carve out the right to build and maintain a building over its land (which is called right of superficies) in favour of a third party, which becomes the owner of the building. The landowner can also sell a building separately from the land on which it is built. In the event the right of superficies is established for a fixed period of time, upon the expiry of the term the right dissolves and the landowner becomes the owner of the building. The right of superficies does not expire when the building is destroyed, but it dissolves if nothing is built for 20 years.[36]

Without the right of superficies, the owner of the land would also become owner of the building[37] (a refund of costs being due to the builder). The right of superficies is not only above land: it can be the right to build over an already existing building[38] or to build underground.[39] Even before any construction is built, the right of superficies can be sold, mortgaged, donated or bequeathed.[40]

34. Art. 2784 Civil Code.
35. Art. 2808 Civil Code.
36. Arts. 952-954 Civil Code.
37. Under article 934 of the Civil Code, any planting, structure or works existing upon or under the soil belong to the owner of the soil.
38. IT: Supreme Court, 5 June 1971, No. 1674.
39. Art. 955 Civil Code.
40. F. Roselli, *Article 952*, in *Commentario al Codice Civile* (P. Rescigno ed., Milan, Giuffré 2014).

15.1.2.2.2. *Emphyteusis*

Emphyteusis can be either perpetual or temporary: in this latter case, it cannot last less than 20 years. The tenant has the same rights that the owner would have to the fruits of the land, to treasure and to the utilization of the subsoil under special laws. The tenant must (i) improve the land and (ii) pay the grantor a periodic rent (in money or in kind). The tenant may sell, donate or bequeath his right: no payment is due to the grantor; upon establishing the right, however, the grantor may forbid the tenant any alienation for 20 years. Secondary emphyteusis (i.e. an emphyteusis over another one) is not allowed. The tenant is entitled to purchase the full ownership of the fund by paying the grantor an amount equal to the net present value of future rents.[41]

15.1.2.2.3. *Usufruct, use and habitation*

The usufructuary has the right to enjoy the property, but he must respect its economic destination; both natural and civil fruits belong to the usufructuary for the duration of his right. The duration of the usufruct cannot exceed the life of the usufructuary (if this latter is an individual); if established in favour of an entity, the usufruct cannot last more than 30 years. The usufructuary can sell his right for some time or for its entire duration, unless the deed establishing the usufruct explicitly forbids so. Apart from the expiry of the term, the usufruct may be cancelled due to non-exercise for 20 years, when it is reunited with the bare ownership and when the property is destroyed.[42]

Usufruct therefore involves both the basic sub-rights: (a) the right to enjoy and (b) the right to dispose (of course only the usufruct can be alienated rather than the full property). However, both such rights are somewhat dimmed with respect to those of the full owner: indeed, the rationale behind such limitation is that the property will eventually revert to the bare owner;[43] consequently, the usufructuary is bound to diligently preserve the property and the bare owner is acknowledged a residual interest in it (also in terms of paying the relating expenses).[44]

41. Arts. 957-977 Civil Code.
42. Arts. 978-1020 Civil Code.
43. L. Bigliazzi Geri, *Usufrutto, uso e abitazione (diritto civile)*, in *Enciclopedia Giuridica Treccani* (loose-leaf).
44. Art. 1005 Civil Code, under which extraordinary repairs are chargeable to the owner (with the usufructuary paying the owner an interest over amounts spent for extraordinary repairs).

Use and habitation are minor rights in rem, patterned after usufruct. The former entitles its holder to the use of a property and to the fruits therefrom, but only to the extent of his personal and family needs. The latter entitles its holder to live in a house, but only to the extent of his personal and family needs. Both rights are extremely personal: they cannot be sold or rented out.[45]

15.1.2.2.4. *Encumbrances*

An encumbrance is a burden over a property for the use of another property belonging to a different owner. Encumbrances can be established either mandatorily (in specific cases provided by law) or voluntarily: in the former case, a court decision usually creates the encumbrance and determines the compensation for the owner of the property receiving the burden. Typical encumbrance cases involve the passage over someone else's property, waters, aqueducts and electric cables. An encumbrance is cancelled when the two properties (i.e. that with the right and that with the burden) are reunited under the same owner or when the right is not exercised for 20 years.[46]

15.1.2.3. Joint ownership

Joint owners may each use the shared property, provided that they do not alter its destination and do not prevent other joint owners from using it. Both the enjoyment and the expenses of the property are in proportion to the ownership stakes: these are presumed to be equal. Each joint owner may sell, mortgage, donate or bequeath his property stake both to other joint owners and to third parties. Each joint owner may ask for the property to be divided.[47]

15.1.3. Characterization of foreign legal rights over immovable property

"*Lex rei sitae*" means "the law of the state where the property is situated": this principle is the basis for the characterization of foreign legal rights over

45. Arts. 1021-1026 Civil Code.
46. Arts. 1027-1099 Civil Code.
47. Arts. 1100-1116 Civil Code.

immovable property in Italy. The matter is provided for under article 51 of the Italian private international law recast (i.e. Law 218 of 31 May 1995, hereinafter Law 218/1995), which expressly states that:

> 51(1) [O]wnership, possession and other rights *in rem* are governed by the law of the State in which the property is situated;
>
> 51(2) [T]he acquisition of ownership, possession and other rights *in rem* is governed by the law of the State in which the property is situated, except for cases in which the acquisition of a property right derives from family relationships or an agreement.

15.1.3.1. Property rights under article 51(1) Law 218/1995

In order to analyse the characterization of foreign legal rights over immovable property in Italy, reference is to be made to the *lex rei sitae*, which regulates how to exercise real rights by the relevant holders as well as the actions that the latter may utilize for purposes of protecting their rights.[48] In this regard, foreign real rights that are not recognized in Italy shall not apply over properties located in the Italian territory. The same principle applies to protection remedies and the content of the real rights, since only those provided for by Italian laws will apply.

The essential elements grounding the principles outlined by article 51 of Law 218/1995 are the ownership, possession and other rights in rem, which are based on the power to enjoy and dispose of a particular property or to benefit from the same. Whenever foreign juridical concepts are concerned, their characteristics should correspond to the above-mentioned elements: foreign legal elements (such as common law liens or mortgages or Austrian rents) may also be re-conducted to those archetypes if – given their particular structure – they contain the essential characteristics of one of those elements provided for by article 51 of Law 218/1995.[49]

With regard to trust instruments, characterized by their nature of a fiduciary relationship whereby property is held by one party for the benefit of another (a trust is created by a settlor who transfers some or all of his property to a trustee, which holds that property for the trust's beneficiary), it produces

48. G.C.Venturini, *Diritti reali (diritto internazionale privato)*, in *Enciclopedia del diritto* XII, p. 777 (Milan, 1964); R. Luzzatto, *Proprietà in generale (diritto internazionale privato)*, in id., XXXVII, p. 301 (Milan, 1988).

49. Luzzatto, id., at 300; P. Benvenuti, *Sub Artt. 51-53, 55*, in *Riforma del sistema di diritto internazionale privato* (l. 31 maggio 1995, n. 218), S. Bariatti ed., Nuove leggi civ., p. 1325, 1327 (1996); M. Frigo, *Diritti reali (diritto internazionale privato)*, in *Enciclopedia del diritto, Aggiornamento*, III, p. 514 (Milan, 1999).

effects in Italy under Law 364 of 16 October 1989, which ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 (hereinafter Hague Convention).[50] The Hague Convention therefore imposes on Italian judges the acknowledgement of a trust[51] that has its related assets located in Italy but is created by a foreign subject and on the basis of that foreign law, providing for the applicable law as the one designated by the settlor[52] or, when no applicable law has been chosen, the law with which the trust is most closely connected.[53] As a consequence of the trust being acknowledged, trust property remains segregated from the trustee's personal property; on the other hand, the trustee may sue, be sued and appear in its capacity as trustee in front of notary publics or other public representatives.

15.1.3.2. Property rights acquisition under article 51(2) Law 218/1995

Lex rei sitae also provides for the acquisition of property rights as a basic rule (as well as the related cases of loss of property rights). However, article 51(2) of Law 218/1995 introduces an exception to the application of the law of the state where the property is situated: i.e. when the acquisition of such right derives from a family relationship or an agreement.[54]

The application of the *lex rei sitae* principle depends on whether or not the property right is acquired originally; in other words, a rule applies when no

50. The trust disciplined by the Hague Convention refers to "the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose." In particular, the trust contains the following characteristics: "(a) the assets constitute a separate fund and are not a part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law."

51. A. Giardina & G. Ponzanelli, *Commentario alla legge di esecuzione del trust*, in *Le nuove leggi civili commentate*, p. 1211 ff. (1993); L. Fumagalli, *La Convenzione dell'Aja sul trust ed il diritto internazionale privato italiano*, Dir. comm. int., p. 533 ff. (1992); M. Lupoi, *Introduzione ai trusts. Diritto inglese, Convenzione dell'Aja, Diritto italiano* (Milan, 1994).

52. Art. 6, Hague Convention.

53. Art. 7, Hague Convention.

54. With reference to contracts, the matter in the European Union is dealt with by the *Convention on the Law Applicable to Contractual Obligations 1980*, now superseded by the Rome I Regulation (593/2008).

previous legal claim existed over the property (*acquisto a titolo originario*); another one when the property right is transferred from a previous holder (*acquisto a titolo derivativo*).

On the one hand, according to major scholars,[55] the law of the state in which the property is situated applies to all cases of original acquisition of the property right (*acquisto a titolo originario*):[56] namely the occupation (*occupazione*), accrual of possession (*accessione*), specification (*specificazione*) and union or confusion (*unione o commistione*). The same principle also applies to the acquisition of a property right by means of prescription (*usucapione*).

On the other hand, in relation to cases when the title is transferred from a previous holder (*acquisto a titolo derivativo*), a specific distinction is to be made: (i) the *lex rei sitae* shall apply to the content, limits and modalities to exercise the property right and (ii) foreign law may apply with regard to the acquisition of the relevant title.

As a consequence of the above, property rights may be created over Italian assets under foreign rules that have no correspondence in Italian law – and that would not produce the same effects if they were provided for under Italian applicable laws. A typical example of a situation where a foreign law creates a title over an Italian real property concerns a foreign inheritance procedure. In such case, foreign law determines who the subject entitled to acquire the real right over the Italian property is, as well as the relevant formalities to obtain such right (e.g. automatically or by means of a specific acceptance), as established by the inheritance law of that specific country. On the other hand, the *lex rei sitae* (Italian law) provides for the content of the real right that the mentioned subject has obtained through the relevant foreign title.[57]

In any case, when foreign laws also apply for the acquisition of the property right, the relevant modalities to exercise such right are governed by the law of the state where the property is situated.[58] The *lex rei sitae* also applies in relation to disclosure and filing with the competent authorities of the relevant deeds of acquisition, assignment and loss of property rights.[59]

55. T. Ballarino, *Diritto Internazionale Privato Italiano* p. 222 (Cedam 2011).
56. Art. 922 et seq. Civil Code.
57. F. Mosconi & C. Campiglio, *Diritto Internazionale Privato e Processuale* p. 302 (Utet Giuridica, 2011).
58. Benvenuti, *supra* n. 49; Bariatti, *supra* n. 49, at 1325 ff.
59. IT: Law 218/1995, art 55.

15.2. Taxation of immovable property under domestic law

15.2.1. Application of income and corporate income taxes to immovable property

15.2.1.1. Definition of immovable property

The Italian income tax code (hereinafter IITC) does not have a specific definition of the term "immovable property". Accordingly, the definition relies on the term as defined in article 812 of the Civil Code. More precisely, the IITC refers to the general term "immovable property" in order to identify a residual class of asset that does not have to be registered into the land and building register.[60] For fiscal purposes, the main definition is instead related to the concept of "land and building" that have to be registered into the land and building registries.[61] The definition of building is provided by article 36(2) of the IITC, which refers to every urban building that is capable of generating income on its own. This provision has to be read in conjunction with the cadastral law.[62] According to article 4 of such law, "every building or permanent construction made of every material apart from the rural building has to be considered as urban building." This "physical concept" has to be linked with the tax side. According to the following article 5, "every part of a building that, as it is and by its own, is capable of producing income has to be considered as urban building." Accordingly, form a fiscal point of view, the concept of urban building refers to cadastral law and it links a physical concept associated with an autonomous capability of producing income.[63]

In principle, the cadastral physical concept does not differ much from article 812 of the Civil Code. However, it can be said that they are not strictly coincident and the cadastral definition is an autonomous concept in relation to the Civil Code provision. This seems to be the position also of the Italian Supreme Court. In decision 16824 of 21 July 2006, in order to determine if an electric power plant turbine has to be considered for fiscal purposes as movable or immovable property, the Court did not rely on the definition in the Civil Code. Indeed such definition was not taken into account because

60. Art. 70(1) IITC.
61. Art. 25 IITC.
62. IT: R.D.L. 532 of 13 April 1939, converted into Law 1249 of 11 August 1939.
63. An extensive analysis of the concept "urban building" as stated in the cadastral law is provided by the Italian Territory Agency in circular letter n. 4/t of 4May 2006.

it does not take into consideration technological progress and new advance techniques through which every material object can be incorporated into a land and thereby become a "building".[64]

Lastly, it can be concluded that the tax definition of immovable property (or more precisely land and building) relies completely on the cadastral law. The Civil Code concept assumes a marginal role only as far as the residual tax rule is concerned and more precisely on land and building that do not have to be registered in the land and cadastral register.

All the above refers to immovable property located in the Italian territory. As far as the immovable property located abroad is concerned, the IITC refers only to land and building. Since some taxation rules applicable to the Italian land and building are also applicable to the foreign land and building, it could be argued that the cadastral notion of land and building has to also be applied to the foreign ones.

15.2.1.2. Taxation of immovable property

15.2.1.2.1. *Immovable property unrelated to a business activity*

The Italian tax system can be qualified as a scheduler one. There are six class of income: income from immovable property, income from capital, self-employment income, labour income, business income and miscellaneous income.

Income from immovable property refers to income related to land and buildings that have to be registered in the land and building register.[65] Immovable property income can be divided into three subcategories, the first two (*reddito dominicale* and *reddito agrario*) related to the land and the third that refers to the buildings (*reddito dei fabbricati*). As a general rule, income is taxed on accrual basis[66] and the taxable person is the person that has legal ownership on the land and building. There is a deemed income that is

64. Another clear example of an autonomous physical concept of immovable property (better, building) refers to solar panels. Indeed, in Circular Letter 36 of 19 December 2013, the Italian revenue agency did not consider a solar panel permanently incorporated into land a building on condition that the solar panel could be removed without losing its capability of being reinstalled. According to the Civil Code, every construction that is incorporated into land, even if not permanently, has to be considered an immovable property.
65. Art. 25 IITC.
66. Art. 26(1) IITC.

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