

Real Estate 2021

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Real Estate 2021

Contributing editors**Patrick Williams and Devina Rana****Fried, Frank, Harris, Shriver & Jacobson LLP**

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Real Estate*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Finland, Indonesia, Ireland, Spain, United Arab Emirates and Vietnam.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Williams and Devina Rana of Fried, Frank, Harris, Shriver & Jacobson LLP, for their continued assistance with this volume.



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Switzerland

Corrado Rampini

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GENERAL

Legal system

- 1 | How would you explain your jurisdiction's legal system to an investor?

Switzerland has a civil law system, with most of the law regulated by statute. Compared with those in other jurisdictions, Swiss statutes, in particular older ones, are often short in style and leave room for interpretation and jurisprudence. In general, Swiss law allows parties to sue for specific performance or damages. Injunctions may be granted if the plaintiff can substantiate by prima facie evidence that the defendant is in breach, or a breach is threatened, and the plaintiff would suffer disadvantage from the breach that is not easily remediable.

Oral contracts are binding under Swiss law unless the law requires a specific form (such as for real estate contracts). As a general rule, courts are free to consider any form of evidence (documents, witnesses, site visits, experts, interrogation of the parties).

Real estate transactions are mostly regulated by federal law, but many relevant topics, such as zoning and taxes, are also governed by local regulations (ie, cantonal law and communal law).

Land records

- 2 | Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Switzerland has a land register, in which all rights in real property are registered. A bona fide purchaser of a property may rely on the fact that no other rights exist than those registered in the land register – with a few specific exemptions of legal liens, –mostly for taxes or workmen's liens, which may exist independently of registration. This system makes title searches or title insurance, customary in other jurisdictions, unnecessary.

Registration and recording

- 3 | What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The acquisition of real estate (including building rights) requires notarisation of a purchase agreement (signing) and registration in the land register (closing). Ownership passes with registration in the land register.

Notaries in the canton where the property is located are exclusively competent to notarise sale and purchase agreements. In some German-speaking cantons the notaries for real estate matters are state officials. In other cantons the notaries are private practitioners. In two cantons the parties may choose between private and state notaries.

To convey title, notary fees, land register fees and (in some cantons) transfer taxes accrue. These fees and taxes vary from canton to canton and may be quite substantial in some cases (up to 3.5 per cent, even for larger properties). Depending on the canton, the fees are paid by the buyer or split equally between the parties.

No particular form is required for leases; they are typically agreed in writing.

Foreign owners and tenants

- 4 | What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Swiss law restricts the acquisition of real estate that is not permanently used for commercial purposes (non-commercial property), such as residential or state-used property, unbuilt land or permanently vacant property (the Lex Koller). Foreign investors need a special permit to acquire non-commercial property. As permits are only available in a limited number of special cases, foreign investors are practically excluded from acquiring non-commercial property. The most relevant exemption in practice where permits are available is for foreigners to acquire a vacation home in certain tourist regions that expressly provide for such permits.

Legal entities with their corporate seat outside Switzerland are deemed to be foreign under the regulations, regardless of who controls them. Legal entities with their corporate seat in Switzerland are deemed to be foreign if foreign investors control them. The law takes a very economic view to determine whether a Swiss entity is foreign-controlled; namely, it looks through the entire holding and financing structure, but is strictly formal as soon as an entity with its corporate seat outside Switzerland is involved.

Swiss nationals are considered to be Swiss irrespective of their place of residence. EU nationals are not considered to be foreign if they have their actual and legal residence in Switzerland. Non-EU nationals must hold a residence permit C in Switzerland to be considered Swiss; they may, however, acquire a primary house at the place of their actual and legal residence beforehand.

Only property that is not permanently used for commercial purposes is subject to the legislation. Mixed property – for example, mixed residential and commercial property – may only be acquired if the residential use is clearly subordinate (for example, a caretaker's apartment in an office building) or if it is situated in a zone where the law prescribes a certain minimum residential use that is below 50 per cent.

Exchange control

- 5 | If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange control issues limiting investment in Swiss real estate or the repatriation of profits. However, Swiss banks are subject to strict anti-money laundering rules, requiring them to trace the source of monies transferred to Switzerland. Also, repatriation of monies as dividends or liquidation proceeds from a Swiss company is subject to a withholding tax of 35 per cent, which non-resident shareholders may only partly or fully reclaim if a double taxation treaty so provides.

Legal liability

- 6 | What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Swiss law has strict liability (in tort) of the owner of a building for damages resulting from deficiencies or insufficient maintenance of a property. Similarly, tenants may become liable for deficiencies or insufficient maintenance of tenant fittings. Lenders are typically not liable.

Protection against liability

- 7 | How can owners protect themselves from liability and what types of insurance can they obtain?

Owners typically take out insurance against building liability risk; insurance is, however, not mandatory. Tenants will typically seek coverage under a general private or business liability policy. Environmental risks are typically not separately insured.

Choice of law

- 8 | How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Agreements on real property located in Switzerland must follow the formal requirements of Swiss law (ie, public notarisation at the place of the property, governing version in the official language of the place of the property). Also, rights in rem on real property in Switzerland are mandatorily subject to Swiss law. In the absence of a choice of law provision, Swiss law also applies to the agreement itself. While a choice of law provision is theoretically enforceable, local notaries in practice often refuse to notarise agreements that are not subject to Swiss law.

For lease agreements, a foreign law may be chosen as governing law (subject to a few public order provisions that apply mandatorily).

Jurisdiction

- 9 | Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Swiss courts have exclusive jurisdiction on rights in rem in real property in Switzerland. Filing a statement of claim with the relevant court starts proceedings. The court exclusively makes service of process. A party does not have to be qualified to do business in Switzerland to enforce remedies.

For lease disputes, the law provides for a special mediation authority that must be consulted to start legal proceedings and for special lease courts as courts of first instance. The mediation authority or court where the property is located has jurisdiction. A choice of arbitration is permissible.

Commercial versus residential property

- 10 | How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Apart from the general restrictions on the acquisition of non-commercial real estate by foreigners (Lex Koller) and zoning laws, Swiss law barely distinguishes between commercial and residential property. Some differences exist in lease law – for example, the minimum notice period for termination is three months for residential and six months for commercial property, and the maximum period by which a lease may be extended by the court upon request by the tenant is respectively four and six years.

Planning and land use

- 11 | How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Zoning law is regulated by federal, cantonal and communal regulations, with detailed zoning being regulated at community level. Building projects require a building application that is reviewed in a process that may be lengthy for larger projects, as well as the publication of the project and setting of building profiles so that neighbours and environmental organisations can appeal the building permit. The procedure differs from canton to canton.

Government appropriation of real estate

- 12 | Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Condemnation of real estate is practically only relevant for infrastructure projects such as roads, railways and similar. Owners that are subject to condemnation receive compensation that is assessed in a judicial process if no agreement is reached. In condemnations based on federal law, the compensation is distributed among the lenders and other holders of rights in rem according to the priority of their rights in rank and the remainder to the owner.

Tenants may claim compensation if their lease agreement is terminated early or the use of the lease object during the lease term is impaired by the condemnation.

Forfeiture

- 13 | Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

A court can only forfeit real estate in a criminal proceeding if the property was acquired through a criminal offence. The right to order forfeiture is limited to seven years, unless the statute of limitations for the offence is longer, in which case this longer deadline applies. No forfeiture may be ordered if a bona fide purchaser has acquired title in the property.

Bankruptcy and insolvency

14 Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Swiss law provides for involuntary and voluntary bankruptcy of Swiss legal entities. When enforcing its claim, a secured creditor may choose whether to sue for foreclosure of the security (resulting in the liquidation of the security) or for payment of the claim (resulting in bankruptcy). A lender secured by mortgage notes will typically choose the first. An unsecured creditor – for example, the lessor – will sue for bankruptcy. Both proceedings are started with an order to pay being issued to the debtor; the debtor has the possibility to object, which will lead to legal proceedings on the merits of the claim.

The directors of Swiss companies are obliged to file for voluntary bankruptcy or request a moratorium if the company is over-indebted – in other words, if the company's liabilities exceed its assets. Such a voluntary bankruptcy may also be started during a pending debt enforcement proceeding. A secured creditor's preferential right remains respected in the bankruptcy or moratorium. In practice, both a bankruptcy proceeding and a moratorium lead to the involuntary liquidation of the company; the company hardly ever survives.

INVESTMENT VEHICLES

Investment entities

15 What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

In principle, any Swiss or foreign entity may acquire real estate in Switzerland. Typically, a Swiss company limited by shares (AG/SA) or limited liability company (GmbH/Sarl) is chosen to shield the investor from liability. While both types of entities are taxed on an individual basis in Switzerland, a GmbH/Sarl is sometimes preferred by US investors as it is regarded as a pass-through entity for US tax purposes.

Foreign investors

16 What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors typically directly acquire real estate with a foreign entity or use an AG/SA or GmbH/Sarl. The direct acquisition has the advantage that no withholding tax applies to distributions. The use of a Swiss property company has the advantage of being more acceptable as a counterparty in Switzerland.

Organisational formalities

17 What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Swiss companies are formed through an incorporation meeting held in the presence of a notary public and registration in the commercial registers. While the preparation of the articles of association and documentation for the meeting can be arranged within days, the payment of the minimal capital to a blocked account and the collection of proxies and signatures may require more time.

Foreign entities holding real estate in Switzerland are not subject to special registration or reporting requirements. They are in principle subject to the same duties as Swiss companies, which include the filing of ordinary tax returns and registration for VAT purposes, if applicable. The acquisition of real estate establishes a limited tax residence in Switzerland for income and capital tax purposes.

ACQUISITIONS AND LEASES

Ownership and occupancy

18 Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Most owned properties are held in full ownership (similar to freehold), in which case the owner has full title to the land and buildings. Other properties are held as a building right (similar to a land lease or leasehold); in this case, the landowner grants to the lessee the right to erect and maintain buildings on the land. Such building rights can be agreed for up to 100 years. At the end of the term, the buildings accrue to the landowner – depending on the agreement – with or without compensation. Building rights are transferable and are traded similarly to properties in full ownership.

Both full ownership properties and building right properties may be split into co-ownership or condominiums. In case of co-ownership, each co-owner owns a proportional quota of the entire property. Each co-owner thus participates in the income of the entire property in proportion to his or her quota.

In the case of condominium property, each owner has the right to use certain rooms exclusively. Each owner thus profits from the use and income of his or her unit. Furthermore, each owner may use the common areas (entrance, stairs, etc).

Leased properties are used based on a lease agreement that is subject to the lease provisions of the Code of Obligations. Swiss lease law and courts are rather tenant-friendly. Commercial properties are usually leased based on a lease for a fixed term (often five to 10 years). Residential properties are typically leased based on indefinite leases that can be terminated by either party with a notice period of three months.

Pre-contract

19 What are the typical pre-contractual steps?

In the residential property market, sellers typically request the buyer to sign a type of reservation agreement and pay a reservation fee in the range of 20,000 to 50,000 Swiss francs that is forfeited to the seller if no binding agreement is signed. In return, the seller typically takes the property off the market. As sale and purchase agreements must be executed in the form of a public deed to be binding, it is questionable to what extent such reservation agreements are enforceable or whether the buyer may reclaim a reservation fee that he or she has paid.

For commercial properties, pre-contracts are not typical among Swiss institutional investors as they are unenforceable if not executed in the form of a public deed. Swiss investors typically prefer to negotiate the final agreement based on a formal offer (normally labelled as 'binding', although it is not binding) submitted by the buyer. When foreign investors are involved, we see term sheets, letters of intent and (non-binding) pre-agreements that are subject to contract, due diligence and other conditions. In such agreements, sellers sometimes grant exclusivity for a limited period of time.

Brokers are not regulated under Swiss law and do not require a special education or certificate. The quality of the brokers thus varies significantly. Brokers are typically engaged by the seller in Switzerland, but are sometimes asked to seek their commission from the buyer.

Contract of sale

20 | What are typical provisions in a contract of sale?

Contracts still widely follow local notary practice, are rather short and more or less standardised among institutional investors. The contract typically includes:

- description of the property (as taken from the land register);
- purchase price and payment details, often with part of the purchase price payable directly to financing banks for the repayment of existing mortgages or to tax authorities as a deposit for real estate gain taxes;
- the closing mechanism: among Swiss investors, sales are often signed and closed on the same day. A separate closing is chosen if the buyer must secure financing or in case of pre-emptive rights;
- payment of notary fees, land register fees and transfer taxes;
- apportionment accounts between seller and buyer for periodic income and duties such as lease income, insurance premiums, taxes, energy costs and service charges;
- transfer of certain agreements (service agreements, facility management, property management);
- VAT; and
- payment of real estate gains tax by the seller – often directly paid by the buyer to the tax authorities, in deduction from the purchase price.

All warranties provided by law are regularly fully excluded. Instead, the parties agree on a limited set of representations and warranties. These typically include:

- no legal liens for taxes, workmen's liens and the like;
- no pending or threatened litigation regarding the property; and
- representations regarding environmental matters and leases.

Environmental clean-up

21 | Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Existing properties without known environmental issues are typically sold without any warranty regarding environmental pollution or with only a representation that the property is not registered in the register of contaminated sites and that the seller has no knowledge of any existing contamination.

For development projects or existing properties with known environmental issues, different solutions are seen: in some cases the seller agrees to bear the costs of remediation; in other cases, the buyer agrees to bear the costs of remediation (in full or up to a certain level), but the purchase price is reduced to reflect the likely costs of remediation.

If nothing is agreed (and any warranty has been excluded), the owner of the property must pay clean-up costs (ie, the buyer if remediation takes place only after the closing). The seller may, however, become liable for the full or part of the remediation costs based on public law if he or she caused the pollution or if the pollution occurred during his or her time of ownership or occupancy.

Lease covenants and representation

22 | What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

According to mandatory Swiss law, lease agreements are transferred by operation of law to the new owner in the case of a property sale. The new owner may, however, terminate the lease early as per the next statutory termination date in case of urgent need of the property for its own purposes. As the seller, as former lessor, must compensate the tenant with damages in the case of such early termination by the buyer, the buyer typically undertakes in the purchase agreement not to exercise its right to terminate early. An early termination may also be excluded by registering the lease in the land register prior to the sale.

The sale and purchase agreement typically contain representations that:

- the net rental income as per the rent roll is correct;
- no material written and oral side agreements exist;
- no terminations have been received or threatened in writing;
- no tenant has requested in writing a reduction in rent;
- no extraordinary arrears in rent exist;
- no disputes or litigation with tenants exist or have been threatened in writing; and
- all rental guarantees and deposits provided for in the lease agreements exist and will be transferred to the buyer upon closing.

Estoppel certificates are not used in Switzerland.

Leases and real estate security instruments

23 | Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

Lease agreements are transferred by operation of law to the new owner if the property is sold in the course of the foreclosure. The new owner may, however, terminate the lease early as per the next statutory termination date in case of urgent need of the property for own purposes, unless the lease has been registered in the land register. If the secured creditor cannot be fully satisfied from the proceeds of the public auction for the liquidation of a property because of a lease registered in the land register that has been registered after the mortgage was registered, the property is again auctioned without such registration – if the auction proceeds are higher this way, the property is sold without registration so that the new owner retains the right to terminate early.

Delivery of security deposits

24 | What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Lease agreements in Switzerland do typically provide for security in an amount between one and three (residential leases) or three and 12 (commercial leases) monthly leases. The security is typically granted in the form of a security deposit or a bank guarantee. A security deposit

must, by law, be paid to a special blocked bank account in the name of the tenant over which the parties can only dispose jointly; in the case of sale of the property, the deposit is 'transferred' by instructing the bank of the new owner or lessor. Guarantees (in the form of a bank guarantee or surety by a bank) must typically be reissued in the case of a sale.

Periodic rent resets or reviews are not common in Swiss leases, and Swiss law also restricts the amount by which the lessor may raise the rent. In leases with a minimum fixed duration of five years, it is, however, possible to agree on a predefined staggered rent or a periodic adjustment of the rent to the consumer price index (but not for both).

Due diligence

25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Because of the land register system, due diligence for the acquisition of the property is often relatively simple, which makes title searches or title insurance, customary in other jurisdictions, unnecessary.

Reports on zoning or opinions regarding compliance with building regulations are rarely seen for property with existing buildings, but more common for development projects, unless a recent building permit exists.

Due diligence is conducted before executing a contract; due diligence after the signing is hardly seen in Switzerland.

Structural and environmental reviews

26 | Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

As all warranties for the condition of existing buildings are typically excluded in sale and purchase agreements, institutional investors often seek reports on the building's condition (in particular capex requirements).

Environmental reports are often limited to a phase 1 report, but may go deeper in case of known water or soil contamination or for development projects. Environmental insurance is not common in Switzerland.

Review of leases

27 | Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Leases are typically reviewed by both the business and the lawyers, with the legal review focusing on the type of lease (tenant fittings, distribution of costs), early breaks, restrictions in use, lease assignment and sub-lease clauses and change of control clauses.

Other agreements

28 | What other agreements does a lawyer customarily review?

The focus of legal due diligence lies on the land register documents, including the supporting documents that show the terms of servitudes and easements encumbering the property. Maintenance agreements, service agreements, insurance agreements and other ancillary agreements are normally only cursorily reviewed, as these agreements are often fairly standard.

Closing preparations

29 | How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

For the signing and closing of an acquisition, each party must provide power of attorney and evidence of its corporate existence (with an excerpt from the commercial register or, for entities from jurisdictions without a commercial register, certificate of incorporation and company secretary certificate). The seller's counsel further typically provides the annexes to the agreement (such as the rent roll) and confirmation by the tax authority about the real estate gains taxes resulting from the transaction, and arranges for the transfer of the mortgage notes (duly endorsed in the case of registered mortgage notes). The buyer's counsel arranges for the payment of the purchase price to the notary's account or the delivery of a payment undertaking by a Swiss bank.

The signing and closing of leases is less formal, as neither public notarisation nor registration is required. Leases are often signed by circulating execution copies by ordinary mail or courier. At the start of the lease, the parties or their representatives typically meet in person at the premises for the handover to document the condition of the premises in minutes signed by both parties – lawyers are usually not present at the handover. Most importantly, the lessor should insist that the rental security is granted prior to handing over the keys.

Financings are usually signed by exchanging execution copies by mail or email. Lawyers are often involved in the preparation of the security documents, in particular if new mortgage notes need to be established and registered in the land register.

Closing formalities

30 | Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Registering the transfer in the land register closes a sale and purchase agreement. In cantons with private notaries, the notary who notarised the purchase agreement normally makes the registration; to secure the payment, the purchase price is typically paid to the notary and released once the transfer is registered. Mortgage notes that must be released by the seller's bank but are needed to secure the financing of the buyer's bank are also sent to the notary who holds them in escrow.

In cantons with state notaries, the parties often meet in person at the land register office. To secure the payment, the buyer presents a payment undertaking by a (typically Swiss) bank in which the bank guarantees to the seller that the payment of the purchase price is made immediately after registration. Mortgage notes are here often transferred directly between the banks – be it before the payment in reliance on a payment undertaking or after the payment based on a promise by the seller's bank to transfer the mortgage notes to the buyer's bank immediately after receipt of payment.

Contract breach

31 | What are the remedies for breach of a contract to sell or finance real estate?

Swiss law provides for specific performance. A buyer may thus sue the non-performing seller for transfer of ownership against payment of the purchase price and in addition for damages for late delivery. As an alternative, the buyer may terminate the agreement and sue for damages. Similarly, a seller may sue the non-performing buyer for payment of the purchase price, including damages for late payment against the transfer of ownership. Alternatively, the seller may terminate the agreement,

retain ownership of the property and sue for damages for non-performance. If the buyer paid a down payment, the seller may retain it if so agreed in the sale and purchase agreement.

Breach of lease terms

- 32 | What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Lease provisions in the Swiss Code of Obligations govern leases of real property. In general, early termination by the lessor is only possible if the tenant's breach makes it unacceptable for the lessor to continue the lease. In case of non-payment of rent by the lessee, the lessor must set a deadline no less than 30 days for payment in writing and threaten to terminate if the outstanding amounts are not paid. If no payment is received within the deadline, the lessor may terminate with a notice period of 30 days. After valid termination, the lessor may start proceedings to evict the tenant.

If a termination is not possible, the parties may ask for specific performance (eg, the repair of defects of the leased property), damages or a reduction in rent.

FINANCING

Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Mortgage notes registered on the property typically secure real estate financings. Mortgage notes grant the creditor a lien on the property in the amount specified in the mortgage notes. Mortgage notes are transferable and may be used as collateral for a subsequent lender after repayment. Mortgage notes are enforced in a formal enforcement proceeding led by the debt enforcement office at the place of the property. The enforcement takes time, certainly more than a year.

In addition, commercial real estate financings (especially by non-Swiss banks) are typically secured by an assignment of rents and other claims, the assignment or pledge of bank accounts, and, sometimes, a pledge of the share of the property company. Assigned claims may simply be collected by the bank to which they were assigned; the enforcement of a share pledge is more difficult.

Swiss banks have a predominant role in the financing of real estate in Switzerland. In recent years, a few pension funds have started to provide financing through mortgage brokers, and the first foreign banks have just recently announced their entry into the market. In addition, a few private institutions have been providing mezzanine financing.

Leasehold financing

- 34 | Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

The acquisition of a building right is typically financed in the same way as the acquisition of full ownership in land. Financing is available for the purchase price, but not for the recurring lease payments.

Lenders do not finance rental agreements. The financing of tenant fittings is typically made in the form of a loan for general business purposes, as it is not practically possible to pledge tenant fittings.

Form of security

- 35 | What is the method of creating and perfecting a security interest in real estate?

Nowadays, real estate financing is almost exclusively secured through mortgage notes. Mortgage notes may be issued in the form of paper securities in bearer or registered form or as paperless mortgages registered in the land register only.

Valuation

- 36 | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

The law does not require third-party real estate appraisals for the financing of real estate. Some lenders nevertheless request such appraisals in commercial financing transactions. In any case, capital adequacy regulations require banks to assess the value of the property at least by an internal valuation.

Some institutional investors, in particular Swiss investment funds, require an independent third-party appraisal for the acquisition of real estate; other investors include such requirements in their internal regulations. Financing banks regularly request the disclosure of appraisals in such cases.

Legal requirements

- 37 | What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Foreign lenders may in principle make loans secured by Swiss real estate without a special qualification to do business in Switzerland being required, provided that lenders do not have infrastructure or employees in Switzerland. However, foreign lenders may face certain tax disadvantages: borrowers of a loan by a non-Swiss-resident lender that is secured by Swiss real estate must withhold federal and cantonal income tax of roughly 13 to 33 per cent of the interest at source. The tax at source on interest income is reduced to zero under a number of double taxation treaties, including those with France, Germany, Luxembourg, the United Kingdom and the United States.

The creation of new mortgage notes leads to notary fees, land register fees and in some cantons even taxes. The fees are substantial in some cantons. Mortgage notes are thus usually not deleted in the land register but transferred to a new lender in case of a refinancing – in general, no fees accrue in this case.

Loan interest rates

- 38 | How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are typically set as LIBOR plus a margin, nowadays often with the caveat that LIBOR may never be less than zero. Federal law does not have maximum interest rates that would apply to anything other than consumer credit loans, but the interest may be considered as usurious in extreme cases. Some cantons have interest rate limits – for example, the maximum interest rate is 18 per cent in the canton of Zurich.

Loan default and enforcement

- 39 | How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Outside the insolvency of the borrower, the lender will typically start debt enforcement proceedings for the foreclosure on the property, in which the borrower has several possibilities to object. In particular, the debt enforcement officer will set the borrower a final deadline of six months to pay prior to organising a public auction to liquidate the property. The enforcement of a security in the property thus takes time.

If claims have been assigned for security purposes, lenders will typically also notify third-party debtors (such as tenants, banks and insurance companies) of the assignment of claims so that the amounts are directly paid to the lender.

The debtor may in principle file for bankruptcy or request a moratorium at any time during the process. Such proceedings have effects on the proceedings for the liquidation of the property, but do not affect the preferential right of the secured lender to the proceeds from the property.

Loan deficiency claims

- 40 | Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Outside the bankruptcy of the borrower, the borrower is liable for the full amount of the loan plus interest and other permitted additions, and must compensate the lenders for any deficiency in the amount recovered through the foreclosure.

Protection of collateral

- 41 | What actions can a lender take to protect its collateral until it has possession of the property?

Outside an insolvency proceeding, in an ordinary debt enforcement proceeding with a view to foreclosure, the bailiff will register a transfer restriction in the land register and must take over the administration (property management) of the property. If rents have been assigned to the lender for security purposes, the lender may also notify the tenants so that the rents can be directly paid to the lender.

In a bankruptcy proceeding, the bankruptcy administration will take control of the debtor and thereby the property. Similarly, in a moratorium proceeding, the administrator will supervise the debtor, and the sale of fixed assets (including investment properties) is excluded without the consent of the court.

Recourse

- 42 | May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Claims from loan financings are ordinary personal claims against the borrower under Swiss law, so that recourse against the borrower is not limited. Non- or limited-recourse loans are unusual in Switzerland and must be specially agreed. In an insolvency situation, however, the lender will benefit from the proceeds of other than secured assets only *pari passu* with other non-preferred creditors.

Cash management and reserves

- 43 | Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Cash management systems are not usual in financing by Swiss banks, but foreign lenders sometimes require such systems based on the practice in their home country.

Credit enhancements

- 44 | What other types of credit enhancements are common? What about forms of guarantee?

Other credit enhancements such as guarantees are not common in Swiss real estate financings.

Loan covenants

- 45 | What covenants are commonly required by the lender in loan documents?

Loans by Swiss lenders are often rather lean and do not contain comprehensive covenants. Generally, the following are most common:

- no insolvency of the borrower;
- no foreclosure on secured property;
- no disposal of secured property;
- no change of use of the secured property;
- no assignment of rents;
- adequate insurance coverage;
- adequate maintenance of the property;
- no default in payment of principal or interest;
- financial reporting and other information requirements (in particular rent roll); and
- *pari passu* clause, negative pledge.

Financial covenants

- 46 | What are typical financial covenants required by lenders?

Most Swiss real estate financing contains explicit (or at least implicit) loan-to-value covenants. Interest cover ratios are sometimes agreed in larger financings, as are financial reporting requirements (typically annually or semi-annually).

Secured movable (personal) property

47 | What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

With the exception of shares, movable property (such as furniture, fixtures and equipment, and tenant fittings) is hardly ever used as security for real estate financings. Swiss law requires the lender to have possession and physical control over movable property for a pledge or security transfer to be valid; in most cases, this excludes the possibility for movable property to be taken as security.

The assignment of claims is common (in particular rents and insurance claims and (less commonly) bank accounts and warranty claims). Intellectual property or other rights are hardly ever used as security in real estate transactions. The assignment of claims requires a written agreement; notification of the debtor is not required (and thus not often made prior to an event of default), but has the effect that the debtor may only pay the assignee to be released.

Single purpose entity (SPE)

48 | Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders do usually not require that each borrower be an SPE, but SPEs are often chosen by investors to enable them to exit by way of a share deal. There is no special regulation of SPEs in Switzerland; the ordinary rules of company law apply.

UPDATE AND TRENDS

International and national regulation

49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction? (eg, transition to a new alternative benchmark rate upon cessation of LIBOR as benchmark rate?)

With LIBOR coming to an end, real estate financing is in transition to SARON, the Swiss Average Rate Overnight, as the basis for interest calculation. The changeover will take place at the end of 2021.

Coronavirus

50 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Swiss government ordered the temporary closure of shops (lockdown) from mid-March to mid-May 2020 to combat the pandemic. Since then, there has been discussion about whether the lockdown will lead to a reduction in rents for shops by law. The law in force does not explicitly regulate the issue. Legal doctrine is divided. A court decision on this question is still missing.

On the political level, a law is currently being prepared in the Swiss parliament, according to which the rent for commercial properties should be divided between the tenant and the landlord. For the period



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of the lockdown, tenants of commercial properties are to pay 40 per cent of the rent; 60 per cent of the rent is to be borne by the landlord. Only smaller tenancies, up to a monthly rent of 20,000 Swiss francs, are covered by this law. A draft law is expected to be debated in the parliament during the next winter session (November/December 2020). It is not yet clear whether the law will enter into force at some point. Until then, tenants of commercial properties are advised to seek dialogue with the landlord to obtain a deferment or reduction of the rent.

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