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Disputes in Real Estate

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1 Introduction

The Swiss real estate market is very important for the Swiss economy. A 2014 study by the Federal Office for Spatial Development summed up all real estate activities (from construction to real estate lawyers to portfolio managers to cement mixers) and concluded that the Swiss real estate market contributes about 18 percent to the Swiss gross domestic product. No other single industry has the same economic impact.

As a very important asset class, Swiss real estate is also of great importance to domestic and foreign investors (although the latter are restricted by law to commercial properties when

it comes to direct investments in real estate).

Given the real estate industry's economic importance, significant interests are often at stake when it comes to disputes. Such disputes can arise between private parties (individuals or companies) (cf. section 2 below) as well as between private and public parties (cf. section 3 below). Real estate disputes can be submitted to state courts or solved by way of arbitration or mediation (cf. section 5 below). Our overview is rounded up with a short excursus on real estate and criminal proceedings (cf. section 4 below).

Real estate disputes under civil law

2.1 General

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Real estate disputes under civil law are found mostly in the fields of landlord and tenancy law, private construction law (e.g. relating to contractors' liens) or in connection with transactions.

In Switzerland, such disputes are subject to the Federal Code of Civil Procedure and the Federal Tribunal Act.

The proceedings usually start with an attempt at conciliation before the conciliation authority. The case can then be taken to one of three courts, depending on the type and amount in dispute (District Court, High Court and Federal Tribunal). The proceedings can take several years. Court and lawyers' fees are awarded to the party who wins the case.

2.2 Recent case study

A recent judgement by the Federal Tribunal defined the term luxury on the basis of a landlord – tenancy dispute.

This Federal Tribunal judgement arose from a dispute concerning an increase in the rent for a ten-room house on the Zurich Gold Coast. One of the questions to be decided was whether this property qualifies as luxurious as defined in Art. 253b para. 2 of the Swiss Code of Obligations (CO).

According to this clause, the provisions on protection against abusive rent (according to Art. 269 et seq. CO) do not apply to luxurious rental apartments and single-family dwellings with six or more rooms (excluding the kitchen).

It is generally recognised that the definition of luxury according to Art. 253b para. 2 CO must be interpreted narrowly. According to this definition, a luxurious dwelling is a dwelling that exceeds the usual level of comfort and is quite rare.

Luxurious features include, for example, marble entrance halls, a swimming pool and/or sauna, an exercise room, exceptionally large rooms, an impressive number of ancillary rooms, expensive floor coverings, expensive materials used for the interior, a private lift, a service entrance, several bathrooms and/or showers, a particularly big living area and big rooms, a big garden, very well maintained grounds, etc. It is not decisive whether one or more of these features exist, decisive is the overall impression made by the property.

The assessment whether a property qualifies as a luxury property based on its overall impression is made by the judge at his discretion. This means that the court is regularly required to do on-site inspections when proceedings are pending.

In the case at hand, the first-instance Landlord and Tenant Court therefore inspected the property. In its judgement which was subsequently confirmed by the High Court it weighed up the elements in favour of and against a qualification as a luxury property.

The Landlord and Tenant Court listed a number of factors which opposed the qualification of this specific property as a luxury property. These included the fact that most of the toilets and bathrooms no longer meet the latest standards and that the kitchen only contains the equipment that is usual these days (oven, dishwasher, microwave, glass-top stove). The Landlord and Tenant Court bemoaned the fact that the property does not have any parking spaces or garage and that it is not possible to

reach the house by car.

The court also mentioned some factors which confirm the luxurious quality of the property, such as an impressive number of ancillary rooms (laundry, drying room, exercise room/bomb shelter, wine cellar, cellar unit, dressing room, shoe room), a generous entrance hall with marble floors, three living rooms with oak/beechwood parquet floors, four toilets, two bathrooms, two balconies, two terraces, location in an exclusive residential area with a view of Lake Zurich, total usable space of more than 300 m2 and attractive grounds of around 2,300 m2.

In its final judgement the Landlord and Tenant Court concluded that a detached house in a quiet and exclusive area with such big grounds and a wide, unobstructed view of Lake Zurich is something of a rarity.

The appearance of the property, the number of representative rooms and the generous amount of space also mean that the interior does not simply provide the usual degree of comfort, even though the fittings are not the most modern (sanitary facilities and kitchen). The court of first instance therefore described the property as luxurious due to its overall impression.

The tenant was not satisfied and appealed this judgement. In the appeal to the High Court he complained that the first-instance court did not consider the fact that the grounds of around 2,300 m2 mostly consist of useless land located on a slope. These grounds demand considerable maintenance. The High Court judged this objection to be unfounded and agreed with the Landlord and Tenant Court: a detached house on grounds of this size with an unobstructed view of the lake very close to the Zurich city centre in a quiet and exclusive area is very rare.

It is in particular the size of the grounds and the location against a slope that give the house its view and privacy. The High Court was not willing to deny the property's luxurious character because the grounds do not have any other use as claimed by the tenant.

The tenant was also not happy with the judgement of the High Court. He appealed to the Federal Tribunal, which again confirmed the judgement of the High Court. The Federal Tribunal did say, however, that it is not permitted to base the rental for residential property, even if it should be luxurious, on an arbitrator's expert opinion.

According to Swiss law, expert opinions by arbitrators and arbitration proceedings only apply to the rent of residential property under very limited conditions which have not been met in this case.

The dispute was therefore referred back for a new judgement to the High Court, which referred the matter back to the Landlord and Tenant Court. The latter will now determine the permissible rent, for which a court expert opinion was requested. The parties can then appeal to the High Court and the Federal Tribunal again.

Real estate disputes under public law

Disputes under public law are mostly found in the areas of public construction law, planning law and environmental law. Such disputes often arise from the approval or refusal of a building **3** permit required for a new building or the renovation or conversion of an existing building.

The relevant proceedings are subject to the cantonal laws and the Federal Tribunal Act. Decisions by the building permit authorities can usually be appealed to a superordinate

administrative unit or a first-instance building appeals court. From there, the stages of appeal go through the cantonal administrative courts to the Federal Tribunal.

Excursus: real estate and criminal proceedings

4.1 General

Criminal proceedings do also exist in the field of real estate, in particular under building and planning law and environmental law.

4 4.2 Case study

In practice, criminal proceedings are initiated fairly often because properties are built in deviation of or without a building permit.

For example, an affluent buyer converted a skeleton building approved as an apartment building into a single-family dwelling, i.e. a luxurious villa.

There were many deviations from the original building permit (one of the approved apartments, for example, was converted into a large workroom and another apartment was converted into a wellness area).

As the architect did not inform the building permit authorities of these project changes in advance, both the buyer and the architect were in the end involved in criminal proceedings.

Alternative dispute resolution

5.1 Arbitration

Arbitration is a discrete option for resolving real estate disputes between private parties. Instead of the state courts, a private arbitrator decides

5 the matter on the basis of an arbitration clause in the agreement between the parties.

Some of the real estate associations issue such procedural codes and appoint the experts needed (such as SVIT, the Swiss Real Estate Association). Any claim freely disposable by the parties can be submitted to arbitration proceedings. Some restrictions apply to landlord and tenant law: in matters related to the lease and tenancy of residential premises the parties can only appoint the conciliation authority as arbitral tribunal.

An arbitration clause in a real estate contract could read as follows:

“Herewith, the parties agree that any controversy arising out of or in connection with this agreement, including any disputes regarding the validity, legal effectiveness, alteration or termination thereof, as well as any legal relations or legal effects directly or indirectly stemming from this agreement shall be adjudicated by the Arbitral Tribunal for the Swiss Real Estate Industry.

Excluding ordinary state courts, the arbitral tribunal shall apply the Rules of Arbitration for the Swiss Real Estate Industry (SVIT-Arbitral Tribunal) to resolve such controversies.

Subject to a different agreement among the parties, up to CHF 100,000 the arbitral tribunal shall be established as a one-member arbitral tribunal, exceeding that amount in dispute a three-member arbitral tribunal shall be competent. The decision of the arbitral tribunal shall be final.”

The advantage of arbitral jurisdiction is that the parties can mostly shape the course of the proceedings to meet their own needs and can also keep the dispute out of the public eye.

5.2 Mediation

Mediation is a voluntary out-of-court procedure that allows the parties to find an amicable solution with the help of a professional mediator. Mediation can replace proceedings before a state court in whole or in part and is always a good option if sustained legal peace has to be established again because the parties are co-dependent in the long term.

is therefore particularly suited to the settlement of disputes between neighbours.

In the real estate sector, mediation



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Wolfgang Muller is recommended by Legal500 as one of five leading individuals for real estate and construction in Switzerland.



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