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GUIDES 2021**

The Legal 500 Country Comparative Guides

Switzerland

REAL ESTATE

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in Switzerland.

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SWITZERLAND REAL ESTATE



1. Overview

Switzerland is a civil law country. Real estate is mainly governed by written laws on a federal level. However, Switzerland is divided into 26 cantons. Moreover, for land register purposes, the cantons are divided into districts as well. Therefore, the 26 cantons are responsible for setting up the land registries, the demarcation of the districts, the appointment and remuneration of officials and supervision arrangements. As a result, there are cantons with a public notary's office such as Zurich and cantons with independent notaries such as Aargau or Bern.

2. What is the main legislation relating to real estate ownership?

The main legislation regarding real estate ownership is the Swiss Civil Code which contains regulations regarding ownership, easements, liens, mortgage certificates etc.

Furthermore, the Swiss Code of Obligations governs the contractual aspects of a transfer of real estate. In this regard, also the Act on the Acquisition of Real Estate by Persons Abroad (so-called *Lex Koller*), the Ordinance on the Land Register and the Act on Rural Land Rights need to be considered.

3. How is ownership of real estate proved?

All acquisition of land ownership must be recorded in the land register hence an owner of real estate is shown in the land register. Since the land register is assumed to be complete and correct and everyone may, in good faith, rely on it, the ownership is deemed to be proved with the entry of the owner in the land register and no further proof is necessary.

4. Are there any restrictions on who can own real estate?

In Switzerland, it is the civil code which lays down the principles of ownership without providing any restriction as to the type of persons (natural or legal) who may acquire real estate. There is, however, the *Lex Koller* which restricts the acquisition of residential properties and unbuilt land by so-called persons abroad or if the main part of the financing is provided by persons abroad. Special rules apply, among others, to main or secondary residences depending on whether the buyer is a citizen of the EU or not. On the other hand, commercial properties are excluded from the scope of this *Lex Koller* and can be freely acquired by persons abroad for the moment. However, recent parliamentary initiatives aim at limiting those exceptions, which could render the acquisition of real estate more complicated in the future.

5. What types of proprietary interests in real estate can be created?

The Swiss Civil Code prescribes a *numerus clausus* of rights that can be created on real estate. Among the proprietary interests are the individual property (freehold), the co-ownership and the condominium ownership. Some easements also grant their beneficiary a quasi-proprietary right, like a building right or an usufruct.

6. Is ownership of real estate and the buildings on it separate?

No. Based on the accession principle, any construction erected on (or beneath) a plot of land automatically becomes part of the plot and thus becomes the property of the owner of such plot. In order to defeat the principle of accession, it is necessary to create a building right, which can cover the entire surface of the plot or only part of it. The building right may be constituted as a simple easement or as a separate and permanent right, in which case it will be registered separately in the land register. The maximum duration of a building right is 100 years but the duration may be extended upon expiration.

7. What are common ownership structures for ownership of commercial real estate?

Commercial real estate is mostly owned by legal entities, for practical as well as tax-related reasons. Certain commercial assets can be in condominium ownership but it is rare (it usually applies rather for residential assets).

8. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

If contemplating an asset deal, the buyer will usually like to proceed with an in-depth analysis of the plot(s) and its respective easements. If there is a risk of pollution, the seller will be asked to provide a corresponding report and, if required, the confirmation that the competent authority has approved the transfer of property. Other aspects of the legal due diligence include ongoing and past works in the building and the respective warranty rights. Conformity with the building permit, which is rather a technical issue, will need to be covered by a corresponding warranty in the deed of sale. The contractual review will cover the existing lease agreements and all related documents, as well as all existing service contracts (incl. janitor or facility services, building management, etc.) and any other contractual agreements with third parties. A list of any existing or potential disputes shall need to be provided by the seller.

In cases where the buyer or the seller are persons abroad, it should be determined whether the *Lex Koller* applies to the transaction. Finally, the possible tax implications will be analysed. As transfers of real estate are in principle not subject to VAT, there are usually no material tax issues.

When contemplating a share deal, the legal due diligence will additionally include the review of the company related issues as well as a specific review of the transaction's tax implications.

9. What legal issues (if any) cannot be covered by usual legal due diligence?

There are no legal issues *per se* which cannot be covered by usual legal diligence. Certain technical issues with legal implications will have to be analysed in close collaboration with the relevant experts so as to include the necessary covenants in the purchase agreement. Furthermore, a specific clause is usually included in order to guarantee that the seller will pay all the taxes

pertaining to the sale of the asset (namely the real estate gains tax).

10. What is the usual process for transfer of commercial real estate?

The beginning of negotiations is usually indicated by the mutual signing of a non-disclosure agreement (NDA), followed by a letter of intent (LOI) by the parties. Hereinafter, a detailed due diligence, with regard to real estate or the real estate company, is carried out by the buyer. Often the seller grants exclusivity to the buyer during that time. Should the buyer after conducting a due diligence confirm its intention to acquire the real estate, and the parties have reached an agreement on the commercial terms, the parties will then enter into an asset purchase agreement or a share purchase agreement, depending on the transaction structure.

In case of a public tender offer, which is supported by the board of directors of the target company (a friendly takeover), the offeror and the target company often enter into a transaction agreement followed by the launch of a public tender offer.

It needs to be noted that the purchase agreement regarding real estate is only valid if it is executed in the form of a public deed in front of a notary public. The transfer of title, however, only occurs upon the respective entry into the "journal" (*Tagebuch*) of the land register, provided, however, that the application is later registered in the "main register" (*Hauptbuch*) of the land register. Therefore, after the signing of the purchase agreement, the notary public and the parties to the agreement will have to submit it to the land registry, which then enters the transaction in the land register.

11. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Real estate may be transferred either by way of a share or asset deal. Both type of deals are very common for the transfer of real estate in Switzerland. It should, however, be noted that the acquisition of real estate by way of share deal does not allow to avoid the application of the *Lex Koller* for persons abroad (see question 4 above). It should also be noted that certain investors (e.g. certain Swiss investment funds) are excluded from doing share deals.

12. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

As a rule, in case of the sale of freehold interests in land, lease agreements will automatically be transferred to the new owner. Thus, benefits of occupational leases and income transfer to the new owner of the property. However, the new owner has the right to terminate a lease on residential or commercial premises as of the next legally admissible termination date if it claims an urgent need to use such premises itself. If the new owner terminates the lease sooner than it is permitted under the lease agreement, the previous owner can be held liable for losses incurred by the tenant.

13. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

Common rights, interests and burdens include easements, real burdens, usufruct and other personal servitudes such as construction rights, rights of way, pipeline rights, construction restrictions or closer or boundary construction rights. Such rights are generally created by public deed executed in front of a notary and by entry in the land register. Once registered in the land register, those rights are visible for third parties and can be easily proven.

14. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

Swiss Law does not know a legal principle comparable to the common law concept of trust; a trust cannot be established under Swiss law. However, Switzerland recognises for instance the Hague Trust Convention hence foreign trust relationships can under certain conditions be registered in the land register. If trusts under foreign law are recognised under Swiss law, it must be noted that a trust relationship that is not annotated in the land register in such a way may be considered invalid against bona fide third parties.

Therefore, any beneficial ownership is only of a contractual nature under Swiss law, which means, in particular, that the right of the beneficiary is not based on an *in rem* title to real estate, but only on a contractual claim against the holder of the real state rights. If that holder disposes of the real estate in violation of the contractual provisions, the beneficiary is limited to a claim for damages.

Furthermore, as soon as a foreign party is involved on the buyer side, the Lex Koller may apply (see question 4).

15. Is public disclosure of the ultimate beneficial owners of real estate required?

The identity of the direct owners of real estate are public information that can be freely consulted in the land register (available on the internet in most Swiss cantons). Where the owner is a legal entity, the identity of the ultimate beneficial owners must be known internally by the corporate bodies and its disclosure may be required by the cantonal or federal authorities, when there is a doubt as to a potential application of the *Lex Koller* (see question 4 above). However, this information is not made public.

16. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

If real estate or the majority (in certain cantons even a minority stake) of the shares in a Swiss real estate company is acquired, it may be subject to real estate transfer tax of between 1% and 3%, depending on the canton where the property is located. As the transfer tax is a cantonal tax, not only the tax rate may vary from canton to canton; certain cantons do not apply a real estate transfer tax at all, such as Zurich. If a transfer tax applies, the tax is usually payable by the buyer, however, the buyer and seller are often jointly and severally liable for the real estate transfer tax. In certain cantons, tax laws may foresee a lien on the property to secure the transfer taxes.

Furthermore, there is a tax payable on the gain realised through the real estate transfer. The tax is either a special real estate income tax or - in exceptional cases - a normal income tax and needs to be paid by the seller.

As a rule, transfers of real estate are excluded from value added tax (VAT). However, if the real estate is not used for private purposes, it is possible to opt for VAT.

In addition, the owner of real estate is obligated to pay income and property taxes.

17. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The legal basis for leases is regulated in the Swiss Code of Obligations. Furthermore, the Ordinance on the Rent

and Lease of Residential and Commercial Premises applies. In principle, tenancy law is tenant-friendly, hence there are certain mandatory provisions in favour of the tenant. However, especially in the case of commercial leases, the parties regulate their rights more detailed in the lease agreement and the landlord ensures that its rights are improved compared to the law wherever possible. The common terms include, among others:

- Length of term: commercial leases typically last for a fixed term of five or ten years, possibly with a prolongation option of one (or two) additional five-year term(s). If an indefinite period applies, a notice period of at least six months applies.

- Rent and ancillary costs: the different possible ancillary costs must be listed in detail in the lease agreement.
- Rent increases: the parties often agree on indexed rents based on the Swiss consumer price index.
- Tenant's right to transfer or sub-lease: subject to the landlord's approval, the tenant is entitled to transfer the lease or to sublet the premises.
- Insurance: the tenant must often provide liability insurance.
- Repairs and maintenance: generally speaking, and as a basic rule, the landlord is responsible for maintenance and major repairs; however, exceptions may apply with leases which come close to double and triple net lease agreements.

18. What (if any) Covid-19 related regulatory controls are in place which affect landlords' abilities to enforce tenant obligations in commercial leases?

There are - at the moment - no Covid-19 related controls in place which affect the landlord's ability to enforce tenant obligations in commercial leases. However, there have been discussions and attempts to introduce rules regarding the question whether the tenants were obliged to pay rent in full or in part during the lockdown. In particular, the idea was that tenants should only owe 40% of the contractually agreed rent for the duration of the lockdown; 60% shall be paid by the landlord. However, at the end of 2020 such a solution was dismissed and hence there is no actual legislation in place permitting non-payment of rent.

19. How are use, planning and zoning restrictions on real estate regulated?

The regulation of use, zoning and planning in Switzerland is performed on four levels (federal, cantonal, regional and local). On each level, respective laws exist. Environmental protection is mainly addressed on a federal level whereas the use of a particular plot is mainly regulated on a local level.

20. Who can be liable for environmental contamination on real estate?

Switzerland generally applies the polluter-pays principle. However, according to the Contaminated Sites Ordinance, the current holder of a polluted plot is responsible for carrying out the investigation, monitoring and remediation measures. Pursuant to art. 32d of the Federal Act on Environmental Protection, any person who is responsible simply as the proprietor of the site does not bear any costs if, by exercising the required care, it could not have had any knowledge of the pollution. The public authority concerned bears the share of the costs of any person responsible who cannot be identified or is unable to pay. However, a different regime applies if the polluted site does not require immediate remediation, i.e. if the obligation to dispose of polluted excavation material is linked to a construction project (as opposed to the normal use of the plot). In such a case, the right of recourse against a third party is subject to very stringent conditions.

In case of the sale of real estate assets, the purchase agreement usually contains an exclusion of guarantee from the seller regarding the quality of the land. Such an exclusion of guarantee is valid unless the Seller has intentionally misrepresented the factual or legal situation.

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

In Switzerland, the assessment and management of the energy performance is regulated on a cantonal level. Generally building regulations, energy legislations and regulations on environmental protection contain provisions on, among others, energy usage, thermal insulation of buildings and on fuels and combustibles. The cantonal energy legislations may also encompass provisions on the recording of individual heat consumption for heating and hot water and the minimum energy performance of buildings.

In general, it is not mandatory for the owners to perform respective tests.

22. Is expropriation of real estate possible?

The right to property is enshrined as a fundamental right in the Swiss Federal Constitution. Real estate expropriation may nevertheless occur in exceptional cases, e.g. for infrastructure works that are in the interest of the Confederation or of a considerable part of the country, as well as for other purposes of public interest recognized by a federal law. In such case, expropriation may, however, only be carried out to the extent necessary to achieve the aim pursued (proportionality) and subject to full compensation.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

Mortgage may be created on real estate in the form of a mortgage contract (*hypothèque*, *Grundpfandverschreibung*) or of a mortgage certificate (*cédule hypothécaire*, *Schuldbrief*), which is considered as a title and can be in registered or bearer form. Dematerialized mortgage notes exist since 2012 but their use is not yet widespread in all cantons. To be

effective, the mortgage must be created in the form of a public deed and recorded in the land register.

The enforcement of the mortgage is carried out by the Debt collection and Bankruptcy Office, which is responsible for realizing the real estate at the request of the creditor, if the debtor of the mortgaged debt does not meet its obligations.

24. Are there material registration costs associated with the creation of mortgages over real estate?

The costs associated with the creation of mortgages comprise notary fees and land register emoluments, both of which are different in each canton, but which generally consist of a percentage of the mortgage amount.

25. Is it possible to create a trust structure for mortgage security over real estate?

See question 14 regarding trust structures in Switzerland. Such structures are hardly seen in Switzerland in connection with real estate; possible structures in connection with mortgages are third-party pledges.

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