IN-DEPTH

Real Estate Law

LUXEMBOURG

LEXOLOGY

Real Estate Law

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In-Depth: Real Estate Law (formerly The Real Estate Law Review) provides an invaluable overview of how key real estate markets across the globe operate and how they react to major world events. With a focus on recent developments, it analyses the legal frameworks governing real estate ownership and transactions in each jurisdiction, while also offering an incisive outlook of potential future trends.

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Luxembourg

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Summary

Introduction

i Ownership of real estate

The property rights under Luxembourg law are ownership, the right to build, the long-term lease right, usufruct and easements.

The mortgage, lien and pledge are secondary or accessory rights in rem, which do not have an independent existence and are attached to a receivable.

The parties cannot agree contractually to create, alter or otherwise extend the scope of property rights beyond what is legally provided or permitted by law.

Ownership is the most complete right of enjoyment of property, and it is a perpetual right. Ownership of land includes the ownership of all that is on and below the ground. Ownership can also take the form of:

1. an indivision – several owners jointly exercise the full ownership right over a property (e.g., two children who are transferred the family house by inheritance); or
2. a co-ownership – several owners enjoy an exclusive property right over private parts and shared rights over common parts (e.g., an apartment building where each apartment as such is subject to an exclusive ownership right while the ground, entrance and lifts are subject to a shared ownership right).

A right to build is the right to own a building or a construction, existing or to be built on the ground, of another person. During the term of the right to build, the holder of the right is the owner of the building erected by it. The right to build is a temporary right, with a maximum duration of 99 years. Upon termination, the owner of the land becomes the owner of the constructions erected. A right to build, as well as any constructions built pursuant to it, are transferable assets that can be sold or mortgaged.

A long-term lease right grants its holder the right to use a building and collect the income as if it was the owner. A long-term lease right can be granted on ground or on an existing building, or both; when granted on ground, the long-term lessee is the owner of the constructions erected by it until expiry of the long-term lease right. The long-term lease right has a minimum duration of 27 years and is limited in time, with a maximum duration of 99 years. The long-term lease right is a transferable asset that can be sold or mortgaged.

A usufruct is the right to enjoy a property that is owned by another person. The usufruct is a temporary right, which terminates notably upon the beneficiary's death (in the case of an individual) or upon its dissolution (in the case of a corporation); when granted to a corporation, the usufruct has a maximum duration of 30 years. A usufruct can also be transferred or mortgaged.

An easement is a right in rem vested on a property to the benefit of another property; therefore, it presupposes the existence of two properties with two different owners. An easement is in principle a perpetual right, but might terminate through prescription or uselessness. It is an indivisible and accessory right that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property.

ii System of registration

To make the transfer of a property right enforceable against third parties, and more particularly against the creditors of the transferor, the title must be recorded at the mortgage register. This record requires a Luxembourg notary since only notarial deeds or acts can be recorded at the mortgage register. Before the record, the notarial deed must be registered, which will trigger the payment of transfer taxes. Consequently, there are two systems or sources of information in Luxembourg:

1. the land register, which provides a status of ownership (including the registration number of the plots of land), which may not be up to date; and
2. the mortgage register, which keeps track of transfers of property rights over the past 30 years.

There is no state guarantee on the title, and the registers cannot be held liable for registering inaccurate information. Because of this absence of state guarantee, we are seeing the development of 'title insurance' in the framework of real estate transactions.

iii Choice of law

Real estate transactions are in principle governed by the law of the location of the asset, here Luxembourg law. Share transactions and real estate finance transactions are sometimes governed by another law than Luxembourg law, such choice of law being valid.

Overview of real estate activity

For the real estate market, 2023 was an annus horribilis. High inflation, increase in interest rates and high construction costs paralysed both real estate investment and construction markets. The residential sector (in future state of completion) has faced a decrease of more than 60 per cent between the second quarter of 2022 and the second quarter of 2023, principally caused by the significative decrease of rental investments. A decrease of more than 50 per cent is also noticed for the sale of building lands. Office market remains severely hit with very limited investment due to rising investment yields.

The outlook for the first quarter of 2024 is pessimistic. However, recovery is expected in the second quarter of 2024, driven by a low vacancy rate, an increase in rents (notably for offices) and a rebalance between expected and proposed yields.

Concerning asset management, investors are expected to focus on assets in line with environmental, social and governance (ESG) factors. The year 2024 will see new obligations coming into force on this topic for specific types of investors.

Foreign investment

Under Luxembourg law, there are no restrictions on foreign investment in real estate. No specific incentive for foreign investment applies either.

Attention should, however, be paid to EU rules on money laundering and on sanctions, especially the ones following the invasion of Ukraine, since economic operators and service providers (e.g., lawyers and notaries) might be prevented from doing business with or rendering services to certain parties that are subject to restrictive measures or for which the know-your-customer and client due diligence is not conclusive. This is, however, not typical to real estate and applies to any type of business, but might have a noteworthy application in real estate, especially on lease agreements. Indeed, the current EU sanctions against Russia prohibit, for example, making funds or economic resources available, directly or indirectly, to or for the benefit of listed natural or legal persons, entities and bodies. This means that the landlord of the property may no longer provide the enjoyment under the lease to a 'listed' tenant. Moreover, the landlord is not allowed to release funds or payments to the tenant (e.g., the repayment of deposits to the tenant). This is not only applicable to tenants actually listed but also to tenants who are, either directly or indirectly, owned or controlled by a listed person or entity.

In addition, on 13 June 2023, the Luxembourg legislator approved the law on foreign direct investment (FDI) introducing a screening mechanism for FDI that may adversely affect national security or public order in Luxembourg. The law introduces a prior notification mechanism for any investments made by a foreign investor into a Luxembourg entity carrying out 'critical activities' that enable the foreign investor to participate effectively in the control of the Luxembourg entity. The screening mechanism under the FDI law entered into force on 1 September 2023.

Structuring the investment

i Concept of real estate company

Luxembourg law does not know the concept of real estate company (i.e., a company whose main assets consist in real estate and that would be treated, mainly for tax purposes, differently from an ordinary company). Consequently, the tax regime applicable to share deals is not subject to deviating rules. Share transactions are not subject to registration duties or VAT (unless the tax administration demonstrates an abuse of law or a sham transaction), and capital gains realised on shares can benefit from a 100 per cent participation exemption in the hands of a qualifying seller.

ii Structuring of the acquisition

Transactions are structured either via the acquisition of shares or the acquisition of ownership.

In a share deal, the purchaser acquires the shares of a special purpose vehicle (SPV) and at the same time inherits all assets and (hidden) liabilities of the company. Extensive due diligence is, therefore, recommended upon acquisition. A share deal might, however, be detrimental to the purchaser: the leverage will be limited to the existing debt at the level of the SPV, and the asset value will correspond to the historical value (i.e., construction or acquisition cost less the depreciation already taken) without step-up. This type of transaction sometimes proves to be difficult to finance, as the bank requires a mortgage on the asset, and the upstream security interest to guarantee a financing of shares can, in some instances, be prohibited by financial assistance rules. It was recently clarified that financial assistance prohibition rules do not apply to companies taking the corporate form of a Luxembourg limited liability company. Solutions can be found in acquiring the shares through a separate acquisition company, which would itself be financed by way of an arm's-length loan followed by a merger. From a pricing and negotiation standpoint, and since the seller should realise a tax-exempt capital gain, it is market practice to negotiate a discount for tax latency.

A sale of ownership (also commonly referred to as an asset deal) allows, in the hands of the purchaser, the recording of a step-up on the asset value (i.e., the asset is recorded, and depreciated,[2] for its acquisition value by the purchaser) and the easy setting up of a full collateral package, without restrictions. It is, however, subject to 10 per cent (within Luxembourg City) or 7 per cent (outside Luxembourg City) registration duties (inclusive of transcription duties), which can be lower in some specific instances.

iii Investment vehicle

Foreign corporate investors can directly acquire ownership. In such a case, the revenues and capital gain are subject to tax in Luxembourg at the ordinary corporate income tax rate of 18.19 per cent (including the 7 per cent unemployment fund surcharge), assuming that the activities of the foreign investors in Luxembourg do not amount to them having a permanent establishment. If that were to be the case, the revenues and capital gain would – on top – also be subject to municipal business tax (at rates varying depending on the municipality of the permanent establishment). The aggregate tax rate for an investment constituting a permanent establishment in Luxembourg City would be 24.94 per cent (in 2024). Such a structure allows a direct appropriation of all revenues without incurring Luxembourg withholding tax on profit distributions (15 per cent or lower) and the absence of 'trapped cash' (i.e., the revenues corresponding to the depreciation taken on the asset) in Luxembourg. Luxembourg does not currently tax capital gains realised by foreign corporate investors upon a share deal.

The investor can also choose to structure its acquisition through a Luxembourg acquisition vehicle: a corporation (SPV), a (special) limited partnership or a civil company.

The SPV is subject to regular Luxembourg accounting and tax rules. The revenues and capital gains are subject to tax in Luxembourg at the ordinary rate of 24.94 per cent (for SPVs having their registered office within the municipality of Luxembourg City). The disadvantage of an SPV lies with its accounting treatment and capital protection rules. The building is automatically depreciated, and this depreciation reduces the accounting (and tax) result and, therefore, the profits available for distribution. It is common practice, but requires enough leverage capacity, to have an intra-group loan granted to the SPV to allow the upstream of this trapped cash. Specific attention must be paid to transfer pricing rules when fixing the conditions of the intra-group loan. Moreover, distributions of profits by an SPV are subject to 15 per cent withholding tax, which can be lowered to zero per cent based on a number of broad exemptions or rate reductions. SPVs can opt to change their accounting rules from the standard historical cost accounting to fair value accounting.

The fair value accounting rules increase the net equity position of the SPV, as no annual amortisation is deducted. This may improve the distribution capacity of the SPV and reduce the likelihood of 'trapped cash'.

Alternatively, investors can opt to acquire ownership through (special) limited partnerships or civil companies. These are company forms that are considered transparent for Luxembourg corporate income tax purposes (subject to the 'reverse hybrid rules'), meaning that it will be the investors that will be taxed on the profits of those entities pro rata to their ownership therein. These entities are not bound by capital protection rules and distributions are not subject to withholding tax on profit distributions. Their activities may, to the extent they would constitute a business, be subject to municipal business tax. Furthermore, while the transfer of shares in an SPV is not subject to registration duties, the transfer of the interests in a (special) limited partnership or a civil company will be assimilated to a (pro rata) disposal of the ownership, or the long-term lease right, and hence give rise to registration duties (of up to 10 per cent).

Luxembourg currently does not offer a real estate investment trust (REIT) regime. Despite the absence of such a regime, Luxembourg offers a wide range of other legal products to initiators, promoters and sponsors in the real estate investment business, which, despite not being specifically tailored to real estate investments, are suitable and widely used to acquire, develop and hold Luxembourg or foreign real property (such as specialised investment funds or reserved alternative investment funds). Certain tax-exempt investment vehicles will be subject to a real estate tax, levied at a flat rate of 20 per cent, on income derived from real estate assets situated in Luxembourg.

Real estate ownership

i Planning

Zoning plans are the main source of planning rules and regulations and contain binding conditions on the use of the concerned area. Each municipality must adopt a general zoning plan covering its entire territory. Specific areas of the municipal territory can be subject to a specific zoning plan adopted by the municipality. Such specific plans concern either an area to be developed where the owner of the area proposes a concrete project or an already developed area where the municipality defines the integration rules of the constructions.

Each municipality must also adopt a building regulation imposing construction rules.

In a nutshell it can be said that construction, modification, renovation and extension require a building permit, as well as the change of the use of a property (e.g., from office to residential). The permit application is to be filed with the mayor of the municipality. A condition to be granted a permit is that the contemplated development complies with the zoning plan (or plans) and the building regulation.

ii Environment

Certain types of buildings (such as offices or shopping centres) require an operation permit prior the start of the construction works. Installations and activities are divided into several classes depending on their impact on the public, the neighbourhood, working conditions and the environment (classes 1, 2, 3-3A-3B and 4). Class 1 and class 2 activities require a prior public enquiry. No permit is required for a class 4 activity. Most real estate projects are subject to a class 1 permit to be delivered by both the Minister of Environment, Climate and Sustainable Development and the Minister of Labour, Employment and the Social and Solidarity Economy.

The sale of an existing building – in an asset deal only and no matter the function of the building – requires the handover of a valid energy performance certificate.

iii Tax

Share deals are not subject to transfer taxes, stamp duty or VAT, unless the tax administration demonstrates an abuse of law or a sham transaction.

Asset deals are subject to transfer tax at a rate of 6 per cent, in addition to a 1 per cent transcription tax, computed on the higher of the agreed price or the market value. Assets located in Luxembourg City are subject to an additional tax amounting to 50 per cent of the normal transfer tax rate, leading to a total of 10 per cent taxes on the transfer of an asset located in Luxembourg City.

Asset deals are, as a rule, VAT-exempt. Parties can opt for the application of VAT on their asset deal – which is then applicable in addition to transfer taxes. The option is only available where the buyer will use the building chiefly (i.e., for more than 50 per cent of the time) for the performance of activities granting the right to deduct input VAT.

An asset deal can also trigger a VAT regularisation obligation for the seller. In the case of an exempt transfer, the seller may be required to regularise the input VAT it has incurred on capital expenditures where this input VAT has been deducted; in the case of transfers subject to VAT, the seller may regularise part of the input VAT it has not deducted in the past (owing to, for example, a VAT-exempt lease). The regularisation spans over a five (movable capital expenditures) or 10-year (immovable capital expenditures) period and covers one-fifth or one-tenth of the input VAT for each remaining year, to be regularised all at once.

iv Finance and security

The collateral package includes the mortgage, pledges on shares, pledges on receivables (e.g., rent receivables and insurance receivables) and pledges on bank accounts. The parent company usually pledges the shares in the SPV and subordinates any intra-group loans. A few points must be kept in mind:

1. a mortgage is subject to 0.24 per cent registration duties and 0.05 per cent inscription duties computed on the amount for which it is inscribed. Considering this tax cost, the practice – mostly with Luxembourg banks but never with Pfandbrief banks – is to inscribe a mortgage for a limited amount and to grant a mortgage mandate for the remainder. A mortgage mandate is not a security but an irrevocable power of attorney to inscribe a mortgage;
2. general banking terms and conditions usually include a right of pledge and set-off provisions in favour of the account bank, which could interfere with the pledge of

bank accounts in favour of the lender. Therefore, it is common practice to require from the account bank a waiver of these rights and provisions. This should be disclosed and discussed with the account bank ahead of the closing; and

3. subordination of intra-group loans is most of the time only partial in the sense that the SPV can still use excess cash to reimburse the intra-group loan.

Leases of business premises

Depending on the type of business, commercial premises can be rented via a common lease or a commercial lease.

i Commercial leases

Commercial leases relate to premises used for a commercial, industrial or craft activity, with the exception of office premises and leases with a duration up to one year. These leases are governed by the Commercial Lease Act of 3 February 2018, which includes several mandatory legal provisions, mostly for the benefit of the tenant.

Duration

The parties are free to negotiate the duration of the lease. Parties often conclude 3-6-9 leases, authorising the tenant to terminate the lease after three or six years.

Rent

The parties are free to negotiate the rent level and the type of rent. The most frequent form remains a fixed rent, but hotel businesses and shopping centres also frequently apply variable rent based on turnover subject to a minimum guaranteed rent.

Assignment

By law, the tenant is entitled to assign the lease in the case of the transfer of its business. The landlord can only oppose such assignment based on good reasons. In a case of assignment, both parties are jointly liable towards the lessor.

Renewal

The tenant is entitled to request the renewal of the lease at least six months prior to the expiration of the (renewed) lease without any time limitation. The landlord can only refuse such renewal based on a limited list of events (e.g., personal occupation, transformation works in the premises or payment of an indemnification to the tenant).

Preference right

As from the 18th year of the lease, in the case of the sale of the premises (i.e., an asset deal), the landlord must inform the tenant and provide it with the sale offer. The tenant will then have 30 days to make a counterproposal. If the landlord refuses the offer of the tenant, the premises must be sold at a price higher than the price offered by the tenant.

ii Common lease

Contrary to commercial leases, the legal provisions applicable to common leases are not mandatory, meaning that the parties can accommodate the different terms and conditions. Except for the prohibition of a perpetual lease (i.e., a lease exceeding 99 years), no restriction applies regarding the term of the lease.

iii Indexation

Commercial and common lease agreements may contain different types of price variation clauses, including the traditional indexation clause that provides for an adjustment of the rent to the cost of living on a yearly basis.

iv Maintenance, repairs and taxes

Concerning maintenance and repairs, the default rule is Article 1754 of the Civil Code, a tenant-friendly provision where the tenant will only be liable for small maintenance and repair works, leaving all other maintenance and repair works, including obsolescence, in the charge of the landlord. Parties however frequently derogate, providing that the rules of Article 606 of the Civil Code will apply, whereby the landlord will only support structural repairs. In sale and leaseback transactions, we have seen lease agreements where all maintenance and repairs, including structural repairs, are met by the tenant.

It is common practice that the taxes linked to the property (e.g., the annual property tax) are recharged to the tenant.

v Registration, fixed date, transcription

Since 1 January 2017, registration of the lease is no longer a legal obligation. However, such registration may remain of interest for the tenant since registration gives the lease a fixed date, limiting the eviction possibilities by a third party claiming property rights on the leased premises, such as the purchaser of the asset. In addition, since the recording obligation (see below) is still mandatory, leases with a duration of more than nine years remain subject to a prior registration formality. Generally, the registration duties are to be paid by the tenant and amount to 0.6 per cent of the rent to paid during the entire duration of the lease – or during 20 years if the lease is entered into for an undetermined period – except if the lease is subject to VAT in which case the lease is registered at a fix rate of €12.

All leases exceeding nine years must be recorded in the mortgage register and, therefore, executed before a notary. If these formalities are not satisfied, the lease will not be enforceable beyond the nine-year term against bona fide third parties claiming a property right on the leased premises.

vi Value added tax

Lease agreements are as a rule VAT-exempt in Luxembourg. However, the parties can opt for the application of VAT on the lease where both parties are VAT taxable persons and the tenant uses the rented space chiefly for the performance of economic activities granting the right to deduct input VAT.

A lease agreement can also trigger a VAT regularisation obligation for the landlord. In the case of a VAT-exempt lease, the landlord may be required to regularise the input VAT it has incurred on capital expenditures where this input VAT has been deducted; in the case of a lease subject to VAT, the landlord may regularise part of the input VAT it has not deducted in the past (owing to, for example, a VAT-exempt lease). The regularisation spans over a five (movable capital expenditures) or 10-year (immovable capital expenditures) period and covers one-fifth or one-tenth of the input VAT for each remaining year, to be regularised all at once and tracked on a yearly basis.

Year in review

i The 2023 coalition agreement

On 17 November 2023, the new Luxembourg liberal-conservatist government published its long-awaited coalition agreement. Amongst others, it includes a number of real estate related measures, of which the main ones can be summarised as follows:

1. changes to the accelerated depreciation regime for rental properties;
2. decrease of the tax rate applicable to capital gains realised upon the sale of real estate by natural persons;
3. introduction of investment tax credits for natural persons investing into real estate;
4. increase of the tax credit related to the acquisition of a main residence;
5. increase of the deductibility cap applicable to interest payments on loans contracted to buy real estate by natural persons;
6. creation of a register of unoccupied homes;
7. increase of the amount to which the 3 per cent housing-VAT rate applies; and
8. tax incentives for employees and employers linked to the housing of employees.

ii Affordable housing

In July and August 2023, a legal framework was voted for, aiming to develop affordable housing by creating a clear, transparent and fair frameworks for the financing of affordable housing and to reinforce individual aids to housing by extending and facilitating individual aids.

The 2023 coalition agreement sets the creation of affordable housing as one of the government's top priorities. To support the housing market in general, and the affordable housing market in particular, the government intends notably to grant tax incentives to investors or buyers, collaborate with the private sector and support the municipalities,

iii Housing leases

On 31 July 2020, a bill of law (No. 7642) was deposited, aiming to modify the Act of 21 September 2006 on the housing lease. The goals are to improve the situation of tenants and promote access to housing by:

1. fighting rent increases;
2. controlling broker fees;
3. decreasing the rental guarantee from three to two months;
4. providing a legal framework for co-housing; and
5. abrogation of the rent indexation in the case of luxury dwellings.

The bill of law is still under review, facing criticism from professional associations.

On 11 July 2023, a bill of law (No. 8272) was deposited, aiming to modify the Act of 21 September 2006 on the housing lease. The goal is to reinforce the landlord rights by excluding the tacit renewal of housing leases, controlling broker fees and authorising the landlord to terminate the lease early in the case of sale of the leased premises. The bill of law is still under review.

In its coalition agreement, the government intends to reform the housing lease regime to keep a balance between landlord and tenant interests.

iv Value added tax

To fight the effects of inflation, a temporary reduction of VAT rates was applicable in 2023. As from 1 January 2024, the reduction will no longer apply. Rates applicable will therefore be 17 per cent, 14 per cent, 8 per cent and 3 per cent. It is to be anticipated that this change may lead, as for 2023, to practical difficulties, especially in the context of VAT-taxable leases (where the applicable VAT rate will have to be increased from 16 to 17 per cent) as well as VAT-exempt leases (where the rent effectively due may have to be adapted in cases where the rent is automatically increased by an amount equal to the applicable VAT rate).

In addition, the supply and installation of solar and photovoltaic panels on a range of buildings benefit from the super-reduced rate of 3 per cent.

Outlook and conclusions

Between increasing interest rates, high inflation and increase of construction costs, the first quarter of 2024 is likely to remain challenging for the real estate sector. During this period, investors are likely to focus on asset management and ESG priorities. A measure of recovery is expected for the second quarter 2024 driven by a decrease in vacancy rates, an increase in rents (notably for offices) and a rebalance between expected and proposed yields.

In this uncertain environment, the residential market will be carefully scrutinised.

Endnotes

1 Julien Lecler is partner and Tom Hamen and Karin Finné are senior associates at Loyens & Loeff. Back to section

2 The acquisition value allocated to the land is not depreciable. Back to section

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