PANORAMIC

REAL ESTATE

Luxembourg

Real Estate

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GENERAL

Legal system
How would you explain your jurisdiction's legal system to an investor?

The Luxembourg legal system is based on a civil code essentially. The Luxembourg Civil Code regulates the main aspects of real estate law in Luxembourg such as property rights, contract law and leases. Laws applicable to real estate are national. Local regulations apply for public real estate matters, such as town-planning. Injunctions may be obtained by way of proceedings, notably to prevent an event that would irreparably harm a plaintiff or to remedy an unlawful situation already occurred. Oral contracts are generally valid. Parol evidence is also admissible. However, evidence rules depend on the nature and the agreed value of the agreements.

Law stated - 1 April 2024

Land records
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?

To make the transfer of a property right enforceable against third parties, and more particularly against the creditors of the transferor, the ownership titles must be recorded at the mortgage register. Same applies for granting or rights *in rem,* leases of more than nine years and securities. 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. Absence of recording does not affect the validity and the enforceability of the contracts between parties. Consequently, there are two systems or sources of information in Luxembourg: 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 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.

Law stated - 1 April 2024

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

Registration is a formality that consists of recording certain acts or transfers in a public registry under the responsibility of a public registrar. The underlying rationaleof this formality is twofold: being able to keep track of specific business operations and levying a tax on the circulation of wealth. While being mandatory for specifically defined acts or transfers, registration may also be voluntary. In that latter case, its main advantage is to attribute a

definite date on a given act or transfer towards third parties. As legal certainty is vital in all business transactions (not only real estate), this may prove to be useful in practice.

Legally the registration duties are due by the purchaser of real estate but nothing prohibits the parties to a deal to agree in the notary deed of transfer on an ***all-in*** price stating that registration duties will be paid by the seller.

Without being exhaustive, the following transactions are subject to registration duties:

- The sale of real estate in full ownership (or the sale of residual property rights such as usufruct, bare ownership) is subject to a 7 per cent or 10 per cent (Luxembourg-City) registration duty. Reduced rates apply to purchase for resale transactions. This registration duty is calculated on the acquisition value of the real estate or its fair market value, whichever is higher.
- The long-term lease right and the right to build are subject to a 0.6 per cent registration duty, calculated on the aggregate lease terms. The transfer of those rights ***in rem*** is subject to the same registration duty computed on the aggregate lease terms. An additional right will be due if the acquiror pays separately for the buildings already constructed on the land subject to the long-term lease right or the right to build, in which case the standard 7 or 10 per cent will become due on the (acquisition or fair market) value of these buildings.
- The occupational agreements (eg, commercial or office leases) are subject to a 0.6 per cent registration duty, calculated on the aggregate lease terms, unless they are subject to value added tax, if only a fixed registration duty of €12 applies. The obligation to register occupational agreements within three months no longer exists. Such lease agreements may, however, still be registered voluntarily at the above-mentioned rates, depending on whether they are subject to value added tax or not. Lease agreements with a term exceeding nine years, including long-term lease rights and rights to build, remain, however, subject to registration formalities as they are still required to be transcribed.
- The registration of a mortgage as well as the transfer of a mortgage, further to the transfer for consideration of the mortgage-backed receivable or loan, is subject to a 0.24 per cent registration duty and a 0.05 per cent inscription fee applicable to the principal amount of the loan receivable.
- The contribution against an issuance of shares of real estate to a commercial company in Luxembourg is subject to registration duties varying between 3.4 per cent and 4.6 per cent, depending on whether or not the real estate is situated on the territory of Luxembourg-City. To the extent the contribution is made against a consideration other than shares, the rates increase to 7 per cent or 10 per cent, depending on whether or not the real estate is situated on the territory of Luxembourg-City.
- The transfer of real estate further to a corporate restructuring is not subject to proportional registration duties. The law defines a restructuring operation to be the contribution, by one or more companies, of the entirety of their assets and liabilities or of one or more branches of activity to one or more companies, in existence or in the process of incorporation, to the extent that this contribution is predominantly remunerated by an issuance of securities representing the capital of the acquiring company.

The sale or transfer of shares of companies whose sole or main asset consists of real estate is not subject to registration duties.

Law stated - 1 April 2024

Foreign owners and tenants

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?

Non-resident entities and individuals can directly acquire ownership of real estate located in Luxembourg. Income derived by non-resident entities and individuals as well as wealth represented by real estate situated in Luxembourg and owned by non-resident entities needs to be declared annually to the Luxembourg tax authorities.

Law stated - 1 April 2024

Exchange control

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

Luxembourg does not impose exchange control or currency regulations.

Law stated - 1 April 2024

Legal liability

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?

Owners of real estate assets can be held civilly and/or criminally liable.

Civil liability may occur:

- based on general in tort liability principle (ie, the owner's fault causing damage linked to that fault). The same goes for a tenant or a lender;
- in the case of damages caused by the ruin of a building due to a lack of maintenance or a construction defect;
- if the owner causes excessive trouble to a third-party, such as neighbour, by using the property; or
- in the case of a breach under a sale agreement (breach of representations, inaccurate representations, etc). The same applies to a tenant in the case of a breach of the lease agreement.

Regarding environmental liability, the polluter pays principle is applicable. The one causing soil contamination is liable for any damage deriving therefrom, although this person or company is no longer the owner or the user of the property. Criminal sanctions may apply.

Law stated - 1 April 2024

Protection against liability

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

Any liability can be contractually shifted. However, criminal liability cannot be transferred or at least such transfer is not enforceable. A candidate buyer can limit liability by performing proper due diligence of the asset and negotiate proper representations or specific indemnities granted by the seller. Asset owners are generally insured in the case of damages caused by their fault, damages caused to the assets or by the assets as well as damages caused to and by the operation of the assets, including environmental issues.

Law stated - 1 April 2024

Choice of law

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?

Under Luxembourg law, the parties may freely choose the law governing their contractual arrangements. With respect to assets, Luxembourg law applies the principle of *lex rei sitae* (ie, the law where the asset is located). If the asset is located in Luxembourg, usually Luxembourg law applies.

Luxembourg courts would not apply a chosen law if:

- the choice was not made bona fide,
- such chosen law was not pleaded and proven;
- such chosen law was pleaded and proven but held contrary to mandatory Luxembourg laws or manifestly incompatible with the public policy rules of the forum;
- in the case of financing, at the time that the opinion documents were entered into, all other elements relevant to the situation were located in a country other than the country of the chosen governing law, to the extent the parties' choice of governing law affects the application of the provisions of the law of that other country, which cannot be derogated from by agreement, and which the court may then apply; or
- the overriding mandatory provisions of the law of the country where the obligations arising out of the documents have to be, or have been performed, render the performance of the obligations under the documents unlawful and, regarding the means of enforcement and measures to be taken by a creditor in the case of a

default in performance, Luxembourg courts may apply the law of the country in which performance is taking place.

Law stated - 1 April 2024

Jurisdiction

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?

Real estate disputes are brought before different tribunals, depending on the subject-matter or the claim value. Justices of peace are competent for civil and commercial matters in the case of claims up to €15,000. Their judgements are definitive (no appeal allowed) when the value of the claim does not exceed €2,000. Justices of peace have exclusive jurisdiction irrespective of the value of the claim for certain matters, such as lease agreement litigations. District tribunals rule in civil and commercial matters for all litigations not specifically allocated to other tribunals. Judgments rendered by the justices of peace can be appealed with the district courts. All other judgments can be appealed to the Court of Appeal. Cassation Court is the highest court in the judicial system. The Cassation Court rules on legality of judgments. Administrative courts are notably competent for administrative matters, such as town-planning law and permits. Parties appear before a tribunal/court in person or represented by a lawyer, member of the Luxembourg bar. Specific rules apply in the case of assignment of out-of-jurisdiction persons.

Law stated - 1 April 2024

Commercial versus residential property

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?

Commercial and residential lease agreements regulations are governed by the Civil Code. However, specific regulations apply to residential and retail lease agreements, that mostly aim to protect tenants' interests. Regarding public real estate, construction of residential and commercial properties is subject to building permit. Construction of commercial properties also often requires an operation permit. There is no difference between commercial and residential properties from a financing perspective.

Law stated - 1 April 2024

Planning and land use

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 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 such 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 (eg, 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.

Law stated - 1 April 2024

Government appropriation of real estate

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?

Luxembourg has a legal regime for compulsory purchase of real estate assets. As per the Constitution, no one may be deprived of its property. Compulsory purchase must be guided by reasons of public utility and is only possible with fair and prior compensation. Compensation is either contractually determined by the parties or by the court subject to expertise. There is no legal compensation for tenants or lenders. The state and the municipalities benefit from pre-emptive rights, subject to specific conditions.

Law stated - 1 April 2024

Forfeiture

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?

Owners’ criminal liability may lead to seizure or confiscation of real estate by a judge.

Law stated - 1 April 2024

Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Under article 437 of the Luxembourg Commercial Code, a commercial company is bankrupt when it has ceased its payments and its credit is exhausted (loss of creditworthiness). The above cumulative conditions must be met on the day of the bankruptcy judgment by the Luxembourg District Court, sitting in commercial matters, which is competent to adjudicate a company bankrupt:

- upon the declaration made by the directors/managers on behalf of such company that it has ceased its payments and has lost its creditworthiness;
- at the request of a creditor;
- at the request of the public prosecutor; or
- on the court's own motion (*ex officio*).

The bankruptcy judgement shall declare the Luxembourg debtor bankrupt and will open a bankruptcy procedure. From the date of the judgement, the board of managers or directors are divested from their office and a receiver is appointed by the court. Creditors must submit all their claims to the appointed receiver. The bankruptcy ruling does not entail an automatic termination of contracts. Only ***intuitu personae*** agreements (ie, agreements for which the identity of the company or its solvency are crucial) can be terminated automatically because of the bankruptcy adjudication.

The occurrence of insolvency proceedings may challenge the validity of certain transactions (including payments, granting of guarantees or security, sale of assets) and agreements concluded during the hardening period and/or up to 10 days preceding the hardening period.

The receiver may also challenge the validity of certain transactions outside the hardening period if the transaction or agreement concluded has the result of defrauding the creditors and emptying the company of its assets.

In addition to the bankruptcy adjudication, a new law voted on 19 July 2023 and entered into force on 1 November 2023 replaced the composition with creditors, the suspension of payment and the controlled management by new reorganisation procedures. In a nutshell, a debtor can initiate with at least two of its creditors an out-of-court arrangement (accord amiable) with the purpose of reorganising all or part of its assets. Such an arrangement would then be homologated by the courts. The debtor may also choose to initiate a judicial restructuring procedure, the outcome of which depends on the objective pursued. Either a standstill or stay can be obtained to reach an out-of-court arrangement, or a restructuring plan agreed between the creditors and the debtors can be obtained, or the transfer of any part of the assets or business of the distressed debtor can be achieved.

The new reorganisation law provides for specific deadlines, especially with respect to the stay, which can be granted for a period of four months (and may be extended up to two years). During such stay, no enforcement of the debtors' claims may be pursued, no seizure can be obtained and the debtor is allowed to suspend the performance of its contractual obligations if the restructuring so requires.

Law stated - 1 April 2024

INVESTMENT VEHICLES

Investment entities

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?

Investments in real estate can be structured via Luxembourg investment funds or via simple holding vehicles. An investment fund is a collective investment undertaking that raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors. Luxembourg real estate investment funds are divided in two main categories: (1) funds subject to initial and ongoing supervision by the Luxembourg regulator (CSSF), such as specialised investment funds governed by the law of 13 February 2007 (SIFs), Investment Companies in Risk Capital governed by the law of 15 June 2004 (SICARs) and Undertakings for Collective Investments governed by the Part II of the law of 17 December 2010 (Part II UCIs) and (2) funds that are formed and operate outside of direct regulatory oversight by the CSSF, such as reserved alternative investment funds (RAIFs) subject to the law of 23 July 2016 and special limited partnerships subject to the law of 10 August 1915 operating as alternative investment funds (unregulated AIF SCSp). SIFs, SIF-like RAIFs and Part II UCIs are subject to risk concentration rules: maximum exposure to a single property is 30 per cent for a SIF or a SIF-like RAIF and 20 per cent for a Part II UCI. SICARs and SICAR-like RAIFs are not subject to diversification rules but must invest in risk capital with a development aspect (no core or core plus strategies) and cannot hold real estate assets directly. An unregulated AIF SCSp is not subject to any investment restrictions.

Regulated funds and the RAIFs can take any corporate form, most popular ones being public limited company (SA), private limited liability company (SARL), corporate partnership (SCA) and special limited partnership (SCSp). SIFs, SICARs and Part II UCIs can also be formed as common funds (FCP). Whereas SA, SCA and SARL have legal personality, SCSp and FCP don't have separate legal personality. In all these structures, the liability of an investor is limited to its commitment (*apport*), which is either immediately paid-up or contributed in instalments upon capital calls.

SIFs, Part II UCIs and RAIFs are exempt from corporate income tax, net wealth tax and withholding tax on distributions and are only subject to a subscription tax on their NAV (if they take the form of a tax transparent entity (eg, SCS, SCSp or FCP) it is uncertain whether the reverse hybrid rules might trigger a corporate income tax liability in specific circumstances). An unregulated AIF SCSp is tax transparent and 'tax neutral' (not subject to any withholding tax, net wealth tax, subscription tax and corporate income tax) subject to the reverse hybrid rules. SICARs (except when organised as SCSp) are subject to corporate income tax, but the return derived from risk capital securities is exempt from income tax, and distributions made by SICARs are not subject to withholding tax. On the other hand, SICARs are not subject to subscription tax. Funds taking the form of a SA, SCA and SARL may be entitled to tax treaty benefits depending on the other jurisdiction

Holding vehicles can take any corporate form, the most popular ones being the SARL and the SCSp. Without a fund qualification, the SCSp remains tax neutral provided that it does not and is not deemed to conduct a business activity (in which case, it becomes subject to the municipal business tax). A holding SARL is a fully taxable vehicle entitled to tax treaty benefits. Dividend distributions by a Holding SARL are subject to 15 per cent withholding

tax unless an exemption or treaty reduction applies. (Partial) liquidation proceeds are not subject to withholding tax.

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 RAIFs). That being said, 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.

Law stated - 1 April 2024

Foreign investors

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

The SCSp – either as Unregulated AIF SCSp or as RAIF or SIF – has undeniably won the race of the most popular form of entity for foreign investors. The principal difference between the other corporate regimes (SARL, SCA, SA) on the one hand, and the SCSp regime on the other, is that the other corporate vehicles have legal personality separate from that of its partners, whereas an SCSp does not have legal personality and must act through its manager, which may be but does not have to be the general partner. Despite the lack of legal personality, the SCSp is, however, legally entitled to hold and register assets and open bank accounts in its own name. Additionally, the other corporate vehicles are required to prepare and publish annual accounts according to Luxembourg general accounting principles or the International Financial Reporting Standards, whereas the SCSp is not, and can use any accounting principles. The limited partners in the SCSp are not publicly disclosed (unlike in a SARL). These and many other flexibilities offered by the SCSp, which was modelled on the successful Anglo-Saxon limited partnership regimes, make the SCSp the go-to vehicle for foreign investors used to investing through England, Cayman Islands, Delaware and other common law jurisdictions.

Law stated - 1 April 2024

Organisational formalities

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?

Funds taking the form of SA, SARL or SCA must be formed before a Luxembourg notary via a notarial deed recording the articles of association and require that a bank account is opened in the name of the soon-to-be-formed entity where seed capital is blocked prior to incorporation. An SCSp is formed by the mere execution of a limited partnership agreement

in two originals by at least one limited and one general partner and no minimum seed capital is required at formation.

Upon execution of the constitutive document (before notary or under private seal), the entity is registered with the Luxembourg Register of Trade and Companies (RCS) and is attributed a company number (available online on the RCS portal) and a tax identifier (communicated to the entity via mailed letter addressed to the registered office of the newly formed entity by the Luxembourg tax authorities). Whereas names of investors in a SA, SCA and SCSp remain confidential, shareholders' identity in the SARL is made public via the RCS (and must be kept up to date). The identity of ultimate beneficial owners is mandatorily disclosed to the Luxembourg Register of Beneficial Owners (RBO) by all Luxembourg entities. RBO is not open to the public but can be accessed on request by all professionals within the meaning of article 2 of the law of 12 November 2004 on the fight against money laundering and terrorist financing. Luxembourg law provides for a fine of between €1,250 and €1,250,000 for any entity that fails to file its beneficial ownership details with the RBO or files inaccurate, incomplete or out-of-date beneficial ownership details. Beneficial owners who fail to provide information to their Luxembourg entity are required to fulfil their obligations to file with the RBO, and also risk a fine of between €1,250 and €1,250,000.

Regulated funds must obtain prior CSSF approval before incorporation. The CSSF collects detailed information, inter alia, about the initiator, the founder and the key service providers of the fund, as well as information about investment strategy and anticipated marketing and distribution activities. Upon obtaining CSSF approval, a regulated fund is formed and admitted to the official list of regulated funds (with the CSSF allocating to it a fund number). Unregulated funds can be formed without any prior regulatory approval and therefore present a time to market advantage. RAIFs only have to request their registration on the official list of RAIFs maintained by the RCS after their formation (within 15 business days). In addition, a RAIF formed as an SCSp must have its formation recorded before a Luxembourg notary within five business days following the execution of the limited partnership agreement.

Following formation, regulated funds and RAIFs must reach a minimum capital of €1.25 million for SIFs, RAIFs and Part II UCIs and €1 million for SICARs within 24 months.

Non-resident investors investing via a Luxembourg fund are not subject to any registration nor reporting requirements (including tax) unless they hold their interest through a Luxembourg permanent establishment or representative. Particular attention should be given to the so-called reverse hybrid rules applicable to SCSps, which, depending on the investor base, could cause the SCSp, despite its default Luxembourg tax transparency, to become (partially) subject to Luxembourg corporate income tax. The choice of the fund vehicle and the holding vehicle ultimately depends on (1) the tax residence and tax characteristics of investors, (2) the asset class, and (3) the type and frequency of income expected.

Law stated - 1 April 2024

ACQUISITIONS AND LEASES

Ownership and occupancy

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

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 an indivision – several owners jointly exercise the full ownership right over a property (eg, two children who are transferred the family house by inheritance); or of a co-ownership – several owners enjoy an exclusive property right over private parts and shared rights over common parts (eg, 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 shall be 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 shall be 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.

The main lease agreements are retail lease agreements and residential lease agreements, which are subject to specific provisions. Industrial lease agreements or office lease agreements are governed by the Civil Code.

Law stated - 1 April 2024

Pre-contract

What are the typical pre-contractual steps?

For commercial real estate transactions, it is customary that the seller and the candidate buyer enter a letter of intent before the execution of a sale contract. As per a letter of intent, the main commercial conditions of the deal are determined and the seller grants the candidate buyer an exclusivity period. During such exclusivity period, the seller will refrain to market the property. A letter of intent is generally a non-binding document. Courts will not enforce a letter of intent if the latter clearly stipulates that the content of such letter of intent is not binding. However, parties must act in good faith. Any abusive and unjustified termination of negotiations may authorise the non-breaching party to claim damages. Brokers are generally involved in real estate transactions. Brokerage activities require a business licence (strictly regulated by law) and a professional training.

Law stated - 1 April 2024

Contract of sale

What are typical provisions in a contract of sale?

Save for forward sale transactions of residential assets, which are governed by mandatory provisions of the Civil Code, parties are free to agree upon the terms and conditions of the contract of sale. The Civil Code applies to transfers of title and provides for a consensual regime where a transfer is perfected between parties once there is an agreement on the object and the price; to be valid, the price must be determined or determinable. Therefore, a contract of sale must contain a description of the property and the agreed purchase price. In addition, the agreement usually provides for general and specific seller and buyer representations and warranties.

Representations and warranties will typically be limited by the seller's disclosure, including the data room. It is therefore essential to agree on a representation on this data room. Parties should also pay attention to disclosures covering 'all publicly available information' and at least agree on a closed list and a cut-off date, since not all this information is available online. By law, the seller is bound by two obligations: the delivery of the object of the sale and the guarantee of the object of the sale. This guarantee is twofold, covering peaceful possession (a guarantee against eviction) and any hidden defects. From a legal standpoint, the seller cannot exclude liability for hidden defects of which he or she was aware. These two obligations apply to both asset and share transactions. The parties can contractually limit these guarantees, which is often the case in transactions between institutional investors. The sale and purchase agreement shall also contain standard representations on the capacity of both parties to contract and execute their respective obligations. In asset transaction, parties are free to agree on a set of representations and warranties, mainly concerning title, leases, permits and contracts. In share transactions, as the guarantees provided by law are limited to the shares, it is market practice to agree on an extensive set of representations and warranties covering all real estate-related items, corporate matters, litigation and taxes.

Under Luxembourg law, the buyer can request the annulment of the sale if its consent has been vitiated, and damages if there has been any misrepresentation. A claim for damages must demonstrate the damage suffered, the fault of the seller (ie, the misrepresentation) and the link between the damage and the fault.

In share transactions, specific attention is required when defining the damage and drafting the claim procedure to ensure that a misrepresentation at target level (eg, compliance with tax law) can qualify as damage (and for which amount) in the hands of the buyer. Parties usually agree on exclusive remedy clauses limiting the possibility for the buyer to claim damages exclusively in accordance with the provisions of the sale and purchase agreement, meaning they can only claim damages for misrepresentation and within the indemnification limits, except in cases of fraud.

In the case of asset transactions, down payments of 10 per cent of the purchase price are usual and are usually held in escrow by the notary. Unless otherwise agreed between the parties, in the case of asset transactions, the purchaser must bear the acquisition costs (eg, registration duties, notary costs and fees). Unless otherwise agreed between the parties, the transfer of risk on the real estate is operated upon the transfer of the real estate or shares.

Law stated - 1 April 2024

Environmental clean-up

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?

As a matter of principle, the 'polluter pays' principle is applicable, so an investor (landowner) should not be held liable for contamination caused by another person. The question on potential responsibility for soil contamination is answered differently depending on the structure of the acquisition, with customary protection being available only in asset transactions.

Law stated - 1 April 2024

Lease covenants and representation

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?

Typical seller's representations regarding existing relate to validity of the leases, compliance with material provisions of the leases and absence of litigation as well as absence of ongoing financial undertakings of the landlord towards the tenants. Contractual provisions usually prevent the seller from altering the building and modifying the legal situation of the building between signing and closing (ie, by entering new lease agreements without buyer's prior approval). Brokerage agreements are generally terminated upon closing. Estoppel certificates are not market practice and therefore do not constitute an obligation to close a transaction.

Law stated - 1 April 2024

Leases and real estate security instruments

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?

A lease agreement is generally not subordinated to a security instrument pursuant to the provisions of such lease agreement. If it is registered and recorded to the mortgage register (for lease agreements for more than nine years), the lease agreement is enforceable towards acquirers of real estate assets and in the case of foreclosure.

Lenders may require an independent guarantee issued from a credit institution to guarantee the payment of the rents to be provided by the tenants. No subordination or non-disturbance agreements are generally required.

Law stated - 1 April 2024

Delivery of security deposits

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?

Security deposits are generally required in all lease agreements, disregarding the nature of the lease agreement. Landlords usually require a first demand bank guarantee or cash deposit up to three to six months' rent, to be available prior access to the leased premises. Automatic rent indexation clauses are prohibited for residential lease agreements. Commercial lease agreements usually contain automatic rent indexation clauses. Upon rent indexation, and to the extend contractually agreed, security deposit must be adapted to properly cover the secured rent amount. Bank guarantees may be granted *intuitu personae* preventing the free assignment of the bank guarantee to the acquirer of a real estate.

Law stated - 1 April 2024

Due diligence

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?

Real estate due diligence is usually carried out by lawyers before the signing of any contract and covers the following topics: title, use, building and operation permits, leases, construction and management contracts, the soil situation, VAT and transfer taxes and litigation. Technical and environmental advisers usually carry out technical due diligence on the physical status of the property and compliance with conditions under the permits. In share transactions, extensive corporate and tax due diligence is performed.

Real estate titles searches occur via an extract from the mortgage register, which keeps track of transfers of property rights over the past 30 years. A seller's representation relating to real estate ownership generally qualifies as fundamental representation covered by a 10-year time limitation. 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.

Law stated - 1 April 2024

Structural and environmental reviews

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?

Environmental review, as part of the technical due diligence investigation, is recommended, especially when harming activities or installations are operated on the property. An environmental review generally includes a review of the register of potentially polluted sites implemented by the Administration, analysis of soil investigations reports, when available, and performance of soil in investigations. Sale agreements generally include representations and warranties given by the seller in relation to possible pollution of the property, as well as indemnification clauses and clauses regarding decontamination costs. Environmental liability insurance covering pollution, remediation and environmental legal liability may be contracted but are not currently market practice.

Law stated - 1 April 2024

Review of leases

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

Lawyers usually review lease agreements from a legal point of view assessing the compliance of the lease agreements provisions with applicable legal regulations. Lawyers also usually point out any non-market practice clauses (eg, in terms of reinstatement, assignment, maintenance and repairs), ongoing financing undertakings from the landlord and any clauses that might trigger financial exposure for a candidate buyer. More generally, lawyers are asked to verify if lease assumptions agreed in the letter of intent are met. The commercial and financial aspects of the lease agreements are usually reviewed by commercial and financial advisers. The same applies to property management agreements. However, usually, the candidate-buyer requests the termination of the property management

agreement upon closing. The lawyers' review is therefore often limited to owner's termination rights.

Usually, the lenders would require a duty of care agreement to be entered into by the manager and the lenders (or its representative) to ensure the proper management of the property in accordance with the terms of the financing arrangements.

Law stated - 1 April 2024

Other agreements

What other agreements does a lawyer customarily review?

In the case of asset transactions, a lawyer customarily reviews the property documentation (ownership titles, mortgage certificate, cadastral documentation), the lease agreements, the service agreements, litigation if any and the building and the operation permits. In the case of a share transaction, lawyers also review in detail the corporate (shares register, minutes of the board and the managers) and accounting and tax documentation.

Law stated - 1 April 2024

Closing preparations

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

Customarily, lawyers ensure that the closing actions agreed upon by the parties are fulfilled at closing. The usage of closing checklist is market practice. Content of closing actions depends on each transaction and usually reflect the outcome of the due diligence process. Lawyers usually verify signature authorisations and corporate approvals (based on the Trade and Companies Register) unless conditions precedent are agreed upon (eg, obtaining a financing, signing and closing occur the same day). In the case of financing, closing may occur within two to four months of signing.

Financing an acquisition is usually a combination of own funds and funds borrowed from a credit institution. The amount of own fund may vary depending on the market conditions and requirements of the credit institutions. The usual corporate approvals, legal opinion and security agreement would be required to satisfy the conditions precedent to the drawdown of the funds. Proration is not customary.

Law stated - 1 April 2024

Closing formalities

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?

In the closing of asset transactions, closing takes place before a public notary. In the case of share transactions, closing occurs in a place agreed by the parties, usually in presence of the lawyers and a bank representative in the case of financing. Remote closings can also be considered.

Law stated - 1 April 2024

Contract breach

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

According to the Civil Code, the non-breaching party is entitled to request either the enforcement of the sale before a judge or to cancel the sale and request damages. If not determined in the sale contract, the amount of damages will be decided by the judge. In asset transactions, down payment is usually paid at signing and will secure the payment of damages in the case of cancellation of the sale.

Law stated - 1 April 2024

Breach of lease terms

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?

Landlords and tenants are entitled to request and enforce the fulfilment of contractual obligations before a judge. Generally, lease agreements authorise landlords to terminate the lease agreement early in the case of tenant's contractual breach, without any judicial intervention. Depending on the facts, the application of such a clause might be declared invalid by a judge. Tenants are also entitled to claim rent decrease and indemnification in the case of breach of landlord's obligations.

Law stated - 1 April 2024

FINANCING

Secured lending

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?

There are two types of security that can be used in real estate financing:

- mortgage over the real estate property; and
- pledge over the shares of the Luxembourg company owning the real estate property.

The mortgage is the most common security granted. There is no distinction under Luxembourg law between a mortgage over land and a mortgage over the buildings on the land. In both instances, the mortgagee will be entitled to the same rights and remedies against the mortgagor.

Foreign lenders are not restricted from taking mortgages over immovable property located in Luxembourg. Depending on the project, a mortgage loan may be the preferred option of the credit institution or lenders.

To the extent the property is owned by a Luxembourg company, lenders would require a pledge over the shares issued by the Luxembourg company. Share pledge agreements are governed by the Luxembourg financial collateral law and are commonly used in Luxembourg as they provide a single point of enforcement and are bankruptcy remote (ie, the bankruptcy of the security provider will not affect the security granted under the financial collateral agreement). In addition, the appropriation is a very straightforward out-of-court means of appropriation, which makes it particularly attractive for lenders.

Law stated - 1 April 2024

Leasehold financing

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

Luxembourg law does not provide for the possibility to finance ground leases.

Law stated - 1 April 2024

Form of security

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

All rights created by real estate-related agreements and listed under Luxembourg law have to be registered. This includes sales of land, creation of ownership splits, certain judgments, leases with a term exceeding nine years, public expropriations, certain gifts and other operations and security.

Mortgages are agreements made on a specified amount (principal and interest). They are enacted in front of a Luxembourg notary and shall be renewed every 10 years to remain enforceable against third parties. Their registration and renewal are subject to a registration duty of 0.05 per cent.

Mortgages should be registered with the Mortgage Office assigned to the immovable property location. The mortgagor should provide Luxembourg authorities with the notarial deed creating the mortgage.

The purpose of the registration of real estate rights is to inform potential buyers of a building or a land who the owner is and whether there are encumbrances *in rem* affecting the real estate property. The Mortgage Office makes this information available to the public in a specific format. Non-registered mortgages will not bind third parties.

Since the registration requirement does not create or otherwise affect any real estate rights, one cannot see it as a state guarantee system.

Law stated - 1 April 2024

Valuation

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?

Usually, the borrower will provide a valuation of the real estate property provided by either international or local valuer such as CBRE, JLL or Nexvia. In some cases, Luxembourg lenders may assist with the valuation of the real estate property or request the use of a specific valuer.

Law stated - 1 April 2024

Legal requirements

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?

To the extent the lenders are not granting loan to the public on a regular basis, no business licence or qualification to do business would be required. Granting loans to the public is a specific profession regulated by Luxembourg law and the performance of such activity is subject to a licence before starting any activity and is subject to the supervision by the Luxembourg financial sector regulator.

The registration of a mortgage as well as the transfer of a mortgage, further to the transfer for consideration of the mortgage-backed receivable or loan, is subject to a 0.24 per cent registration duty and a 0.05 per cent inscription fee applicable to the principal amount of the loan receivable.

Luxembourg does not levy taxes on the issuance of a note secured by real estate situated in Luxembourg.

Law stated - 1 April 2024

Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

There is no applicable usury or interest limitation laws in the Grand Duchy of Luxembourg that may restrict recovery of any amounts payable in relation to the mortgage loan. A Luxembourg judge may, however, consider the interest rate applied to the loan to be excessive if requested to examine it by the borrower. Interest would only be deemed excessive if it is obtained by a lender that abuses the inexperience of the borrower (some case law excludes loans between professionals) such that the rate would be deemed excessive compared to the risk associated with the loan. There is no automatic requalification of remuneration on a loan, and it is quite common in Luxembourg to have high interest rates with high exit fees. However, if the lender voluntarily abuses the borrower's need to get an interest clearly exceeding the normal interest in respect of the risk coverage of the loan, a Luxembourg judge, at the request of the borrower, can reduce the borrower's obligations to repay the loan capital and the payment of interest.

Law stated - 1 April 2024

Loan default and enforcement

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?

The secured creditors are entitled to enforce their security if the secured debt has become due and payable and upon the occurrence of an event of default of the borrower (under the conditions provided in the relevant finance document). To initiate the enforcement procedure, the mortgagee must obtain a court payment order to enforce the mortgage by way of a seizure of immovable property. A bailiff must then serve to the mortgagor a summons to pay, stating that, in the absence of payment, the immovable property shall be attached. Following further steps, the mortgagee must eventually file a formal application with the clerk of the court requesting a hearing. The court thereafter will assess the validity of the attachment and will appoint a notary to organise the public auction of the immovable property.

In the case that the security interest granted is a first ranking mortgage, the above procedure may be shortened if the notarial deed, which constitutes an enforceable title, provides that the mortgagee is authorised to sell the immovable property through a notary. In such a case, the mortgagee is not required to follow the statutory attachment procedure and, therefore, court proceedings, which may be lengthy and expensive, are not involved.

Enforcement of a Luxembourg law share pledge agreement is fairly easy as no in-court procedure is required. Enforcement and in particular, appropriation is made by the registration of the pledgee (or a designated third party) in the register of shareholders of the Luxembourg company as new shareholder of the Luxembourg company. Enforcement can occur before the valuation of the shares finalised.

Law stated - 1 April 2024

Loan deficiency claims

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?

If the value of the collateral is lower than the secured liabilities or if the price of the sale of the real estate property is not sufficient to cover the sums due by the borrower, the lenders are entitled to exercised other remedies in the finance documents, such as other guarantees or collateral. A receivable will remain outstanding as long as the debt remains unrecovered. The borrower may file for bankruptcy and the lenders may have to add their receivables to the insolvency estate by filing a receivable statement with the court appointed receiver upon declaration of bankruptcy made by the Luxembourg courts.

Law stated - 1 April 2024

Protection of collateral

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

To conserve its mortgage rights, the mortgagee shall renew its mortgage every 10 years.

A security taken by a lender cannot, in principle, be avoided or rendered unenforceable. However, in the case of a judgment declaring a borrower's bankruptcy, securities such as mortgages or any rights in rem granted by the debtor during the hardening period, which is generally a period of six months before the declaration of bankruptcy, may be declared null and void. The concept of a hardening period does not apply to financial collateral arrangements.

In insolvency proceedings, individual legal actions by privileged and unsecured creditors are, in principle, suspended. However, if the lender has secured its claims through the registration of a mortgage over the asset, then the above stay of enforcement does not apply. This is because mortgages may be enforced despite the adjudication in the bankruptcy of the mortgagor.

A debtor cannot, in general, block an enforcement action for commercial matters except, of course, in the case that he proves the repayment of the debt owed to the lender. However, it can seek and benefit, if possible, from a stay under the new reorganisation procedure law, which may suspend the effect of the seizure and bankruptcy.

Law stated - 1 April 2024

Recourse

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?

Luxembourg securities are by law limited recourse to the assets their relate to. In addition, mortgages are limited to the amount indicated in the mortgage itself.

Law stated - 1 April 2024

Cash management and reserves

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

Cash management and reserves are not common nor required by lenders. Lenders may require a bank guarantee in the form of a block sum onto a bank account.

Law stated - 1 April 2024

Credit enhancements

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

Lenders may require an independent guarantee or commitment or support letters from the borrower's shareholder. Those letters or independent guarantee provide either financial support or commitment to perform. Luxembourg law has recently introduced the professional guarantee, which remains a pure contract arrangement, leaving the parties to freely determine their obligations. Professional guarantee also benefits from bankruptcy remoteness as the Luxembourg legislator wanted to align the regime of independent guarantee with the financial collateral arrangements law.

Enforcement of a professional guarantee or an independent guarantee or credit or support letter is an in-court procedure and the beneficiary of the guarantee or comfort letter shall seek their performance and damages (if any) in front of the Luxembourg competent court.

Law stated - 1 April 2024

Loan covenants

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

Aside from the usual covenants such as centre of main interest, tax residency, compliance with law and regulations, and no default and information covenant, the lenders would require covenants such as ownership of assets, negative pledge as well as compliance with asset management or lease agreement terms and conditions.

Law stated - 1 April 2024

Financial covenants

What are typical financial covenants required by lenders?

Financial covenants are usually based on loan-to-value ratios indicating the maximum percentage of the loan towards the value of the real estate property. Those are based on an expert valuation and, depending on the property's use, the frequency of the report varies (from one to three years).

In addition to the above, an interest cover ratio covenant, indicating the minimum ability of the debtor to pay its interest obligations for a certain interest period will be included in the loan documentation, along with a capital expenditure covenant (evidencing the maximum amount for the capital expenditure).

In the case of a breach of a financial maintenance covenant, equity cure rights are included in the loan documentation requesting the sponsors to inject equity into the structure to block such breach.

In Luxembourg law-governed straight loans, the financial maintenance covenants will generally be limited to loan-to-value covenants and interest cover ratios.

Law stated - 1 April 2024

Secured movable (personal) property

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?

Movable assets security is made usually under private seal and governed by the terms and conditions of the agreement between the parties thereto.

Security agreements over shares, receivables, account bank and securities are governed by the financial collateral law and do not require a specific notarial deed to be valid. The perfection requirement will vary depending on the asset over which the security is granted.

A pledge over shares is perfected by the registration of the pledge in the register of shareholders of the Luxembourg company.

A pledge over account bank shall be perfected by the notification and acknowledgement of the account bank that a pledge is created and a waiver by such account bank of its general pledge during the relevant security period.

A pledge over receivables shall be notified to the relevant debtors.

Control agreements are not necessary nor used in Luxembourg.

Law stated - 1 April 2024

Single purpose entity (SPE)

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?

Usually, the Luxembourg real estate property is owned by a single entity irrespective of the structure of the acquisition or holding structure and whether there is other financing in place, such as mezzanine or junior financings.

Managers or directors of the SPE shall manage the SPE in the interest of the SPE only. They are liable towards the company itself and shall assess the corporate interest of the company to enter into the transaction on a standalone basis. In addition, they have an obligation to file for bankruptcy within a month of discovering the state of cessation of payments of the Luxembourg company. They face individual and collective liability towards the company in that respect.

Law stated - 1 April 2024

UPDATE AND TRENDS

International and national regulation

Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

On 1 February 2024, the new Luxembourg government declared the Luxembourg construction sector to be in a state of crisis. This announcement followed the economic slump that has been dominating the construction sector as well as the housing market for months. To avoid an ever-growing demand for affordable housing coming to a complete standstill on the supply front, the Luxembourg government recently presented a number of fiscal measures with the hope that these will give the sector the boost that it so desperately needs.

Formalised in a bill of law on 9 February 2024, the government announced, among other things, the following measures with a view to increase private property investment and to facilitate access to housing:

- the existing real estate transfer tax credit for individuals acquiring their main residence will be increased from €30,000 to €40,000 per person. Moreover, a new real estate transfer tax credit for the acquisition of rental units of €20,000 per person will be introduced;
- the individual income tax rate applicable to capital gains realised on Luxembourg real property will be reduced by 25 per cent or 50 per cent, depending on the holding period of the property sold;
- the flat rate for accelerated amortisation applicable to newly constructed rental units will be increased to 6 per cent for six years, limited to a total tax benefit of €250,000; and
-

the deductibility cap applicable to interest payments on mortgage loans will be gradually increased.

The sector is also impatiently waiting for the national real estate roundtable, which is due to take place on 22 February 2024, and which aims at establishing a catalogue of additional measures to further boost the Luxembourg housing market.

Law stated - 1 April 2024