

SWISS INVESTMENT REPORT* 9

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The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

Of course, the Swiss Investment Report is also addressed to any other person who is interested in obtaining background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a

Revision of Swiss Property Law

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Revision of Immovable Property Law

I. Introduction

The revision of the property law, which was passed by the Federal Parliament on December 11, 2009, entered into force on January 1st, 2012. It is the most extensive revision of the immovable property and land register law since the Swiss Civil Code became effective in 1912. The main purpose of this revision is to modernize and to adapt the legal framework to commercial requirements and to facilitate administration procedures.

II. What are the general requirements for the acquisition of a real estate?

A. Purchase Contract

The acquisition of a real estate requires a purchase contract notarized by a notary public. The same applies to letters of intent and contracts establishing a right of purchase, pre-emption right or option of repurchase. To comply with the legal prerequisites, the notarized contract must contain at least the designation of the real estate to be transferred, i.e. the address and parcel number according to the land register as well as the price agreed by the parties. Any other conditions which are from an objective point of view or from the parties' subjective point of view crucial for the purchase agreement must also be part of the notarized contract, e.g. guarantee of particular characteristics of the real estate, payment conditions etc.

B. Registration

To become effective, the real estate acquisition must be registered with the land register. The land register is a public register, providing information about immovable property rights. Any person showing a credible interest has the right to consult the register. It mainly shows the name of the owner, encumbrances of the property and certain kinds of contractual third-party rights, e.g. pre-emption rights. Before such registration, the purchaser does legally not possess the real estate and has therefore no disposal rights. The notarized purchase contract must be enclosed to the application for registration.

C. Authorization for persons abroad

Swiss Law restricts the acquisition of real estate for residency purposes in Switzerland by persons abroad. Generally, the acquisition of real estate for residency purpose by persons abroad is subject to prior authorization (for further information on this topic see Swiss Investment Report, No. 5, February 2010).

III. Implementation of a Registered Mortgage Deed

A. What are the real estate securities provided by Swiss Law?

Swiss law provides two kinds of real estate securities. Lien (“Grundpfandverschreibung”) and mortgage deed (“Schuldbrief”). The third one (“Gült”), which has no practical relevance anymore and is a pure real estate security - without personal liability of the debtor - has been rescinded with the property law revision.

A lien serves as security for any kind of actual, future or even uncertain payment obligation. The requirements for the establishment of a lien are (i) a lien contract certified by notary public and (ii) the registration with the land register. The payment obligation and the security right are connected with each other in a way that whenever the obligation is fulfilled or the contract establishing the payment obligation (e.g. loan agreement) turns out to be invalid the security right automatically ceases to exist.

A mortgage deed in contrast allows the owner of a real property to transfer the value of his property or part thereof into a negotiable instrument. As the mortgage deed is independent from the underlying contract (e.g. loan agreement), any person holding the mortgage deed has the right to enforce the debtor’s payment obligation. The mortgage deed itself can further be encumbered by a simple transfer of possession. Like the lien, the establishment of a mortgage deed requires (i) a publicly notarized contract and (ii) must be registered in the land register.

B. Advantage of the Registered Mortgage Deed

With the revision of the property law, the registered mortgage deed (“Register-Schuldbrief”) has been implemented. As the name let assume, the registered mortgage deed is not a physical document anymore, but only a registered security right. However, it will still remain an option to create an actual mortgage deed in the future. The registered mortgage deed can only be transferred or encumbered by amendment of the registration in the land register. The implementation of the registered mortgage deed shall mainly facilitate and minimize costs for legal transactions between banks, notaries and the land register authorities. Furthermore, the risk of loss of the deed, and costly cancellation procedures caused thereby, will be eliminated.

IV. Statutory lien in favor of construction workers

According to the Swiss Civil Code, construction workers or companies are granted a statutory lien for their payment claims based on a construction contract. Not only the main contractor, but also subcontractors are entitled to such real estate security. It might happen that a subcontractor successfully applies for the registration of a lien, even though the property owner has already fulfilled all his obligations towards the main contractor. Therefore it is important to eliminate this risk by inserting an appropriate clause into the construction contract. The establishment of such statutory lien presumes that the construction worker applies for the registration of the lien within three months upon completion of construction work. From the 1st of January 2012 on, this application term will be extended up to four months. If the tenant of a real estate property mandates a construction company with construction works, the lien is only granted if this work was conducted with prior consent of the property owner. This rule, which was implemented by jurisdiction, will now become statutory law.

V. Higher formal requirements for the establishment of easements

Easement is a right derived from a contract between right holders of two immovable properties (dominant property and servient property), whereby the holder of the dominant property has the right to utilize the servient

property to facilitate the use of his property. The right usually takes the form of passage through the servient property, objecting the owner of the servient property to build above a certain level or to build at all. The specific easement right depends on the particular agreement. The easement becomes effective upon (i) entering into the easement contract and (ii) registration with the land register. Before the enforcement of the property law revision, easement contracts generally had to be concluded in written form. For the future, most kind of easement contracts will require certification by notary public. This revision has mainly been implemented in order to increase legal certainty. However, stricter formal prerequisites also always result in higher costs and less flexibility.

VI. Dependent real estate property

If, according to the land register, the property of a certain parcel of real estate (“B”) belongs to the registered owner of another parcel (“A”), real property B is a so called dependent real property, whereas parcel A is the main real property. With the revision of the immovable property law, this institution (which already existed before according to the land register regulation) and its legal effects will now be stated in the Civil Code. According to the new provision, the dependent real property cannot be transferred or encumbered separately, i.e. without the transfer or encumbrance of the main real property. In other words, the dependent real property becomes a legal part of the main real property and shares its legal destiny.

VII. Revision of Land Register Regulation

Within the revision of the immovable property law, the land register regulation was revised as well. The revised regulation was set in force together with the revised Civil Code, on 1st of January, 2012. Its main purpose is to facilitate the implementation of an electronic administration of the land register and to make the system more efficient. In addition a new regulation regarding the electronic certification was set in force. This new regulation will allow the notary public to transmit the issued public certificates electronically and to notarize copies and signatures electronically.

VIII. Conclusion

Generally it can be noticed that the revision of the immovable property law has brought major facilitation within the administration of real property rights. Even though the revision also implements a few higher formal requirements, in particular for the establishment of easements, on an overall view the relief of administrative hindrances prevails.

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