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# Real Estate

Switzerland: Law & Practice  
Walder Wyss Ltd

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## Law and Practice

Contributed by Walder Wyss Ltd

### Contents

<b>1. General</b>	<b>p.5</b>	<b>4. Planning and Zoning</b>	<b>p.7</b>
1.1 Main Sources of Law	p.5	4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning	p.7
1.2 Main Market Trends and Deals	p.5	4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction	p.7
1.3 Proposals for Reform	p.5	4.3 Regulatory Authorities	p.7
<b>2. Sale and Purchase</b>	<b>p.5</b>	4.4 Obtaining Entitlements to Develop a New Project	p.7
2.1 Categories of Property Rights	p.5	4.5 Right of Appeal Against an Authority's Decision	p.7
2.2 Laws Applicable to Transfer of Title	p.5	4.6 Agreements with Local or Governmental Authorities	p.8
2.3 Effecting Lawful and Proper Transfer of Title	p.5	4.7 Enforcement of Restrictions on Development and Designated Use	p.8
2.4 Real Estate Due Diligence	p.5	<b>5. Investment Vehicles</b>	<b>p.8</b>
2.5 Typical Representations and Warranties	p.5	5.1 Types of Entities Available to Investors to Hold Real Estate Assets	p.8
2.6 Important Areas of Law for Investors	p.5	5.2 Main Features of the Constitution of Each Type of Entity	p.8
2.7 Soil Pollution or Environmental Contamination	p.5	5.3 Minimum Capital Requirement	p.8
2.8 Permitted Uses of Real Estate Under Zoning or Planning Law	p.5	5.4 Applicable Governance Requirements	p.8
2.9 Condemnation, Expropriation or Compulsory Purchase	p.5	5.5 Annual Entity Maintenance and Accounting Compliance	p.8
2.10 Taxes Applicable to a Transaction	p.6	<b>6. Commercial Leases</b>	<b>p.8</b>
2.11 Legal Restrictions on Foreign Investors	p.6	6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time	p.8
<b>3. Real Estate Finance</b>	<b>p.6</b>	6.2 Types of Commercial Leases	p.8
3.1 Financing Acquisitions of Commercial Real Estate	p.6	6.3 Regulation of Rents or Lease Terms	p.8
3.2 Typical Security Created by Commercial Investors	p.6	6.4 Typical Terms of a Lease	p.8
3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders	p.6	6.5 Rent Variation	p.9
3.4 Taxes or Fees Relating to the Granting and Enforcement of Security	p.6	6.6 Determination of New Rent	p.9
3.5 Legal Requirements Before an Entity Can Give Valid Security	p.7	6.7 Payment of VAT	p.9
3.6 Formalities When a Borrower is in Default	p.7	6.8 Costs Payable by Tenant at Start of Lease	p.9
3.7 Subordinating Existing Debt to Newly Created Debt	p.7	6.9 Payment of Maintenance and Repair	p.9
3.8 Lenders' Liability Under Environmental Laws	p.7	6.10 Payment of Utilities and Telecommunications	p.9
3.9 Effects of Borrower Becoming Insolvent	p.7	6.11 Insuring the Real Estate that is Subject to the Lease	p.9

6.12 Restrictions on Use of Real Estate	p.9	<b>8. Tax</b>	<b>p.11</b>
6.13 Tenant's Ability to Alter and Improve Real Estate	p.9	8.1 VAT	p.11
6.14 Specific Regulations	p.9	8.2 Mitigation of Tax Liability	p.11
6.15 Effect of Tenant's Insolvency	p.9	8.3 Municipal Taxes	p.12
6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations	p.9	8.4 Income Tax Withholding for Foreign Investors	p.12
6.17 Right to Occupy After Termination or Expiration of a Lease	p.9	8.5 Tax Benefits	p.13
6.18 Right to Terminate Lease	p.9	8.6 Key Provisions in the Federal Tax Reform Legislation	p.13
6.19 Forced Eviction	p.10		
6.20 Termination by Third Party	p.10		
<b>7. Construction</b>	<b>p.10</b>		
7.1 Common Structures Used to Price Construction Projects	p.10		
7.2 Assigning Responsibility for the Design and Construction of a Project	p.10		
7.3 Management of Construction Risk	p.10		
7.4 Management of Schedule-related Risk	p.10		
7.5 Additional Forms of Security to Guarantee a Contractor's Performance	p.10		
7.6 Liens or Encumbrances in the Event of Non-payment	p.11		
7.7 Requirements Before Use or Inhabitation	p.11		

**Walder Wyss Ltd** has specialised and established itself in Switzerland's real estate sector over the course of many years. Its experienced and well-known real estate team, consisting of over 30 lawyers and tax experts, is one of the largest and most specialised in the country, which enables the firm to execute highly complex real estate transactions, planning issues and real estate litigation efficiently and with an integrated perspective. Walder Wyss advises real estate players in all parts of Switzerland through its offices in Zürich, Geneva, Basle, Lugano, Bern and Lausanne, which

also offer notarial services such as notarisations of sale and purchase agreements. The firm advises and represents institutional and private investors before all state courts, arbitral tribunals and administrative authorities in all legal and tax aspects of the real estate market, such as real estate transactions, development and construction projects, real estate financing, securitisations, planning tax structures, Lex Koller rulings, lease agreements, environmental law issues; representing clients and PPP.

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## 1. General

### 1.1 Main Sources of Law

The main sources are the Swiss Civil Code and the Swiss Code of Obligations.

### 1.2 Main Market Trends and Deals

As real estate in Switzerland is probably coming close to the end of its current cycle, the price level is rather high and therefore primarily institutional investors with a need to invest the funds allocated are active as buyers, whereas foreign investors and ultra high net worth individuals are quite reluctant to invest at this stage. Moreover, some of the real estate actors try to increase their profit with development projects. The transaction level was rather high over the last twelve months, but no particular transaction could be mentioned as the most significant deal.

### 1.3 Proposals for Reform

There are currently no reforms planned that might have a significant impact on real estate in Switzerland.

## 2. Sale and Purchase

### 2.1 Categories of Property Rights

Freehold, leasehold, co-ownership and storey-ownership rights.

### 2.2 Laws Applicable to Transfer of Title

Transfer of title is primarily regulated by the Swiss Civil Code and by the Federal Ordinance of Land Registry. The transfer of residential real estate to any foreign persons is generally restricted according to the Federal Law on the Acquisition of Real Estate by Persons Abroad (the so-called Lex Koller). Moreover, tax issues have to be considered, which differ from canton to canton.

### 2.3 Effecting Lawful and Proper Transfer of Title

The transfer of real estate is registered at the competent land registry. Any buyer of real estate acting in good faith is protected by the information contained in the land registry and hence no title insurance is required in Switzerland.

### 2.4 Real Estate Due Diligence

As registration is conclusive, legal due diligence involves analysing the land register extract and its supporting documents, which shows all relevant property information. In addition, any existing leases must be examined, since these are transferred to the buyer as the new landlord upon purchase of the property. Another aspect of due diligence relates to environmental law. Further, prudent buyers perform, in addition to legal due diligence, tax, technical and financial due diligence. If a foreign person buys property that includes real estate that is not commercial property or provides for relevant land reserves, it must be verified that there is no

infringement of the Lex Koller. This type of purchase can be deemed void, since the Lex Koller restricts foreign persons from buying residential and other non-commercial real estate in Switzerland. Financing transactions should be examined on a case-by-case basis.

### 2.5 Typical Representations and Warranties

The warranties typically given by a seller within a share deal include corporate warranties relating to the correct organisation and valid existence of the company, accurate correct presentation of the financial statements and title to shares. Other important warranties relate to the accuracy of rent rolls and the due diligence information being accurate, complete and up to date. Moreover, specific tax representations are usually contained in the purchase agreement. In both asset and share deals, the seller does not usually provide any warranty as to the substance of the building. With respect to the seller's other representations, they are often qualified by the seller's knowledge.

In share deals, most of the seller's warranties are often capped at a certain amount; for example, at 10% of the asset's price. However, such cap normally does not apply to the seller's title in the shares. In the event of any misrepresentation, the seller is liable to compensate the buyer for any damage incurred. In share deals, part of the purchase price is often held in escrow for a limited period to protect the buyer.

### 2.6 Important Areas of Law for Investors

Contract law, property law, building law, lease law and environmental law.

### 2.7 Soil Pollution or Environmental Contamination

The legal owner of the property is partly liable for contamination of the real estate, even if contamination took place pre-ownership. Moreover, a landlord can also be held responsible for a pollution caused by its tenant.

### 2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

Usually, based on applicable building law, the buyer has some certainty regarding the permitted use of a property. Moreover, in the case of any uncertainty, the issue can be discussed with the competent authority, which can also impose specific rules for a property or area.

### 2.9 Condemnation, Expropriation or Compulsory Purchase

Governmental taking of land, condemnation, expropriation or compulsory purchase is possible. Depending whether the expropriation is based on federal or cantonal law, the proceedings vary. However, the landlord has constitutional rights under all relevant proceedings and usually gets fully compensated.

## 2.10 Taxes Applicable to a Transaction

In most cantons, cantonal and/or municipal real estate transfer taxes apply to the transfer of real estate. Generally, the buyer pays the tax, but the seller is jointly and severally liable for payment. The rates range between 1% and 3.3%. It is not uncommon for the parties to agree contractually to share the transfer tax. In share deals in some cantons, there is no real estate transfer tax. Also, corporate restructurings (including of real estate companies) generally no longer trigger transfer taxes and similar charges. Further exceptions are regulated in Article 12(3) of the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels. Most cantons that impose real estate transfer tax can secure their corresponding tax receivables by a first-ranking legal lien on the real estate. In addition, the transfer of real estate is subject to cantonal and/or municipal land registry and notary fees.

## 2.11 Legal Restrictions on Foreign Investors

Foreign ownership of residential real estate and to some extent land reserves is restricted by the Lex Koller. In the case of an infringement, the transaction can be deemed void, which can even lead to criminal sanctions. Transactions having a similar effect to ownership should be examined on a case-by-case basis, as it is not only the mere ownership of residential real estate that is governed by the Lex Koller (such as financing, long leases, etc). Exceptions exist for holiday apartments, serviced apartments, real estate inherited, etc. In the case of any doubt, rulings from the competent Lex Koller authorities are sought for confirmation and legal certainty.

## 3. Real Estate Finance

### 3.1 Financing Acquisitions of Commercial Real Estate

While Swiss and foreign institutional investors (eg, pension funds, sovereign wealth funds and insurance companies) invest and hold significant real estate portfolios that are financed without external financing, other investors typically finance through a mix of equity and external funding sources (secured term loans, sometimes revolving loans, development financings). Traditionally, Swiss banks have had a lion's share of the domestic real estate financing market. However, new means of refinancing methods may make it more attractive for foreign banking and non-banking lenders to re-enter the market; eg, following international investors. In particular, larger development financings and/or mezzanine-type financings continue to be difficult to be placed in the Swiss domestic market only.

### 3.2 Typical Security Created by Commercial Investors

A typical security package would consist of a security interest in mortgage notes (*Schuldbriefe*), which can take the form

of mortgage notes in paper form (*Papierschuldbriefe*) or of register mortgage notes (*Registerschuldbriefe*).

In addition, rent, insurance claims and other receivables are typically pledged or assigned for security purposes. Pledges over the shares of the borrower and security interest in bank accounts are customary.

### 3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

No restrictions exist with respect to Swiss commercial real estate financing transactions. There are no regulatory restrictions on cross-border lending in general, either. Financing of residential real estate by foreign lenders will have to be analysed carefully under the applicable Lex Koller legislation restricting the acquisition of residential real estate in Switzerland by foreigners. However, financing structures typical in the Swiss residential mortgage market (standard security package, standard terms of the loan agreement, loan-to-value ratio below 80%, etc) should not usually raise concerns. In the case of uncertainty, Lex Koller ruling confirmations are available from competent cantonal authorities for individual cases whereas the Swiss Federal Office of Justice, for formal reasons, no longer seems to be willing to issue general letter confirmations on, eg, covered bond programmes or the like, but without changing its general view on the permissibility of such structures. It would be desirable – *de lege ferenda* – for the legislator to exempt such financing transactions from the applicability of the Lex Koller legislation in the first place to enhance legal certainty for debt capital market transactions and novel origination structures that will involve alternative lenders rather than Swiss banks.

### 3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Small registration fees apply to the registration of holders of mortgage notes in the creditor register (*Gläubigerregister*) of the competent land registry. However, such registration is not a perfection requirement for the mortgage security but rather serves administrative purposes.

There are special withholding taxes on interest payments at federal and cantonal level to the extent that foreign lenders are involved. A refund of the Swiss source tax (or reduction at source) will be subject to applicable double taxation treaty protection. General federal withholding tax on interest payments may also have to be looked at depending on the exact funding structure (banks, non-banks, double taxation treaties), etc. Depending on the location of the property, transfer taxes might apply to the direct and indirect transfer of a Swiss property. Real estate capital gains are either taxed by a special RCGT or by ordinary income taxes (which vary from canton to canton). Ordinary notarial and land registry fees will apply. Finally, it is always recommended to keep an eye on Swiss value added tax (VAT) aspects as well (with respect

to transfers of Swiss real estate but also deemed servicing fees, etc).

### **3.5 Legal Requirements Before an Entity Can Give Valid Security**

Under Swiss corporate and Swiss tax laws, financial assistance and corporate benefit rules will apply to any upstream or cross-stream security, guarantee or joint liability. The rules are rather detailed and complex but, in a nutshell, the value of any such 'impaired' security will be limited to freely distributable reserves (that could be paid out as a dividend) of the Swiss company in question, subject to general Swiss federal withholding tax of 35%, if applicable.

### **3.6 Formalities When a Borrower is in Default**

The Swiss enforcement process is a court-guided process, the timing of which will very much depend on the behaviour of the borrower in question. However, in larger transactions, private sale mechanisms are often agreed contractually to avoid a lengthy process and a public auction with associated higher costs.

### **3.7 Subordinating Existing Debt to Newly Created Debt**

This is generally possible and frequently done, even though there are some residual uncertainties around the enforceability of such arrangements in the event of insolvency of the borrower. However, the general view of legal scholars is that Swiss insolvency administrators will be bound by such contractual arrangements as well.

### **3.8 Lenders' Liability Under Environmental Laws**

Generally, lenders who merely financed a property will not become liable under environmental laws but the borrower may have become liable, of course, which may have an indirect effect on the financing and potential enforcement scenarios.

### **3.9 Effects of Borrower Becoming Insolvent**

If a borrower becomes insolvent, security granted by a Swiss borrower will not become void automatically. It should be noted, though, that Swiss law knows the concept of avoidance actions, providing for hardening periods of one to five years. Upstream and cross-stream securities may also be limited in value. Enforcement actions may become the subject of official proceedings run by the court or insolvency administrator.

## **4. Planning and Zoning**

### **4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning**

In Switzerland, regulatory responsibilities are shared among various authorities at federal, cantonal and municipal level. Pursuant to Article 75 of the Swiss Constitution, the Con-

federation shall lay down principles on spatial planning, which are binding on the cantons. Except for some specific regulations at federal level, zoning and building regulations are enacted by the cantons and implemented by the municipal building authorities. Accordingly, there are 26 cantonal zoning and building regimes. Any construction project and any change to an existing building or construction is subject to a building permit from the competent (typically local) authority.

### **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction**

Design, appearance and construction method requirements vary by zones. Typically, specific dimension and distance regulations apply. Buildings and land under cultural heritage protection or nature conservation areas are subject to particularly strict regulations.

### **4.3 Regulatory Authorities**

Building permits must usually be obtained from the municipal authority where the project is located. The local authority co-ordinates with the cantonal authorities and further bodies involved in the granting of the building permit. Buildings located in non-construction zones require a cantonal building permit.

The following legislations apply: the Federal Act on Spatial Planning (*Raumplanungsgesetz*, or RPG); cantonal planning and construction laws (*Planungs- und Baugesetz*), and the municipal zoning and construction laws (*Bau- und Zonenordnungen*). In addition, various other federal and cantonal laws apply, such as the Environmental Protection Act (*Umweltschutzgesetz*), the Noise Control Act (*Lärmschutzverordnung*), the Clean Air Act (*Luftreinhalteverordnung*), the Water Protection Law (*Gewässerschutzgesetz*) and the Energy Law (*Energiengesetz*).

### **4.4 Obtaining Entitlements to Develop a New Project**

The building permit application must be filed with the competent authority (typically the municipal authority), which will publish it if all formal requirements are met. The building permit must be granted if the project is in accordance with all applicable regulations.

Third parties that are affected by the project (eg, neighbours) and organisations entitled to appeal may object.

### **4.5 Right of Appeal Against an Authority's Decision**

Applicants and third parties that have objected the building permit have the right to appeal to the superior administrative authority against the relevant authority's decision. The decision of the superior administrative authority may be appealed to the Administrative Court.

## 4.6 Agreements with Local or Governmental Authorities

Formal agreements with the authorities are only permitted within a given legal framework (eg, infrastructural requirements). However, informal, not-binding negotiations with the authorities often take place before the building permit application is filed.

## 4.7 Enforcement of Restrictions on Development and Designated Use

The competent authority must monitor the realisation of the project. Moreover, the completed project is subject to formal acceptance proceedings. Violations of the permit are subject to sanctions and the removal of illegal structures may be ordered.

## 5. Investment Vehicles

### 5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Depending on the corporate structure of the buyer, including the ultimate beneficial owner or sponsor, newly established Swiss or foreign SPVs are used. Foreign SPVs are primarily domiciled in countries that have entered into double taxation treaties with Switzerland, to avoid withholding tax and ease an exit by share deals. Foreign SPVs domiciled in offshore jurisdictions are also used. Real estate investment funds also commonly invest in Swiss real estate.

### 5.2 Main Features of the Constitution of Each Type of Entity

A company with limited liability may be established by natural persons or legal entities. It requires a declaration in front of a public notary that the founder(s) is/are forming such company, lay down the articles of association therein and appoint the governing bodies. The company is entered in the commercial register of the place at which it has its seat and acquires legal personality once it has been registered in the Commercial Registry.

### 5.3 Minimum Capital Requirement

The most commonly used investment vehicle, a company limited by shares, must have a minimum share capital of CHF100,000, of which at least CHF50,000 must be paid up. Its little sister, the so-called partnership limited by shares, must have a minimum share capital of CHF20,000. For investment fund vehicles, the capital requirements are generally higher.

### 5.4 Applicable Governance Requirements

The governance requirements differ between investment vehicles requiring an approval of Switzerland's Financial Market Supervisory Authority (FINMA) and investment vehicles not requiring any public approval. For the latter, general corporate governance rules apply. Authorisation for

investment vehicles requiring FINMA approval is granted if, among others:

- the persons responsible for management and the business operations have a good reputation, guarantee proper management, and have the requisite specialist qualifications;
- the significant shareholders have a good reputation and do not exert their influence to the detriment of prudent and sound business practice;
- compliance with the duties is assured by internal regulations and an appropriate organisational structure; and
- sufficient financial guarantees are available.

## 5.5 Annual Entity Maintenance and Accounting Compliance

The cost varies strongly depending on whether it is a regulated or non-regulated investment vehicle and depending on the real estate assets and structure of the vehicle.

## 6. Commercial Leases

### 6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Basically, Swiss (private) law provides two types of purely contractual arrangements (as opposed to the rights in rem such as ownership and ground lease): the lease and the usufructuary lease. Public bodies may also grant public works constructions for certain infrastructure projects.

### 6.2 Types of Commercial Leases

There are not different types of commercial leases.

### 6.3 Regulation of Rents or Lease Terms

Swiss tenancy law provides various mandatory provisions (typically in favour of the tenants).

Excessive rents are prohibited and tenants have the right to challenge them in court as being abusive.

### 6.4 Typical Terms of a Lease

Typically, the lease term is not below five years (due to the requirement of a minimum term of five years if the rent shall be subject to indexation). Frequently, the parties agree on options of the tenant to extend the lease. Lease terms may also be concluded for an indefinite period.

With the exception of minor repair works, all maintenance and repair costs must be borne by the landlord. Double-net and triple-net structures are valid subject to certain conditions (eg, the tenant must confirm that the transfer of maintenance and repair obligations to the tenant has been sufficiently reflected in the calculation of the rent).



Typically, rent is paid in advance, either monthly or quarterly.

### **6.5 Rent Variation**

The parties may agree on certain adaptations subject to changes of the interest rate level or, for leases with a minimum term of five years, the Swiss Consumer Price Index (so-called indexed rent).

Further, the parties may also agree on staggered rents (however, not in combination with indexed rents for the same period) and special types such as turnover rents.

If the landlord makes value-adding investments in the leased premises, it has the right to increase the rent unilaterally subject to certain statutory regulations.

### **6.6 Determination of New Rent**

Typically, Swiss tenancy law provides the framework for calculation of such rent increases.

### **6.7 Payment of VAT**

Pursuant to Article 21 paragraph 2 No 21 of the Swiss VAT Law, the rent of real estate is not subject to VAT (with certain exceptions). However, for commercial leases, the landlord may opt for VAT taxation of the rent.

### **6.8 Costs Payable by Tenant at Start of Lease**

Typically, the lease agreement includes the obligation of the tenant to provide security for the payment of the rent before handover of the leased premises (rent deposit, bank guarantee). If the tenant carries out the fit-out, it must obviously bear such costs.

### **6.9 Payment of Maintenance and Repair**

Maintenance and repair costs for a building and its surroundings (landscaping) are included in the ancillary costs to be paid by the tenant. The costs related to the common areas are allocated to each tenant separately (typically based on the share of its leased premises).

### **6.10 Payment of Utilities and Telecommunications**

Costs and charges arising solely from the business operations of the tenant are typically borne by the tenant even if invoiced to the landlord. The costs related to the common services and infrastructure are allocated to each tenant separately (typically based on the share of its leased premises).

### **6.11 Insuring the Real Estate that is Subject to the Lease**

The owner must insure a building and pay such costs. Insurance costs must not be included in the ancillary costs.

### **6.12 Restrictions on Use of Real Estate**

Basically, the parties are free to agree on limitation in relation to the use of leased premises (they can even agree on an obligation to use; eg, for tenants in shopping facilities).

In addition, a sublease by the tenant is subject to the landlord's approval, but such approval may only be withheld if the tenant refuses to disclose the terms of the sublease, if the terms of the sublease are abusive, or if the sublease has major disadvantages for the landlord.

### **6.13 Tenant's Ability to Alter and Improve Real Estate**

If a tenant wants to alter or improve the rented property, the landlord's written permission is required. The landlord's consent may be subject to the obligation of the tenant to remove its alterations at the end of the lease and to waive any rights to be compensated for the added value of such works.

### **6.14 Specific Regulations**

Basically, Swiss tenancy law differentiates between commercial and residential leases only. Certain mandatory provisions only apply to residential leases.

### **6.15 Effect of Tenant's Insolvency**

In the event of a tenant's insolvency, all rent receivables due become assets in bankruptcy. However, the lease does not end automatically: the landlord can request security for future rents. If security is not provided within a grace period, the landlord is entitled to give extraordinary notice and immediately terminate the lease contract.

### **6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations**

Rent deposit, bank guarantee/surety, additional liability of a third party/affiliate.

### **6.17 Right to Occupy After Termination or Expiration of a Lease**

Once a lease is terminated, the tenant has no right to occupy the leased premises. However, tenants may – within 30 days after the termination by the landlord or two months before the end of the fixed lease term.

Due to the tenant's mandatory right to claim the extension of the lease, landlord's rights in relation to legal measures are rather limited, unless it becomes obvious that the tenant will not leave on the agreed (and ordered by the court, respectively) date. Under these circumstances, it might be possible to evict the tenant on the date of termination.

### **6.18 Right to Terminate Lease**

Unless otherwise agreed, the notice period with regard to indefinite business leases is six months. Tenants are entitled to submit a request for extension of the lease term to a judge if the termination would cause undue hardship that cannot

be justified by the landlord's interests. The maximum extension for commercial leases is six years.

Default in the payment of rent entitles a landlord to terminate a lease. However, the landlord must first grant a deadline of a minimum of 30 days for payment, combined with the announcement of termination in the event of further default, and may then terminate the lease with a notice period of another 30 days. The landlord may also terminate the lease if the tenant becomes insolvent (see **6.15 Effect of Tenant's Insolvency**).

A tenant may terminate a lease if the landlord does not hand over the leased premises at the time agreed upon, or if, at the handover, the premises have defects that significantly impair their suitability for the intended use. During the lease, the tenant may give notice with immediate effect if the landlord is notified about such a defect and fails to remedy the defect within an adequate period.

In addition, both a landlord and a tenant may terminate a lease for valid reasons that make it impossible to continue the lease.

### **6.19 Forced Eviction**

Tenants can be forced to leave. The duration of the process depends on court instances and can take several months or years.

### **6.20 Termination by Third Party**

The government or other authorities may not terminate private leases.

## **7. Construction**

### **7.1 Common Structures Used to Price Construction Projects**

As consideration for the services performed by the contractor, prices are usually agreed as unit prices (*Einheitspreise*), lump sums (*Globalpreise*), or at a flat rate (*Pauschalpreise*). These prices are normally considered as fixed prices.

Unit prices determine the consideration for individual services that are listed as separate items in the schedule of services. They are defined for the individual units of quantity, so that the consideration owed for a service is computed after its completion. The quantities of services performed at unit prices are determined, depending on the terms of the contractor agreement, in accordance with their actual measure (by measurement, weighing or counting) or with their theoretical measure based on the underlying designs.

A lump sum may be agreed for individual services, for part of the project or for the whole of the project carried out by the contractor. It shall consist of a fixed amount of money.

Agreements on lump-sum payments should be made only on the basis of complete and clear documentation (ie, detailed project specifications, designs and the like).

Flat-rate prices differ from lump-sum payments solely in that they are not subject to price adjustment clauses.

### **7.2 Assigning Responsibility for the Design and Construction of a Project**

General and total contractor models are often used.

In the general contractor model, the owner uses an architect and engineering team for the planning. The owner either enters into a single planning contract with a consortium of planners/designers (often in the form of a simple partnership) or concludes individual contracts with each architect or engineer involved. For the execution of the construction work, the owner enters into a contract with a contractor who in turn uses subcontractors.

In the total contractor model, the owner contracts with a single company that assumes full responsibility for the planning and realisation of a project.

### **7.3 Management of Construction Risk**

The contractor is liable for ensuring that the project is carried out free of defects and bears such liability irrespective of the cause of the defect (eg, negligent workmanship, use of unfit materials, unauthorised deviation from designs and instructions of the construction manager), and independently of fault.

If defects occur, the owner is entitled to defect warranty rights, such as the right of remediation, deduction and/or rescission. Unless otherwise agreed, the owner is to notify defects immediately (ie, within seven days). However, the owner and contractors often agree on an extended notification period of two years.

The owner's defect warranty rights are subject to a limitation period of five years following acceptance of the project or a certain part of a project, respectively.

### **7.4 Management of Schedule-related Risk**

Parties are allowed to agree that an owner is entitled to monetary compensation if certain milestone and completion dates are not achieved. Moreover, the parties often agree on a penalty to ensure that milestones and completion dates are complied with.

### **7.5 Additional Forms of Security to Guarantee a Contractor's Performance**

It is common that owners seek such additional forms of security (in particular, guarantees or sureties of a Swiss bank or insurance company).

### 7.6 Liens or Encumbrances in the Event of Non-payment

Contractors that have supplied labour and/or materials are permitted to a statutory lien, while designers/planners for the intellectual work (ie, plans, designs and the like) are excluded from such lien. The lien is entered into the land register only if, inter alia, the claim has been acknowledged by the owner or confirmed in a court judgment and may not be requested if the owner provides the contractor with adequate security.

### 7.7 Requirements Before Use or Inhabitation

There is an official inspection of the project by the competent authority of the local community before the project can be inhabited or used for its intended purpose.

## 8. Tax

### 8.1 VAT

Generally, the sale of real estate properties is exempt from VAT without credit of input VAT. However, with respect to commercial real estate properties, the landlord can opt to submit the rent to VAT and the seller can opt to submit the property sold to VAT. Accordingly, VAT applies to the sale, provided the buyer is (or will become) a taxable person and registered for Swiss VAT purposes, and the real estate property sold is not exclusively used for private purposes. In this case, the standard rate of 7.7% applies. Please note that all tasks relating to the construction of a new building for a landlord are subject to VAT. Accordingly, input VAT charges incurred on the construction can only be recovered if the landlord is exercising its option to submit the rent and the sale of the property to VAT.

Beside VAT, local transfer taxes, and notary and/or land registry fees apply. Each of the 26 cantons has specific laws and rules on these transfer taxes and fees. Depending on the location of a property transferred, these additional charges may be substantial, particularly as in some cantons notary and land registry fees are calculated based on the value of the property transferred. While a few cantons (such as the cantons of Zürich and Schwyz) have abolished the real estate transfer tax, all cantons are levying land registry fees. In cantons where the real estate transfer tax is not known or has been abolished, notary and land registry fees may be substantial and if computed based on the value of the property transferred, include a tax component as well. While in the cantons that have a separate real estate transfer tax a change of control in a so-called real estate property company by the sale of a majority stake in the shares triggers the transfer tax, notary and land registry fees are only triggered in the event of a change of title of the underlying property (and not by a sale of a majority stake in a real estate property company). Hence, with due regard to these local taxes, it may be worthwhile to conduct a comparison between the

tax consequences of an asset vs a share transaction. In a few instances the overall charge of transfer taxes, notary and land registry fees may be lower in a share than in an asset deal.

In most of the cantons that have a real estate transfer tax the buyer is liable for payment of the tax. However, in a few cantons it is the seller or a 50:50 split applies between the seller and the buyer. In the case of a corporate restructuring an exemption from the transfer tax may be available and in some cantons the notary and/or land registry fees are reduced and tax should not hinder corporate restructurings. This also applies to real estate companies or a group of real estate companies contemplating a group internal restructuring. Real estate transfer taxes, notary and land registry fees are charged without regard as to whether the seller is realising a gain or loss. In most of the cantons payment of the tax (or even payment of notary and/or land registry fees) is secured by a first-ranking legal lien on the property sold and often the seller and the buyer are jointly liable for payment of the tax (or even payment of notary and/or land registry fees). Therefore, well-advised parties to a property sale and banks providing mortgage-secured funding to the buyer will take care that all taxes triggered, and all notary and land registry fees incurred are paid in advance or put on escrow by the relevant party.

The transfer tax rates in major cantons are as follows (in general, a percentage of the purchase price of the property): Zürich, 0%; Bern, 1.8%; Lucerne, 1.5%; Basle-City, 3.0%; St Gallen, 1.0%; Vaud (Lausanne), 3.3%; and Geneva, 3%.

In certain cases reduced tariffs apply.

The land registry fees in major cantons are as follows (in general, a percentage of the market value of a property): Bern, from CHF200; Lucerne, 0.2%; Basle-City, 0.1%; St Gallen, 0.2%; and Vaud (Lausanne), 0.025-0.7%.

In certain cantons the fee is calculated based on an official market value estimation. Please also note that the transfer of real estate property usually is subject to a notary fee that is added on top of the land registry fee.

For real estate capital gains taxes, see **8.4 Income Tax Withholding for Foreign Investors**.

### 8.2 Mitigation of Tax Liability

The pros and cons of an asset vs a share deal for the acquisition of a property portfolio need to be considered carefully. Beside the implications on the corporate income and/or real estate capital gains tax, transfer taxes, notary and land registry fees need to be taken into account. The outcome of such analysis may vary depending on the location of the properties sold. Furthermore, the set-off of gains and losses, the extraction of future profits, security deposits for Swiss taxes (in particular VAT) to be made by foreign companies and

approval requirements for a future exit by the competent Swiss tax authorities need to be taken into account carefully. As in a share deal, a debt pushdown into the target is hardly possible and as limitations on upstream securities apply, the structure chosen needs to be discussed with the bank and savings made with respect to notary and land registry fees may be lost due to less advantageous funding conditions by the banks or the loss of tax-efficient interest deductions and/or acquisition costs. It is a case-by-case analysis and the location of the underlying properties has a crucial impact on the outcome of the analysis.

While a share deal does not trigger VAT, an asset deal may. However, if a portfolio of assets is sold, in general the notification procedure should be open and therefore no cash leakage due to a time-consuming payment and refund procedure should occur.

### 8.3 Municipal Taxes

Some cantons and/or municipalities (eg, Geneva, but not Zürich or Zug) levy special taxes on the value of the real estate located in their territory. These have to be paid by the property owner.

Moreover, rental income is subject to federal, cantonal and municipal income tax in the canton/municipality where the property is located. While the federal corporate income tax rate is uniform in the whole country, the cantonal and municipal income tax rates may vary widely.

### 8.4 Income Tax Withholding for Foreign Investors

Generally, rental income from investments in Swiss properties earned by corporate investors is subject to Swiss federal, cantonal and municipal corporate income tax in the canton and the municipality where the property is located. The aggregate corporate income tax rate varies depending on the location of the property and may be anything between approximately 12% in the Canton of Schwyz and 24% in the Canton of Geneva. The same applies for individual investors buying Swiss properties. The personal income tax may be anything between something around 23% in the Canton of Schwyz and 48% in the Canton of Geneva. If the property held by an individual investor qualifies as a business (and not as a private) asset, social security contributions may be triggered on top of this. The tax is assessed based on a tax return to be filed by the Swiss or foreign investor. No withholdings apply.

Interest accrued on debt funding is deductible, which is also true with respect to shareholder or other related party advances. However, thin capitalisation rules apply and the amount of the debt funding and the interest rate applied should remain within the periodically published safe harbour limits. Otherwise a constructive distribution may be assumed that would not allow for an income tax-effective deduction and trigger the (dividend) withholding tax of

35%. Buildings may be depreciated over their useful lifetime and the depreciation deductions may be deducted from taxable income. The straight line or the reducing balance depreciation method may be chosen freely. Land cannot be depreciated. However, a blended rate may be applied if land and building values are not split and do not have separate book entries. Safe harbour depreciation rates are available for the depreciation methods and the blended rate. In the event of a sale of the property, recaptured depreciation deductions are subject to corporate income tax. Accordingly, depreciation deductions taken that do not reflect real losses of value lead to a mere income tax deferral. In general and with due regard to the current negative interest rate environment, in a share deal scenario deferred income taxes are fully deducted from the purchase price as a deferred liability.

Interest paid on mortgage-secured funding advanced by a bank (or other lender) outside Switzerland to a Swiss borrower is subject to a local interest withholding. The applicable rate depends on the location of the property securing the loan. Again, depending on the location of the property, the withholding tax may be anything between 13% and 33%. The interest withholding is not levied if the investor is a resident of a benign treaty jurisdiction where the interest clause in the treaty excludes taxation in the source country.

The holding of a property in Switzerland is also subject to Swiss wealth tax (for individual investors) or capital tax (for corporate investors), respectively. The maximum tax rates for the wealth/capital tax vary significantly between the different cantons and municipalities; from around 0.11% in the Canton of Nidwalden to 1.03% in the Canton of Geneva.

Appreciation gains realised on the disposal of properties are subject to taxation. Depending on the cantonal regime, two systems apply: (i) the so-called monistic system where any appreciation gain, be it on a private or a business asset, is subject to a separate cantonal and municipal real estate capital gains tax; among others, this system applies in the cantons of Zürich and Berne; and (ii) the so-called dualistic system where any appreciation gain realised on the disposal of a business asset remains subject to corporate income tax (and no real estate capital gains tax is levied); among others, this system applies in the cantons of St Gallen and Zug. While corporate income tax is a flat tax that applies without regard as to whether the property disposed of was held for a short or long period, progressive tax rates apply under real estate capital gains tax. If the holding period was less than one year, some cantons and municipalities levy a real estate capital gains tax of 60% (on top of the federal income tax). If a long holding period applies, the real estate capital gains tax may be 20% or in some cantons even less than that. Accordingly, whether the gain realised by a corporate investor will be subject to corporate income tax or real estate capital gains tax may have quite some impact on the after-tax performance of an investment. Again, in the case of a

corporate or group internal reorganisation the tax may be deferred as the tax should not hinder such restructurings.

Dividends (and other distributions) paid by Swiss companies are subject to withholding tax of 35%. The withholding has to be deducted from the dividend in advance and has to be paid by the debtor of the dividend; ie, the company paying the dividend (a reporting procedure is only available in the case of a Swiss parent company or a parent company in a benign double tax treaty state). For withholding tax purposes, it is therefore advantageous if the investor (a shareholder of the SPV) is domiciled in a country that has entered into a double taxation treaty with Switzerland. Unless this is the case, it is advantageous to use a foreign SPV to avoid withholding tax.

### 8.5 Tax Benefits

As shown above, a corporate investor may apply income tax-effective interest and depreciation deductions. Furthermore, the costs for maintaining the property in good shape and fit for its purpose as well as income and capital taxes accrued and provisioned may be deducted from the income tax base. The same is true with respect to all expenses relating to the property management and letting.

### 8.6 Key Provisions in the Federal Tax Reform Legislation

The imminent Swiss federal tax reform legislation (subject to a referendum and entering into force in 2020 at the earliest) does not have any impact on commercial real estate investment in Switzerland.

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