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Real Estate 2022

Switzerland: Law & Practice
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SWITZERLAND

Law and Practice

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1. GENERAL

1.1 Main Sources of Law

The main sources of real estate law in Switzerland 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 still rather high, so it is primarily institutional investors with a need to invest allocated funds who are active as buyers, while foreign investors and ultra high net worth individuals are rather reluctant to invest at this stage. Moreover, some of the real estate actors are trying to increase their profit with development projects.

The transaction level remained lower than before the COVID-19 pandemic started, but geared up compared to the previous year.

1.3 Impact of Disruptive Technologies

The first transactions based on disruptive technologies have already been concluded in Switzerland. This trend is expected to continue, but this type of transaction is not expected to gain a significant market share in the next 12 months.

1.4 Proposals for Reform

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

2. SALE AND PURCHASE

2.1 Categories of Property Rights

The categories of property rights that can be acquired are 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 the Federal Ordinance of Land Registry. The transfer of residential real estate to any foreign person 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, although these 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, so no title insurance is required in Switzerland. COVID-19 has had no impact on the registration requirements.

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 the purchase of the property. Another aspect of due diligence relates to environmental law.

In addition to legal due diligence, prudent buyers also perform 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.

As personal inspection of real estate was partially restricted for a very limited time in Switzerland, buyers had to rely more on data room information than on personal on-site visits.

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. The seller's other representations are often qualified by the seller's knowledge. Due to COVID-19, a new representation relating to waivers of rent claims in the past was typically included in real estate transactions relating to commercial premises.

In share deals, most of the seller's warranties are often capped at a certain amount – eg, 10% of the asset's price. However, such cap normally does not apply to the seller's title in the shares. In case 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 of time in order to protect the buyer.

Representation and warranty insurance are very unusual in real estate transactions.

2.6 Important Areas of Law for Investors

Contract law, property law, building law, lease law and environmental law are the most impor-

tant areas of law for an investor to consider when purchasing real estate.

2.7 Soil Pollution or Environmental Contamination

Basically, the buyer of a real estate asset is responsible for soil pollution or environmental contamination of a property even if they did not cause the pollution or contamination, since 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 be held responsible for pollution caused by its tenant.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

Based on the applicable building law, the buyer usually has some certainty regarding the permitted uses of a property. In 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 and compulsory purchase are possible. The proceedings vary, depending on whether the expropriation is based on federal or cantonal law. However, the landlord has constitutional rights under all relevant proceedings, and is usually 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 contractually agree to share the transfer tax. In some cantons, there is no real estate transfer tax in share deals. 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 that have a similar effect to ownership should be examined on a case-by-case basis, as the Lex Koller governs not only the mere ownership of residential real estate, but also aspects such as financing, long leases, etc. Exceptions exist for holiday apartments, serviced apartments, inherited real estate, etc. If there is 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 held the lion's share of the domestic real estate financing market, but new 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 place 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 registered 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

There are no restrictions on granting security to foreign lenders with respect to Swiss commercial real estate financing transactions, nor are there any regulatory restrictions on cross-border lending in general. The 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, LTV below 80%, etc) should not usually raise concerns. If there is any uncertainty, Lex Koller ruling confirmations are available from the competent cantonal authorities for individual cases; for formal reasons, the Swiss Federal Office of Justice no longer seems to be willing to issue general letter confirmations on covered bond programmes or the like, for example, but

has not changed 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 further enhance legal certainty for debt capital market transactions and novel origination structures that will rather involve lenders other 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 a mortgage note 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 both federal and cantonal levels, to the extent foreign lenders are involved. A refund of the Swiss source tax (or reduction at source) will be subject to any 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 taxed either by special real estate capital gain taxes (RCGT) or by ordinary income taxes (this varies from canton to canton). Ordinary notarial and land registry fees will apply. Finally, it is always recommended to keep an eye on Swiss VAT aspects as well (with respect to transfers of Swiss real estate but also with respect to deemed servicing fees, etc).

3.5 Legal Requirements before an Entity Can Give Valid Security

Under Swiss corporate and 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.

Some temporary legislation was introduced to protect borrowers against the negative financial impact of the COVID-19 pandemic. However, such new legislation has very limited impact on real estate-related borrowings, as the market could cope with the limited impact of the pandemic on real estate.

3.7 Subordinating Existing Debt to Newly Created Debt

The subordination of existing debt to newly created debt is generally possible and frequently done, even though there are some residual uncertainties around the enforceability of such arrangements in the 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 become liable, which

may have an indirect effect on the financing and potential enforcement scenarios.

3.9 Effects of a Borrower Becoming Insolvent

If a borrower becomes insolvent, security granted by a Swiss borrower will not become void automatically. It should be noted, however, 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.

3.10 Consequences of LIBOR Index Expiry

The Swiss National Bank (SNB), in co-operation with SIX Swiss Exchange, has developed CHF reference rates for the financial markets that are based on CHF repo interbank market data provided by SIX Repo Ltd. The CHF yield curve is to be based on the Swiss Average Rate Overnight (SARON) in future. The Swiss reference rates comprise the Swiss Average Rates (SAR) and the Swiss Current Rates (SCR), covering a term spectrum ranging from overnight (ON) to 12 months (12M). SIX Swiss Exchange is the Swiss reference rates administrator and is thus responsible for the daily calculation and publication thereof.

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 the federal, cantonal and municipal level. Pursuant to Article 75 of the Swiss Constitution, the Confederation 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 different 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 legislation applies:

- the Federal Act on Spatial Planning (*Raump-lanungsgesetz – RPG*);
- cantonal planning and construction laws (*Planungs- und Baugesetz*); and
- municipal zoning and construction laws (*Bau- und Zonenordnungen*).

Various other federal and cantonal laws also apply, such as the Environmental Protection Act (*Umweltschutzgesetz*), the Noise Control Act (*Lärmschutzverordnung*), the Clean Air Act

(Luftreinhalteverordnung), the Water Protection Law (Gewässerschutzgesetz), the Energy Law (Energiegesetz), etc.

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 complies 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 to 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 not permitted, with the exception of certain aspects of the project (eg, infrastructural requirements). However, informal, non-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, and 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 special purpose vehicles (SPVs) are used by investors to hold real estate assets. 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. This requires a declaration in front of a public notary that the founder(s) is (are) forming such company, laying down the articles of association therein and appointing the governing bodies. The company is entered in the commercial register of the place in 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 is the company limited by shares, which must have a minimum share capital of CHF100,000, of which at least CHF50,000 must be paid in. Its little sister, the so-called partnership limited by shares, must have a minimum share capital of CHF20,000. For investment funds vehicles, the capital requirements are generally higher.

5.4 Applicable Governance Requirements

The governance requirements differ between investment vehicles that require approval from

Switzerland's Financial Market Supervisory Authority (FINMA) and investment vehicles that do not require any public approval. For the latter, general corporate governance rules apply. Authorisation for investment vehicles requiring FINMA approval is granted if the following requirements are met, amongst 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 annual entity maintenance and accounting compliance 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 for two types of purely contractual arrangements (as opposed to 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 no different types of commercial leases.

6.3 Regulation of Rents or Lease Terms

Swiss tenancy law contains 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.

Overall, COVID-19 did not have a major effect on leases as many landlords voluntarily granted rent reductions to commercial tenants suffering from the impact of the pandemic. Residential leases were hardly affected by the pandemic.

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 for the rent to be subject to indexation). Frequently, the parties agree on the tenant's options 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 them has been sufficiently reflected in the calculation of the rent).

As a result of COVID-19, parties to leases often include force majeure clauses dealing with the handling of pandemic situations and responsibilities in this respect, amongst other issues.

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 and, alternatively for leases with a minimum term of five years, of the Swiss Consumer Price Index (so-called indexed rent).

The parties may also agree on staggered rents (although 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 unilaterally increase the rent, subject to certain statutory regulations.

6.6 Determination of New Rent

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

6.7 Payment of VAT

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

6.8 Costs Payable by a Tenant at the Start of a Lease

Typically, the lease agreement includes the obligation of the tenant to provide security for the payment of the rent before the 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 its share of the 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 Insurance Issues

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

As most business interruption insurance policies were not crystal clear regarding pandemic aspects (mandatory closures of businesses, clean-up costs, etc), compromises were often reached with insurance providers so the losses incurred at the policy holders were shared.

6.12 Restrictions on the Use of Real Estate

Basically, the parties are free to agree on limitations 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 apply only to residential leases.

6.15 Effect of the Tenant's Insolvency

In the case 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 a Failure of the Tenant to Meet Its Obligations

The forms of security that can be provided to a landlord to protect against a failure by the tenant to meet its obligations are rent deposits, bank guarantee/surety, and the additional liability of a third party/affiliate.

6.17 Right to Occupy after Termination or Expiry of a Lease

Once a lease is terminated, the tenant has no right to further occupy the leased premises. However, tenants may request the extension of the lease within 30 days of the termination by the landlord or two months before the end of the fixed lease term, where termination of the lease would cause a degree of hardship for them or their family, which cannot be justified by the interests of the landlord.

Due to a tenant's mandatory right to claim an extension of the lease, a 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 court-ordered, respectively) date. Under these circumstances, it might be possible to evict the tenant on the date of termination.

6.18 Right to Assign a Leasehold Interest

Pursuant to mandatory tenancy law, the tenant may transfer the lease or sublease all or a portion of the leased premises, subject to certain conditions. The landlord may withhold consent only for good cause (transfer of lease) in the following circumstances:

- if the tenant refuses to inform it of the terms of the sublease;
- if the terms and conditions of the sublease are unfair in comparison to those of the principal lease; or
- if the sublease gives rise to major disadvantages for the landlord.

6.19 Right to Terminate a Lease

Unless otherwise agreed, the notice period with regard to indefinite business leases is six months. Tenants are entitled to submit a request for an 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 case 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 the 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 it within an adequate period of time.

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

6.20 Registration Requirements

There are no registration requirements and/or execution formalities. However, the parties to a lease may agree to have it entered under priority notice in the land register with the effect that every future owner must allow the property to be used in accordance with the lease. Typically, the fees relating to such registration do not exceed CHF1,000.

6.21 Forced Eviction

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

6.22 Termination by a 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*) or 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 according to 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 regardless 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 milestones 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 for owners to seek additional forms of security, particularly 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 regis-

ter 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 is registered for Swiss VAT purposes, and that the real estate property sold is not used exclusively 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 the 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 can include a tax component as well, if computed based on the value of the property transferred. While a change of control in a so-called real estate property company by the sale of (typically) a majority stake in the shares triggers the transfer tax in those cantons that have a separate real estate 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). With due regard to these local taxes, it may therefore be worthwhile to conduct a comparison between the tax consequences of an asset versus a share transaction. In a few instances, the overall charge of transfer taxes, notary and land registry fees may be lower in a share deal than in an asset deal.

The buyer is liable for the payment of real estate transfer tax in most of the cantons that have it. However, in a few cantons the seller is liable, or there is a 50:50 split between the seller and the buyer. In 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 the tax should not hinder corporate restructurings. This also applies to real estate companies or a group of real estate companies contemplating an internal group restructuring. Real estate transfer taxes and notary and land registry fees are charged without regard to whether the seller is realising a gain or a 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 the seller and the buyer are often 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 to ensure that all taxes triggered – and all notary and land registry fees incurred – are paid in advance or put in escrow by the relevant party.

8.2 Mitigation of Tax Liability

The pros and cons of an asset versus 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 and notary and land registry fees also 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 carefully considered.

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. Case-by-case analysis should be performed, and the location of the underlying properties has a crucial impact on the outcome of such analysis.

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

8.3 Municipal Taxes

Some cantons and/or municipalities 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. If the property held by an individual investor qualifies as a business asset (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 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, but 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, with the applicable rate depending on the location of the property securing the loan. 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), the maximum rates for which vary significantly between the different cantons and municipalities.

Appreciation gains realised on the disposal of properties are subject to taxation. One of the following two systems applies, depending on the cantonal regime:

- 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; this system applies in the cantons of Zürich and Bern, amongst others; and

- 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); this system applies in the cantons of St Gallen and Zug, among others.

While corporate income tax is a flat tax that applies regardless of 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 even less than that in some cantons. 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 it should not hinder such restructurings.

Dividends (and other distributions) paid by Swiss companies are subject to a 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

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.

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 more than 30 lawyers and tax experts, is one of the largest and most specialised in Switzerland, enabling it to handle highly complex real estate transactions, planning issues and real estate litigation efficiently and with an integrated per-

spective. Walder Wyss advises real estate players in all parts of Switzerland through offices in Zurich, Geneva, Basel, Lugano, Bern and Lausanne, which also offer notarial services such as notarisations of sale and purchase agreements. The firm works with clients to develop solutions that generate added value and are executed with interdisciplinary project teams where necessary.

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