

THE REAL ESTATE
LAW REVIEW

EIGHTH EDITION

Editor
John Nevin

THE LAWREVIEWS

THE REAL ESTATE
LAW REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Nevin

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATORS

Gavin Jordan, Tommy Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Louise Robb

SUBEDITOR

Anna Andreoli

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2019 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at February 2019, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-009-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALLEN & OVERY SCS

AL TAMIMI & COMPANY

AUMENTO LAW FIRM

BELLWETHER GREEN

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

BIRD & BIRD

CHIOMENTI

CORDATO PARTNERS LAWYERS

DENTONS

DE PARDIEU BROCAS MAFFEI

DLA PIPER

ESTUDIO BECCAR VARELA

GUZMÁN ARIZA

HENGELER MUELLER

HERBERT SMITH FREEHILLS CIS LLP

LIEDEKERKE WOLTERS WAELEBROECK KIRKPATRICK

MAPLES GROUP

N.DOWUONA & COMPANY

NIEDERER KRAFT FREY

NISHIMURA & ASAHI

NORTON ROSE FULBRIGHT SOUTH AFRICA INC.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU STOICA & ASOCIAȚII

SLAUGHTER AND MAY

SOŁTYSIŃSKI KAWECKI & SZŁĘZAK

TSMP LAW CORPORATION

URÍA MENÉNDEZ

WOLF THEISS

CONTENTS

PREFACE.....	vii
<i>John Nevin</i>	
Chapter 1 BREXIT AND REAL ESTATE.....	1
<i>John Nevin</i>	
Chapter 2 ARGENTINA.....	5
<i>Pedro Nicholson and Delfina Calabró</i>	
Chapter 3 AUSTRALIA.....	15
<i>Anthony J Cordato</i>	
Chapter 4 AUSTRIA.....	26
<i>Tibor Fabian and Markus Uitz</i>	
Chapter 5 BELGIUM.....	35
<i>Yves Delacroix and Alexandre Emond</i>	
Chapter 6 BRAZIL.....	46
<i>Franco Grotti and Guilherme de Toledo Piza</i>	
Chapter 7 CAYMAN ISLANDS.....	55
<i>George Loutas</i>	
Chapter 8 DENMARK.....	64
<i>Torben Mauritzen</i>	
Chapter 9 DOMINICAN REPUBLIC.....	76
<i>Fabio J Guzmán Ariza, Christoph Sieger and Alfredo Guzmán Saladín</i>	
Chapter 10 ENGLAND AND WALES.....	82
<i>John Nevin</i>	

Contents

Chapter 11	FRANCE.....	96
	<i>Pierre Gebarowski and Guillaume Rossignol</i>	
Chapter 12	GERMANY.....	113
	<i>Jan Bonhage and Thomas Lang</i>	
Chapter 13	GHANA.....	126
	<i>NanaAma Botchway</i>	
Chapter 14	HONG KONG.....	136
	<i>Dennis Li</i>	
Chapter 15	INDONESIA.....	146
	<i>Ayik Candrawulan Gunadi and Tania Faramutia</i>	
Chapter 16	ITALY.....	157
	<i>Umberto Borzi</i>	
Chapter 17	JAPAN.....	166
	<i>Norio Maeda, Takuya Shimizu, Keisuke Yonamine and Yujin Gen</i>	
Chapter 18	LUXEMBOURG.....	183
	<i>Serge Hoffmann and Philippe Eicher</i>	
Chapter 19	NETHERLANDS.....	193
	<i>Max van Drunen and Leen van der Marel</i>	
Chapter 20	POLAND.....	204
	<i>Janusz Siekański and Radosław Waszkiewicz</i>	
Chapter 21	QATAR.....	214
	<i>Nicola de Sylva</i>	
Chapter 22	ROMANIA.....	225
	<i>Valentin Creața</i>	
Chapter 23	RUSSIA.....	238
	<i>Sergey Kolobov</i>	
Chapter 24	SCOTLAND.....	249
	<i>John Bingham</i>	

Contents

Chapter 25	SINGAPORE.....	261
	<i>Jennifer Chia, Yvonne Lian and Zan Wong</i>	
Chapter 26	SLOVENIA.....	277
	<i>Markus Bruckmüller and Petra Jermol</i>	
Chapter 27	SOUTH AFRICA	287
	<i>Pieter Hugo Niehaus</i>	
Chapter 28	SPAIN.....	295
	<i>Diego Armero and Rodrigo Peruyero</i>	
Chapter 29	SWEDEN.....	305
	<i>Jan Berg and Carl-Magnus Ugglå</i>	
Chapter 30	SWITZERLAND	314
	<i>Andreas F Vögeli and Oliver Zbinden</i>	
Chapter 31	UNITED ARAB EMIRATES	323
	<i>Iain Black and Joe Carroll</i>	
Chapter 32	UNITED STATES	337
	<i>Meredith J Kane</i>	
Appendix 1	ABOUT THE AUTHORS.....	353
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	369

PREFACE

I am delighted to introduce the eighth edition of *The Real Estate Law Review*. The continued success of the *Review* confirms its relevance to real estate practitioners and their clients. Real estate is increasingly viewed on a global basis and readers can only benefit from a general understanding of how individual jurisdictions operate within the global real estate market.

This edition extends to 31 jurisdictions, and we are delighted to welcome new contributions from distinguished practitioners from around the world. I am very grateful to all contributors for their hard work and essential role in compiling this eighth edition. Each chapter provides an invaluable insight into key legal issues and market trends in the author's jurisdiction and, together, they offer an up-to-date synopsis of the global real estate market.

The *Review* seeks to identify distinctions in practice between the different jurisdictions by highlighting particular local issues. We believe that this offers investors and occupiers and their professional advisers an invaluable guide to real estate investment outside their own domestic market. Overseas investors are increasingly prepared to look beyond traditional markets and sectors to exploit international opportunities as and when they arise. Often, investors need to act quickly, and we hope that the *Review* provides an advantageous starting point to understanding cross-border transactions in the light of the reader's own domestic forum.

International economic and political instability continues to have a significant effect on the global real estate market. In the UK, Brexit-generated uncertainty remains as negotiations for leaving the EU are still ongoing as we approach the 29 March 2019 deadline. However, the continued attraction of UK real estate to overseas investors confirms that each event or development in a particular country must be seen in a global context to ascertain the bigger picture. It is no longer possible to ignore globalisation and view real estate markets in isolation. Brexit notwithstanding, the UK remains a safe haven for investors from around the world, and investment levels in London and the wider UK market remain buoyant.

In addition to all the distinguished authors, I would like to thank the members of the Law Review team for their tireless work in compiling this eighth edition of *The Real Estate Law Review*.

John Nevin
Slaughter and May
London
February 2019

SWITZERLAND

*Andreas F Vögeli and Oliver Zbinden*¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

Under Swiss law, different types of real estate ownership exist. The most common forms of ownership are sole ownership² and co-ownership. A special – and in Switzerland predominant – form of co-ownership is the condominium-principled co-ownership. Its main characteristic is that different persons own separate units in a common property or, as the law puts it, condominium is a form of co-ownership of immovable property that gives the co-owner the exclusive right to make sole use of specific parts of a building thereon and design the interior of such parts. Each condominium owner can manage, use and design the structure of their units as they wish but must not obstruct any other condominium owners in the exercise of their own rights or damage the common parts of the property. Importantly, each unit has its own folio in the land register and may be sold separately without the consent of the other co-owners, who have no statutory right of pre-emption.

Further property rights include:

- a* usufructuary rights – a contractual arrangement where the owner confers complete enjoyment of the object on the usufructuary;
- b* right of residence – the right to live in all or parts of a building; and
- c* building rights³ – the ownership of the ground is dissociated from the ownership of the constructions.

One major difference between a usufructuary right and the right of residence is that the latter can only be granted to individuals but not to legal entities.

A lease contract, if entered in the land register, provides a similar legal position to the beneficiary as the aforementioned rights *in rem*. The effect of such entry is that every future owner, in principle, must allow the property to be used in accordance with the lease.

1 Andreas F Vögeli is a partner and Oliver Zbinden an associate at Niederer Kraft Frey.

2 Often also referred to as freehold or land ownership as the sole owner usually owns the land and its integral parts and everything built on it.

3 Compared to the freehold, the owner of a building right is not owner of the land but only the holder of a leasehold right encumbering that land. He or she is granted a right to erect and maintain a building on the underlying lot.

ii System of registration

Every (privately owned) piece of land, including individual condominium units, has its own folio in the land register, where title information (ownership, size and description of the property), easements, usufructs and other servitudes, charges, lien and mortgages, notes (typically public law restrictions) and priority notices (e.g., contractual pre-emption rights, lease agreements) are recorded.

Title to real estate is transferred to the new owner exclusively by way of entry in the land register. The ownership cannot be transferred as long as the purchaser is not entered into the land register. The prerequisite for registration is a notarised purchase contract constituting the legal ground for acquisition of ownership or any other rights *in rem* on real property. Only such notarised contracts can be entered into the land register.⁴

There is a legal presumption that federal land register entries (but not entries in cantonal registries in the few locations where the federal land register is not yet fully introduced) are true and correct. Every person that relies on the land register in good faith is therefore fully protected. The content of the land register prevails over the factual circumstances as long as good faith is given. Furthermore, the land register establishes the presumption that the registered rights exist. Therefore, title insurance is neither needed nor known.

iii Choice of law

Rights *in rem* on real property are exclusively subject to the law of the place where the real property is located. In principle, contracts concerning real property or its use are also governed by the law at situs; however, a choice of law by the parties is permitted. In any case, the form of the contract is governed by Swiss law if real estate in Switzerland is concerned.

Because of the notarisation requirement, Swiss law is generally chosen by the parties to a real estate transaction as governing law.

II OVERVIEW OF REAL ESTATE ACTIVITY

Interest in home ownership remains high in Switzerland. Because of the limited supply in most regions, prices for single-family homes are likely to rise further in 2019, while prices for condominiums are likely to remain stable. As for the rental market, the situation is different: the vacancy rate for apartments rose again in 2018 – by the end of the year, there will be an excess of supply of approximately 31,000 apartments. However, because the real estate market still offers noticeably higher returns than comparable investment alternatives, investments in new projects will continue. This will put pressure on rents, which are already falling.⁵

In the commercial property sector, the downward trend in the office market in 2017 was halted because of additional demand for office space. The favourable economic environment brought confidence back to investors and construction activity has increased noticeably since the end of 2017. However, as a result of the availability of new built space, letting remains challenging and it can be assumed that rents for office space will continue to be under slight

4 Notary law is cantonal; therefore, the notarisation process may differ from canton to canton. Generally, only notaries at the place of the property are competent to notarise real estate purchase contracts. An exception to this is the special case of a transfer of assets under the Swiss Federal Act on Mergers: Under this Act, in case of certain forms of restructuring of legal entities, all assets, including real estate, are transferred by entry of the corresponding contract in the Commercial Register.

5 See wüstpartner, Immo-Monitoring 2019 | 1, p. 10.

pressure. In the retail market, rents on offer are likely to fall further in 2019, not least as a result of the steadily growing online trade. Instead, investors are increasingly focusing on logistics space on the outskirts of conurbations.⁶

All in all, real estate investments have remained high up in investors' favour in 2018. Although the yield spreads to alternative investments have passed their peaks, demand for 'concrete gold' has remained robust because of the negative interest rates, particularly among institutional investors. There was simply a lack of alternatives to solve investors' yield problem without excessive risk. At present, however, a certain reluctance on the part of investors with regard to medium-term construction projects is noticeable. Furthermore, there is some uncertainty about the effects of the interest rate turnaround, which is not expected in Switzerland until autumn 2019.

III FOREIGN INVESTMENT

The purchase of real estate by foreign investors, in particular of residential properties, as well as foreign mortgage financing of residential properties is restricted by the Swiss Federal Act on the Acquisition of Real Estate by Persons Abroad (the Lex Koller) and the respective ordinance. The Lex Koller requires that foreign investors – EU/EFTA nationals without permanent residence in Switzerland and nationals of other countries without a C permit – must apply for authorisation when acquiring residential properties in Switzerland. In practice, authorisations for residential properties are difficult to obtain. They may be granted, for example, for the purchase of a holiday home based on a yearly defined quota in touristic (alpine) regions.

No authorisation is required if the property is used for commercial purposes (e.g., offices, shopping centres, retail, hotels, restaurants). If this is the case, it is irrelevant whether the property is used for the buyer's business or rented or leased by a third party to pursue a commercial activity. The property may also have land reserves if they – as a rule – do not exceed one-third of the total surface of the land.

The purchase of undeveloped land needs an authorisation even if it is in a commercial or industrial zone except when work on a building that will be used for commercial purposes has already started or will start within a short time.

At the latest after the conclusion of the real estate purchase contract, the foreign investor must request authorisation for the transaction or determination that no authorisation is required for the respective acquisition. The authorisation may be granted with conditions and restrictions to ensure that the property is used in accordance with the purpose stated by the foreign acquirer.

IV STRUCTURING THE INVESTMENT

Traditionally, investments in real estate were made by acquiring specific properties directly or through a legal entity established for that purpose. Given the recent growth of the real estate investment products market, a general trend towards indirect investments can be observed. The advantages of indirect investments are low transaction costs, high liquidity, broad diversification and a lower entry level compared to direct investments.

⁶ See wüstpartner, Immo-Monitoring 2019 | 1, p. 11 and 42.

The main types of indirect real estate investment vehicles are real estate funds,⁷ non-regulated investment companies limited by shares, which must be either listed or only accessible to qualified investors, Swiss real estate investment foundations, and special purpose vehicles (SPVs). Real estate funds may be established in the form of contractual investment funds, SICAVs (investment company with variable capital), KGKs (limited partnership for collective capital investments) or SICAFs (investment company with fixed capital).

Contractual investment funds, SICAVs and standard SPVs are the most common investment vehicles. In addition, real estate investment companies and real estate investment foundations have become quite popular in recent years. Depending on the investor's corporate structure, SPVs may offer a number of advantages. Real estate investment trusts (REITs) and real estate derivatives are typically not set up in Switzerland and may be subject to regulatory requirements and restrictions if distributed in Switzerland.

The contractual investment fund is a contract based on a collective investment agreement under which the fund management company commits itself to investors in accordance with the number and type of units which they have acquired in the investment fund, and to manage the fund's assets in accordance with the provisions of the fund contract at its own discretion and for its own account. The fund management company draws up the fund contract and, with the consent of the custodian bank, submits it to FINMA for approval. The fund management company's share capital must be at least 1 million Swiss francs (paid up in cash), and the investment fund must have net assets of a minimum of 5 million Swiss francs.

SICAVs are, in principle, established under the provisions of the Swiss Code of Obligations. They are not allowed to begin operations before obtaining FINMA's authorisation, which includes all constitutional documents. The most important authorisation and approval requirements are: assets of at least 5 million Swiss francs, the company's name must contain a description of its legal form or the abbreviation 'SICAV', the ratio of company shareholder deposits to total assets must be appropriate, company and investor shares that do not have a nominal value and are freely transferable must be fully paid up in cash, a custodian bank must be designated, the SICAV must choose to be either self-managed or externally managed and must hold a defined quantity of equity capital. SICAVs are usually listed on the Swiss stock exchange, which alleviates certain Lex Koller burdens.

KGKs are limited partnerships with the sole object of collective investment. They must be authorised by FINMA and their constitutive documents approved. At least one member (general partner) bears unlimited liability. The other partners (limited partners) are liable only up to a specified amount. General partners must have paid-in capital of a minimum of 100,000 Swiss francs and limited partners must be qualified investors.

A SICAF is a company limited by shares with the sole object of collective investment. It must seek FINMA authorisation and have its constituting documents approved as well. Its shareholders are not required to be qualified investors and it is not listed on a Swiss stock exchange. Essential features of a SICAF are that it only manages its own assets and generates returns or capital gains without engaging in business activities as such. The minimum deposit on foundation must be at least 500,000 Swiss francs, fully paid up.

Swiss real estate investment foundations are used for the joint investment and management of pension assets. The group of investors of an investment foundation is generally limited to pension funds and to persons supervised by FINMA who manage the collective investments of pension funds. The launch of a Swiss real estate investment

⁷ See the SXI Real Estate® Funds Broad Index for the real estate funds listed on the SIX Swiss Exchange.

foundation requires a broad range of documents, such as foundation regulations, articles and a prospectus. It is subject to (pre-)approval and direct supervision by the Occupational Pension Supervisory Commission.

In general, the costs for each type of entity used to invest in real estate vary depending on the volume and the structure of the vehicle. How a foreign investment is structured in a particular case is usually determined by tax considerations.

V REAL ESTATE OWNERSHIP

i Planning

Zoning laws are based on a federal act, but the implementation is on the cantonal and communal level. Building regulations are mainly enacted by the cantons and implemented by the municipal building authorities, which leads to significant regional differences. Change of use, particularly of residential premises into commercial ones and vice versa, is heavily regulated and increasingly restricted.

In general, new buildings or any changes to existing buildings require a permit by the competent local authority. They must be planned and designed in a way that they render a harmonious overall impression, both individually and taking into account the surrounding area. Special building regulations may help to facilitate the planning of major projects. Additionally, dimensions and distances stipulated in the regulations must be observed. Furthermore, a variety of special regulations (e.g., on fire and earthquake safety) need to be complied with.

Once the planning application is submitted to the competent municipal authority, it publishes the project in the local official gazette. All parties affected by the project, primarily owners of neighbouring buildings, have the right to raise objections against it. If the municipal building commission finds that the project is in accordance with all applicable regulations and all objections are settled, a building permit is issued. It is key that the finalisation of the project does not deviate from the specifications set out in the building permit, otherwise the authority may order the removal of the illegal structures of the construction.

Buildings and land under cultural heritage protection as well as nature conservation or agricultural areas underlie strict regulations; new constructions and renovations must therefore be carefully planned.

ii Environment

Swiss environmental law differentiates between the polluter who actually caused the pollution and the owner of the property. Primarily, the person causing the pollution must bear the costs of remediation. If the polluter cannot be called upon to bear the costs, the remediation costs remain with the cantons and partly with the owner of the land. Hence, the buyer of real estate may also be held responsible for environmental issues, particularly soil pollutions.

Polluted real estate is registered in the cadastre of contaminated sites and may only be transferred with the approval of the competent cantonal authority, which may order that potential future costs of remediation be secured.

iii Tax

The transfer of real estate is subjected to land registry and notary fees. Additionally, transfer taxes may apply depending on the canton (Zurich and Zug, for instance, do not levy transfer taxes). The rates range between 1 and 3.3 per cent of the purchase price. It is common for

the parties to a real estate purchase contract to agree to share the real estate transfer taxes as well as the land registry and notary fees, even if most cantonal regulations provide that the buyer must pay them.

Further, the seller must pay real estate capital gains tax if a gain is realised by the transfer of the property. The capital gains tax, the amount of which largely depends on the duration of the ownership, varies from canton to canton. The range of applicable rates is therefore large and may vary between 0 (in the canton of Geneva after a duration of ownership exceeding 25 years) and 60 per cent (for short-term capital gains in the cantons of Zurich, Zug and Basel City). In most cantons the payment of the tax is secured by a public-law mortgage right on the property. Hence, a purchaser must be certain that the seller pays the tax.

Additionally, an individual using a property as his or her own residence is annually taxed on a deemed rental income (known as imputed rental value). On the other hand, maintenance and financing costs relating to the property may be deducted, which may even outweigh the imputed rental value.

iv Finance and security

Swiss real estate is usually financed by a mix of own and external funds. The standards applying to real estate financing by Swiss banks provide that 10 per cent of the value of the property, as valued by the bank, must be paid down in cash as well as any difference between the value and the actual (usually substantially higher) purchase price. Banks additionally require security for another 10 per cent of the property value. Borrowers must further amortise their mortgage debt down to two-thirds of the property's lending value within 15 years.

Buyers and owners of real estate in Switzerland are free to raise external financing from lenders abroad. The granting of a security over a mortgage note does not entail problems under the Lex Koller as long as the terms of the security are at arm's length and do not aim to circumvent the provisions of the Lex Koller. In practice, institutional investors often hold significant real estate portfolios that are financed without external funding. However, a mix of own funds and external debt in the form of a secured term loan and a revolving credit facility is also common.

External real estate financings are primarily secured by security interest (in the form of an ownership transfer for security purposes or a mortgage) of mortgage notes. The creation of a (registered or bearer) mortgage note provides an independent claim in the mortgage note's amount and is separate from the claim under the credit documentation (i.e., the loan). The mortgage loan claim is secured by the underlying property.

VI LEASES OF BUSINESS PREMISES

Two main types of purely contractual lease arrangements exist: the traditional lease and the usufructuary lease. Both types are governed by the Swiss Code of Obligations. The traditional lease is more common in Switzerland, both for residential and business premises in the retail, hotel, office and industrial sector. Usufructuary lease is typical in the agricultural and the gastronomy sector.

The law only sporadically differentiates between the lease of commercial and residential properties. Notable differences are the minimum notice periods (three months for residential and six months for commercial premises) and the security furnished by the tenant (in a residential lease, the landlord may not ask for more than three months' rent by way of security; in a commercial lease, there is no such restriction). A large number of Swiss tenancy

law provisions are mandatory to protect the tenant, who is *per se* considered to be the weaker party, which is obviously often not the case with commercial tenants. However, commercial lease contracts may also only be negotiated within the limits of mandatory tenancy law.

Lease contracts may be limited or open-ended. Parties to open-ended lease contracts usually agree that they can terminate the contract subject to a six or 12-month notice period. Yet, typically, commercial leases are concluded for a term of five to 10 years, with the option to extend the lease for one or more similar terms. Landlords usually seek five-year lease terms because it offers the possibility to adapt the rent to the Swiss consumer price index. An agreement to link rent to the Swiss consumer price index is not valid where the lease is contracted for less than five years. In addition, banks financing commercial real estate often require that part of the mortgage or loan is repaid before the lease terminates. At the same time, long-term lease is particularly attractive for tenants developing the property for their specific needs (at their own expense), as it is common not to claim reimbursement for the investments from the landlord at the end of the lease.

Extension options can be designed in different ways. Usually tenants favour options where the conditions of the rent, in particular the rental price, remain, while landlords prefer options that offer the possibility to adapt the rent at the end of the lease term to the new market price.

In both limited and open-ended leases, the parties are free to choose a certain lease model. Typically, the rent is fixed and will only be revised if the contractually agreed rent calculation basis changes (e.g., the Swiss consumer price index, reference interest rate) or if the landlord provides additional services. The parties may agree on a staggered rent or a turnover or sales-based rent instead – usually combined with a guaranteed minimum rent. The law only forbids clearly excessive rents, which is not the case if the rent falls, for example, within the range of rents customary in the district, if it is justified by increases in costs or by additional services provided by the landlord or if it does not exceed the range of gross pre-tax yield required to cover costs in the case of a recently constructed property. However, in certain circumstances, the rent amount can also be challenged by the tenant after the conclusion of the rental agreement.

While the rent for residential leases is almost always paid monthly in advance, it is not uncommon for parties to commercial leases to agree on quarterly payments. Most commonly, the rent is secured by a security deposit, which is paid by the tenant before the lease starts. The deposit provided in the form of cash or negotiable securities is deposited on a bank account in the tenant's name. The bank can release such security only with the consent of both parties or in compliance with final payment or final court decision. Alternatively, bank guarantees can also serve as a security. If the tenant neglects to pay the rent, the landlord is allowed to terminate the lease contract after having set the tenant a final deadline for payment.

A security of tenure does not exist in Switzerland. Nonetheless, the tenant may request the extension of a fixed-term or open-ended lease where termination of the lease would cause a degree of hardship that cannot be justified by the interests of the landlord. The lease may be extended by up to six years for commercial premises. In practice, extensions of more than two years are rarely granted in the greater Zurich area.

VII DEVELOPMENTS IN PRACTICE

There have been a number of recent revisions to the regulatory framework impacting the real estate market.

On 1 January 2018, the completely revised Energy Act as well as three new ordinances and six revised ordinances came into force. The aim is to reduce energy consumption, increase energy efficiency and exploit the potential of renewable energies. With a consumption of around 45 per cent of the energy required in Switzerland, buildings play a key role here. In order to reduce energy consumption and carbon dioxide emissions, the state has been granting subsidies for the energy-related redevelopment of buildings since 2010. In future, more funds will be available for this building programme. Furthermore, from 2020, not only investments in energy-related redevelopments of buildings, but also the costs of demolition for a replacement building will be deductible from income tax. We assume that these measures will boost the construction industry.

After the tightening of the Swiss Federal Act on the Acquisition of Real Estate by Persons Abroad (*Lex Koller*) proposed by the Federal Council faced heavy opposition in the 2017 consultation process, the Federal Council decided in June 2018 to forego the revision. Therefore, foreigners are still entitled to acquire shares in listed Swiss residential real estate companies and to purchase commercial properties (e.g., offices, factories, logistics, shopping centres, hotels) as investors (i.e., not for their own business activities). However, a parliamentary initiative on the *Lex Koller* remains pending, which aims to exclude the sale of strategic infrastructures of the energy industry such as hydropower plants, electricity grids and fibre-optic networks to persons abroad.

After a long genesis with two hearing procedures, in October 2018 the Federal Council passed the draft for the second stage of the partial revision of the Spatial Planning Act for the attention of parliament. The first stage of the partial revision, which has already entered into force, aims at promoting the internal development of settlements and reducing the size of oversized building zones. As a consequence, for example, the cantons are obliged to introduce a levy by 30 April 2019, which is imposed on planning advantages gained by landowners owing to the determination of new building zones. With the second stage of the partial revision of the Spatial Planning Act, construction outside the building zones is to be newly regulated, although the fundamental principle of separating building areas from non-building areas will be maintained. In future, the cantons are to be given greater leeway in permitting buildings outside the building zones. If this leeway is exercised, additional land use must be compensated for on the basis of a planning and compensation approach, for example by removing buildings that are no longer needed. Among other things, this will open up new opportunities for the cantons to expand existing catering and accommodation services outside the building zone, which will be of particular interest to hotels.

Currently, the Swiss Federal Law on Public Procurement is revised. The main objectives are to reflect the multilateral agreement on public procurement between the member states of the World Trade Organisation, as well as to harmonise the procurement regulations of the Swiss Confederation and the cantons. Furthermore, parliament aims to introduce regulations with regard to the abolishment of the taxation of the imputed rental value for self-occupied premises. It is not yet possible to forecast when these amended laws will enter into effect.

In Switzerland, the use of Building Information Modelling (BIM) – a new digital technology to model any existing or future building using extremely detailed and comprehensive information – is increasingly gaining ground and will become the standard method for many construction projects, especially larger and more complex ones. In contrast, building and planning laws still require blueprints (or computer models) in 2D when submitting building applications. We assume that the legislators will soon become active in this field.

Crowdfunding structures to acquire real estate with limited financial capability are still increasing.

The markets show that real estate in good locations is rare, expensive and has low yields. As a consequence, investors look for alternative investment possibilities such as real estate development projects. The aim is to still achieve attractive yields.

VIII OUTLOOK AND CONCLUSIONS

As outlined above, real estate investors and developers must deal with a number of laws governing real estate transactions: civil law, environmental law, tax law, etc. In the area of tenancy law, it is key that the parties negotiate lease contracts only within the limits of the mandatory provisions. Since 2016, certain residential real estate transactions are also restricted by the Federal Act on Second Homes, which led to a decrease in real estate projects in some touristic (alpine) regions. It remains to be seen whether the aims of this new legislation – reducing the rents as well the ‘cold beds’ – will be achieved or, in the worst case, local construction companies and industries will suffer. The Lex Koller restrictions and authorisation regime will continue to apply and have not been tightened. In particular, the acquisition of commercial property is still not subject to authorisation.

Despite high real estate prices, investments remain attractive, particularly for institutional investors. Despite the strong Swiss franc, which might be a deterrent, the Swiss real estate market is still attractive for foreign investors as the initial yields are high and the finance costs are low compared to other real estate markets. Therefore, there is still strong demand for commercial properties in prime locations, and it is rather unlikely that prices will significantly drop in the near future, except for in the retail market. However, there is some uncertainty about the effects of the interest rate turnaround, which is not expected in Switzerland before autumn 2019.

In summary, the outlook on the real estate market remains stable as investors continue to rely on Switzerland’s political and financial stability as well as on continuous economic growth and a robust legal system. However, it is likely to become increasingly difficult to maintain the good performance of previous years as further capital will be fed into the comparatively high-yielding real estate market that is consistently putting yields under pressure.

ABOUT THE AUTHORS

ANDREAS F VÖGELI

Niederer Kraft Frey

Andreas F Vögeli heads the real estate team at Niederer Kraft Frey that deals with a variety of highly complex real estate transactions. He specialises in large and complex domestic real estate transactions, with a particular focus on enterprises that are involved in project development, hotel or leisure projects. His expertise covers the full lifecycle of real estate, providing a comprehensive and commercially pragmatic approach for the clients.

Mr Vögeli is an expert at the University of Zurich at the MAS Real Estate, lecturer at the Institute of Financial Services Zug IFZ, Lucerne University of Applied Sciences and Arts and regularly holds seminars in real estate matters. He is a council member of the Real Estate Management programme of the Institute of Financial Services Zug IFZ, Lucerne University of Applied Sciences and Arts.

Mr Vögeli is highly reputed among clients throughout Switzerland and abroad. He is distinguished as a leading real estate lawyer by *Chambers Europe* and *The Legal 500* and won the ILO Client Choice Award 2017 and 2018 in the category Real Estate for Switzerland.

OLIVER ZBINDEN

Niederer Kraft Frey

Oliver Zbinden is an associate in the real estate team at Niederer Kraft Frey. He regularly advises and represents domestic and international investors, financial institutions, companies and private clients in all aspects of real estate law, particularly real estate transactions, tenancy law, private construction law, public construction and zoning law, environmental law and Lex Koller issues.

NIEDERER KRAFT FREY

Bahnhofstrasse 53
8001 Zurich
Switzerland
Tel: +41 58 800 8000
Fax: +41 58 800 8080
andreas.f.voegeli@nkf.ch
oliver.zbinden@nkf.ch
www.nkf.ch



ISBN 978-1-83862-009-7