



CHAMBERS
Global Practice Guides

Real Estate

Switzerland – Law & Practice

Contributed by

Niederer Kraft & Frey AG

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SWITZERLAND

LAW & PRACTICE:

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

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SWITZERLAND LAW & PRACTICE

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Niederer Kraft & Frey AG is a preeminent Swiss law firm with a decades-long track record of legal excellence and innovation. As a market leader in Switzerland, NKF has built long-standing relationships with the world's best international law firms. The majority of NKF lawyers have undertaken further training at American, British or other foreign universities and many of them have gained professional experience in partner law firms abroad. NKF attaches great importance to combining a highly professional approach

and persistence in pursuing its clients' goals with being easy to work with, even in the most demanding situations. NKF currently employs around 100 lawyers, including 33 partners. NKF is one of the few major Swiss law firms to cover the entire spectrum of real estate law with recognised specialists. Clients are offered comprehensive advice throughout the complete lifecycle of real property, including financing, structuring as well as tax considerations.

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1. General

1.1 Main Sources of Law

Switzerland has a civil law system, so the main source of real estate law is codified law, namely the Swiss Federal Code of Obligations (in particular art. 58 regarding the liability of owners for defects of a building; arts. 216-221 regarding real estate sales and purchases, options and pre-emption rights; and arts. 253-301 regarding leases), the Swiss Federal Civil Code (in particular arts. 641-712t regarding real estate; arts. 730-792 regarding easements and real burdens; arts. 793-875 regarding mortgages; and arts. 942-977 regarding the land register), the Swiss Federal Act on the Acquisition of Real Estate by Persons Abroad (so-called *Lex Koller*), the Swiss Federal Debt Enforcement and Bankruptcy Act, and the Ordinance on the Land Register. Public law including rules regarding zoning, planning, procurement and environmental issues is also relevant, as well as various acts in relation to tax issues.

1.2 Main Market Trends and Deals

The slowdown of the real estate market continued in 2015, despite Switzerland maintaining historically low interest rates. These low interest rates also meant that prices were relatively high in 2015. The cooling off of the property market is also a result of the Swiss government and the Swiss National Bank introducing stricter lending criteria to lower housing debt. The National Bank's recent decision to abolish the cap against the Euro also made Swiss real estate more expensive for foreign investors, which, in turn, reduced corresponding demand. In addition, due to negative yields on Swiss government bonds, institutional investors – particularly pension funds and insurance companies – have focused on assets with positive cash flows, such as real estate investments. This investment pressure pushed net initial yields down to a new record low for prime commercial and residential properties.

Nevertheless, real estate transactions have remained attractive for investors, which is evidenced by many significant deals in the last 12 months, with the sale of commercial buildings such as the new HQ of the Swiss Federal Railways (SBB) in Berne, the HQs of Kuoni and Actelion, Rue du Rhone 8 in Geneva and the Designer Outlet in Landquart, and the sale of several hotels, notably the Hotel Palace Lucerne, Hilton Zurich Airport and Moevenpick Hotel Lausanne.

1.3 Proposals for Reform

On January 1, 2016 the Federal Act on Second Homes and the respective ordinance entered into force, governing the limitation of the use of residential property as secondary holiday homes. An amendment to the Water Protection Act was also put into force, and the Technical Ordinance on Waste was totally revised and its name changed to the Ordinance on Waste Avoidance and Disposal. In the future, own-

ers renovating or converting buildings constructed before 1990, which may entail the risk of containing asbestos, will regularly have to submit disposal concepts to the building permit authorities. This will shift the duty of investigation from contractors to owners, and needs to be taken into account in the planning process (timeline and costs).

The Swiss Federal Law on Public Procurement is currently being revised, with the amendments aiming to reflect the revised multilateral agreement on public procurement between the member states of the World Trade Organization. Moreover, parliament is discussing regulations regarding further reductions of carbon dioxide emissions, the launch of subsidies for energy-efficient building restorations and the abolishment of the taxation of fictitious income from self-occupied premises. Further legislative work concerns the revision of the Swiss Federal Land Use Planning Law. It is not yet possible to forecast when these amended laws will enter into effect.

2. Sale and Purchase

2.1 Categories of Property Rights

The most important categories of property rights are sole ownership, joint ownership, co-ownership (including the condominium-principled co-ownership), building rights, usufructuary rights and rights of residence. There are also other benefits to and burdens on real estate, such as rights of way, easements, access rights and mortgages. Pre-emption, emption and redemption rights on the one hand and lease and leasehold agreements on the other are similar to rights in rem if they are annotated in the land register.

2.2 Laws Applicable to Transfer of Title

At the federal level, the Swiss Civil Code contains the principles of Swiss property law (types of ownership and in rem rights) and the limitations applying to them, as well as provisions with regard to the land register filing. The contractual provisions with regard to sale and purchase of real estate are governed in the Swiss Code of Obligations. Said provisions also include that real estate sale deeds must be signed before a notary public to be valid, and filed with the land registry for registration purposes. Real property transactions involving rights of pre-emption, purchase or repurchase are subject to the same notarisation requirements. At the cantonal level, each canton has its own notary regulations, and some of them have their own *Lex Koller* implementation statutes. The tax treatment of sales is also mostly regulated by cantonal laws.

The *Lex Koller* and the respective ordinance restrict the acquisition of Swiss residential real estate and land reserves by foreign investors. Primary residences in communes which have more than 20% second homes can in principle only be

transferred to a person who is domiciled in the commune, due to the restricted use detailed within the Federal Act on Second Homes.

2.3 Effecting Lawful and Proper Transfer of Title

Every (privately owned) piece of land has its own file in the land register, where the following information is recorded: title information (owner, size and description of the real estate), easements, mortgages, mentions (typically restrictions of ownership) and annotations (contractual pre-emption rights and selling restrictions).

Title to real estate is transferred to the new owner by way of registration in the land register. The prerequisite for registration is a notarised contract between the seller and the purchaser constituting the legal ground for acquisition of ownership or any other rights in rem on real property. Only such a contract constitutes an obligatory right of entry into the land register.

Title insurance is neither needed nor common as purchasers acting in good faith are legally protected and can rely on the registration of title in the land register.

2.4 Real Estate Due Diligence

Due diligence in any real estate transaction always includes an examination of a certified land register excerpt regarding the plot, including all supporting documents connected to the entries in the land register. In addition, any existing leases must be examined, as these are transferred to the purchaser who is becoming the new landlord by acquiring the property. Maintenance agreements, management agreements, recent construction agreements and insurance policies are customarily reviewed as well. Other important elements of due diligence involve building permits, zoning plans and environmental law (the latter because the legal owner of the property is partly liable for contamination of the property, even if the property was contaminated before the transfer of title). Moreover, buyers regularly carry out tax, technical and financial due diligence.

In principle, the acquisition of Swiss real property by foreigners (in particular EU/EFTA nationals who do not have their permanent residence in Switzerland and nationals of other countries who do not hold a C permit) is subject to authorisation under the Lex Koller (see **1.1 Main Sources of Law**, above). The conditions for granting such authorisation are very restrictive – namely, the foreign investor must fall under one of the exceptions to proceed with a real estate acquisition. Purchase restrictions apply to residential and other non-commercial real estate as opposed to commercial real estate, a market that has been considerably opened to foreign investors with the 1997 and 2002 Lex Koller revisions. In the context of due diligence, the Lex Koller is therefore often an important aspect, including pertaining

(cantonal) practice. The Federal Council is currently discussing tightening the Lex Koller.

2.5 Typical Representations and Warranties

In the absence of a waiver, the seller is liable to the purchaser for express representations made; in addition, the seller is liable that the object of purchase has no physical or legal defects which eliminate or substantially reduce its value or fitness for use.

In both asset and share deals, however, contracts often contain a disclaimer to all warranties with regard to physical defects of the property. The property is purchased “as seen”. As a consequence, the purchaser is left with the statutory warranty provisions contained in the Swiss Code of Obligations, which cannot be waived. In particular, exclusion and limitation of liability clauses with regard to physical defects of the property are valid only if the seller did not deceive the purchaser as to the defects.

Important warranties relate to the correctness of rent records, the due diligence information being accurate, complete and up to date, and the absence of pending or threatened litigation with tenants, neighbours or authorities, as well as specific environmental and tax representations. Subject to the agreed statute of limitations, the purchaser may usually claim damages from the seller in case of a breach.

In corporate real estate sales, warranties typically also relate to the correct organisation and valid existence of the company, the correct presentation of the financial statements and the title to shares.

2.6 Important Areas of Law for Investors

The most important areas of law are described above, under **1.1 Main Sources of Law**.

2.7 Soil Pollution or Environmental Contamination

Based on Swiss environmental law, the buyer of real estate may be responsible for any soil pollution if he knew that such environmental contamination existed. The law differentiates between the owner and the polluter who actually caused the pollution of the site through his actions. In remediation cases where the polluter cannot be called upon to bear the costs, the remediation costs remain with the cantons and may partly remain with the owner of the land.

Therefore, real estate that is registered in the cadaster of the contaminated sites can only be transferred with the approval of the respective cantonal authority. The authority may ask to secure the potential future costs of remediation.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

Swiss law provides detailed (federal, cantonal and municipal) zoning and building regulations on the procedures and circumstances under which land can be developed. As a rule, the owner must file a request for a building permit for any construction. The potential buyer should therefore request a copy of all relevant permits from the seller.

Most zoning and building regulations provide special building regulations – eg design plans – which can help to facilitate major projects such as shopping centres, transformation of industrial wastelands, larger residential developments, etc.

2.9 Condemnation, Expropriation or Compulsory Purchase

Expropriation of land is only possible if it is necessary for a predominant public interest, such as the development of infrastructure, widening of roads, or construction of highways. The state needs to establish the following prerequisites for a permitted expropriation:

- the legal grounds for the expropriation are given;
- the expropriation is in the public interest;
- the expropriation suffices the principles of proportionality;
- there is no other reasonable measure to achieve the result; and
- full compensation is granted to the property owner.

The property owner can challenge the expropriation through legal proceedings and has the right for an independent court to decide on the suitability of the expropriation and the compensation offered.

2.10 Taxes Applicable to a Transaction

The transfer of real estate is subject to land registry and notary fees.

In most cantons of Switzerland, real estate transfer taxes apply (cantonal and/or municipal), and range from 1% to 3.3%. Most cantonal regulations provide that the buyer has to pay the real estate transfer tax, but it is not unusual for the parties to agree that the real estate transfer tax as well as the land registry and notary fees will be shared. In certain cantons, tax laws stipulate a first ranking legal lien on the real estate to secure real estate transfer taxes.

Share deals or corporate restructuring of real estate companies (eg transfer of assets and liabilities according to the Swiss Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities) are subject to neither real estate transfer taxes nor land registry fees. However, fees are levied by the register of commerce.

2.11 Legal Restrictions on Foreign Investors

The Lex Koller (see 1.1 Main Sources of Law) provides that foreign real estate investors can only buy real estate which is used for commercial purposes (eg, offices, shopping centres, retail, hotels, etc). Residential real estate as well as land reserves cannot be acquired by foreign investors (see also 2.4 Real Estate Due Diligence).

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Swiss real estate transactions are usually financed by a mix of own funds and external financings. In particular, Swiss and foreign institutional investors (eg, pension funds and insurance companies) invest and hold significant real estate portfolios that are financed without external financing. On the other hand, other real estate investors often use a mix of own funds and external debt, the latter often in the form of a secured term loan and a revolving credit facility.

3.2 Typical Security Created by Commercial Investors

The security package for real estate financings consists primarily of a security interest (most often in the form of an ownership transfer for security purposes (Sicherungsübereignung)) with respect to mortgage notes (Schuldbriefe). Mortgage notes can be created as registered mortgage notes in paper form (Namenschuldbrief) or as bearer mortgage notes (Inhaberschuldbrief) or as registered mortgage notes (Registerschuldbrief). Mortgage notes in paper form must be physically handed over to the lender, together with an endorsement on the mortgage note in favour of the lender. By virtue of the creation of a mortgage note, an independent claim in the amount of the mortgage note is created, which is separate from the claim created under the credit documentation (ie, the loan(s)). Such mortgage loan claim is then secured by the underlying property.

Further security is usually taken with respect to rent and other receivables as well as insurance claims (in each case to the extent assignable) by means of a security assignment agreement (Sicherungscession). Furthermore, share pledges may be granted over the shares of the borrower and its subsidiaries (if any).

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no restrictions in relation to Swiss commercial real estate.

Lex Koller restrictions on the acquisition of residential real estate in Switzerland (see 2.4 Real Estate Due Diligence and 2.11 Legal Restrictions on Foreign Investors) must also be

taken into account when granting or enforcing security with respect to Swiss residential real estate. The mere granting of security over mortgage notes should not create a problem under the Lex Koller if the terms and conditions of the financing/security are at arms length and the transaction is not structured to circumvent the Lex Koller restrictions. If the ratio between the external financing and the value of the residential property is very significant (eg, an LTV exceeding 80%) or in case other elements of the financing cause uncertainty, it may be advisable to obtain a ruling from the competent cantonal Lex Koller authority in this respect.

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

The holder of a mortgage note can register itself in the creditor register (Gläubigerregister) maintained by the competent land register at the place where the property is registered. A small registration fee may become due in connection with this.

The granting of security over Swiss real estate in the form of mortgage notes to secure loans granted by non-Swiss lenders generally triggers Swiss cantonal and federal source tax on the interest payments connected to such loans. A refund of the Swiss source tax or a reduction at source will only be available based on and in accordance with the applicable double taxation treaty, if any.

In connection with the transfer of property to the acquirer, Swiss real estate transfer tax and notarial and registration duties may apply. The seller is subject to real estate capital gains tax (if a gain is realised on such transfer). The payment of the Swiss real estate transfer tax and the real estate capital gains tax is usually secured by a statutory lien in favour of the relevant tax authorities over the relevant property. In certain circumstances, Swiss VAT aspects may need to be analysed as well, in case of a transfer of Swiss property.

See below re Swiss withholding tax in case of up-stream and cross-stream security.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The granting of security by a Swiss company for obligations of affiliates other than subsidiaries – so-called up-stream and cross-stream security – raises a number of issues under Swiss corporate law and may trigger Swiss withholding and other tax consequences in case of the enforcement of the security or if the conditions for granting such security are not in line with the principle of dealing at arm's length. The risks associated therewith are generally mitigated by a special purpose clause in the articles, corporate actions and contractual limitations in the loan and security documentation (essentially limiting the value of such security to the freely distributable capital of the Swiss company at the time

of enforcement, minus any Swiss withholding tax (currently 35%), if applicable).

3.6 Formalities When a Borrower is in Default

While a self-sale of mortgage notes is theoretically feasible, it is not usually the preferred route as the acquirer will thereby only acquire the mortgage note itself and therefore the secured claim against the property, but not the actual property. The official debt enforcement process (Betreibung auf Pfandverwertung) will instead be initiated, with the aim of achieving a sale of the property itself by the competent debt enforcement authority. However, the property owner has several legal remedies that can substantially delay any such enforcement process (even more so in an international context). Therefore, instead of going through an official debt enforcement process, in larger real estate investments it is common for lenders and investors to agree on a private sale of the property in order to avoid the risks associated with a public auction, a lengthy proceeding and higher costs.

3.7 Subordinating Existing Debt to Newly Created Debt

It is generally possible for existing secured debt to become subordinate to newly created debt if there is an agreement among the relevant creditors. However, the recognition and handling of such subordination agreements in an insolvency scenario is somewhat controversial, as the Swiss Debt Enforcement and Bankruptcy Act details only the secured creditors and three predefined classes of unsecured creditors, and it is unclear whether and how an insolvency administrator must respect such subordination arrangements among certain creditors of the Swiss company.

3.8 Lenders' Liability Under Environmental Laws

As a general rule with respect to polluted sites, the Swiss Federal Environmental Protection Act states that the person responsible for the pollution bears the costs of the measures required to investigate, monitor and remediate polluted sites. If two or more persons are responsible for the pollution, they bear the costs pro rata in accordance with their contribution to the pollution, with the person who caused the need for the remedial measures being primarily responsible. A person simply involved as owner of the property shall not be held liable for costs if, by exercising the required care, such owner could not have had any knowledge of the pollution. The competent public authority bears the share of the costs of any person responsible who cannot be identified or is unable to pay.

Lenders who financed the property may not become liable because of the mere holding of security, but they may indirectly finance the borrower to pay for such costs. In the case of an enforcement of security and a transfer of the property to a third party, the above rules must be taken into account.

3.9 Effects of Borrower Becoming Insolvent

Security granted by a Swiss borrower will not become void per se if the borrower becomes insolvent. However, Swiss law includes the concept of avoidance actions (with hardening periods between one and five years) which, if the criteria are fulfilled, may have the effect that the security is set aside. Furthermore, up-stream and cross-stream security granted by a Swiss borrower will be of no value if the Swiss borrower is in financial distress (see above).

The opening of Swiss insolvency proceedings against a Swiss borrower generally has the consequence that the right to enforce security interests is restricted and subject to the rules and obligations of the formalities of the official insolvency proceeding whereby, as a general rule, the insolvency administrator organises the enforcement process and the distribution of assets resulting from such an enforcement process.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Swiss authorities at the federal, cantonal and municipal levels have various regulatory responsibilities with respect to planning, zoning and public construction law. As a matter of principle, 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 new building or construction and any change to an existing building or construction is subject to obtaining a building permit from the competent local authority.

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

Buildings, structures and their surroundings must be designed in a way that creates a favourable or pleasing picture when combined with each other as a whole as well as individually. Buildings and land under cultural heritage protection or nature conservation areas are subject to particularly strict regulation. Also, buildings must be constructed in accordance with the rules governing the area of a property that may be used for construction in relation to the area that must remain unused, as well as dimensions and distances that have to be observed.

4.3 Regulatory Authorities

Building permits must usually be obtained from the local authority where the construction work is performed. The local authority co-ordinates with the cantonal authorities and further bodies involved in the granting of the building permit.

The following legislations apply: the Swiss Federal Land Use Planning Law (Raumplanungsgesetz, RPG), building laws of the cantons (Baugesetz) and zoning laws of the local communities (Bau- und Zonenordnung), as well as various other federal and cantonal laws, 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

As mentioned, planning applications must be submitted to the competent municipal authority. Thereafter, the project is published in the local official gazette and all affected parties are given the opportunity to raise objections against the project. A building permit is issued if the competent building commission finds that the project complies with all applicable regulations.

4.5 Right of Appeal Against an Authority's Decision

Both the applicant and the third party whose rights have been affected have the right to lodge an appeal with the superior administrative authority against the decision of the municipal authority. Moreover, Swiss federal law stipulates that the possibility of an appeal against the decision of an administrative authority to a court of law must be provided. The Swiss Supreme Court has final jurisdiction.

4.6 Agreements With Local or Governmental Authorities

Besides the possibility of the design plans, which can help to facilitate major projects, it is not common to enter into agreements with local authorities. However, it is possible to enter into a contracting agreement with utility suppliers.

4.7 Enforcement of Restrictions on Development and Designated Use

In order to ensure that the project is executed in accordance with the plans submitted in the planning proceedings, the competent local authority must be notified of all relevant steps of the execution, and supervises their conformity with the permit. Violations of the permit lead to the criminal as well as financial liability of the owner, and result in an order to remove illegal structures. If the owner refuses to obey such an order, the authority has the power to have the structures removed at the owner's cost.

5. Investment Vehicles

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

Specific objects can be acquired either directly by the individual investor or indirectly through a legal entity established for that purpose. The traditional way of investing in real estate in Switzerland is direct investment. With a growing market for real estate investment products, there has been a general trend towards indirect real estate investments, since these typically involve relatively lower transaction costs, higher liquidity, broader diversification and, most importantly, a lower entry level compared to direct investments into specific objects.

The main types of indirect real estate investments/investment vehicles are:

- Real estate funds (see the SXI Real Estate Funds Index for the real estate funds listed on the SIX Swiss Exchange), which can appear in the form of a:
 - (a) contractual investment fund (Art. 25 CISA);
 - (b) SICAV (investment company with variable capital; Art. 36 et seq. CISA); and
 - (c) KGK (limited partnership for collective capital investments; Art. 98 et seq. CISA);
 - (d) SICAF (investment company with fixed capital; Art. 110 et seq. CISA)
- Non-regulated investment companies limited by shares (Art. 620 et seq. CO), which must either be listed or only accessible for qualified investors (cp. Art. 2 para. 3 CISA)
- Swiss real estate investment foundations which are governed by Art. 53g et seq. of the Occupational Retirement, Survivors' and Disability Pension Plans Act (OPA), the Ordinance on the Supervision of the Occupational Retirement, Survivors' and Disability Pension Plans (OPO 1), the Ordinance on Investment Foundations (IFO) and Art. 80 et seq. CC.
- Special purpose vehicles (SPVs).

The most common investment vehicles are contractual investment funds and SICAVs. In addition, real estate investment companies and real estate investment foundations have become very popular in recent years. Depending on the corporate structure of the investor, 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 or restrictions with respect to their distribution into Switzerland.

5.2 Main Features of the Constitution of Each Type of Entity

The **contractual investment fund** is not a legal entity but a contract. It is based on a collective investment agreement (fund contract) under which the fund management com-

pany (a legal entity) commits itself to involve 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.

SICAVs are established under the relevant provisions of the Swiss Code of Obligations but are exempt from the provisions governing non-cash contributions, non-cash acquisitions and special privileges (Art. 37 para. 1 CISA). A SICAV must be authorised by FINMA before it can begin operations, and must obtain approval for its constituting documents (ie, its articles of association and investment regulations). The following are specific authorisation and approval requirements for SICAVs:

- the company's name must contain a description of its legal form or the abbreviation "SICAV";
- company and investor shares which do not have a nominal value and are freely transferable must be fully paid up in cash;
- investment regulations must be defined;
- a custodian bank must be designated; and
- the SICAV must choose to be either self-managed (ie, it handles its own administration and may delegate portfolio management activities as set out in Art. 51 para. 1 CISO) or externally managed (ie, it delegates both administration and portfolio management activities as set out in Art. 51 para. 2 CISO).

A **KGK** is a company whose sole object is collective investment. At least one member (the general partner) bears unlimited liability, while the other members (limited partners) are liable only up to a specified amount (the total limited partner's contribution) (Art. 98 para. 1 CISA). Unless CISA provides otherwise, the provisions of the Swiss Code of Obligations apply in relation to KGKs. A KGK must be authorised as an institution by FINMA before it can begin operations. The constituting document (partnership agreement) also requires approval. The general licensing and approval requirements set out in CISA apply, but there are other specific requirements which must be met, the most important of which are that:

- a general partner must be constituted as a limited company with its registered office in Switzerland and must act solely for one KGK;
- limited partners must be qualified investors as defined in Art. 10 para. 3 CISA;
- the partnership exists as soon as it appears in the Commercial Register; and

- the partnership's name must contain a description of its legal form or the abbreviation "KGK".

A **SICAF** is a company limited by shares as defined in Art. 620 et seq. CO. Its sole object is collective investment. It is usually not listed on a Swiss stock exchange and its shareholders are not necessarily qualified as required in Art. 10 para. 3 CISA. A SICAF must be authorised by FINMA as an institution before it can begin operations. FINMA must also approve the SICAF's constituting documents, namely its articles of association and investment regulations. The following specific authorisation and approval requirements for SICAFs are set out in Art. 110 et seq. CISA and Art. 122 et seq. CISO:

- the company's name must contain a description of its legal form or the abbreviation "SICAF";
- the issuing of voting shares, participation certificates, dividend right certificates and preference shares is prohibited;
- the key provisions concerning investments, investment policy, investment restrictions and risk diversification, etc, must be set out in the articles of association and the investment regulations;
- a custodian bank must be designated; and
- an audit firm must be appointed.

As an exception to the general rule of a FINMA approval and supervision, an investment company in the form of a company limited by shares is not subject to the CISA where (a) the shares of the investment company are listed on a Swiss exchange or (b) its shareholders are exclusively qualified investors under the CISA, or (c) the investment company qualifies as an investment club.

A **company limited by shares** may be established by natural persons or legal entities. It is established when the founder members declare by public deed that they are forming a company limited by shares, lay down the articles of association therein and appoint the governing bodies (Art. 629 para. 1 CO). The company is entered in the commercial register of the place at which it has its seat and acquires legal personality only through entry in the commercial register (Art. 640 and 643 para. 1 CO).

The launch of a **Swiss investment foundation** requires a broad range of documents, such as foundation regulations, articles and a prospectus (Art. 53g para. 1 OPA in connection with Art. 12 et seq. OPO 1 and Art. 80 et seq. CC). It is subject to (pre-)approval and direct supervision by the Occupational Pension Supervisory Commission.

5.3 Minimum Capital Requirement

Minimum capital requirements are as follows:

- **Contractual investment fund** : Share capital of the fund management company of at least CHF1 million, to be paid up in cash (Art. 43 CISO). Additionally, the investment fund must have net assets of at least CHF5 million at the latest one year following its launch (Art. 35 para. 2 CISO).
- **SICAV** : In respect of a self-managed SICAV, company shareholders must provide a minimum investment of CHF500,000 at the time of formation; where a SICAV is externally managed, a minimum investment of CHF250,000 is required (Art. 54 CISO). Additionally, the SICAV must have net assets of at least CHF5 million at the latest one year following its launch (Art. 53 in connection with Art. 35 para. 2 CISO).
- **KGK**: General partners must have paid-in capital of at least CHF100,000 (Art. 118 para. 2 CISO). There are no further capital requirements.
- **SICAF** : Shares amounting to at least CHF500,000 must be fully paid up in cash at the time of formation (Art. 122a para. 1 CISO). Additionally, pursuant to Art. 122b CISO, the governing bodies must at all times hold treasury shares as a percentage of the total assets of the SICAF as follows, subject to a maximum of CHF20 million:
 - (a) 1% for that portion not exceeding CHF50 million;
 - (b) 0.75% for that portion exceeding CHF50 million but not exceeding CHF100 million;
 - (c) 0.5% for that portion exceeding CHF100 million but not exceeding CHF150 million;
 - (d) 0.25% for that portion exceeding CHF150million but not exceeding CHF250 million; and
 - (e) 0.125% for that portion exceeding CHF250 million.

Company limited by shares : A company limited by shares must have a share capital of at least CHF100,000 (Art. 621 CO). When the company is established, capital equivalent to at least 20% of the nominal value of each share must be paid up. In all cases, the (initial) capital contribution must be at least CHF50,000 (Art. 632 CO). Under the circumstances specified in Arts. 628 and 634 CO, contributions in kind may satisfy the contribution requirement. Special listing rules and capital requirements apply in the case of listed investment companies.

Swiss investment foundation: A minimum capital of CHF100,000 must be dedicated at the establishment of the investment foundation (Art. 22 OPO 1).

5.4 Applicable Governance Requirements

In general, and particularly according to Art. 14 para. 1 CISA, authorisation for the entities that require FINMA approval is granted if:

- the persons responsible for management and the business operations have a good reputation, guarantee proper management, and possess the requisite specialist qualifications;

- the significant equity holders 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;
- sufficient financial guarantees are available; and
- the additional authorisation conditions listed in the relevant provisions of the CISA are met.

Furthermore, FINMA may make its granting of authorisation dependent on compliance with the codes of conduct of a specific industry body (Art. 14 para. 2 CISA).

Similar rules apply with respect to the investment foundation. General corporate governance rules apply to the company limited by shares.

5.5 Annual Entity Maintenance and Accounting Compliance

The costs vary greatly depending on the volume 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

There are basically two types of purely contractual arrangements (as opposed to the rights in rem mentioned under **2.1 Categories of Property Rights** above): the lease and the usufructuary lease.

6.2 Types of Commercial Leases

See **6.1 Types of Arrangement Allowing the Use of Real Estate for a Limited Period of Time**; this classification is, however, not limited to commercial leases.

6.3 Regulation of Rents or Lease Terms

Lease terms are only negotiable within the mandatory limits of the Swiss tenancy law, which is rather in favour of the interests of the tenants.

Excessive returns are prohibited and the tenants have the right to challenge them in court as being abusive. Generally, rent is not considered abusive if, for example, it is within the range of rents that are usual in the neighbourhood or if it is based on increased costs or additional benefits provided by the landlord.

6.4 Typical Terms of a Lease

Typically, the parties agree a term of five years, with the possibility to extend the lease for one or several similar terms. Various types of such extension options may be agreed by the parties. Under so-called real options the conditions of the lease are maintained, whereas under so-called unreal op-

tions the parties are not bound by the previous conditions. If the lease term is at least five years, the rent can be partially or fully adjusted in accordance with the Swiss Consumer Price Index (so-called “indexed rents”).

It is also not unusual to agree on a staggered rent. If the parties do so, the term may not be less than three years. Within the term of the staggered rents, a combination with indexed rents is not possible.

Lease terms may also be concluded for an indefinite period.

The costs for regular maintenance and small repairs (usually not exceeding 1% of the annual rent) must be borne by the tenant, regardless of whether or not he is responsible for the damage. By contrast, the landlord is responsible for the costs of any other (larger) maintenance and repairs.

Monthly advanced payments of rent are common in Switzerland, but the frequency of the rent payments is negotiable. Depending on the credit standing of the tenant and the guarantees provided, it might be advisable to agree on a quarterly or six-monthly advanced payment.

6.5 Rent Variation

A rent increase is possible under narrowly defined formal and quantitative requirements as per the next possible termination date and if the landlord can demonstrate that the increase does not result in an excessive rent. The landlord must notify the tenant about the rent increase at least ten days before the beginning of the next notice period.

As mentioned above (**6.4 Typical Terms of a Lease**), the rent may also be adjusted if indexed rents or staggered rents were agreed in the lease contract. Another adjustment possibility is to include an explicit reservation of a rent increase in the lease contract, stating the amount of the possible increase; however, this is only possible if the original rent lies below market value.

Furthermore, turnover rents may be agreed, which depend on the turnover of the business run in the leased property, but are usually combined with a minimum rent. This mechanism can also result in different lease amounts during a lease term.

6.6 Payment of VAT

Generally, pursuant to article 21 II (21 of the Swiss VAT Law, with certain exceptions) the rent of real estate is exempt from VAT. A landlord who is registered as a VAT payor, however, has the possibility to opt for the taxation of the rent, provided that the tenant does not use the leased premises exclusively for private purposes.

6.7 Costs Payable by Tenant at Start of Lease

It is common practice to request a security deposit from the tenant at the start of the lease (see also **6.15 Forms of Security to Protect Against Failure of Tenant to Meet Obligations**). If the parties agree on a tenant fit-out, costs in that respect are payable by the tenant as well.

6.8 Payment of Maintenance and Repair

Maintenance and repair costs are generally paid by the landlord but reimbursed by the tenants via the service charges.

6.9 Payment of Utilities and Telecommunications

Costs for utilities and telecommunications services are generally paid by the landlord but reimbursed by the tenants via the service charges.

6.10 Insuring the Real Estate That is Subject to the Lease

The owner must insure the building against damages caused to the property, such as fire or water damage. Insurance for environmental problems is, in general, not available.

6.11 Restrictions on Use of Real Estate

The parties may agree on a certain use of the premises. Usually usages which could cause emissions are prohibited. Furthermore, the use of the buildings has to comply with the zoning regulations.

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.

6.12 Tenant's Ability to Alter and Improve Real Estate

If the tenant wants to alter or improve the rented property, he has to obtain written permission from the landlord. Otherwise, the tenant has to reinstate the original situation upon move-out of the property. If the landlord agrees to the alterations and they result in a substantial improvement of the property, the tenant is entitled to adequate compensation.

6.13 Specific Regulations

Swiss law only distinguishes between commercial and residential leases. In the context of commercial leases, specific agreements in consideration of the type of business may of course be concluded within the scope of statutory law.

6.14 Effect of Tenant's Insolvency

If the tenant becomes insolvent, 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.

6.15 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

The landlord usually requires a rent security deposit. If the tenant provides security in the form of cash or negotiable securities, the landlord must deposit it in a bank savings or deposit account in the tenant's name. The bank may release such security only with the consent of both parties or in compliance with a final payment order or a final court decision.

Alternatively, bank guarantees may also serve as rent security.

6.16 Right to Occupy after Termination or Expiration of a Lease

Once the lease is terminated, the tenant has no right to continue to occupy the property. However, tenants are entitled to submit a request for extension of the lease term to the judge if the termination would cause undue hardship which cannot be justified by the landlord's interests.

Due to the right of extension, the landlord cannot generally undertake precautionary legal measures to ensure that the tenant moves out on time, unless it becomes obvious that the tenant will not leave on the agreed date. Under these circumstances, it might be possible to evict the tenant on the date of termination.

6.17 Right to Terminate Lease

Lease contracts with a fixed term expire without any further action at the end of their term, unless both parties continue to maintain the contract, in which case the contract is converted into a lease with an indefinite period.

Unless otherwise agreed, the notice period with regard to indefinite business leases is six months. As mentioned, tenants are entitled to submit a request for extension of the lease term to the judge if the termination would cause undue hardship which cannot be justified by the landlord's interests. The maximum extension for commercial leases is six years.

Default in the payment of rent entitles the landlord to terminate the lease. However, the landlord must first grant a deadline for payment of a minimum of 30 days, 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 above **6.15 Forms of Security to Protect Against Failure of Tenant to Meet Obligations**).

The tenant may terminate the 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 of time.

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

6.18 Forced Eviction

Tenants can be forced to leave – see **6.17 Right to Terminate Lease**. The duration of the process depends on the court instances and can take several months or years.

6.19 Termination by Third Party

A lease can be terminated as per the next possible termination date by the new owner of the property if he can prove urgent need for him or his family. Government or other authorities cannot terminate private leases.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Most construction contracts qualify as work contracts according to which the contractor promises to produce a work project for which the principal promises to pay a certain price. The essential feature is that the amount to be paid by the principal is due only if the work is completed as agreed. The compensation may either be a fixed price (which may generally not be exceeded unless extraordinary circumstances are given) or may be determined in accordance with the value of the work performed. The contractor usually bears the risk of success of his endeavours, especially where a fixed price is agreed.

Conditions of payment in larger projects usually provide for stage payments, which entitle the contractor to draw a percentage of the total compensation whenever certain pre-defined steps of the construction process are completed.

7.2 Assigning Responsibility for the Design and Construction of a Project

A common organisational structure of a project is for the owner of a property to hire a general contractor. In its relationship with the owner, the contractor is liable for the performance of the contract and thus for the work of the subcontractors.

7.3 Management of Construction Risk

In construction contracts the contractor usually provides a performance guarantee. Upon completion, the contractor gives a warranty with regard to defects of the construction. Typically, the performance guarantee as well as the defects warranty are secured by either a bank guarantee or other

surety. Based on the bank guarantee, the guarantor bank commits to pay any sum up to a pre-defined maximum amount to the guaranteed party, upon the latter's first demand; the guarantee is irrevocable and unconditional, and may be exercised even if certain underlying obligations have not been met. In a surety contract the grantor undertakes to fulfil the obligations of the principal obligor towards the secured party in case the principal obligor is not able to do so. In this constellation, and in contrast to the guarantee, the grantor has all the legal defences of the principal obligor since the surety does not create an independent contractual claim like the guarantee does.

Generally, the contractor also takes out insurance coverage for civil liability in connection with damages resulting from the construction. Furthermore, the property owner must ensure sufficient insurance coverage for civil liability relating to damage resulting from the property itself.

7.4 Management of Schedule-Related Risk

As mentioned above (see **7.1 Common Structures Used to Price Construction Projects**), stage payments are usually agreed to manage schedule-related risk. The terms of construction contracts often also include provisions relating to penalties to be paid by the contractor in case of default, consequences of early termination, etc.

If instructions by the owner risk causing delay, defects or an increase in work costs, it is incumbent upon the contractor to notify the owner about such risk as, otherwise, the contractor may be liable for any consequences.

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

It is common for the contractor to provide a completion guarantee, commonly issued by a bank (see **7.3 Management of Construction Risk**).

7.6 Liens or Encumbrances in the Event of Non-Payment

The contractor may request that the court establishes a statutory charge on the property for the performed work within four months of its completion. The charge is registered only if the claim has been acknowledged by the property owner or confirmed in a court judgment, and may not be requested if the owner provides the claimant with adequate security.

7.7 Requirements Before Use or Inhabitation

Before the project can be inhabited, the authorities will order a final inspection and acceptance of construction works; they will particularly check if all fire and safety rules have been fulfilled.

8. Tax

8.1 VAT

Pursuant to article 21 II (20) of the Swiss VAT Law, the sale of real estate is exempt from VAT. However, pursuant to article 22 II of the Swiss VAT Law, a seller who has registered as a VAT payer may opt for taxation at the standard VAT rate (currently 8%) provided that the purchaser does not use the real estate exclusively for private purposes.

8.2 Mitigation of Tax Liability

Since transfer, recordation, stamp or other similar taxes (if any) are levied on a cantonal or communal level, there is no commonly used method to mitigate such taxes. Optimisation possibilities (eg, exemptions in case of group re-organisations, reduction of calculation base, etc) have to be analysed on a case by case basis.

8.3 Income Tax Withholding for Foreign Investors

Net rental income (gross rental income less attributable deductions) and capital gains of foreign investors derived from Swiss real estate are taxable in Switzerland. Foreign owners of Swiss real estate are obliged to file a tax return in Switzerland in the canton where the real estate is located, and to pay the resulting taxes.

Tax rates on net rental income vary from canton to canton and from commune to commune. For corporate owners, the applicable maximum corporate income tax rates in the different cantons and communes range from 12% to 25%. For individual owners, the maximum income tax rates in the different cantons and communes range from 20% to 41%. Exemptions may be available for tax-exempt entities such as charitable institutions and pension schemes.

Taxation of capital gains derived from Swiss real estate also varies from canton to canton and even from commune to commune. Capital gains tax rates may be progressive and may also depend upon the duration of ownership. Different capital gains tax rates may apply to corporate and individual owners. The range of applicable capital gains tax rates is therefore large, and may be between 10% and 60% (for short-term capital gains). Exemptions may be available in case of reorganisations or for tax-exempt entities such as charitable institutions and pension schemes.

8.4 Tax Benefits

A tax payor using Swiss real estate for commercial purposes may benefit from standardised depreciation rates as fixed by the respective guidelines issued by the Swiss Federal Tax Administration (Guideline of 1995 regarding Depreciation of Assets of Commercial Entities). Furthermore, any other commercially justified costs relating to Swiss real estate are tax-deductible.

An individual tax payor using Swiss real estate for its own private purposes is taxed on a deemed rental income but is allowed to deduct any maintenance and financing costs relating to the real estate.

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