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# THE REAL ESTATE LAW REVIEW

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SIXTH EDITION

EDITOR  
JOHN NEVIN

LAW BUSINESS RESEARCH

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For further information please email  
[Nick.Barette@lbresearch.com](mailto:Nick.Barette@lbresearch.com)

# THE REAL ESTATE LAW REVIEW

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Sixth Edition

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JOHN NEVIN

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Gideon Robertson

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# EDITOR'S PREFACE

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Real estate is a truly global industry. The worldwide impact of events of the preceding 12 months has confirmed that it is no longer possible to look at domestic markets in isolation. It is hoped that *The Real Estate Law Review* reflects this position. An evolving awareness of the global real estate market and an understanding of the practices, requirements and concerns of overseas investors is essential if practitioners and their clients are to take full advantage of investment trends as they develop.

The *Review* seeks to provide an overview of the state of the global real estate market. The theme this year has been one of uncertainty. First we had Brexit, as the UK voted to leave the EU, and then the result of the US election. It is probably fair to say that neither was expected, and while the significance of Brexit diminishes in a global context, the same cannot be said of Donald Trump's victory. It will be very interesting to see how the global real estate market evolves over the coming months. While there will undoubtedly be risks, there will also be opportunities. Investors and their professional advisers will need to develop an appropriate strategy to ensure that risks are assessed and opportunities are taken. By and large, markets do not like uncertainty and some of the positive outlook reflected in last year's edition has undoubtedly diminished.

The continued success of the *Review* is a true testament to its validity in the global real estate market. The sixth edition covers 37 jurisdictions, and we are delighted to welcome new contributions from around the world. Each contributor is a distinguished practitioner in his or her own jurisdiction and has provided invaluable insight into the issues pertinent to that jurisdiction in a global context.

Once again, I wish to express my deep and sincere gratitude to all my distinguished colleagues who have contributed to this edition of the *Review*. I would also like to thank Gideon Robertson and his publishing team for coordinating the contributions and compiling the sixth edition.

**John Nevin**  
Slaughter and May  
London  
February 2017

## Chapter 35

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# SWITZERLAND

*Andreas F Vögeli and Thomas A Frick<sup>1</sup>*

### 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 ownership<sup>2</sup> 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 immoveable 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 rights<sup>3</sup> – the ownership of the ground is dissociated from the ownership of the constructions.

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1 Andreas F Vögeli and Thomas A Frick are partners at Niederer Kraft & Frey Ltd.

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 is granted a right to erect and maintain a building on the underlying lot.

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.

## 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, etc.) 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.<sup>4</sup>

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.

Due to 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

For more than 10 years, Switzerland's real estate markets, both residential and commercial, have been growing constantly, leading to a continuous increase in housing prices, rents and

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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 the contract on the merger or splitting of a company.

low vacancies due to booming demand.<sup>5</sup> Since mid-2014, in terms of usage costs, owning a property has been cheaper on average than renting.<sup>6</sup> Against the backdrop of the Swiss Financial Market Supervisory Authority FINMA and the Swiss National Bank introducing stricter lending criteria to lower the risk of an overheating, a slight cooling off of the real estate market can be witnessed – despite Switzerland maintaining historically low interest rates. According to UBS's research, for the first time since 1999, a housing price decline is projected.

The Swiss National Bank's decision to abolish the cap against the euro made Swiss real estate more expensive for foreign investors, which – together with the decreasing rate of immigration of high-end buyers – also reduced corresponding demand. On the other hand, due to negative yields on Swiss government bonds, institutional investors – particularly pension funds and insurance companies – have been increasingly focusing on assets with positive cash flows, particularly real estate investments.

Real estate prices have rarely been so high, but at the same time, paradoxically, real estate owners – aware that a further price increase is unlikely in the short term – are reluctant to sell because of the negative interest rates passed on by the banks to their customers. The investment pressure pushed net initial yields down to a new record low for prime commercial and residential properties.

All in all, real estate transactions have remained attractive for investors, which is evidenced by many significant deals in the past months. Among the key transactions were the sale of commercial buildings such as the new headquarters of the Swiss Federal Railways in Berne, the headquarters of Kuoni and Actelion, Rue du Rhone 8 in Geneva, the Designer Outlet in Landquart, the World Trade Center in Lausanne, buildings at the famous Bahnhofstrasse in Zurich and the sale of several major hotel buildings, notably the Hotel Palace Lucerne, Hilton Zurich Airport and Moevenpick Hotel Lausanne.

### 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, etc.). The property may also have land reserves if they – as a rule – do not exceed one-third of the total surface of the land.

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5 See Credit Suisse, Swiss Real Estate Market 2016, available at [www.credit-suisse.com/media/production/pb/docs/privatkunden/hypotheken/cs-immobilienstudie-2016-en.pdf](http://www.credit-suisse.com/media/production/pb/docs/privatkunden/hypotheken/cs-immobilienstudie-2016-en.pdf).

6 See UBS, Real Estate Focus 2016, available at [www.ubs.com/ch/de/swissbank/privatkunden/hypotheken/beratung/immobilienmarkt-immobilienbewertung.html](http://www.ubs.com/ch/de/swissbank/privatkunden/hypotheken/beratung/immobilienmarkt-immobilienbewertung.html).

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 in order 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.

The main types of indirect real estate investment vehicles are real estate funds,<sup>7</sup> 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 at least be 1 million Swiss francs (paid up in cash), and the investment fund must have net assets of minimum 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 which do not have a

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<sup>7</sup> See the SXI Real Estate Funds Index for the real estate funds listed on the SIX Swiss Exchange.

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 ones (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.

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) needs 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 10 and 60 per cent. 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. But also a mix of own funds and external debt in form of a secured term loan and a revolving credit facility is common.

External real estate financings are primarily secured by security interest (in the form of an ownership transfer for security purposes or a pledge) 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 in order 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, also commercial lease contracts may 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), since 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 2016, the Federal Act on Second Homes entered into force. It aims to protect the (alpine) environment and local population struggling with increasing rents as well as to reduce so-called 'cold beds' by limiting the number of second (holiday) homes to 20 per cent per commune. The Act and the corresponding ordinance are affecting the real estate business heavily in alpine regions, since new built properties in communes with more than 20 per cent second homes can only be sold to persons who will be using them as primary residence in the respective commune and not as a second home.

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, owners 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).

Currently, the Swiss Federal Law on Public Procurement is revised. The aim is to reflect the multilateral agreement on public procurement between the member states of the World Trade Organisation. Furthermore, parliament aims to introduce regulations with regard to further reductions of carbon dioxide emissions, the launch of subsidies for energy efficient building restorations and the abolishment of the taxation of the imputed rental value for 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.

Recently, some Swiss banks announced their intention to facilitate mortgage origination for private purchasers. Due to the requirements of the Swiss Financial Market Supervisory Authority (FINMA), the total annual mortgage interest amount on a residential property (calculated based on a theoretical interest rate of 4.5 to 5 per cent, although the actual rate today is between 1 and 2 per cent depending on the term of the loan) may not exceed one-third of the net income of the purchaser. Banks now try to find possibilities to enable a broader public to acquire real estate. One idea is to reduce the theoretical interest rate to 3 per cent, subject to agreement on a 10-year loan with a fixed interest rate and amortisation that will lead at the end to an exposure within the above-mentioned financial sustainability. Another idea is to determine

the theoretical interest rate on a more individual basis. Other banks criticise these efforts and argue that the high interest rates (for the purpose of the calculation) should be maintained to avoid higher insolvency risks in case of rising interest rates.

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 this year, certain residential real estate transactions are also restricted by the Federal Act on Second Homes, which will likely lead to a decrease in real estate projects in touristic (alpine) regions. It remains to be seen whether the aims of this new legislation 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 might be even tightened. Hence, foreign real estate investors are not facing major changes in the legal environment in the near future.

Despite continued high real estate prices, investments remain attractive, particularly for institutional investors. There is strong demand for commercial and residential properties in prime locations, and it is unlikely that prices will significantly drop in the near future. Volatile exchange rates and a strong Swiss franc will continue to influence foreign investors' investment decisions, though, and may lead to sudden increase or decrease in demand for Swiss commercial real estate.

Some banks have recently expressed plans to even further reduce the already record low mortgage rates, which were met with criticism by the Swiss Financial Market Supervisory Authority FINMA, the Swiss National Bank as well as the major Swiss banks. Yet, in times of negative interest rates, such scenario is quite conceivable.

In summary, the outlook on the real estate market remains stable since investors continue to rely on Switzerland's political and financial stability as well as on continuous economic growth and a robust legal system.

## Appendix 1

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# ABOUT THE AUTHORS

### **ANDREAS F VÖGELI**

*Niederer Kraft & Frey Ltd*

Andreas F Vögeli heads the real estate practice from NKF 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 as well as in hotel or leisure projects. His real estate experience also includes a profound knowledge of hotel and leisure projects, special rental contracts, Lex Koller and environmental law issues.

Mr Vögeli is lecturer at the University of Zurich at the MAS Real Estate and regularly holds seminars in real estate matters. Furthermore, 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 and throughout Switzerland and abroad. He is distinguished as leading real estate lawyer by *Chambers Europe* and *The Legal 500*.

### **THOMAS A FRICK**

*Niederer Kraft & Frey Ltd*

Dr Thomas A Frick specialises in counselling Swiss and foreign banks and other financial institutions in all kinds of legal and regulatory issues, with a focus on regulatory and contractual issues of financing of real estate and real estate portfolios, acquisition of real estate portfolios and structuring the acquisition and the financing for individual and for portfolio acquisitions.

Dr Frick is member of the board of directors and of the audit committees of Swiss banks and of other prudentially supervised financial market participants.

His core practice areas are banking and finance, commercial, public business law, and employment law.

**NIEDERER KRAFT & FREY LTD**

Bahnhofstrasse 13

8001 Zurich

Switzerland

Tel: +41 58 800 8000

Fax: +41 58 800 8080

[andreas.f.voegeli@nkf.ch](mailto:andreas.f.voegeli@nkf.ch)

[thomas.a.frick@nkf.ch](mailto:thomas.a.frick@nkf.ch)

[www.nkf.ch](http://www.nkf.ch)