

# Real Estate

*Contributing editor*  
**Joseph Philip Forte**



2016

GETTING THE  
DEAL THROUGH

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# Real Estate 2016

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# Switzerland

Yves Jeanrenaud and Josef Caleff

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## General

### 1 Legal system

#### How would you explain your jurisdiction's legal system to an investor?

Switzerland has a civil law system. Real estate is mainly regulated by the Federal Swiss Civil Code (articles 641 to 712(t) regarding real estate and rights of pre-emption, articles 730 to 792 regarding servitudes, articles 793 to 875 regarding mortgages, articles 942 to 977 regarding the Land Register) and the Federal Swiss Code of Obligations (article 58 regarding the liability of owners for defects of a building; articles 216 to 221 regarding real estate sales and purchases, options and pre-emption rights; articles 253 to 301 regarding leases). For a non-binding English version of the Swiss Civil Code see [www.admin.ch/ch/e/rs/210/index.html](http://www.admin.ch/ch/e/rs/210/index.html) and of the Swiss Code of Obligations see [www.admin.ch/ch/e/rs/220/index.html](http://www.admin.ch/ch/e/rs/220/index.html). Furthermore, various acts in relation to tax issues, the Land Registers, environmental issues and the acquisition of property by persons abroad govern tax and administrative aspects of real estate transactions.

Swiss law does not distinguish between remedies at law and equitable remedies. In general, a plaintiff may request specific performance or monetary compensation at its discretion, unless otherwise agreed in the agreement. Evidence law in general permits documents, witnesses, visual inspection by the court, experts and interrogation of the parties. The Swiss legal system excludes juries in private law and in administrative matters. Therefore, the principle of free consideration of evidence by the court applies.

Switzerland is divided into 26 states (cantons). Local (cantonal and municipal) public law applies with regard to the taxation of real estate transactions (except VAT, if applicable), the zoning laws and building regulations.

### 2 Land records

#### Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Switzerland has a tract index system for the registration of ownership, leasehold and security interest in real estate. It allows for use of all interest in real estate. In general, there is no unregistered land and, therefore, no system for recording. Transfer of interests in real estate requires the registration of the transfer in the Land Register. Failure to do so does not make the transaction void or voidable, but prevents closing and perfection of the transaction. Hence, non-registered interests do not have a rank. As a rule, registration of an ownership, leasehold or security guarantees title and priority to the registering party over later registrations.

### 3 Registration and recording

#### What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The direct sale and purchase of real estate requires the notarisation of the sale and purchase agreement, the application for registration of the sale and purchase with the Land Register and the entry of the application in the Land Register. Only notarised agreements will be entered in the Land Registers. Cantonal laws govern the notarisation of sale and purchase

agreements. In certain cantons, the agreements have to be notarised by public officials at the place of the property. In other cantons, the notaries are qualified private persons who must have their place of business in the canton of the property concerned. The same applies to the establishment of the security interests. Lease agreements can be annotated in the Land Register. Annotation is possible with a simple written application by the land owner filed together with the original lease agreement.

Certain cantons or municipalities levy a real estate transfer tax. The real estate transfer tax rates vary from canton to canton and are between zero and approximately 3 per cent of the purchase price (market value) of the real estate. There are exemptions from, or reductions of, the transfer tax, for example, in the case of a reorganisation. In general, the buyer is liable for the transfer tax but in certain cantons the seller may also be liable for such tax. The parties to a sale and purchase agreement may also agree to (and, in general, they do) split the transfer tax.

Further, in all cantons there is a fee for the notarisation and a fee for the registration of the sale and purchase in the Land Register. These fees may be substantial (for example, in the canton of Zurich, the fees amount to 0.25 per cent of the purchase price). The buyer is liable for their payment but the parties may (and, in general, do) agree to split these fees.

The sale of shares in a real estate company does not usually require notarisation and is not registered in the Land Register. Therefore, a sale is not, in general, subject to a notarisation fee or a Land Register fee. In some cantons, such sale is, however, subject to the real estate transfer tax. The sale of shares in a limited liability company (GmbH) might have to be notarised depending on its articles of association. The sale of a real estate company instead of the sale of the real estate and the liquidation of the company may have tax advantages.

### 4 Foreign owners and tenants

#### What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction?

#### What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

The acquisition of Swiss real estate by foreigners is restricted as defined by the Swiss Federal Act regarding the Approval of the Acquisition of Property by Persons Abroad (Lex Koller). Swiss nationals (including persons with dual citizenship) do not qualify as foreign nationals, even if they have residence outside Switzerland. As a rule, foreign nationals need an authorisation to acquire real estate in Switzerland, but not to lease real estate (unless such lease grants a similar legal position as ownership, eg, in the case of a very long-term lease of 10 or more years). It does not matter whether the real estate is already in foreign hands or not; nor does the legal cause of the transfer (purchase, exchange, donation, etc) have any bearing on the application of the law. Authorisation is granted only if the conditions set out in the Lex Koller are met. In particular, authorisation to purchase a holiday home or an apartment in apart-hotels (a serviced apartment complex that uses a hotel-style booking system) may be granted under certain circumstances to persons abroad.

Property that is used as a permanent business establishment for the exercise of an economic activity (industrial production, trade in products and services and craft trades, but not real estate acquired for the building, sale or rental of housing) may be acquired without authorisation (including: residential housing run on a hotel basis; residential housing as part of

a permanent business establishment when it is necessary for the business, for example, for a caretaker; minor residential housing that is impossible in practical terms and unreasonable to separate from the business site; or residential housing as part of a permanent business establishment if such residential housing is mandatory pursuant to housing unit quotas under planning or zoning regulations and such quotas are low). Further, no approval is required for the direct or indirect acquisition of a company that owns residential housing but whose main purpose is not the acquisition, holding and sale of residential housing, provided the residential housing owned by such company is, as a rule, less than 30 per cent of the assets of such company. Foreign nationals may purchase plots not built upon in zones set aside for construction, if works on buildings to be used for economic activities are undertaken within approximately one year. Foreign nationals may also purchase real estate that includes parts not built upon, if such part of the real estate does not exceed in general one-third of the total surface area ('allowable reserve surface'), even if it is not intended to undertake works within one year.

The following persons do not require authorisation to purchase real estate in Switzerland: nationals of a member state of the European Union or of the European Free Trade Association (EFTA) who are domiciled in Switzerland (resident foreign nationals or settled foreign nationals), other foreign nationals entitled to settle in Switzerland (holding a settlement permit 'C') and Swiss-based companies controlled by persons holding the above rights of residence or settlement. Non-EU or EFTA nationals domiciled in Switzerland who do not yet have the right to settle in Switzerland do not require authorisation to acquire their main residence (if the surface area of the plot does not exceed 3,000 square metres).

The transfer of a property to a trust is in principle subject to an authorisation if any of the trustees or any of the beneficiaries qualifies as a foreign national.

The ownership of property does not require administrative reporting to the authorities either by residents or by non-residents. If the acquisition of the real estate is possible as set out above, entities from another jurisdiction do not have to qualify to do business, file special tax forms or other reports with the local authorities or obtain a special licence.

## 5 Exchange control

**If a non-resident invests in a property in your jurisdiction, are there exchange control issues?**

No. However, the distribution of dividends by a Swiss company is subject to a withholding tax of 35 per cent, which non-resident shareholders may only partly or fully reclaim if a double taxation treaty applies.

## 6 Legal liability

**What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?**

An owner of real estate faces a contractual liability towards its tenants to maintain the property in a condition appropriate for the intended use. The landlord may be held liable for damages if it does not comply with this obligation. Tenants may take recourse to the landlord if they are held liable by their customers or by contractors. The tenants have the obligation to treat the real estate with the appropriate duty of care.

Pursuant to Swiss public law, the owner of a property is primarily liable for the removal of contaminated soil at a contaminated site. The owner of a contaminated property in the first place also has to bear the costs to remove the contaminated soil. Since the 'polluter pays' principle applies in environmental protection law, the owner may, however, take recourse against the polluter and, if the polluter is unable to pay or cannot be traced, such costs will be borne by the canton and not by the current owner if such owner acted diligently and could not have any knowledge of the pollution. In the case of pollution without contamination, requiring no monitoring or clean-up (ie, if the pollution does not endanger the environment, in particular the groundwater), if the owner would like to execute works to rehabilitate the site, the excavation costs necessarily linked with such works are under certain circumstances to be borne by the polluter or previous occupants for two-thirds and by the owner for one-third. However, if the polluter is unable to pay or cannot be traced, the owner could then have to pay all costs.

Finally, the owner of a building or other construction, in principle, also other possessors of the building such as tenants, is strictly liable for any damages caused by such building due to its faulty design or construction, or to inadequate maintenance. The owner may claim recourse from other persons who are responsible to him or her.

## 7 Protection against liability

**How can owners protect themselves from liability and what types of insurance can they obtain?**

Insurance against damage to the property is mandatory. In certain cantons, the property has to be insured mandatorily with the cantonal building insurance. Such cantonal insurance does not cover loss of rent or the strict liability of the property owner. Loss of rent and third-party liability insurance is, however, available from private insurers. Insurance for environmental problems is, in general, not available.

## 8 Choice of law

**How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?**

Rights in rem to real property are subject to the law at situs (law of the place in which property is situated).

Contracts regarding real property or its use are subject to the law of the state in which the property is located. However, a deviating choice of law is permitted and enforceable (subject to public policy provisions). Swiss law applies in any case to the form of contracts regarding real estate in Switzerland.

Because of the requirement to notarise the transfer agreement and to file it with the Land Register, Swiss law is in general chosen as governing law.

## 9 Jurisdiction

**Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?**

The courts at the situs have exclusive jurisdiction over actions concerning rights in rem to real property in Switzerland. For contractual claims, the parties may agree on a place of jurisdiction different from the situs of the property or an arbitration tribunal with the exception of lease agreements. The courts at the situs have exclusive jurisdiction over actions concerning lease agreements. The parties may agree on an arbitration tribunal in the case of commercial lease agreements. For out-of-jurisdiction service to Swiss residents in matters relating to foreign properties, judicial assistance must be requested. For out-of-jurisdiction service to foreign residents in matters relating to Swiss properties, foreign law applies. A party does not have to be qualified to do business in Switzerland to enforce remedies in Switzerland.

## 10 Commercial versus residential property

**How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?**

Swiss laws do not differ between commercial and residential properties regarding real estate ownership and financing, or the enforcement of those interests in real estate, with the exception of the Lex Koller issues set out in question 4. The laws regarding tenancy differ regarding the mandatory minimum notice period (three months for residential and six months for commercial properties), a possible extension (four years for residential and six years for commercial properties) upon termination and a possible retention right as security for rent (not possible in case of residential properties).

**11 Planning and land use**

**How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?**

Swiss laws control or limit development, construction, or use of real estate and protect existing structures based on detailed planning system on the federal, cantonal and municipal level. There is a detailed zoning regime on the municipal level determining the possibilities of developing and constructing (in certain cases replaced by a specific planning process).

**12 Government appropriation of real estate**

**Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?**

Switzerland has a legal regime for condemnation of real estate at the federal and cantonal level. Owners generally receive compensation for a condemnation. Condemnation is only permitted based on a specific act, if there is a predominant public interest and if the condemnation is necessary and reasonable to achieve the intended goal.

**13 Forfeiture**

**Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?**

A court can order the forfeiture of assets (including real estate) that have been acquired through the commission of an offence or as payment therefor, unless the assets are passed on to the person harmed for the purpose of restoring the prior lawful position. Forfeiture is not permitted if a third party has acquired the assets in ignorance of the grounds for forfeiture, provided he or she has paid a consideration of equal value therefor or forfeiture would cause him or her to endure disproportionate hardship. The right to order forfeiture is limited to seven years; if, however, the prosecution of the offence is subject to a longer limitation period, this period also applies to the right to order forfeiture.

**14 Bankruptcy and insolvency**

**Briefly describe the bankruptcy and insolvency system in your jurisdiction.**

Swiss law provides for voluntary and involuntary bankruptcy. The bankruptcy proceedings are identical after the adjudication of bankruptcy. Involuntary proceedings require, in general, the delivery of an order to pay by the debt enforcement and bankruptcy authority at the request of the creditor (indicating the existence of any security for the claims made), a successful setting aside of a possible objection raised by the debtor in a court procedure and the petition to continue the execution. The bankruptcy court may order the establishment of an inventory of all the debtor's assets at the creditor's request. The court will adjudicate on the bankruptcy upon request of the creditor, if the claim of the creditor is not satisfied within 20 days of the petition of continuation. Upon the adjudication of bankruptcy, the bankruptcy authority will proceed with the execution of the bankruptcy. The appointment of an administrator is possible. The adjudication of bankruptcy can be suspended by the court if a petition for a composition agreement is submitted. Upon adjudication of bankruptcy one sole bankrupt estate is formed consisting of all assets to which the debtor is entitled.

A bankruptcy administration is appointed, which establishes an inventory of all assets (including the value of the assets), takes protective measures and fully assumes the administration of the debtor (including the collection of rents). If the rent claims have been assigned to the lender, the lender may collect such rent claims accrued prior to the adjudication of bankruptcy. The assignment of rent claims accruing after the adjudication of bankruptcy is, however, invalid. Hence, a lender cannot collect rent accruing after the adjudication of bankruptcy. The bankruptcy administration ascertains the creditors' claims and lists them in the schedule of claims by order of ranking and secured rights, realises the securities and distributes the proceeds. The realisation of real estate is highly formalised

(often a sale by auction) and takes at least six months after the delivery of the order to pay.

**Investment vehicles****15 Investment entities**

**What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?**

Swiss law differentiates between individuals and legal entities. Legal entities comprise corporations, limited liability companies, cooperatives and foundations. Entities formed for the purpose of performing business regularly in Switzerland are usually corporations or limited liability companies. Swiss law also regulates simple partnerships, general partnerships and limited partnerships, but they do not qualify as legal entities and are pass-through entities for tax purposes.

For collective investments, Swiss law provides the legal forms of real-estate investment funds, of open-ended mutual investment funds companies with variable capital (SICAV), closed-end investment companies with fixed capital (SICAF) and limited partnerships for collective investments (for real estate and construction projects). With the exception of the SICAF, such collective investment schemes are in general fiscally transparent, but not in the case of direct investment in real property.

Corporations and limited liability companies best shield ultimate owners from liability.

**16 Foreign investors**

**What form of entities do foreign investors customarily use in your jurisdiction?**

Foreign investors customarily use corporations, limited liability companies and foreign special purpose vehicles (SPVs) for investment in properties. The use of limited liability companies may have income tax advantages for US companies. The use of foreign SPVs may have real estate capital gains tax advantages in the case of a sale of the SPV.

**17 Organisational formalities**

**What are the organisational formalities for creating the above entities? What requirements does your jurisdiction impose on a foreign entity? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?**

In order to establish a corporation or a limited company the founders must hold an incorporation meeting, which has to be notarised by a public notary. The incorporation meeting has to resolve on the articles of association, has to appoint the corporate bodies and has to confirm that the share capital of the company has been paid. Swiss law does not impose additional requirements on foreign entities participating in the foundation of a company. They must, however, prove their existence and registered seat.

The use of any legal entity has the effect that profit is in principle taxed twice: the first time on profits of the company and the second time in the case of distribution of profits as income to the shareholders. Resident shareholders may under certain requirements request reduced taxation of the dividend in most cantons. In the case of holding companies certain privileges apply. From a Swiss tax perspective, all legal entities are treated equally.

**Acquisitions and leases****18 Ownership and occupancy**

**Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.**

Swiss law provides for full ownership (unlimited in time and scope), usufructuary rights, building rights (the right to construct and maintain a building on a property for a certain period of time), general co-ownership rights or condominium-principled co-ownership (exclusive rights to the apartment and co-ownership regarding the common area) and lease

agreements. Most common are full ownership and condominium-principled co-ownership. Less common are general co-ownership and building rights. Usufructuary rights are rare. All categories other than lease agreements are qualified as real estate and registered with the Land Register as real estate. Lease agreements do not qualify as real estate but only as contractual rights to use certain real estate. It is, however, also possible to annotate the lease agreement in the Land Register that has certain benefits in case of a sale of the real estate. Benefits to and burdens on real estate (such as rights of way, easements, air rights, access, etc) are created by notarised agreement and registration in the Land Register.

Lease agreements for commercial purposes and residential leases differ in a few details (termination notice period, extension period in case of hardship, etc), but are in general the same from a legal perspective. From a commercial perspective, commercial lease agreements are usually entered into for fixed periods of five to 10 years (with extension options) whereas residential lease agreements are usually entered into for an indefinite period of time. Commercial leases also tend to shift a greater share of the costs (repairs, ancillary costs, fit-outs, etc) to the tenant.

## 19 Pre-contract

**Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?**

In Switzerland, it is customary to enter into a non-binding agreement (letter of intent) before the execution of a binding contract of sale. Courts do not enforce the obligation to enter into a binding agreement, even if so agreed in a non-binding agreement. Other terms (confidentiality, distribution of costs, etc) might be enforceable, however. In general, reservation fees (less costs) have to be returned to the potential acquirer if the parties do not agree on a binding agreement, notwithstanding any other regulation in the agreement. It is customary to negotiate and agree on a term sheet, such terms and conditions are, however, usually integrated into a letter of intent. It is not customary to have only a term sheet. It is customary to take the property off the market while negotiation of a contract is ongoing, but only if the parties have agreed on exclusivity in a letter of intent.

## 20 Contract of sale

**What are typical provisions in a contract of sale?**

Typical provisions are:

- detailed description of the property (in accordance with the Land Register excerpt);
- payment terms;
- down payment to the seller or to a notary public;
- date of transfer of ownership;
- date of transfer of risk and benefit;
- settlement of the revenues and charges associated with the property;
- transfer of maintenance agreements;
- assignment of all warranty claims against contractors that have carried out work;
- environmental warranties;
- warranty regarding the tenant schedule;
- warranty regarding the absence of pending or threatened litigation with tenants, neighbours or authorities;
- transfer of mortgage certificates;
- VAT;
- security to purchaser regarding the real estate gain tax; and
- payment of fees.

The owner of a property is registered in the Land Register. A purchaser in good faith can rely on such registration. The seller provides the purchaser with an excerpt from the Land Register confirming its ownership. The seller warrants in the agreement full title with the exception of any encumbrances as registered in the Land Register.

## 21 Environmental clean-up

**Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?**

In general, the property owner is responsible for future environmental clean-ups. Based on public law, it may, however, take recourse to the polluter for an unlimited period of time under certain conditions. Clauses regarding long-term environmental liability and indemnity that survive the term of a contract (survival provisions) are not common. The seller in certain cases warrants that, to its knowledge, the property is not contaminated. Subject to the agreed statute of limitations, the purchaser may usually claim damages from the seller in the case of a breach.

## 22 Lease covenants and representation

**What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?**

Typical representations include the absence of (threatened or pending) disputes with tenants, the absence of lease agreements or lease terms other than those disclosed and the correctness and completeness of the tenant schedule (attached to the purchase agreement as annex). The tenant schedule usually includes the key terms of the lease agreements: at least the tenant name, the annual rent, payments for ancillary costs on account or lump sum, the duration of the lease agreements (starting and end date) and the vacant spaces. Other information may include termination notice period, options and indexation. Creditworthiness of the tenants is usually not warranted.

Purchase agreements in general do not include covenants regarding lease agreements for the period between signing and closing.

Brokerage agreements are neither automatically terminated because of the sale of a property nor automatically transferred to purchaser. Hence, a broker cannot make any claims against the purchaser (as long as the purchaser does not implicitly accept the services of the broker). Therefore, no covenants regarding brokerage agreements for leases are usually included in the purchase agreement.

Estoppel certificates from tenants are not used in sale and purchase agreements subject to Swiss law.

## 23 Leases and real estate security instruments

**Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?**

A lease may be noted in the Land Register. If it is not noted, in the case of sale of property, it may be terminated pursuant to statutory law by the new owner, if such new owner can show that it needs to use the property itself for an important reason (in the event of such an early termination, the seller is liable for the tenant's damage). If the lease is noted, it may be terminated only pursuant to the terms and conditions of such lease agreement by the new owner. In cases of sale because of the foreclosure of a mortgage (the only registered security instrument) the same regulation applies. However, if a lease agreement has been noted after the establishment of the mortgage the following applies: if the foreclosure auction shows that the value of the property was higher without the registration of the lease agreement and if the proceeds does not cover the mortgagee's claim otherwise, the mortgagee may request the deletion of the registration. With the approval of the mortgagee, a lease agreement may rank prior to a mortgage, even if the lease is noted after the establishment of the mortgage. Lease agreements are usually noted after the establishment of mortgages and are subordinated to mortgages. Lenders therefore,

do not normally need to request the subordination of lease and non-disturbance agreements. Leases are generally not subordinated to other security instruments (eg, the assignment of rent). The same principle of priority also applies to ground leases with the difference that ground leases are in general registered in the Land Register (which is often not the case for commercial leases).

#### 24 Delivery of security deposits

**What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?**

It is common to get a tenant security deposit or a bank guarantee under a lease. In the sale and purchase of a property, the tenant security deposit is assigned to the buyer from closing and bank guarantees are handed over at the closing. For commercial leases the security usually amounts to the equivalent of the rent for a period of three to 12 months. Swiss banks provide special rent deposit escrow accounts.

Lease agreements with a fixed lease period of at least five years (for the landlord) can be (and are often) indexed to the Swiss consumer price index. Lease agreements with a fixed lease period of at least three years can provide for a staggered rent. It is, however, not possible to cumulate at the same time an indexed rent and a staggered rent. Rent resets or reviews are customary only with the exercise of an extension option.

#### 25 Due diligence

**What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate.**

Switzerland has a tract index system. Therefore, title searches, title insurance and opinion letters are not required. A purchaser in good faith may rely on the registered property owner of a certain plot. Swiss law provides for statutory priority for recorded instruments. In general, the principle 'first in time, first in right' applies. There is one exception. Mortgages have an assigned rank among each other, irrespective of the time of registration. Priority among interests can be reordered by contract between the parties.

#### 26 Structural and environmental reviews

**Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available? Is it customary to obtain a zoning report or legal opinion?**

It is customary to arrange an engineering and an environmental review. The requirements for such review depend very much on the individual property. It is not customary to get specific representations or indemnity from the reviewer, but the reviewer is liable for a careful performance of its services pursuant to statutory mandate law. Environmental insurance is in general not available. It is not customary to obtain a zoning report or legal opinion.

#### 27 Review of leases

**Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?**

Leases are usually reviewed by lawyers and the business side. Other than the key terms of the lease (lease amount, term), the following issues are in general, critical: indexation of lease, validity of extension options, down payment for ancillary costs and scope of ancillary costs, security, reinstatement obligations upon termination of the lease and registration of the lease agreement in the Land Register.

#### 28 Other agreements

**What other agreements does a lawyer customarily review?**

Maintenance agreements, management agreements, recent construction agreements and insurance policies are customarily reviewed. Not

agreements as such, but always reviewed in view of a transaction, are the Land Register excerpt regarding a property, including all supporting documents regarding the entries in the Land Register (including agreements regarding rights of first refusal, purchase rights, construction rights annotated in the Land Register), the mortgage certificates, confirmations of all rent deposits and copies of all rent guarantees, recent building permits, recent acceptance of the building by the authorities (if available), valuation and environmental reports, accounts of ancillary costs, correspondence with authorities and neighbours (in particular regarding compliance with fire and safety regulations), zoning plans, and excerpts from the registers of contaminated sites or potentially contaminated sites.

#### 29 Closing preparations

**How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?**

In the case of an acquisition, the seller's lawyer takes care of delivery of the mortgage certificates (endorsed in the case of registered mortgage certificates); notarised powers of attorney; and excerpts from the Register of Commerce confirming the signing power of the persons present (required for the signing of the filing to the Land Register for the registration of the sale and purchase agreement). The purchaser's lawyer takes care of payment to an escrow agent; delivery of a cheque or an irrevocable promise to pay by a Swiss bank; notarised powers of attorney; in the case of individuals as buyers obtaining the confirmation from the residence municipality that the buyer is not restricted in his or her legal actions; excerpts from the Register of Commerce confirming the signing power of the persons present (required for the signing of the filing to the Land Register for the registration of the sale and purchase agreement); and agreement in order to establish new mortgage certificates. Prorations are not customary. In general, signing and closing occur at the same time. However, parties can and do often agree on a separate closing. The timing can be agreed at the discretion of the parties. Closing and funding usually occur simultaneously. The funding is usually secured by the payment of the purchase price to an escrow account of the notary or by bank guarantee.

In the case of a lease, no specific form for the closing (handover) is required. The timing between the contract and the closing (handover of the premises, start of the lease) can be several weeks to months. Usually, the payment of the rent deposit or the provision of the bank guarantee is a requirement to the handover of the premises and has to be prepared. Finally, at the closing, a handover certificate shall be established documenting the condition of the premises at the beginning of the lease. The lawyer is usually not involved in the preparation of the deposit, the guarantee or the handover certificate.

In the case of a financing, no specific form is required for the payment of the funds, but certain actions have to be prepared for the establishment of the security. Lawyers are usually only involved in the preparation of the security documentation (review of the draft mortgage establishment deed established by the notary, draft and negotiations of the other security documents such as assignment declarations).

#### 30 Closing formalities

**Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?**

Closing of the transfer of ownership is usually done in person at the notary with all parties present or represented or without the presence of the parties based on an escrow arrangement with the notary. The notary is either a public official (in which case the closing is conducted at a government office) or a private person, depending on the canton. Signing and closing of leasing and financing does not require the presence of the notary. Hence, such closing can be done by mail (with the exception of the establishment of mortgages that also need to be notarised).

**31 Contract breach**

**What are the remedies for breach of a contract to sell or finance real estate?**

Pursuant to statutory law, the remedies for breach of a contract to sell real estate are price reductions and rescission. For the remedies for breach of a financing contract, see question 39. The parties have broad discretion to agree contractually on other remedies or to exclude the statutory remedies. The contract can be specifically enforced by the purchaser. The seller and purchaser are able to make a claim for damages against the defaulting party (indirect damage only in case of negligence or intent of the defaulting party).

**32 Breach of lease terms**

**What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply?**

General and special contract laws apply to real estate leases. In case of a breach, the landlord and tenant can ask for specific performance or financial indemnity. A defaulting tenant cannot be evicted prior to valid termination of the lease agreement. After termination, the eviction order can be requested from the court (in certain cases in summary proceedings). In case of a proper eviction, the tenant cannot claim any damages from the landlord.

**Financing****33 Secured lending**

**Discuss the types of real estate security instruments available to lenders in your jurisdiction.**

Predominant security instruments are mortgages (bearer mortgage certificates, registered mortgage certificates or paperless registered mortgages). The mortgages grant the lender a lien upon the real estate collateral. Additional security instruments are the security assignment of rent, the pledge of bank accounts and the pledge of other claims.

**34 Leasehold financing**

**Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?**

Financing for the initial fee is available for ground leases, but not for annuities. It does not differ in general from financing for land ownership transactions.

**35 Form of security**

**What is the method of creating and perfecting a security interest in real estate?**

- Pledge or security transfer of mortgage certificates: notarised deed, registration in the Land Register and handing over of the mortgage certificates (registered mortgage certificates must be duly endorsed) or registration in the case of paperless mortgage certificates.
- Pledge or security assignment of claims: written agreement and notification of the debtors.

**36 Valuation**

**Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?**

No third-party real estate appraisals are required by lenders for their underwriting of loans.

**37 Legal requirements**

**What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?**

Making a loan secured by collateral in Switzerland has no ramifications for a lender from another jurisdiction with the following tax exception: a borrower of a loan collateralised with a mortgage on a Swiss property has to withhold the income tax of 15 to 20 per cent of the interest at source. Subject to applicable double taxation treaties, the lender may be exempt from the source tax. Further, if a loan is syndicated, under certain circumstances, the loan may be subject to the stamp tax and the borrower may have to withhold a tax of 35 per cent on the interest. Some double taxation treaties provide for exemptions or reductions. In general, there are no taxes applicable to a borrower's issuance of a note secured by real estate.

A lender does not need to qualify to do business in Switzerland. Liens on property are usually issued as transferable registered or bearer mortgage certificates. The establishment of such mortgage certificates requires notarisation and registration in the Land Register. The fees for the establishment and registration of such mortgage certificates are substantial (for example, in the canton of Zurich the fee is 0.25 per cent of the mortgage amount). No fees accrue for the transfer of the mortgage certificates. The security assignment of claims requires a written assignment declaration.

**38 Loan interest rates**

**How are interest rates on commercial and high-value property loans commonly set (with reference to LIBOR, central bank rates, etc)? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?**

Interest is charged on a spread (in general depending on loan-to-value ratio) over LIBOR rates, EURIBOR rates or equivalent rates.

Pursuant to case law, an interest of more than 18 to 20 per cent is in general usurious. In special cases (eg, particularly high-risk cases), higher interest rates are permitted. Usurious interest is reduced to the permitted level. Fees are normally not included as interest for the calculation of unreasonably high rates.

**39 Loan default and enforcement**

**How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?**

Non-monetary remedies are always enforced in judicial procedures. Monetary remedies including the realisation of collateral may be enforced in a non-judicial debt enforcement procedure. The first step of the debt enforcement is the request of the debt enforcement authority to submit to the debtor an order to pay. The request has to indicate the collateral. The debtor may refuse to pay pursuant to the order. In such case, the lender has to follow up the request in ordinary or summary court proceedings depending on the circumstances. If the court approves the claim, the lender has to follow up the non-judicial debt enforcement procedure depending on how and if the debts are secured. The time frame for the foreclosure of mortgage-secured loans is at least six months after the delivery of the order to pay, but may also last for a few years. In order to avoid the official debt enforcement procedure, the borrower may agree in the security agreement to the private realisation of the collateral, following the occurrence of a default.

There are no restrictions on the types of legal action that may be brought by lenders with the exception of the right of the borrower to ask for the realisation of the collateral prior to the lender taking direct action (unless otherwise agreed in the security documentation). For economic reasons it is not customary to take different legal actions at the same time.

### Update and trends

The Swiss parliament approved the Federal Law on Secondary Homes on 20 March 2015 (restricting the construction of non-main residences in certain touristic areas), which will replace the current ordinance regarding this matter. This new law will probably enter into force as of 1 January 2016.

A recent decision of the Federal Court has raised concerns that the sale of shares in a company holding agricultural land only to a minor extent will require governmental approval (previously such approval was only required in the event of the sale of a majority in a company holding agricultural land as a main asset). Until the new practice of the authorities has developed, the issue remains unclear.

The Swiss Federal Bank introduced a negative interest rate for deposits of banks with the Swiss Federal Bank. This caused certain

disputes regarding (mortgage-backed) loans that are based on a LIBOR-plus interest rate. The effect on the Swiss real estate market is not yet clear. On the one hand, investment pressure of certain institutional investors (pension funds, insurers) led to increased demand; on the other hand, concerns regarding the economic development and vacancies (in particular regarding office space) had a negative effect on prices.

The reference mortgage interest rate, applicable to all lease agreements in Switzerland, is 1.75 per cent as of 2 June 2015. It has been constantly falling since September 2008.

#### 40 Loan deficiency claims

**Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there any limitations on the amount or method of calculation of the deficiency?**

Lenders are entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance (and permitted additions) and the amount recovered in the foreclosure. There are no limitations on the amount or method of calculation of the deficiency.

#### 41 Protection of collateral

**What actions can a lender take to protect its collateral until it has possession of the property?**

In the event of bankruptcy of a legal entity, a bankruptcy administration is appointed, which takes all the necessary steps to protect the collateral (including the collection of rent). Enforcement of the collateral in general involves the sale of the property in an auction, but not necessarily to the lender. The lender has no claim to receive possession or title to the property.

#### 42 Recourse

**May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?**

Security documents never provide for recourse to all of the assets of the borrower. Preferential recourse is always limited to the collateral. If the collateral is not sufficient to cover the claim of the lender, the lender is treated as an unsecured creditor for the remaining amount in the bankruptcy proceedings. Therefore, the lender has to indicate its collateral in the bankruptcy proceedings. Personal recourse to guarantors is not limited (unless otherwise agreed in the guarantee).

#### 43 Cash management and reserves

**Is it typical to require cash management system and do lenders typically take reserves? For what purposes are reserves usually required?**

It is not typical for Swiss lenders to require a cash management system or to take reserves.

#### 44 Credit enhancements

**What other types of credit enhancements are common? What about forms of guarantee?**

Other types of credit enhancements (including guarantees) are not common in real estate transactions.

#### 45 Loan covenants

**What covenants are commonly required by the lender in loan documents? What is the difference depending on asset classes?**

Covenants typically required by the lender include:

- provision of information (quarterly or semi-annual reports regarding financial statements, property evaluation, acquisitions and sales of property, vacancies, arrears, budget, further information on request, material adverse changes, change of lease terms);
- no transactions outside of the ordinary course of business, transactions only at arm's length, appropriate insurance coverage, authorisations, *pari passu* clauses and hedging;
- appropriate maintenance of the properties;
- no additional loans;
- negative pledge;
- no restructuring without the approval of the lender;
- no granting of loans; and
- no change of the business purpose.

There is no difference depending on asset classes.

#### 46 Financial covenants

**What are typical financial covenants required by lenders?**

Interest rates and event of defaults are commonly related to loan-to-value ratios and net-interest cover ratios. At least semi-annual reporting of financial statements and annual appraisals are required.

#### 47 Secured moveable (personal) property

**What are the requirements for creation and perfection of a security interest in moveable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?**

The pledge or security assignment of claims requires a pledge or security assignment agreement and, for perfection, the information of the debtor of the claim. Security interests in the debtor's deposit accounts with third-party banks are usually created by a security assignment of the deposit accounts (that is, of the debtor's claims against the bank). Perfection of such security assignment requires the notification of the assignment to the bank. The assignment notification may include authorisation to the bank to give the debtor its customary access and right to the funds maintained in the deposit account until the lender sends notice of exclusive control to the bank. Lenders in general require a confirmation from the bank that it has taken notice of the security assignment, will block the account if the debtor instructs the bank to change the notified signatories for the account, and waives any lien on the debtor's assets for its claims. The assignment of deposit accounts to third-party lenders and the conclusion of control

agreements are not common in Switzerland. The above-mentioned confirmation of the bank has to be negotiated in each and every case with the bank and there is no established standard. In certain cases, banks indicate that they will terminate the contractual relationship with the debtor and will close the accounts as soon as they receive an assignment notice (due to a possible violation of the 'know your customer' rules if the bank continues to maintain the contractual relationship with the debtor after the assignment of the account).

If the lender is also the financial institution at which the deposit account is maintained (bank), then the lender has automatic perfection in and control over the deposit account, and no separate agreement is needed. As set out above, the general terms and conditions of the banks usually provide for a lien on the customer's assets with the bank for any claims of the bank.

The pledge of other tangible assets (eg, shares) requires a pledge agreement or security transfer agreement and the handing over of such assets to the lender. Therefore, with the exception of the pledge or security

transfer of shares in an SPV holding a property or mortgage certificates, the pledge or security assignment of other tangible assets of the debtor is not common. The pledge of intangible assets only requires a pledge agreement. The general pledge of all moveable property is not possible under Swiss law.

#### 48 Single purpose entity (SPE)

**Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?**

Lenders do not require each borrower to be an SPE. There are no special requirements for SPEs and SPEs as such are not a part of a special statutory regime in Switzerland. There is also no concept of an independent director in Switzerland.

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