

Corporate Real Estate

First Edition

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Switzerland

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Introduction

Space in Switzerland is more limited than elsewhere. Of the country's total surface of only 41,285 km², 25% is entirely unproductive by nature (inshore waters, unproductive vegetation, surface without any vegetation at all such as rocks, glaciers etc.). A further 31% is covered by forests (which are protected by law). Almost 36% is used for agriculture (which is also protected by law), and only 7.5% (3,079 km²) counts as settlement area. Of the settlement area, 196.44 km² are parks and recreational area, 952.39 km² are used for traffic (streets, railway lines, airports etc.) and 170.30 km² are used for special infrastructure. Only 1,520 km² are used for buildings and even less, namely 239.75 km², for industry (source: Federal Office for Statistics, *Bodennutzung und Bodenbedeckung*; data for 2009).

The population of Switzerland is constantly growing due to immigration (by approximately 80,000 persons or 1% of the population every year) and reached 8 million in 2012 (in 1980: 6.3 million; source: Wikipedia). In other words: around 5,000 people have to share one square kilometre of land covered with buildings to live and work in. An expansion of the settlement area by using agricultural land or land covered with forests for housing or industrial purposes is not possible under the current provisions of planning law. Changing the planning law in order to reduce agricultural or forest land and create more room for housing or business is unfeasible for political reasons.

As a result, real estate prices are very high in Switzerland compared to international standards. Since commercial enterprises (unless their business is to invest in real estate) prefer to invest their money in operational activities rather than locking it up in buildings and land, commercial real estate in Switzerland is very often rented. This is true for office space in particular, but also applies for production facilities. Housing too can often only be rented, as the majority of the population cannot afford to buy real estate. For many decades already, the market reality in economically attractive areas of Switzerland has been that landlords would actually be in a very strong position *vis-à-vis* tenants should there be no legislative countermeasures aimed at redressing this natural imbalance.

Consequently, the legislator did exactly this, introducing a set of rules into the Swiss Code of Obligations (SCO) that aim at preventing abusive practices with regard to the rental of both commercial and residential real estate. While there are certain rules that apply only to one of these two categories, many rules apply to both. These provisions are very often mandatory and cannot be changed by a mutual agreement between landlord and tenant. In addition to the codified rules, there is also an abundance of case law that practitioners in the field of commercial real estate rental law need to consider. In addition, the cantons (i.e. the states of the Swiss Confederation) also have the competence to legislate in certain, albeit quite small, fields of rental law. And finally, the associations of landlords and tenants can, to

a certain extent, issue their own rules that supplement the body of rules adopted by the state. As a result, the following abstract can only provide a limited introduction to Swiss real estate law and, in particular, rental law that can never replace sound advice in a specific case. We first outline the key legal provisions with respect to leases, then summarise certain tax principles in connection with acquiring, holding and selling Swiss properties and conclude with some remarks on upcoming legislation and market developments.

Key leasing provisions

Term of lease

Leases can be concluded for a limited or an indefinite duration (Art. 255 par. 1 SCO). If it is the parties' intention that a lease should end without the need for any notice of termination, the lease is considered to be concluded for a limited term (Art. 255 par. 2 SCO). All leases that are not limited-term leases are leases for an indefinite duration (Art. 255 par. 3 SCO). Hence, the lease for an indefinite duration is the default rule and the lease for a limited term is the exception to the rule.

In a commercial context, five- or ten-year leases are usual, either as fixed-term leases (i.e. expiration without notice of termination) or for a minimum duration of five or ten years (i.e. notice of termination must be given to terminate a lease agreement, but at the earliest with effect to a date five or ten years hence). Often the parties agree to include additional "options" for the tenant to extend the (minimum) term by one or more further periods, usually of five years (each). Such extension options give the tenant the right to unilaterally extend the term of the lease. It is conspicuous that fixed terms, minimum terms or extension terms usually cover a period of at least five years. The reason for this is Art. 269b SCO, under which an agreement to link the rent to an index is only valid if (among other conditions) the lease is agreed for at least five years. Landlords are usually interested in linking the rent to an index.

Where the parties did not agree to a limited duration, they may give notice to terminate a lease by observing the legally prescribed notice periods and termination dates, except where they agreed a longer notice period or a different termination date (Art. 266a SCO). Art. 266d SCO states that a party may terminate the lease of a commercial property by giving six months' notice to a date fixed by local custom or, in the absence of such a custom, to the end of a three-month period of the lease.

Rent

The rent, i.e. the consideration owed by the tenant to the landlord for the transfer of the use of the property, must be paid at the end of every month and at the latest on expiry of the lease, unless otherwise agreed or required by local custom (Art. 257c SCO). This statutory default rule is not normally used since the parties to a commercial lease agreement usually agree to different payment terms. Payment is mostly due in advance, i.e. at the latest on the last day of a month for the next month, the next quarter or the next semester. Monthly payment terms are common. In a commercial context, trimestral or semi-annual payment deadlines are frequently encountered.

As a matter of principle, the rent can – still – be agreed between the parties of a lease agreement on the basis of the principle of freedom of contract. However, since in Switzerland real estate is rare and expensive and this potentially shifts bargaining power to the landlords, for many decades already the principle of freedom of contract in the field of rental law has been, depending on your political views, supplemented, modified or

restricted (some would even say undermined or abolished) by statutory provisions and case law, first and foremost by the Swiss Federal Supreme Court. In Art. 269 to 270e, the SCO makes provision for protection against unfair rents or other unfair claims by the landlord. Such protection is not only granted to tenants of residential premises, but also to tenants of commercial premises. These protection measures are based on two principles that are really somewhat contradictory, namely the principle of market rent and the principle of cost rent. While Art. 269 SCO, a provision that is very open to interpretation, simply states that rents are unfair if they permit the landlord to derive excessive income from the leased property or if they are based on a clearly excessive sales price, Art. 269a SCO further substantiates this principle – to a limited extent only – by defining (still on a high level of abstraction) what is “not generally held to be unfair”, namely (*inter alia*) (a) if rents fall within the range of rents customary in the locality and the quarter; (b) if rents are justified by increases in costs or by additional services provided by the landlord; (c) if, in the case of a recently constructed property, the rents do not exceed the range of gross pre-tax yield required to cover costs; (d)...; or (e) if rents serve merely to balance out the inflation on the risk capital. On the basis of these and other statutory principles, supplemented by provisions contained in a government decree, a very elaborate set of case law has developed that plays an important role here, even though it is hardly free of contradictions. Only lawyers specialised in rental law manage to manoeuvre unscathed through this minefield of complicated further principles evolved in case law. While the flawless application of these principles will certainly become very important in case of a rent review, they nevertheless have to be taken into account (and from a tenant’s perspective: be known) from the beginning. Not only can the tenant challenge any rent increase requested by the landlord during the rental relationship, thereby making this request subject to review by the conciliation authority in rental matters or the courts, but Art. 270 SCO also states that the tenant, within 30 days of taking possession of the property and under certain conditions precedent, may challenge the initial rent as unfair as defined by Art. 269 and 269a SCO before the conciliation authority. Such a review of the initial rent is only permissible, however, if (a) the tenant felt compelled to conclude the lease agreement on account of personal or family hardship or by reason of the conditions prevailing on the local market for residential and commercial premises, or if (b) the initial rent demanded by the landlord is significantly higher than the previous rent for the same property. Case law suggests that an increase of more than 10% qualifies as a “significantly higher” rent.

Remedies for non-payment of rent and breach of other covenants

In addition to the landlord’s ability to enforce his claim for payment of the rent in court and/or through debt enforcement proceedings, the landlord can resort to Art. 257d SCO if the tenant is in arrears with the payment of rent or ancillary charges. Pursuant to this provision, the landlord can set a time limit for payment and notify the tenant that non-payment will result in the termination of the lease on expiry of this time limit. The minimum time limit is 30 days for leases of residential or commercial premises. In the event of non-payment within the time limit, the landlord can terminate the contract by giving 30 days’ notice to the last day of a calendar month.

Should the tenant breach other (substantial) covenants, he risks the termination of the lease. Art. 257f SCO states that the tenant must use the property with all due care (par. 1) and show due consideration for others who share the building and for neighbours (par. 2). If, despite written warning from the landlord, the tenant continues to act in breach of his duty of care and consideration so that continuation of the lease becomes unreasonable for the landlord or other persons sharing the building, the landlord may terminate the contract

subject to at least 30 days' notice to the last day of a calendar month (par. 3). If the tenant intentionally causes serious damage to the property, the landlord can even terminate the lease with immediate effect (par. 4).

Rent review

The landlord may at any time increase the rent with effect from the next termination date. He must give notice of and reasons for the rent increase at least ten days before the beginning of the notice period for termination using a form approved by the canton (Art. 269d par. 1 SCO). However, the tenant can challenge the rent as unfair and request its reduction as of the next termination date if he has good cause to suppose that, because of significant changes to the calculation basis and most notably a reduction in costs, the return earned by the landlord from the leased property is now excessive as defined by Art. 269 and 269a.

The legal limits to the landlord's possibilities for increasing the rent are quite strict. Usually, i.e. if the parties did not agree to a purely index-linked rent (see below), the landlord can increase the rent if three main factors – together – have changed in his favour since the rent was either agreed or unilaterally changed: a) increase in the mortgage rates; b) increase in the consumer price index; and c) increase in other costs. Regarding the change in mortgage rates, it is not the actual mortgage interest paid by the landlord that is relevant, but a volume-weighted average rate for domestic mortgages (rounded to the next ¼%) determined and published by a federal government office every three months. If this reference interest rate (RIR), as it could be translated, rises by ¼%, the landlord can increase the rent by 2% (if the RIR is more than 6%), by 2.5% (if the RIR is between 5% and 6%) or by 3% (if the RIR is below 3%). On 3 September 2013, for example, the RIR fell to a record low of 2%, where it has been stuck ever since. For an increase in the consumer price index, the landlord can pass on to the tenant 40% of the inflation (however, if a linkage of the rent to the consumer price index *has been agreed*, this is a different rent adjustment mechanism: see below last paragraph of this title). Regarding the other costs, the relevant items are in particular charges, taxes on the property, interest payable for building rights, insurance premiums and maintenance costs. Since the landlord also has to prove any increases in such costs and since proving (and disproving) these factors often costs more in time and effort to be spent by the parties involved than the abovementioned factors (RIR, consumer price index, both of which are in the public domain), the conciliation authorities and lower instance courts have resorted to applying flat-fee rates (e.g. 0.5% per year) by which landlords can increase the rent based on these factors. Interestingly enough, the Swiss Federal Supreme Court and also the superior courts on the cantonal level have repeatedly held that the increase in costs must be proven and that flat-fee rates are, as a matter of principle, inadmissible. In spite of this, flat-fee rates are still widely used as a pragmatic tool in order to avoid or quickly terminate disputes.

In a similar way as the landlord can increase the rent, the tenant can request a reduction of rent from the landlord. If the landlord does not accede to the request in full or in part, or does not respond in good time, the tenant can apply to the conciliation authority. If, for example, the RIR decreases, the tenant can request a reduction of the rent. However, the landlord can set off the obligation to reduce the rent resulting from one of the adjustment factors (such as the RIR) against other factors that may have developed in his favour (e.g. consumer price index or other costs). He can also block a reduction by proving that his return is insufficient (there is case law on this, too) or that the rent is still below the range of rents customary in the relevant locality and quarter. The tenant can also defend himself against an increase in the rent by claiming that an increase would lead to an excessive return, or a rent that exceeds the range of rents customary in the relevant locality and quarter.

There are other possibilities for the landlord to increase and the tenant to request a reduction of the rent under certain circumstances (e.g. if the landlord provides additional services, if defects to the rental property should develop, upon expiration of an indexation period, etc.) that cannot be elaborated further here.

The parties to a lease agreement can also substitute the aforementioned and quite complicated system of rent adjustment entirely by choosing in their rental agreement to link the rent to an index. Art. 269b SCO states that this is only valid, however, if the lease is contracted for at least five years and if the benchmark is the official Swiss consumer price index. If they choose this linkage, a party – without prejudice to the right of the tenant to challenge the initial rent – may only argue before the conciliation authority that the rent increase or reduction requested by the other party is not justified by a corresponding change in the index. Since index-linkage is a less complicated method, this system is very widely used for the rent of commercial premises.

Break rights

It is permissible to agree break rights for both the landlord and the tenant for a fixed-term lease period. However, since the mere possibility that the landlord may terminate the lease before the expiration of at least a five-year lease period makes it impossible to link the rent to an index (Art. 269b SCO), such break rights are usually only agreed in order to unilaterally enable the tenant, not the landlord, to prematurely terminate the lease agreement.

Maintenance and repair

As a matter of principle, the landlord is responsible for the maintenance and repair of the rental property. Art. 259 SCO states that the tenant must only remedy such defects that can be dealt with by *minor* cleaning or repairs as part of regular maintenance and, depending on local custom, must do so at his own expense. Case law has made it possible for the parties to agree on a more extensive duty of the tenant to take care of maintenance and repair, but only under certain conditions precedent that guarantee that the tenant is adequately compensated for carrying this burden for the landlord.

The tenant has a variety of legal remedies available if defects arise to the property that are not attributable to the tenant and which the tenant is not obliged to remedy at his own expense, one of which is quite efficient: among other things, the tenant can pay the rent on deposit rather than to the landlord (Art. 259a par. 2 and Art. 259g–259i .SCO).

Alterations

The landlord may renovate or modify the property only if reasonable for the tenant and if the lease has not been terminated. If so, the landlord must give due consideration to the tenant's interests. The tenant's claims for the reduction of the rent and for damages are reserved (Art. 260 SCO).

On the other hand, there are also conditions precedent to the tenant's possibilities to make alterations to the property. Art. 260a SCO states that he may only renovate or modify the property with the written consent of the landlord. The landlord may require the restoration of the property to its previous condition only if this has been agreed in writing. Should the property at the end of the lease have appreciated significantly in value as a result of renovations or modifications to which the landlord consented, the tenant may claim appropriate compensation for such appreciation. Since Art. 260a SCO is not in its entirety mandatory law, the parties can agree otherwise, which often happens. Quite frequently, lease agreements contain provisions waiving any right for compensation of the tenant for any added value that he has provided to the landlord with his – authorised – modifications to

the property. Very often, the landlord's right to require the restoration of the property to its previous condition is expressly embodied in written lease agreements.

Reinstatement

At the end of the lease, the tenant must at his own expense return the property in a condition that corresponds to its contractually designated use (Art. 267 par. 1 SCO). The property must be cleaned and smaller maintenance and repair work (as provided for in Art. 259 SCO) must be performed. If the tenant was properly authorised by the landlord to modify the property (Art. 260a SCO), the tenant does not have to restore the property to its previous condition, unless the parties agreed otherwise in writing (which is quite often the case). Any modifications made by the tenant without the landlord's written consent must in any case be reinstated, unless the landlord waives his right to request reinstatement.

Assignment and subletting

A tenant of commercial premises cannot in principle be deprived of his right to assign the lease agreement to a new tenant. Art. 263 SCO states that such a tenant has the right to transfer his lease to a third party with the landlord's written consent and that such consent can only be withheld for good cause. If the landlord grants his consent, the third party subrogates to the rights and obligations of the tenant under the lease, which in turn also means that the tenant is released from his obligations towards the landlord with the following exception: the tenant remains jointly and severally liable with the third party until the lease ends or may be terminated, but in any event not for more than two years.

The landlord, on the other hand, cannot unilaterally transfer the lease agreement to a third party (i.e. a new landlord; *cf.*, however, the consequences of a change of ownership which also results in a change of landlord: Art. 261 SCO). Such a transfer would always require the consent of the tenant, which the tenant can withhold unconditionally.

Similar to the assignment of a lease, a tenant of commercial premises has the indefeasible right to sublet all or part of the property with the landlord's consent and the landlord may only refuse his consent if (a) the tenant refuses to inform him of the terms of the sub-lease, (b) if the terms and conditions of the sub-lease are unfair compared to those of the principal lease, or (c) if the sub-letting of the property gives rise to major disadvantages for the landlord (Art. 262 par. 2). The tenant is, however, liable to the landlord that the sub-tenant uses the property only in the manner permitted for the tenant himself. Should, for example, the tenant only be allowed to use the property as office space, the sub-tenant may not use the property as a hotel or a department store.

Sale by landlord

If the landlord sells the property, the lease passes to the buyer. The same applies in the case of a change of ownership, for example due to a foreclosure sale in the course of debt collection or bankruptcy proceedings (Art. 261 SCO). To a strictly limited extent, though, the new owner can terminate the lease by giving notice of termination to the next legally admissible termination date (even if a termination is not yet possible under the lease agreement), provided that the new owner can claim urgent need of the rental property for himself, his close relatives or in-laws (Art. 261 par. 2 SCO). If such a termination is accomplished sooner than is permitted under the lease agreement, the landlord selling the property becomes liable to the tenant for all resulting losses (Art. 261 par. 3).

Permitted use

The tenant may only use the property as agreed in the lease agreement. If the tenant violates this duty and in spite of a written warning by the landlord continues his violation, the landlord

can terminate the lease subject to at least 30 days' notice to the last day of a calendar month (Art. 257f SCO). The use defined by the lease agreement is also binding for sub-tenants and assignees.

Insurance

The building must be insured by the owner. It is a Swiss peculiarity that in most cantons fire insurance is a government scheme. The insurance is mandatory and usually covers fire and other natural disasters such as storms or avalanches. The insurance covers the costs for the immediate reconstruction of the building, i.e. the restoration of the building and not the construction of a different building. Additional insurance policies may be taken out on a voluntary basis. For example, the occupant may be interested in taking out liability insurance cover such as commercial third-party liability insurance.

In case of a property sale, the rights and obligations from insurance contracts are transferred to the buyer by operation of law. Except for the mandatory fire insurance, (i) the buyer may refuse such transfer within 30 days from the transfer and (ii) the insurance company may terminate the insurance contract within 14 days after receiving knowledge of the new owner.

Service charge

Ancillary charges are the consideration for services provided by the landlord or a third party in connection with the use of the property and are payable by the tenant only where this is specifically agreed with the landlord (Art. 257a SCO). Examples of such ancillary charges are the actual outlays by the landlord for services such as heating, hot water, air conditioning, public taxes arising from the use of the property, etc. Very often, rental agreements oblige the tenant to pay for ancillary charges either as a lump sum or on an accounting basis. In the latter case, the tenant usually makes monthly or trimestral account payments (together with the rent), and at least once a year the landlord must provide a service charge statement for the reporting period. The landlord must allow the tenant on his request to inspect the documents in support of the claimed outlays.

Security of tenure, renewal rights, extensions of contractual term

In Switzerland, the legal framework providing security of tenure is well developed. Notice of termination given by the landlord may be challenged where it contravenes the principle of good faith (Art. 271 SCO). Pursuant to Art. 271a SCO, notice of termination can be challenged before specialised conciliation boards and, thereafter, in court, in particular (without limitation) where such notice was given, e.g.:

- because the tenant is asserting claims arising under the lease in good faith; or
- because the landlord wishes to impose a unilateral amendment of the lease to the tenant's detriment or to change the rent; or
- during conciliation or court proceedings in connection with the lease, unless the tenant initiated it in bad faith; or
- even within three years of the conclusion of conciliation or court proceedings in connection with the lease in which the landlord (1) was largely unsuccessful, (2) withdrew or considerably reduced his claim or action, (3) declined to bring the matter before the court, or (4) reached a settlement or some other compromise with the tenant.

This effective protection of the tenant from the termination of the lease is taken even further: notice of termination can also be challenged if the tenant can produce documents showing that he reached a settlement with the landlord concerning a claim in connection with the lease *outside* conciliation or court proceedings.

As a result, smart tenants engage in smaller “conflicts” with the landlord regarding matters that they know they would win before the conciliation authority (e.g. regarding the removal of defects or the reduction of the rent based on falling mortgage interest rates). They subsequently agree (in writing) to a compromise in their favour, with this document then protecting them from the termination of the lease agreement for three years.

There are limits, though. For example, security of tenure does not apply if notice of termination is given because the landlord urgently needs the property for his own (personal) use or for family members or in-laws, the tenant is in default with payments, the tenant is in serious breach of his duty of care and consideration, as a result of alienation of the leased premises, for good cause or if the tenant is bankrupt (Art. 271a par. 3 SCO).

If notice of termination was given by the landlord and such notice is not considered to be contrary to the principle of good faith, the tenant may request the extension of the lease if its termination would cause a degree of hardship for him (or his family) that cannot be justified by the interests of the landlord (Art. 272 SCO). For commercial premises, such an extension can be granted by the conciliation authority or the court for up to six years (Art. 272b SCO). No extension is possible where notice of termination is given because the tenant is in default on his payments, in serious breach of his duty of care and consideration or bankrupt, or where the lease had been expressly concluded for a limited period until refurbishment or demolition work begins or the requisite planning permission is obtained (Art. 272a SCO). In addition, no extension is granted if the landlord offers the tenant equivalent premises.

Security provided to landlords

It is common for tenants to be required to provide collateral to landlords. With residential premises the collateral is usually deposited as an amount in cash with a bank in a savings account to be opened in the name of the tenant. For residential property, the security may not be more than three months’ rent. The bank may only release the collateral with the consent of both parties or based upon a legally effective payment or court order. For commercial premises bank guarantees or bank surety bonds are most common, but parent company guarantees, parent company surety bonds or comfort letters also exist.

Taxes and other occupational costs

In this chapter we broadly outline certain tax principles applying to the acquisition, holding and sale of Swiss real estate through a Swiss company. Direct holding of Swiss real estate by a foreign investor is usually not more favourable, since the real estate is taxed where it is located.

Acquiring a Swiss property

The acquisition of real estate or the majority of the shares in a Swiss real estate company may be subject to real estate transfer tax of usually between 1% to 3%, depending on the canton where the property is located. Certain cantons do not apply a real estate transfer tax, such as Zurich which abolished real estate transfer tax a few years ago. The tax is normally payable by the buyer, but in some cantons it is split between the buyer and the seller; contractual agreements are also possible. Furthermore, transactions are subject to public notary and land register fees of 0.1% to 0.3% of the purchase price. Often, the buyer and seller are jointly and severally liable for real estate transfer tax and public notary and land register fees.

Depending on the taxation system of the canton where the property is located, tax laws may foresee a lien on the property to secure capital gains (payable by the seller only) or transfer

taxes. Therefore, a buyer should make sure that the seller pays the taxes that are owed, otherwise the buyer risks being finally charged for such taxes.

It should also be noted that the buyer and seller are jointly liable for Swiss income tax on brokerage fees paid to a foreign broker involved in the transaction. The tax liability is limited to 3% of the purchase price of the property.

As a rule, neither the purchase price in a real estate acquisition nor the rent paid under a lease for a Swiss property is subject to value added tax (VAT). However, waiver of exemption and option for VAT on the purchase price of the building(s) and/or the lease is possible, provided that the real estate is not used for private purposes. As a result, the investor will be able to reclaim Swiss input VAT on the purchase price and/or ongoing costs (the current VAT rate is 8%). Many interesting questions may arise regarding VAT and Swiss real estate that cannot be treated in more detail in this chapter although they may be very relevant in economic terms and should therefore be carefully considered.

Holding a Swiss property

Corporate income tax of 12% to 25% (effective income tax rate) will be levied on the net rental income of the property depending on the location of the property (i.e. rental income less maintenance costs, management fees, taxes, depreciation and financing costs).

All maintenance costs in relation to the conservation of the property may be deducted. However, value-increasing investments must be capitalised on the property's book value and depreciated according to the rates applicable to land and buildings.

The interest on property financing is, in principle, fully tax-deductible, subject to arm's-length interest charges and thin capitalisation rules. The maximum interest rates for property financing are fixed annually by the federal tax authorities. There is no Swiss withholding tax on interest payments on loans, but Swiss source tax is levied on interest on mortgage-secured property loans.

As a rule, transaction costs such as transfer taxes or registration fees need to be capitalised and depreciated according to the rates applicable to land and buildings. A full charge of all transaction costs to the accounts in the year of acquisition is often not accepted by the tax authorities. Should the company accumulate any tax losses, for example in the first year following the acquisition of a property, it may use them for seven years without limitation.

In addition to income taxes, annual capital tax on equity of 0.001% to 0.5% is levied on real estate assets located in Switzerland. Furthermore, some cantons charge annual real estate taxes on the property value of usually between 0.1% to 0.3%, depending on the location of the property.

Selling a Swiss property

The sale of a Swiss property by a Swiss company (asset deal) is in most cantons subject to corporate income tax of 12% to 25% on the capital gain on the book value. In some cantons such as Zurich or Berne, corporate income tax will only be levied on the recaptured depreciation (i.e. on the difference between the book value and the initial costs including value-increasing investments in the property), whereas the actual capital gain (i.e. the difference between the sales price and the initial cost) is subject to a separate real estate capital gains tax of 20% to 60%, depending on the holding period during which the seller owned the property (i.e. the longer the real estate was held, the lower the property capital gains tax). In addition, the difference between the sales price and fiscal book value will be subject to a net federal income tax of 7.83% (i.e. the federal income tax of 8.5% is recognised as an expense).

In the case of a share deal, i.e. if a non-Swiss corporate investor sells the shares in the Swiss company holding the property, no Swiss corporate income tax is triggered. However, in cantons that apply a separate real estate capital gains tax, the sale of a majority of the shares usually triggers such real estate capital gains tax. However, no Swiss taxation of the capital gain will apply under some Swiss double taxation treaties (e.g. with Luxembourg), provided that the conditions for treaty protection (such as the substance requirement) are met by the seller. Under such treaty protection, Switzerland cannot tax the capital gain and the selling holding company will presumably benefit from local participation exemption on the capital gain. As a result, the capital gain, from a worldwide perspective, will remain tax-free. As a result, a share deal can be much more tax efficient than an asset deal for the seller. However, buyers usually prefer asset deals when acquiring Swiss properties and, if they agree to a share deal, will normally claim a discount on the purchase price for the shares in the amount of around 50% due to the deferred tax liability at company level. It should also be noted that, as outlined at the beginning of this chapter, the sale of the shares or the property may trigger real estate transfer taxes for which no treaty protection in a share deal exists.

Dividends from a Swiss real estate company to its shareholders are principally subject to 35% Swiss withholding tax, for example if the proceeds resulting from a property sale are distributed to the shareholders. However, under the EU Savings Directive and many Swiss double taxation treaties, dividend payments to a corporate shareholder are subject to a 0% net withholding tax. If an individual holds the Swiss real estate company, the net withholding tax under the treaties will normally be 15%.

As part of the Swiss corporate tax reform, what is known as the capital contribution principle came into force on 1 January 2011. Under this principle, *agio* (i.e. share premiums and any other payments made by the shareholders to the company “*à fonds perdu*”) is treated like share capital and is no longer subject to withholding tax when repaid to shareholders.

Upcoming regulation or legislation

Expected changes in legislation relevant for the real estate sector include such important topics as environmental law, planning and zoning law, second homes and banking regulation. For example, from 1 July 2014 the approval of the relevant cantonal authority will be required for the transfer of a property which is listed in a register of potentially contaminated sites.

Other developments in the market

In general, demand for real estate still outstrips supply in many market segments, making it difficult to find suitable real estate investment opportunities and bringing in low returns for investors. Although there are certain signs of a bubble in some market segments, it is widely believed that the current situation is unlikely to change in the near future.

For non-Swiss investors it is important to follow the political discussions on the Swiss Federal Act on Acquisition of Real Estate by Persons Abroad (Lex Koller), which restricts the acquisition of residential and other non-commercial real estate by non-Swiss investors. In this respect the Swiss Federal Council issued a recommendation to maintain the law on 13 November 2013 which is currently being debated in the Swiss parliament.



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Wolfgang Müller is a partner at Meyerlustenberger Lachenal and co-heads the real estate team. Wolfgang Müller was born in 1965. He graduated from the University of Zurich in 1990 and in 1992 was conferred a doctoral degree by the University of Zurich (*Dr. iur.*). Wolfgang Müller was admitted to the bar in Switzerland in 1993. After having successfully completed his MBA at the Australian School of Business in Sydney/Australia and the University of Michigan Business School in Ann Arbor/USA, he joined the company in 1997 and is a partner since 2004. Wolfgang Müller's professional languages are German and English.

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Walter Häberling (born 1962, graduation from University of Zurich 1987 *lic. iur.*, 1989 *Dr. iur.*; University of Texas at Austin School of Law 1999 *LL.M.* Admitted to the bar in Switzerland in 1994) started his career in 1990 at the district court of Pfäffikon where he began to focus on rental law. He took over the chair of the conciliation authority in rental matters in 1991. Later, as a judge with the district court of Zurich (1995-1997), he also headed the court for rental matters from time to time. When he started to work as an attorney in 1997 with Meyerlustenberger Lachenal, he continued his practice of rental law as a member of the firm's real estate team. In 2004 he became partner. Dr. Häberling regularly advises Swiss and international clients with regard to rental and real estate matters, both in non-contentious matters and in litigation/arbitration. His professional languages are German and English.



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