

THE REAL ESTATE  
LAW REVIEW

SEVENTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

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SEVENTH EDITION

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John Nevin

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# THE LAW REVIEWS

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# PREFACE

I am delighted to introduce the seventh edition of *The Real Estate Law Review*. This edition extends to 35 jurisdictions, and we are delighted to welcome new contributions from distinguished practitioners from around the world. I am very grateful to each and every contributor for their hard work and essential role in the continued success of the *Review*. Each chapter provides an invaluable insight into key legal issues and market trends in the author's jurisdiction and, together, they offer an up-to-date synopsis of the global real estate market.

The *Review* seeks to identify distinctions in practice between the different jurisdictions by highlighting particular local issues. We believe that this offers investors and occupiers and their professional advisers an invaluable guide to real estate investment outside of their own back yard. The years since the first edition, back in 2012, have confirmed that real estate is a truly global industry. Overseas investors are increasingly prepared to look beyond traditional markets and sectors in order to exploit international opportunities as and when they arise. Often, investors need to act quickly and we hope that the *Review* provides an advantageous starting point to understanding cross-border transactions in the light of the reader's own domestic forum.

International economic and political instability continues to have a significant effect on the global real estate market. In the UK, Brexit generates uncertainty as the negotiations for leaving the EU continue. However, the continued attraction of UK real estate to overseas investors confirms that each event or development in a particular country must be seen in a global context to ascertain the bigger picture. It is no longer possible to ignore globalisation and view real estate markets in isolation. Brexit notwithstanding, the UK remains a safe haven for investors from around the world and this year has seen record levels of investment in central London from overseas buyers.

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

**John Nevin**

Slaughter and May

London

February 2018

# SWITZERLAND

*Andreas F Vögeli and Oliver Zbinden*<sup>1</sup>

## I INTRODUCTION TO THE LEGAL FRAMEWORK

### i Ownership of real estate

Under Swiss law, different types of real estate ownership exist. The most common forms of ownership are sole ownership<sup>2</sup> and co-ownership. A special – and in Switzerland predominant – form of co-ownership is the condominium-principled co-ownership. Its main characteristic is that different persons own separate units in a common property or, as the law puts it, condominium is a form of co-ownership of immoveable property that gives the co-owner the exclusive right to make sole use of specific parts of a building thereon and design the interior of such parts. Each condominium owner can manage, use and design the structure of their units as they wish but must not obstruct any other condominium owners in the exercise of their own rights or damage the common parts of the property. Importantly, each unit has its own folio in the land register and may be sold separately without the consent of the other co-owners, who have no statutory right of pre-emption.

Further property rights include:

- a* usufructuary rights – a contractual arrangement where the owner confers complete enjoyment of the object on the usufructuary;
- b* right of residence – the right to live in all or parts of a building; and
- c* building rights<sup>3</sup> – the ownership of the ground is dissociated from the ownership of the constructions.

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

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

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

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

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

## ii System of registration

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

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

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

## iii Choice of law

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

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

## II OVERVIEW OF REAL ESTATE ACTIVITY

After 14 years of price growth in the residential property sector until stagnation in 2015 and even a drop in 2016, there is now again a noticeable upward trend in prices for condominiums and single-family homes.<sup>5</sup> However, unlike the residential property sector, there is no upturn in sight regarding the rental accommodation market; the downturn that set in 2016 has continued in 2017. The negative interest environment prevailing for over three years and the investment crisis resulting from this are driving the construction of rental apartments to

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

5 See Credit Suisse, Swiss Real Estate Market 2017, available at <https://www.credit-suisse.com/ch/en/articles/private-banking/schweizer-immobilienmarkt-studie-2017-201703.html>, p. 4; wüestpartner, Immo-Monitoring 2018 I 1, p. 10.

very high levels, despite the fall in demand due to lower immigration. At the end of 2017, vacancies in the rented accommodation sector reached a record level in Switzerland. Tenants increasingly benefit from lower rents.<sup>6</sup>

As far as the commercial property sector is concerned, although the situation eased for some investors in 2017, office market conditions remain difficult: asking prices are falling. However, construction of offices is still rising. As for retail premises, retail turnover is suffering greatly from online retailing. A ray of hope comes from consumer spending, which is expected to rise. Furthermore, cross-border shopping should start to decline following the appreciation of the euro. The number of construction permits for retail premises has increased in the past six months.<sup>7</sup>

All in all, real estate investments have remained very high up in investors' favour in 2017. Although the yield spreads to alternative investments have passed their peaks, demand for 'concrete gold' has remained robust due to the negative interest rates, particularly among institutional investors. There was simply a lack of alternatives to solve investors' yield problem without excessive risk.

### III FOREIGN INVESTMENT

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

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

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

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

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6 See Credit Suisse, *Swiss Real Estate Market 2017*, available at <https://www.credit-suisse.com/ch/en/articles/private-banking/schweizer-immobilienmarkt-studie-2017-201703.html>, p. 4; wüestpartner, *Property Market Switzerland 2017 I 4*, available at [https://www.wuestpartner.com/publications/immobilienmarkt%20schweiz%202017%20i%204\\_3](https://www.wuestpartner.com/publications/immobilienmarkt%20schweiz%202017%20i%204_3), p. 2.

7 See wüestpartner, *Property Market Switzerland 2017 I 4*, available at [https://www.wuestpartner.com/publications/immobilienmarkt%20schweiz%202017%20i%204\\_3](https://www.wuestpartner.com/publications/immobilienmarkt%20schweiz%202017%20i%204_3), p. 4.

#### IV STRUCTURING THE INVESTMENT

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

The main types of indirect real estate investment vehicles are real estate funds,<sup>8</sup> non-regulated investment companies limited by shares, which must be either listed or only accessible to qualified investors, Swiss real estate investment foundations, and special purpose vehicles (SPVs). Real estate funds may be established in the form of contractual investment funds, SICAVs (investment company with variable capital), KGKs (limited partnership for collective capital investments) or SICAFs (investment company with fixed capital).

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

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

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

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

A SICAF is a company limited by shares with the sole object of collective investment. It must seek FINMA authorisation and have its constituting documents approved as well. Its shareholders are not required to be qualified investors and it is not listed on a Swiss stock

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

exchange. Essential features of a SICAF are that it only manages its own assets and generates returns or capital gains without engaging in business activities as such. The minimum deposit on foundation must be at least 500,000 Swiss francs, fully paid up.

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

## **V REAL ESTATE OWNERSHIP**

### **i Planning**

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

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

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

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

### **ii Environment**

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

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

### **iii Tax**

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

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

Further, the seller must pay real estate capital gains tax if a gain is realised by the transfer of the property. The capital gains tax, the amount of which largely depends on the duration of the ownership, varies from canton to canton. The range of applicable rates is therefore large and may vary between 10 and 60 per cent. In most Cantons the payment of the tax is secured by a public-law mortgage right on the property. Hence, a purchaser must be certain that the seller pays the tax.

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

#### **iv Finance and security**

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

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

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

## **VI LEASES OF BUSINESS PREMISES**

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

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

weaker party, which is obviously often not the case with commercial tenants. However, also commercial lease contracts may only be negotiated within the limits of mandatory tenancy law.

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

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

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

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

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

## VII DEVELOPMENTS IN PRACTICE

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

On 1 May 2017, both the revised Waters Protection Ordinance and the revised Contaminated Sites Ordinance entered into force. The former particularly gives the cantonal authorities greater freedom in defining the spaces provided for waters. According to the latter, the concentration values of ammonium and nitrite in the groundwater do not need to be considered any more when assessing the need for remediation of a polluted site. As a consequence, according to the Federal Office for the Environment, remediation cost savings of a total of 60–80 million Swiss francs are expected.

Further, the parliament mandated the Federal Council to change land registry ordinance, so that the owner of the ground can see who has been making requests about his or her land through the electronic land register. Therefore, the land registry ordinance will be changed in the near future.

In March 2017, the Federal Council of Switzerland opened a hearing procedure for the amendment of the Lex Koller, the law restricting the acquisition of real estate by persons abroad. The Federal Council proposed that authorisation be required for the acquisition of main residences in Switzerland by nationals of non-EU/EFTA states with a C permit. The proposed authorisation would always be linked to the obligation to resell the dwelling within two years of giving up residence in Switzerland. Shares in housing cooperatives, however, would be acquirable by these persons without an authorisation, if the acquisition of shares is necessary for the rent of such a dwelling. Controversial questions in practice would be clarified and the procedure for establishing authorisation requirements would be shortened, according to the proposals of the Federal Council.

The Federal Council also put up for discussion very severe restrictions, in particular whether commercial properties (e.g., offices, factories, logistics, shopping centres, hotels) should, as a rule, be subject to the Lex Koller again, repealing the corresponding liberalisation of the Lex Koller that was enacted in 1997. Foreign investors would thus be excluded from acquiring commercial properties in Switzerland in the future. The only exception would be where owners use the properties for their own business activities and do not lease the property to third parties. The Federal Council also put up for discussion whether the acquisition of shares in a legal entity, the real purpose of which is the acquisition of real estate, should be subject to an authorisation even if these shares are listed on a stock exchange in Switzerland. Only the acquisition of shares in a SICAV would be exempt.

The hearing procedure closed at end of June 2017. The proposals and the restrictions put up for discussion faced heavy opposition from many political parties, organisations and from the real estate industry. Therefore, it is not clear at this time whether or what changes the Federal Council might propose to the parliament.

Currently, the Swiss Federal Law on Public Procurement is revised. The main objectives are to reflect the multilateral agreement on public procurement between the member states of the World Trade Organisation, as well as to harmonise the procurement regulations of the Swiss Confederation and the cantons. Furthermore, parliament aims to introduce regulations with regard to further reductions of carbon dioxide emissions, the launch of subsidies for energy efficient building restorations and the abolishment of the taxation of the imputed rental value for self-occupied premises. Further legislative work concerns the revision of the Swiss Federal Land Use Planning Law, affecting, for example, hotels outside the building zone. It is not yet possible to forecast when these amended laws will enter into effect.

Recently, a few new real estate investment funds were launched. Moreover, an internet platform-based investment forum for the purchase of co-ownership units was successfully launched.

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

## **VIII OUTLOOK AND CONCLUSIONS**

As outlined above, real estate investors and developers must deal with a number of laws governing real estate transactions: civil law, environmental law, tax law, etc. In the area of tenancy law, it is key that the parties negotiate lease contracts only within the limits of the mandatory provisions. Since 2016, certain residential real estate transactions are also restricted by the Federal Act on Second Homes, which led to a decrease in real estate projects in some touristic (alpine) regions. It remains to be seen whether the aims of this new legislation – reducing the rents as well the ‘cold beds’ – will be achieved or, in the worst case, local construction companies and industries will suffer. The Lex Koller restrictions and authorisation regime will continue to apply and may be even tightened. The most far-reaching potential amendment would be that the acquisition of commercial properties is again subject to an authorisation. In our opinion, such a major change in the legal environment, which would affect foreign real estate investors, is rather unlikely.

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

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

## ABOUT THE AUTHORS

### **ANDREAS F VÖGELI**

*Niederer Kraft & Frey*

Andreas F Vögeli heads the real estate practice at NKF that deals with a variety of highly complex real estate transactions. He specialises in large and complex domestic real estate transactions, with a particular focus on enterprises that are involved in project development, hotel or leisure projects. His real estate experience also includes a profound knowledge of hotel and leisure projects, special rental contracts, Lex Koller and environmental law issues.

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

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

### **OLIVER ZBINDEN**

*Niederer Kraft & Frey*

Oliver Zbinden regularly advises and represents domestic and foreign investors, financial institutions, companies and private clients in all aspects of real estate law, particularly real estate transactions, tenancy law, private construction law, public construction and zoning law, environmental law and Lex Koller issues.

### **NIEDERER KRAFT & FREY LTD**

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



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