

CMS Adonnino Ascoli & Cavasola Scamoni
CMS Albiñana & Suárez de Lezo CMS Bureau Francis Lefebvre
CMS Cameron McKenna CMS DeBacker CMS Derks Star Busmann
CMS von Erlach Henrici CMS Hasche Sigle CMS Reich-Rohrwig Hainz



Real Estate Finance Issues in Switzerland

Mortgages

1. Brief outline of Swiss real estate law

1.1 What types of property interests in real estate do exist?

There are the following types of property interests (in rem and quasi in rem rights):

- (i) ownership (such as sole ownership, joint ownership, co-ownership including condominium).
- (ii) in rem rights of limited scope ("beschränkte dingliche Rechte"):
 - a) easements and other encumbrances: easements (e.g. right of passage, right to establish a building transgressing the neighbouring real estate, right to limit the height of the building on the neighbouring real estate), usufruct and right of habitation, building right, source right;
 - b) security interests:
 - aa) contractual security interests:
Contractual security interests are based on an agreement of the holder of the property interest and the secured party.
 - mortgage certificates ("Schuldbrief"): mortgage certificates are the most commonly used security interest in the real estate finance context;
 - actual mortgage ("Grundpfandverschreibung"): regular actual mortgage or actual bearer mortgage deed ("Hypothekarobligation auf den Inhaber; frequently used in the French speaking part of the country);
 - "Gült" (insignificant).
 - bb) statutory security interests:
Statutory security interests take the form of an actual mortgage and are based on the relevant provisions of the statute (either setting forth the requirements under which such interest can be registered or directly granting such interest).
Thus, the following two types are to be distinguished:
 - security interests effective only upon registration in the Real Estate Register (e.g. craftsmen and contractors lien);

- security interests effective without registration in the Real Estate Register, in particular security interests regarding real estate related taxes;
- c) real estate charges ("Grundlasten", i.e. rights to certain real estate related performances vis-à-vis real estate owners secured by such real estate).
- (iii) Quasi in rem rights ("Realobligationen"): certain in personam rights can achieve quasi in rem status by registration in the Real Estate Register thereby becoming effective against third parties and later registered rights. The following limited number of rights can obtain such status upon registration:
 - a) in personam rights noted on record ("vormerkbare persönliche Rechte"):
 - pre-emption right (right of first refusal);
 - right of repurchase;
 - purchase right;
 - lease;
 - leasehold;
 - right of advancement in rank.
 - b) restrictions on alienation ("Verfügungsbeschränkungen").
 - c) provisional registrations ("vorläufige Eintragungen")

1.2 What types of in personam interests in real estate do exist?

There are in personam interests deriving from lease, leasehold and leasing contracts (by registration in the Real Estate Register lease and leasehold contracts can achieve quasi in rem character).

1.3 Which objects can be subject to ownership/other property interests?

The following objects and rights can be subject to ownership and other property rights in real estate:

- (i) immovables: in particular land;
- (ii) independent and permanent in rem rights (of limited scope) registered in the Real Estate Register: in particular transferable building rights with a minimal term of thirty years registered in the land register;
- (iii) mining rights;
- (iv) co-ownership rights including condominium parts.

1.4 What is the scope of ownership in land?

Ownership in land encompasses the surface and – to the extent commanded by the reasonable interest of the owner – the ground beneath and the airspace above such surface.

1.5 Does ownership in land also cover the buildings on the land?

Yes, as a rule ownership in land does also extend to the buildings built on the surface (principle of accession).

As an exception the ownership in the land and the buildings erected on it can insofar differ as an independent and permanent right of building is established and registered in the land register. Thereby the ownership in the land and the buildings can be separated for the term of such building right.

1.6 What are the general transfer requirements of ownership and other property interests?

In essence, the general requirements for transferring and acquiring property interests in real estate are as follows:

- (i) valid sale and transfer agreement (generally in the form of a public deed);
- (ii) registration of the interest in the land register.

1.7 Are there any restrictions on the acquisition of real estate by foreign persons?

Yes, the law on the acquisition of real estate by foreign persons ("Lex Koller"; the Act) provides restrictions as to the kind of real estate which foreign persons may acquire.

Foreign persons are, in essence, precluded from directly or indirectly owning real estate not used for economic purposes.

As real estate used for economic purposes under the Act qualifies real estate used as a permanent establishment for economic activities: offices, shopping centres and retail premises, hotels and restaurants, warehouse facilities, workshops, etc. In contrast, in particular residential and administrative (or governmental) real estate is subject to the restrictions of the Act.

Technically, the Act restricts the acquisition of real estate falling under the Act by requiring prior authorisation from the competent authorities. Such authorisation will, however, only be granted, if the transaction at hand exceptionally falls under the

very narrowly defined grounds permitting the acquisition of restricted real estate. In case of doubt as to whether a planned acquisition needs an authorisation the acquiring party should seek a ruling from the competent authorities confirming that no authorisation is required. Not complying with the authorisation requirement will give rise to civil (nullity of the transaction), administrative and criminal sanctions.

An authorisation under the Act is generally required if:

- the real estate is subject to the Act (e.g. residential real estate);
- the purchaser is a person abroad (i.e., in essence, persons/entities with domicile/seat abroad or foreign controlled Swiss entities);
- the transaction qualifies as acquisition of real estate (any transaction giving a person actual control over real estate qualifies as acquisition of real estate; acquisition is very broadly interpreted: e.g. also the granting of a security interest to a foreign bank participating in highly leveraged transactions may fall thereunder).

The Swiss government has issued a draft bill aimed at the repeal of the Act. Due to resistance by the parliament it is, however, at present unclear, if and when the Act will be abolished. The repeal of the Act would allow foreign banks to play a more significant role in the residential real estate finance market. Moreover, foreign banks would henceforth also be entitled to participate in foreclosure sales of restricted real estate. Furthermore, also the segment of mixed properties (administrative, residential, permanent business establishments) in the commercial real estate market would be boosted by a repeal.

2 Can security be granted to a foreign lender? Are there any restrictions in this respect?

Yes, security over interests in real estate can be granted to foreign lenders.

Generally a foreign lender in favour of whom a security interest is granted is not subject to an authorisation requirement under the laws on the acquisition of real estate ("Lex Koller"; the Act; for an outline see above 1.7).

However, a foreign lender may in particular be subject to an authorisation requirement regarding the security interest, if he participates in an “excessively” highly leveraged financing of restricted real estate (i.e. granting a loan in excess of the usual maximum limit applied by Swiss banks). In case of doubt as to the authorisation requirement under the “excessive leverage test” a ruling of the competent authority confirming that there is none should be obtained.

3 Can a foreign lender take a mortgage over land and buildings?

Yes, a foreign lender can take a security interest over real estate. Such security interest can be granted in the form of a mortgage certificate (“Schuldbrief”) or an actual mortgage (“Grundpfandverschreibung”; whether as regular actual mortgage or as actual mortgage with issued bearer deed); mortgage certificates are most commonly used in the real estate finance context.

Subject to the exception mentioned under 2 above, the taking of a security interest is not subject to an authorisation requirement.

Pursuant to the principle of accession the buildings on land share the legal fate of the land itself. Therefore, any security interest over the land normally also encumbers the buildings erected on it. Only if the buildings are subject to an independent and permanent building right registered with the Real Estate Register can land and buildings legally be separated from each other. This being the case the two distinct property interests in the land and the buildings can also be separately encumbered with differing security interests.

4 What are the rules determining priority between competing rights encumbering the real estate?

In case several rights in rem of limited scope or quasi rights in rem encumber the real estate priority is, except as regards security interests inter se, determined pursuant to the date of registration of the interest with the Real Estate Register (principle of temporal priority). The parties in interest can modify the established priority ladder by agreement and registration in the land register.

Determining priority regarding different security interests encumbering a property follows different rules: priority between security interests is determined pursuant to their respective rank. Such rank is assigned to the interest upon registration. Normally senior lenders obtain first rank security interests, whilst mezzanine lenders obtain second ranked interests. The established priority ladder can be modified by the agreement of all parties in interest. Moreover, it is possible to reserve the right to advance in the rank of the security ladder.

Most commonly lenders are granted security interests in the form of mortgage certificates (“Schuldbrief”). Subsequent to its registration the Real Estate Register issues a deed of the mortgage certificate. Such deeds are negotiable instruments incorporating the loan and the security interest. The rights incorporated therein can, therefore, generally only be assigned by transferring the deed. (Pursuant to a draft bill introducing mortgage certificates without deeds to be issued, lenders will in the future be able to opt either for mortgage certificates with or without deeds). The customary security package for real estate lenders provides also for a transfer of ownership in the deeds by way of security (“Sicherungsübereignung”).

In the French speaking part of Switzerland it is not uncommon to grant security interests in the form of an actual mortgage with a bearer deed (“Hypothekarobligation auf den Inhaber”).

5 What are the mechanisms for registering ownership interests and security interests in real estate?

Transfer/creation of an ownership/security interest requires:

- (i) a valid agreement regarding the sale and transfer of the ownership in the real estate respectively regarding the mortgage to encumber it. Such agreement has to be in the form of a public deed issued by the competent notary public.
- (ii) registration of the interest with the Real Estate Register. The ownership interest will transfer and the security interest perfect upon entry of the respective transaction in the Real Estate Register.

The issuance of the deed (“mortgage certificates”) by the Real Estate Register is, however, not a perfection

requirement. Such issuance can, in practice (in some parts of the country), take quite a long time (up to a year).

The registration of such interests with the Real Estate Register requires a prior written declaration by the owner of the real estate requesting the Real Estate Register Officer to register the transfer and/or encumbrance ("Grundbuchanmeldung").

Failure to register the interest will neither transfer an ownership interest nor perfect a security interest.

The entries in the Real Estate Register are legally presumed to be true and correct. Therefore, the reliance of a good faith party on an incorrect entry is fully protected by law.

The costs for registering and perfecting security interests are regulated by cantonal law and vary across the 26 Swiss Cantons. In the Canton of Zurich the following costs arise:

- (i) Notary fees are set at 0.01% of the amounts secured; and
- (ii) Registry fees are set at 0.025% of the amounts secured.

Each time at least a minimum amount of CHF 50.00 is due.

6 Can a foreign lender use a Security Trustee to hold security on trust for creditors?

Under Swiss law there are no trusts. Thus, the structure aimed at has (as far as possible) to be achieved by similar means available under Swiss law. Customarily this is done by having the "Security Trustee" act as direct representative of the finance parties. Under certain circumstances such structure may, however, lead to difficulties in case of syndication.

7 How can a foreign lender enforce its security?

As a general rule, official debt enforcement proceedings must be initiated, in the course of which the debt enforcement officer will ultimately auction off the real estate and distribute the net proceeds to the creditors secured by it. Within such official enforcement proceedings, the debt enforcement officer may also carry out a private sale ("Freihandverkauf") provided

that (i) all parties concerned so agree and (ii) at least the amount of the valuation is offered. The proceeds of realization of the security are applied to satisfy the secured lenders claims; only if such realization results in an amount exceeding the secured lender's claim, may such amount be returned to the security grantor or applied in favour of other enforcing creditors, respectively.

Upon opening of bankruptcy proceedings, generally, all debt enforcement proceedings are stopped, and the bankruptcy trustee will realize the security interest and distribute the proceeds substantially in the same manner as the debt enforcement officer in an out of bankruptcy enforcement.

If provided for in the security agreement, a lender can enforce its security interest by private sale, i.e. outside of the official enforcement proceedings, or even acquire the security interest for its own account. Upon opening of bankruptcy proceedings such private enforcement option can no longer be exercised.

8 Leases and charging of rental income?

8.1 Does the landlord/borrower have control over changes in tenants?

Yes, in principle, the landlord has control over changes in tenants. In view of the rules governing subleasing and assigning of the lease, however, the foregoing "yes" is only a qualified one, because:

- (i) although the tenant is required to obtain the landlord's consent to an intended sub-lease, such consent may not be withheld except under certain restrictive conditions. Upon consummation of a sub-lease the original tenant will still be bound by the original lease agreement;
- (ii) although the tenant may assign a lease over business premises in whole with the landlord's consent, such consent may only be withheld for valid reasons. Upon consummation of the transfer the original tenant is no longer bound by the original lease agreement. However, he will be jointly and severally liable with the third party until the lease ends or is terminated (either by law or agreement), in any event no longer than for a maximum period of two years.

8.2 Are banks able to take security by way of an assignment over rental income? Also, can a separate entity own land and the rental income derived from the land?

Yes, in Switzerland banks are able to take security over rental income. Typically, banks take a mortgage over the real estate (in particular land) and a separate security assignment over the rental income the property generates. Such assignment is typically done in a separate assignment agreement. Further, banks ensure by covenants that all rent is paid into a rent account of the borrower (over which the bank has security and control; if such account is held with a third party bank, the lenders typically insist on a separate bank account pledge or bank account assignment).

In Switzerland a mortgage will only charge the rental income upon initiating of the official lien realization proceedings or the opening of bankruptcy proceedings (tenants are only affected by such extension of the mortgage upon notification). Further, the assignment over rental income precludes such extension of the mortgage. Moreover, in respect of the much more common private enforcement measures, rental income is not covered at all by the mortgage. To charge the rental income irrespective of the mode of enforcement banks, thus, resort to separate assignment agreements.

Unlike in other jurisdictions, in Switzerland the land and the rental income derived from the land can be owned by separate entities.

9 Other issues for a foreign lender?

Inter alia, the following other issues are of interest for a foreign lender:

9.1 Statutory security interest

Statutory security interests requiring no registration with the Real Estate Register for perfection (in particular regarding real estate related taxes) are (i) “invisible” and (ii) take priority even over first ranked mortgage certificates of the lenders.

Unlike the above mentioned statutory security interests other types of such interests are only perfected upon registration (in particular the craftsmen’s and contractor’s lien).

9.2 Certain tax issues

Interest payable to foreign creditors on loans secured by Swiss real estate is subject to federal and cantonal withholding taxes in the aggregate amount of approx. 17% to 22%, depending on the Swiss Canton where the property is located. There are various countries, including the U.K., which have concluded double taxation treaties with Switzerland under which such withholding tax has been reduced or entirely eliminated. To avoid (or at least minimise) the withholding tax for real estate secured loans, it is crucial to ensure that the lenders are domiciled in countries that have concluded the appropriate double taxation treaties with Switzerland.

Loans to Swiss entities, whether or not secured by Swiss real estate, may be subject to the federal withholding tax of 35%. This can be avoided under certain criteria to be regulated in the loan agreement.

Under the federal withholding tax law, it is questionable whether gross-up clauses are valid. The relevant risk can be reduced by using specific Swiss tax wording.

Leases

Legal issues that would be likely to impact upon the valuation and the security of income from an investment perspective.

1 Lease Structure

1.1 Typical lease length?

Generally, the parties are free to determine the lease length according to their economic needs. Typically, commercial leases are entered into for a five-year term (such term being the prerequisite for an indexed rent). Further, commercial lease agreements often provide for options in favour of the tenant for another term of five years.

1.2 Maximum/minimum lease length if any?

Leases may be entered into for a definite or an indefinite period of time.

In respect of leases entered into for a definite period, i.e. leases not granting ordinary termination rights and ending after the lapse of the stipulated term, there are no express statutory provisions prescribing a minimum or maximum lease length. However, the maximum lease length is limited under general principles of Swiss law. In absence of clear precedents expressly addressing the maximum length it is fair to say that terms of 20 or even 30 years are still admissible (a 20-year term can also be combined with two options for additional five-year terms). Such terms also correspond with the longest terms market participants agree upon. Contract provisions linking the term of the lease to the existence of a business or company (e.g. lease terminable only upon winding up of a certain company etc.) are, according to court rulings, after the lapse of the admissible period of time (around 30 years), subject to ordinary termination.

Leases entered into for an indefinite period, i.e. leases not stipulating any term, are, as a rule, terminable with a 6 months notice to certain dates (31.3 or 30.6 or 30.9 of each calendar year) or, alternatively, to the end of a 3 month lease duration.

Leases expressly excluding termination rights of any party (so called "eternal leases") are inadmissible. However Swiss courts will, generally, not hold such leases as null and void, but only reduce the "eternal term" to an admissible lease length.

1.3 Statutory controls and obligations re renewal / termination of leases (does tenant have automatic right to renewal or can they apply to the courts for a new lease); also does some form of notice have to be served to terminate a lease to avoid renewal?

Fixed term leases end after the lapse of the respective term. If the parties continue the lease after the lapse of such term, the lease is transformed into a lease for an indefinite period.

Leases entered into for an indefinite term, i.e. lease agreements not providing for a term, may be terminated with a 6 months notice to the end of certain dates (31.3 or 30.6 or 30.9 of each calendar year) or, alternatively, to the end of a 3 month lease duration.

Commercial leases entered into for an indefinite term or a fixed term may, generally, be extended by the competent court for a maximum period of 6 years. The granting of an extension by the court requires that the end of the lease would result in hardship for the tenant which is not justifiable by the interests of the landlord. In weighing the interests, the competent authority takes into account the following criteria:

- the circumstances of entering into the lease agreement and its terms;
- the duration of the lease relationship;
- the economic condition of the parties and their behaviour;
- a need for personal use by the landlord and the urgency of such need;
- the local market conditions for business premises.

The tenant may only twice apply to the court for an extension. The two extensions may in the aggregate not exceed 6 years. In practice, courts seldom grant extensions reaching the maximum period, because often, reasonable replacement premises for the tenant are available within a shorter timeframe.

Further, a termination by the landlord may be subject to challenge by the tenant, if it is given in violation of principles of good faith. This is in particular deemed to be the case, if the termination is given:

- because the tenant has in good faith asserted contractual claims;

- to impose unilateral changes detrimental to the tenant or to adjust the rent;
- during a conciliation or court proceeding in relation to the lease relationship (save where the tenant abusively initiated such proceedings);
- prior to the expiration of three-year “barring-period” after a conciliation or court proceeding regarding the lease relationship in which the landlord:
 - o lost to a substantial degree;
 - o has withdrawn or substantially reduced his claim or action;
 - o has waived his right to appeal to the judge;
 - o has concluded a settlement or otherwise reached an agreement with the tenant.

A successful challenge makes the termination invalid. Further, it triggers the “barring-period”, which factually precludes the landlord from giving termination for the next three years.

1.4 Any overriding statutes concerning the ability of the tenant to break a fixed term lease (whether or not included as a term of the lease)?

A tenant may terminate fixed term leases with immediate effect, only if:

- (a) the landlord does not either transfer the premises at the agreed time or transfers it in time but with defects excluding or significantly impairing its suitability for the predetermined use and, in addition, he fails to transfer the premises or cure the defects within a reasonable period of time (generally 5 to 15 business days);
- (b) after the transfer of the premises, the landlord is aware of a defect preventing or significantly impairing the predetermined use of the premises and does nevertheless not remedy such defect within a reasonable period of time.

Defects affecting the use of the premises less significantly give rise only to damage claims and other remedies (reduction of rent, deposit of rent, remedy of defects by third party).

Further, a tenant may terminate a fixed term lease by extraordinary termination, if he can avail himself of valid

reasons rendering the further performance of the lease intolerable. Courts construe such reasons very narrowly. Generally, only circumstances not foreseeable at the time of entering into the lease agreement may be taken into account. In case the tenant can avail himself of valid reasons he may terminate the lease at any point in time respecting the statutory notice period of 6 months.

1.5 Any other security of tenure provisions available to a tenant that would frustrate possession or prevent receipt of market rents?

No.

2 Rent/Rent Reviews

2.1 Rental income receivable quarterly/monthly in-advance/in-arrears?

The parties may freely agree on the dates of payment of the rent and the relevant costs connected with the use of the premises (e.g. monthly/quarterly in-advance or in arrears). The statutory default provision stipulates that, if no other time is in accordance with local custom, the payment date shall be at the end of each month (i.e. payment monthly in arrears), in any event at the latest at the end of the lease period. Typically, commercial lease agreements provide for monthly or quarterly rental payments in advance.

2.2 Periodicity of reviews?

Commercial leases are usually entered into for a fixed term of five years. Such term allows for an indexation of the rent linked to the Federal Index of Consumer Prices. An indexed rent entitles the landlord to rent increases in accordance with such index. Moreover, the parties can provide for staggered rents, which enable the landlord to increase the rent yearly by the amount the parties have agreed upon. Further, parties may agree to a variable rent tied to the turnover of the tenant's business. Indexed, staggered and turnover rents may not be combined. In addition to these special increase mechanisms a landlord may also increase the rent on a restricted number of general grounds, in particular in case of renovation and additional benefits granted to the tenant.

If the lease agreement does not provide for one of these mechanisms the landlord may increase the rent pursuant to the general grounds justifying a rent increase, in particular in case of an increase of the interest rate for mortgage loans or an increase of inflation.

2.3 Basis of review (upwards-only or variable, indexation or market rent)?

The parties can agree on:

- (a) variable rents (e.g. turnover rents, normally upwards, with a “floor”, i.e. minimum rent);
- (b) staggered rents (generally, only upwards; however, also a “mixed down- and upward staggering” qualifies as staggered rent and has to meet the pertinent requirements);
- (c) indexed rents.

In case the parties agree on neither of these mechanisms the basis of review is determined by the general grounds justifying an increase (see in further detail under 2.2).

2.4 Are rents/reviews subject to statutory control in regard to quantum or increase (i.e. rent control)?

The law protects tenants against abusive initial rents and abusive rent increases by granting challenge rights to the tenant. Generally a rent qualifies as abusive, if it results in excessive returns (such term being interpreted narrowly) or if it is based upon an obviously excessive purchase price. As a rule, however, rents are deemed not abusive, in particular, if the rent:

- falls within the range of rents customary in the neighbourhood;
- is based upon increased costs or additional benefits granted to the lender;
- with regard to relatively new buildings lies in the range of a cost covering gross return;
- only serves to compensate for a previously granted lower rent based on deferred market conformed financing costs, and if it is set out in a payment plan disclosed to the tenant in advance;
- merely compensates a cost increase with regard to the risk carrying capital; or

- does not go beyond the extent recommended by landlord and tenant associations or organizations safeguarding similar interests in their general agreements.

3 Lease Obligations: Who has responsibility for:

3.1 Internal maintenance, decoration and repair?

The landlord is under a general duty to keep the leased premises in a condition suitable for the predetermined use and to maintain it in such condition throughout the period of the lease. Thus, the duty of internal and external maintenance and repair is, as a rule, an exclusive duty of the landlord. With respect to (internal) maintenance and repair tenants have only very limited duties: only very small outlays for cleaning and small repairs (rule of thumb: CHF 100-200) are to be borne by tenants.

The tenant may renovate or modify the premises only with the written consent of the landlord.

3.2 External maintenance, decoration and repair?

See 3.1.

3.3 Structural repairs?

The landlord has responsibility for structural repairs. Moreover, the landlord has to bear all maintenance costs that do not qualify as small outlays (see 3.1).

3.4 Insurance?

The premises are subject to mandatory insurances. Premiums have to be paid by the landlord and cannot be passed on to the tenant.

3.5 VAT?

Rental income is not subject to VAT. In respect of business leases, however, the landlord may under certain conditions opt to become subject to VAT. After “opting in” the landlord may charge the applicable rate of 7.6 % to the tenant; further it entitles the landlord to the pre-tax deduction (“Vorsteuerabzug”), in particular on any building costs or maintenance and repair costs.

3.6 Rates?

As to the VAT-Rate, see 3.5; as to public levies, see 3.7.

3.7 Other typical outgoings?

- Interest on mortgage loans.
- Actual expenditures connected with the use of the premises ("Nebenkosten"), such as heating, hot water and other similar operating costs (e.g. cost for cleaning the staircase) and public levies. Typically, such costs are ultimately borne by the tenants. Passing on such costs to the tenants requires, however, an express agreement to that end.

3.8 The ability to recoup any landlord outgoings (including management costs) by way of service charges?

Landlords may only recoup outgoings qualifying as actual expenditures connected with the use of the premises ("Nebenkosten"; see in more detail 3.7). Management costs do only partially qualify as such expenditures. In absence of clear precedents it is fair to say that passing on management costs of 2 % of the rental income to the tenant is admissible.

4 Enforceability

4.1 Are terms of leases/contracts recognised and supported by case law in the jurisdiction?

Like in other civil law systems Swiss landlord and tenant law, generally, consists of a set of default rules that will govern the lease in absence of a contrary agreement of the parties. In addition to these rules landlord and tenant law provides for several mandatory provisions, which cannot be altered by the parties (in particular provisions with a protective aim, e.g. rules against abusive rents and terminations, extension of lease, etc.).

The primary source of law, thus, is the agreement of the parties, which, however, must respect the mandatory provisions of the landlord and tenant statute. The agreement will only be supplemented by the default rules, if it does not contain provisions deviating from such rules.

Like in other civil law systems the Swiss judiciary is, therefore, generally, restricted to the task of interpreting the relevant

statutes. However, because neither statutes nor lease agreements tend to be complete, the judiciary also has the task of filling in gaps either of the statute or the agreement.

Given the foregoing, courts must recognise any lease term that does not contravene mandatory provisions of landlord and tenant law.

5 Valuation

5.1 To be recognised in the courts, does an appraisal have to be prepared by some domestically regulated/qualified party or is an RICS (Royal Institution of Chartered Surveyors)-qualified appraisal report accepted and recognised in each jurisdiction?

Parties are free to support allegations made in court by valuations prepared by any kind of real estate appraiser (it being understood that the better the standing of the appraiser the more the court may be convinced by the valuation). To be admitted as formal evidence (expert opinion; "Gutachten"), however, a valuation must be prepared by an appraiser appointed by the court.

Prepared by Dr. Kaspar Landolt, LL.M., Attorney at Law (kaspar.landolt@cms-veh.com) and Albert Comboeuf, Attorney at Law (albert.comboeuf@cms-veh.com).

Disclaimer: The foregoing summary on Real Estate Finance issues contained herein has been prepared for discussion purposes only and does not constitute, and shall not be relied upon as, legal advice. Specific legal advice on any issues or transactions should be sought.

CMS von Erlach Henrici AG
Dreikönigstrasse 7
CH-8022 Zurich
Switzerland
T +41 44 285 11 11
F +41 44 285 11 22
www.cms-veh.com

CMS is the organisation of independent European law and tax firms of choice for organisations based in, or looking to move into, Europe. CMS provides a deep local understanding of legal, tax and business issues and delivers client-focused services through a joint strategy executed locally across 31 jurisdictions with 59 offices in Western and Central Europe and beyond. CMS was established in 1999 and today comprises nine CMS firms, employing over 2,200 lawyers and is headquartered in Frankfurt, Germany.

The members of CMS are in association with The Levant Lawyers with offices in Beirut, Abu Dhabi, Dubai and Kuwait.

CMS nine member firms are: CMS Adonnino Ascoli & Cavasola Scamoni (Italy); CMS Albiñana & Suárez de Lezo (Spain); CMS Bureau Francis Lefebvre (France); CMS Cameron McKenna LLP (UK); CMS DeBacker (Belgium); CMS Derks Star Busmann (Netherlands); CMS von Erlach Henrici (Switzerland); CMS Hasche Sigle (Germany); and CMS Reich-Rohrwig Hainz (Austria).

CMS offices and associated offices worldwide: **Amsterdam, Berlin, Brussels, London, Madrid, Paris, Rome, Utrecht, Vienna, Zurich,** Aberdeen, Abu Dhabi, Algiers, Antwerp, Arnhem, Beijing, Beirut, Belgrade, Bratislava, Bristol, Bucharest, Budapest, Buenos Aires, Casablanca, Cologne,

Dresden, Dubai, Dusseldorf, Edinburgh, Frankfurt, Hamburg, Kuwait City, Kyiv, Leipzig, Ljubljana, Lyon, Marbella, Milan, Montevideo, Moscow, Munich, New York, Prague, Sao Paulo, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Utrecht, Warsaw and Zagreb.
www.cmslegal.com