Practice Guides

SWISS M&A

Third Edition

Contributing Editors
Ueli Studer, Kelsang Tsün and Joanna Long

LEXOLOGY
Getting the Deal Through

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Practice Guide

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Real Estate Transactions with a Special Focus on Hotel Acquisitions

Markus Aeschbacher, Thomas Schönenberger and Ion Eglin[1]

Introduction

Introductory remarks

Even though price growth in the Swiss real estate market has slowed somewhat in recent years, it is to be expected that real estate property will remain in demand in the future and represent an attractive investment opportunity.

However, access to these attractive investment opportunities has been restricted for foreign investors in Switzerland for many decades. In particular, the Federal Law of 16 December 1983 on the Acquisition of Real Estate by Persons Abroad (better known as the Lex Koller) restricts the acquisition of real estate for residential purposes. This will be discussed in more detail in the course of this chapter. This restriction inevitably leads to foreign investors having to focus on the acquisition of commercial property for the time being. For this reason, the chapter focuses on real estate transactions in the area of commercial property. Since it has also transpired in the past that foreign investors in Switzerland are increasingly investing in hotels, a separate section of this chapter goes into more detail on hotel transactions.

Principles and systems of the real estate sector in Switzerland

Switzerland has extensive building regulations (regarding land use, building quality, distances to adjacent properties, etc). Land is divided into different zones, such as agricultural, residential, commercial and industrial. There are also many environmental regulations.

The land register is the public register for rights in rem to real estate such as ownership rights, easements, land charges and liens on real estate. Its main purpose is to make private rights and encumbrances on real property visible to third parties.

1 Markus Aeschbacher, Thomas Schönenberger and Ion Eglin are partners at Bratschi Ltd.

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Swiss law requires contracts for the purchase of land and very often also for other legal transactions concerning rights in rem to be drawn up as notarial instruments by a notary.[2] The procedure for public notarisation is left to the cantons, which is why there are different systems:

- In the case of independent professional notaries, the notary is a self-employed person who draws up the notarial instrument, while the land registries make the land register entry based on the application for registration.
- In cantons with official notaries, the act of drawing-up the notarial instrument is carried out directly at the land registry by a public official who is also the chief clerk of the land register.
- Finally, there are hybrid systems in which the elements of independent professional notaries and official notaries are mixed in various ways.[3]

Restrictions for foreign investors

Under the Lex Koller direct investment in residential and other non-commercial real estate and the acquisition of shares of a real estate company with such purpose by a foreign investor (Person(s) Abroad) are restricted and permitted only with a corresponding administrative authorisation. Approval will be denied unless there is a reason for approval specified by law. The acquisition of residential real estate for purely investment purposes is generally not allowed.

Not considered as Persons Abroad according to the Lex Koller are particularly foreigners domiciled in Switzerland who are nationals of EU/EFTA member states or of the UK with a respective residence permit and nationals of other countries who are holders of a valid settlement permit (C permit) in Switzerland. All other foreigners are generally subject to the Lex Koller. Legal entities are considered Persons Abroad if they are either domiciled abroad or dominated by Persons Abroad. Domination by Persons Abroad is presumed in particular when more than one-third of a company's capital or more than one-third of the voting rights are in the hands of Persons Abroad, or if they have granted substantial loans to the company.

In addition to the direct purchase of real estate registered in the land register, any transaction (the acquisition of property rights, title, or usufructs in shares, the constitution and exercise of a right of purchase, pre-emption or redemption, etc) that from a commercial perspective confers a position analogue to ownership, is deemed an acquisition under Lex Koller.

Real estate for permanent business establishment, such as manufacturing facilities, warehouses, offices, shopping centres, retail premises, hotels, restaurants, etc, can be acquired without authorisation. In this case, it is immaterial whether the real estate is used for the buyer's business or was rented or leased by a third party in order to pursue a commercial activity. Such real estate properties may also be purchased solely as an investment.

Real estate transactions in general

Transaction basics

Subject matter of contract and deal structure

As in the case of corporate M&A transactions, there are basically two possible main structures for real estate transactions. The first one is the asset deal, where the real estate itself (with its

2 See for example articles 657(1), 732(1) and 799(2) Swiss Civil Code.

3 See for example Mühlematter Adrian/Stucki Stefan, *Grundbuchrecht für die Praxis*, 2nd ed, Orell Füssli Verlag, 2017, p53.

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associated rights and obligations as well as contractual relationships) forms the subject matter of the contract and is transferred to the buyer. In an asset deal, the real estate can be transferred either by singular succession or by partial universal succession by means of a transfer of assets under the Federal Merger Act.

The other main transaction structure is the share deal where the participation right (eg, a share in the company owning the real estate) forms the subject matter of the contract and is purchased by the buyer.

Since by far the most common deal structure in real estate transactions in Switzerland is still the asset deal with singular succession, which also differs most clearly from corporate M&A transactions, this chapter focuses on this type of deal structure, while asset deals by means of transfer of assets under the Federal Merger Act and share deals are only mentioned if there are particularly noteworthy differences to asset deals with singular succession.

Overview of transaction process and deal phases

Real estate transactions basically follow the same process and are divided into the same deal phases as corporate M&A transactions. These are the preliminary phase, the signing phase, the closing phase and the post-closing phase. However, as will be shown below, the processes are less developed in practice, M&A terminology is mostly not used and there are some special features and differences worth mentioning.

Preliminary phase

Information memorandum and indicative offer

In Swiss real estate practice, the information memorandum issued by the seller and an initial process letter (in smaller transactions often only sales documentation, a teaser or a letter or email asking for an indicative offer) are followed by an indicative offer from the prospective buyer.

Due diligence

If this seems reasonable to the seller, the prospective buyer is granted access to the data room for a certain period of time after signing a confidentiality agreement. The documents contained in the data room enable the prospective buyer to carry out a large part of the due diligence. Particularly with regard to legal and tax issues, but also in environmental and contaminated site matters, the prospective buyer often relies heavily on the documents available in the data room. The prospective buyer examines in particular (without claiming completeness):

- the extract from the land register including land register plans and existing land register documents for the registrations and reservations, easements and land charges as well as mortgages (eg, promissory notes);
- the extract from the register of contaminated sites;
- tenants' statements, tenancy agreements and service charge statements;
- other contracts (such as maintenance and service contracts, caretaker contracts, management contracts); and
- tax returns and invoices.

For the purpose of carrying out structural or technical and commercial due diligence, the prospective buyer is usually also given the opportunity to inspect the property on site. Finally, most data rooms already contain a first draft of the purchase agreement.

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Binding offer

In a second process letter, the prospective buyer is then requested to make a binding offer and to submit it by a certain date together with any requests for amendments and/or additions to the draft purchase agreement. However, it must be emphasised here that binding offers in the case of an asset deal with singular succession are not legally binding due to formality requirements under Swiss law. This is because any contractual agreements in connection with the transfer of real estate – even if they are only pre-contractual agreements – are subject to mandatory public notarisation in order to be valid or binding (see above). Regardless of its invalidity, the binding offer is usually a prerequisite for being admitted to further contractual negotiations with the seller. Often the prospective buyer is also granted a certain period of exclusivity with regard to contract negotiations.

Signing phase – purchase agreement

General remarks

Since agreements for the purchase of real estate need to be drawn up as official notarial instruments in order to be valid, the standard documents developed by cantonal notarial practice for the acquisition of private property form the basis of the draft agreements. In comparison with international practice and M&A standards, these are relatively rudimentary and structured simply, especially with regard to larger transaction projects.[4] Deviations from these standard documents are permitted only to a limited extent and depend on the respective canton and notary's office. It is therefore advisable to consult the responsible notary early on and to involve him or her in the drafting of the agreement. For the sake of efficiency, it is advisable not to provide the responsible notary with a draft of the purchase agreement at this stage, but only with a list or a term sheet with the points to be included in the agreement, which the notary will then use as a basis to draw up the first draft.

Object of purchase and price

The first major part of the agreement for the purchase of real estate is the object of purchase, which is defined on the basis of a current description of the property (including measurements, notes[5] and priority notices, easements, real estate liens, etc), which the notary integrates into the agreement on the basis of the extract from the land register. Another important part of the agreement is the purchase price with details of the partial payments, the recipients of payment as well as other terms (due date, security payments, etc).

The time of the transfer of ownership is also stipulated, which usually takes place immediately after the notarisation. However, a different date at the end or beginning of the month is usually chosen for the transfer of benefits and risks (the effective date), so that rental income and other periodic obligations can be settled more easily.

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4 See also for example Vischer Markus/Hänni Luca, *Lehren aus der M&A Praxis für den Immobilienkauf*, AJP 2012, p613 et seq, p614; Baumann Maja, *Gewährleistung in Grundstückkaufverträgen mit professionellen Investoren*, AJP 2010, p1269.

5 'Notes' of legally relevant facts, legal restrictions or exemptions from legal restrictions.

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Representations and warranties

Detailed warranty clauses are uncommon. In practice, the statutory warranties are either amended or excluded.

They are frequently amended in the case of new buildings, often by granting the buyer essentially the same rights arising from defects in relation to the seller as the seller (in its capacity as customer or project owner) has in relation to its contractors, for example through the adoption of SIA standard 118, which is widely used in building projects. As an alternative to this arrangement, the buyer's warranty rights against the seller are often excluded (to the extent legally possible); in return, the latter assigns its rights arising from defects against the contractors to the buyer. However, this is not without legal problems, particularly since it is controversial whether such assignments may be made and, if so, to what extent.

In the event of a purchase of properties that are not new buildings, and thus by far in the majority of cases, warranties are excluded in purchase agreements with the exception of certain representations (see below). Under the principle of contractual freedom, this is generally possible provided that the seller has not fraudulently concealed a defect.[6] The validity and scope of the exclusion of warranties (warranty exclusion clause) are legally controversial. In cases of doubt, the courts interpret warranty exclusion clauses in a restrictive and buyer-friendly manner. The seller is therefore well advised to draft the warranty exclusion clause as clearly and in as much detail as possible, including making reference to any known defects and possibly unanticipated special features of the object of purchase and describing the condition of the buildings.

The exclusion of warranties does not apply in the event that the agreement provides for representations made by the seller. They mainly concern the tenancy agreements that are transferred to the buyer by operation of law upon transfer of ownership,[7] which are usually listed with the most important key figures in an annex that forms part of the purchase agreement (rent schedule). Frequently encountered among professional investors, for example, are clauses according to which the seller represents that:

- the (due diligence) documents provided are complete and correct;
- the rent schedule is complete and correct;
- the aforementioned rent deposits are in place and that the rights thereto will be transferred to the buyer;
- no additional ancillary agreements have been entered into with the tenants and, in particular, that there are no amortisation agreements or loans for tenant improvements in place and that they are not part of the rental payments;
- no rent reductions have been promised;
- no notices of termination have been given or threatened;
- there are currently no legal disputes or proceedings in connection with the tenancies or with neighbours in connection with the object of purchase and that no such disputes have been threatened;

6 Articles 192(3) and 199 Swiss Code of Obligations.

7 Article 261(1) Swiss Code of Obligations.

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- there are no outstanding claims from contractors or workers for work carried out in the past four months and that there is therefore no risk of statutory lien of tradespeople and building contractors being registered with regard to the property; and
- all taxes and fees related to and due on the object of purchase have been paid.

Depending on the circumstances, buyers may also try to negotiate further representations, for example, regarding the accuracy of measurements within a percentage tolerance range, creditworthiness and payment habits of the tenants as well as compliance of existing buildings with regulations and permits. Which and how many representations the parties want to include in the purchase agreement ultimately mainly depends on how well the seller knows the property, which clarifications the buyer was able to make in the course of the due diligence process and how many risks are accounted for in the purchase price.

In addition to a careful due diligence process regarding possible soil contamination, it is particularly important to include clear provisions regarding this issue in the warranties. Any contaminations the buyer is aware of should be listed. Should a reclamation of contaminated sites be necessary in the foreseeable future, it is advisable to include provisions as to who shall bear the costs and, if appropriate, to agree on a security for the amounts to be paid.

If an owner benefits from an increase in the value of his property as a result of a spatial planning measure under public law (eg, change of zone into a development zone), the owner must expect to be put under an obligation at cantonal and communal level to pay an added-value charge to the local authority. Since many cantons provide for a lien on the property and/or joint and several liability of legal successors to secure this charge, it is important to check when acquiring a property whether such a value-added charge has already been imposed (and possibly postponed) or is latent. If this is the case, a provision should be included in the purchase agreement to say that the buyer shall pay the unpaid charge directly to the local authority (such payment being offset against the purchase price) or that the seller shall furnish security in the appropriate amount.

According to the law, the parcel of land and the buildings and installations on it must be inspected as soon as possible in the ordinary course of business and any defects must be reported immediately thereafter; any defects discovered later must be reported immediately upon their discovery. According to the case law, these deadlines are very short and they create legal uncertainty as they are not clearly defined. From the buyer's point of view it is therefore advisable to agree on clear deadlines that are sufficiently long depending on the object of purchase.

Other clauses

There are numerous other contractual provisions that are beyond the scope of this chapter. Most of them are standard clauses, for example, on the obligation to pay VAT, on the transfer of insurance policies and other agreements (management agreement, caretaker and maintenance agreements), on declarations regarding the Lex Koller, on the provision of documents, on the (non-)obligation to pay commission fees of real estate agents and on the payment of notary and land registry fees.

Special set-ups

The agreement for the purchase of real estate is often linked to other types of agreements. If the seller is obliged to construct a building, there are generally three possible ways to structure this:

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- The parties enter into a purchase agreement for a future object. In this case, the purchase agreement is concluded immediately and the transfer of ownership (and thus usually also the major part of the purchase price payment) takes place upon completion of construction.
- The parties enter into a hybrid purchase/construction agreement. In this case, an agreement for the purchase of real estate is entered into, which contains a construction obligation, and ownership usually transfers immediately while the building is constructed or completed thereafter.
- The parties conclude both a purchase agreement and a (comprehensive) construction agreement, and these two agreements are linked.

A legally controversial, but in practice frequent set-up is sale and lease back, in which the seller leases back the sold property or parts thereof from the buyer on a long-term basis. This involves a lease agreement that is usually concluded prior to the agreement for the purchase of real estate, which only comes into force on condition that ownership is transferred to the buyer (and subsequent landlord).

Finally, in the real estate industry, the purchase of a real estate is often linked to the acquisition of the related development projects. In this case, a comprehensive intellectual property rights agreement is required, which ensures the transfer of all project rights to the buyer and the buyer's entry into the existing agreements between the seller and the planners, contractors, etc. This provision can be integrated into the purchase agreement.

Closing phase

The main performance obligations under the purchase agreement are executed by transferring ownership to the buyer by registering the purchase transaction with the land register and paying the purchase price. This 'exchange of service' usually occurs reciprocally and simultaneously. In most cases, payment of the purchase price is secured by an irrevocable bank guarantee or, in the case of private notaries, by the notary acting as escrow agent.

A signed written document is sufficient for the application to the land register, but the seller needs to provide proof of its right of disposal by certified signature or personal presentation of an official ID document at the land registry. The application to the land register is immediately entered in the daily register. Rights and obligations arise once they are later entered in the main register but with retroactive effect to the time of the entry in the daily register.

The purchase price is not always transferred in full to the seller's account. If there is no other security for the real estate capital gains tax, part of the purchase price amounting to the estimated tax amount is usually paid into an account of the tax office. A further part of the purchase price is often transferred to the seller's lending bank so that, in return, the latter redeems any liens on the property (or possibly transfers them to the buyer's mortgage bank). This exchange of service can also be secured by the above-mentioned instruments.

Post-closing phase

Post-closing rights and obligations

Compared with corporate M&A transactions, the rights and obligations of the contracting parties after closing play rather a minor role in real estate transactions. However, purchase agreements usually contain provisions on the following post-closing rights and obligations of the contracting parties after completion:

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- obligation of the contracting parties, within a certain period of time after the transfer of ownership or the date of taking possession, to settle separately from the purchase agreement and pro rata temporis the periodic services related to the object of purchase, such as public charges, taxes, energy costs, insurance premiums, rent, shares of heating and operating costs, etc;
- obligation of the seller to hand over to the buyer in return for a separate receipt all original documents relating to the object of purchase that have not already been provided, in particular all lease agreements, building and construction specifications, contracts for work and services, property plans, maintenance contracts, etc; and
- obligation of the buyer not to terminate any assumed tenancies for cause (with reference to the buyer's own need).

Special post-closing rights

Sometimes, especially in sale and lease back situations where the seller remains the tenant of the object of purchase, special rights are granted to the seller in the purchase agreement, which the seller can exercise after closing. These are primarily pre-emption and repurchase rights that, when exercised, allow the seller to re-acquire ownership of the sold property at a later date, usually under predefined conditions.

Taxes

The following taxes are typically payable in real estate transactions in Switzerland:

- Real estate gains tax – in general, tax must be paid on the difference between a property's purchase value (less the property transfer tax, land register fees and notary fees) and the sale proceeds (less the property transfer tax, land register fees, notary fees and broker commission). This tax is generally payable by the seller. In certain circumstances, taxation is deferred.
- Property transfer tax – in the vast majority of all cantons, the acquisition of real estate is subject to property transfer tax based on the purchase price plus all other services provided by the buyer. Property transfer tax is generally borne by the buyer. There are exemptions in certain circumstances.
- Value added tax (VAT) – in general, the sale of land is not subject to VAT. However, the seller can, under certain circumstances, voluntarily subject the property to VAT.

In connection with the above-mentioned taxes, in many cantons the corresponding tax claims are secured by a legal lien on the transferred real property and/or there is a joint and several liability of the party responsible for paying the tax in question and the other contracting party.

Hotel transactions in particular

Preliminary remarks

Buying hotels in Switzerland has always been attractive to foreign investors, whether in cities or resort hotels in the mountains, whether as investments or for 'asset parking' in the politically stable environment of Switzerland, or as 'trophy assets' in the case of some luxury hotels.

In principle, of course, the acquisition of a hotel is only a real estate transaction. However, many aspects significantly differentiate the acquisition of a hotel from the acquisition of other commercial real estate.

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Current hotel operator

First, it is necessary to know who currently operates the hotel and what legal relationship exists between the current operator, plus maybe a franchisor, and the owner. Hotels which are operated by the owner still exist mainly in family businesses, but usually even then the operation of the hotel is outsourced to a separate company in order to protect the asset from the financial and operational risks of the daily hotel business.

The legal relationships between the operating company and the owner are either governed by a hotel lease agreement (in various forms) or a hotel management agreement (with additional trademark licence, marketing or centralised services agreements, if applicable). These may be combined with a franchise agreement, whereby the lessee or manager then acts as white label operator.

Hotel lease agreements

In principle, lease agreements remain in force and unaffected in the case of a sale of a hotel. This means that the buyer of a hotel automatically takes over any existing lease agreement. Consequently, it is recommended to carefully review the existing lease agreement before the acquisition. In addition, hotel lease agreements often contain clauses that grant a pre-emptive or termination right to the lessee in the event of a sale of the hotel – which could influence or even prevent the intended transaction.

Hotel management agreements

Such pre-emptive or termination rights in the event of a sale may also be contained in hotel management agreements. However, the legal qualification of hotel management agreements is more complex, especially with regard to termination rights. Under Swiss law, hotel management agreements are qualified as 'innominate contracts', which consist of different standard agreements such as, among others, the mandate agreement. As mandate agreements can be terminated at any time,[8] it is questionable whether such termination rights could be applicable to hotel management agreements. The question has not been definitively clarified by Swiss courts so far; however, in 2005, the Federal Supreme Court decided in a case involving the Hilton hotel in Geneva[9] that it cannot be said once and for all which legal norms govern such management contracts. Rather, the question must be answered considering the overall agreement and legal relationship between the parties. Taking into account that hotel management agreements are quite complex, consist of various different rights and obligations, and are usually long-term relationships, it seems very unlikely that a termination right at any time would be applicable. Either way, it is recommended that the hotel management company be involved in any acquisition plans. If the acquisition is confidential and this is not possible, the buyer should request appropriate warranties, indemnifications or even withdrawal rights from the seller in order to obtain the best possible protection against the various scenarios. This is particularly recommended because the employees of the hotel are usually employed by the owner and not the manager in hotel management relationships (see 'Transfer of employment relationships').

8 Article 404 Swiss Code of Obligations (a compulsory provision).

9 Decision of the Swiss Federal Supreme Court No. 131 III 528 from 30 May 2005, 5C.252/2004.

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Franchise agreements

If the hotel is operated by a lessee or a manager under another brand, there is usually a franchise agreement in place with a franchisor, such as an international hotel chain. These franchise agreements often not only include the use of a brand, but also offer their own distribution system and sales channels, with global marketing campaigns, loyalty programmes, etc, and may also contain requirements for some construction elements, interior design or food and beverage concepts. Furthermore, franchise agreements often contain special rights or sanctions in the event of a sale of the hotel that can affect the intended transaction. In addition, if the brand or protected design elements are permanently installed, a termination of the franchise agreement may require structural measures in order to modify or remove the previous brand or design elements for the buyer and new owner. Last, there might also be 'owner's agreements': these are additional agreements between the franchisor and the owner, obligating the owner to secure the franchise in the event of insolvency of the lessee – or specifically in the event of a sale of the hotel. Hence these agreements also must be carefully examined before a planned hotel acquisition.

Share deal or asset deal

Like other real estate, a hotel can also be acquired by way of a share deal (purchase of the shares in the owning company) or an asset deal (purchase of the real estate only). However, unlike other commercial real estate, a hotel is usually an ongoing operation, has numerous employees, has guests for short-, medium- or long-term stays, and has current and future bookings as well as numerous other contractual relationships.

Due diligence for hotels – specifics

As a result, the scope and topics of a due diligence review differ from other commercial real estate, regardless of whether the hotel is acquired through a share or an asset deal. To illustrate the specific nature of a hotel deal and, as examples only, some selected topics are explained in more detail below.

Transfer of employment relationships (acquisition of business)

Legally, the acquisition of a hotel in operation is usually qualified as a takeover of the business.[10] As a consequence, all existing employment contracts of the hotel are automatically transferred to the buyer, regardless of whether the acquisition is made through a share or an asset deal – unless the employees are employed by the lessee in the case of a lease agreement that continues (see above). If the employment contracts are being transferred, it is highly recommended to review all employment contracts, related obligations and claims prior to the acquisition, including, but not limited to, outstanding salaries and bonuses, holiday entitlements, overtime compensation, pension contributions, withholding taxes, compliance with the collective employment contract[11] and labour safety regulations, as well as threatened or pending labour law disputes. Another important point in connection with employees is their housing – whether a staff house is connected to the hotel, or whether rental apartments are available.

10 Article 333 Swiss Code of Obligations.

11 The collective labour agreement in the Swiss hospitality industry, L-GAV, https://l-gav.ch/.

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Maintenance of the hotel

A hotel property is typically more exposed to wear and tear than a normal residential or office property. This is why it is advisable – even in the case of an asset deal and in addition to structural and technical examinations – to study the minutes of the meetings between the owner and the hotel operator, the board of directors, the general meetings and, if applicable, the condominium owners' association. If major or repeated structural or technical problems have arisen, it is very likely that they will have been an item on the agenda or mentioned at one of these meetings. Particularly sensitive and expensive areas are the wellness and spa facilities, hotel and restaurant kitchens, and building technology in general.

In the case of a lease, the owner should review the list of interfaces[12] in particular. Who is responsible for which parts and which maintenance works, the owner or the lessee? Are there any limits? And does the lease agreement contain an obligation of the lessee to build reserves to cover its future maintenance obligations?

Furniture, fixtures and equipment (FF&E)

The FF&E of a hotel must usually be replaced every seven years, some even more frequently. The ownership of the FF&E is usually clarified in the lease agreement: While the initial procurement has usually been provided by the owner, renewals and replacements are typically the obligation of the operator (who usually must build a reserve fund in cash for this purpose – whose existence must be verified in the due diligence as well). However, it is often not clear who will be the owner of all FF&E at the termination or expiration of the lease agreement. This being said, we recommend diligently verifying the inventory, the list of interfaces and again the lease agreement in this regard.

Ongoing hotel operations

Hotel operations require a variety of external services and contractual relationships with third parties, such as travel agencies, tour operators, online travel agencies (with maybe granted packages and future bookings) and tourism organisations, sales and marketing agencies, hotel associations, suppliers and technical companies for maintenance (such as lifts, heating, spa, etc) or maybe outsourced housekeeping, just to name a few. These contracts, the ongoing charges and their termination options are also important for a hotel transaction, again whether a share deal or an asset deal is intended.

Intellectual property rights

The intellectual property rights of a hotel are very important: Under which brand is the hotel managed? Do franchise agreements exist (see above)? Which software and licences are used for booking, reservation or new digital applications for the guests? And, especially important, who owns the guest data, the operator or the owner? What applies in case of the expiry or termination of the lease or the management agreement? And finally, is compliance with the applicable data protection regulations ensured? All these questions affect the owner in any case as well, regardless of the nature of its acquisition or the legal relationship with the operator.

12 Usually drafted as an appendix to the hotel lease agreement.

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Permits

In general, a hotel in Switzerland requires two types of permits:

- a permit relating to the building: it is issued by the municipality after construction or renovation and allows the hotel to be opened to the public. This relates to fire protection, escape routes, etc, and usually already exists; and
- an actual operating licence: this authorisation is issued to a natural person, typically to the general manager of the hotel.

Are all these authorisations granted and in force? It is advisable to check whether all periodic fire safety tests, regular inspections and food controls, etc have been passed and all reports are available.

Environment, ESG

An increasingly important issue is the compliance with environmental protection regulations and ESG guidelines. Many aspects of a hotel are subject to particular scrutiny: heating systems, electricity and water consumption (eg, laundry), alternative energy sources, waste disposal, certifications, existing or planned sustainability measures, connection to public transport, etc. These aspects can be crucial for the assessment by financing banks and for the calculation of future investment needs.

Economic viability of the hotel

Last but not least, the economic viability of a hotel is relevant to a buyer as well. In order to examine the profitability, the buyer must be familiar with the key figures of hotels, such as revenue per available room, average room rate, occupancy rate, total revenue, capital expenditures, and adjusted/gross operating profit. Other aspects should also be considered. What is the competitive situation in the region? Is a refurbishment needed? Is an extension possible? How is the hotel being operated? What are the fees or the expected rent? Again, the covid-19 pandemic has shown that hotels are not simple fixed assets, but require the owners, in cooperation with the operator, to actively manage them. This is what makes hotels a special and complex, but even more interesting, asset class.

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Appendix 1

About the Authors

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Markus Aeschbacher is a partner at Bratschi Ltd and co-head of the industry group construction, real estate and hotels. For many years he has been practising in construction and real estate law, with a focus on real estate transactions, construction and planning contracts and turnkey and general contractor agreements. His international and national clients predominantly include professional investors, property developers and real estate companies. He represents parties in national and international disputes before civil courts and arbitral tribunals. Markus Aeschbacher graduated from the University of St Gallen (lic iur HSG) and the Georgetown University Law Center in Washington DC (LLM) and holds the degree of Certified Specialist SBA Construction and Real Estate Law.

Thomas Schönenberger

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Thomas Schönenberger has been a partner at Bratschi Ltd since 2008 and served as the firm's chair from 2017 to 2022. He is co-head of the industry group construction, real estate and hotels. Being a Certified Specialist SBA Construction and Real Estate Law since 2014, he advises Swiss and international corporations, predominantly professional investors and real estate companies, in all matters of construction and real estate law. Furthermore, he advises clients in corporate M&A transactions. Admitted to the Swiss Bar in 2001, Thomas Schönenberger is also an experienced litigator in the field of real estate and construction law.

Ion Eglin

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Ion Eglin is a partner at Bratschi Ltd, was heading its industry group construction, real estate and hotels, and is now the firm's chair.

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For many years Ion Eglin has had a strong focus on hospitality law: He advises professional and private investors and hotel owners on hotel transactions and is involved in many national and international hotel development projects. He has a particular expertise in the various types of agreements between hotel owners and hotel operators, such as hotel management agreements, hotel lease agreements, franchise agreements and all auxiliary agreements.

Ion Eglin is a recognised practitioner in *The Legal 500* and *Who's Who Legal*, which classified him in 2022 as 'Thought Leaders Global Elite' in hospitality law.

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