

SWITZERLAND

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BASEL

PRELIMINARY REMARKS

Swiss landlord and tenant law is regulated for the whole of Switzerland by art. 253 et seq. and art. 275 et seq. of the Swiss Code of Obligations (cf. www.admin.ch, Classified Compilation, SR 220). The corresponding statutory regulations are completed by federal law as well as implementing ordinances (especially the ordinance on rent and lease of residential and commercial property, SR 221.2132.11). In addition, there is comprehensive case law established by the Swiss Federal Court and the cantonal courts dealing with rent- and lease-related issues that fall outside the statutory regulations made by the Federal Legislator.

The application of landlord and tenant law lies mainly in the responsibility of the cantons (proceeding regulations, court organisation, etc.).

2 STARTING DATE, TERM, AND EARLY TERMINATION OF THE LEASE

2.1 Lease term

Commercial leases for shopping centres (hereafter called "leases") in Switzerland are normally concluded for fixed terms of either 10, 15 or (in exceptional cases) 20 years. Because of the market situation (large amount of vacancies in commercially rented properties), a majority of commercial tenants try to negotiate a shorter contractual lease term of 5 years.

2.2 Right to terminate the lease

Leases with an indefinite term are only concluded in exceptional cases. The Swiss Code of Obligations provides for a compulsory minimal notice period of 6 months before the end of a contractually agreed termination date or—if the lease agreement does not provide such date—the termination date in accordance with local customs.

Agreements regarding termination of temporary leases are unusual. In specific cases, however, the tenant may be accorded the right to terminate the lease of individual (clearly identified) parts of the premises before the contractual termination date, provided a notice period of at least 6 months is given.

If the tenant returns the rental property to the landlord before the termination date, he may only be released from his contractual obligations if he proposes a reasonable new tenant to the landlord. This new tenant is required to be solvent and willing to accept the same terms and conditions of the lease.

2.3 Options to extend a fixed-term tenancy

In fixed-term lease agreements, renewal rights are regularly stipulated in favour of the tenant in the form of options to extend the tenancy under the same terms and conditions. Usually, one or more options are granted to the tenant to extend the temporary tenancy by 5 years each.

Swiss law does not grant the tenant a statutory right to extend a fixed-term lease. If, however, the parties continue the lease after its expiration date, the lease is converted to an indefinite lease with a statutory right of termination for both parties with a 6-month notice period.

2.4 Early termination

Under certain conditions, Swiss tenancy law provides (in case of both fixed-term and indefinite leases) a right of early termination of the lease. In practice, early termination of a lease agreement relates to delays in payment or insolvency of the tenant.

Furthermore, the lease agreement may include essential grounds entitling both parties to an early termination of the lease.

3 RENT AND RENT ADJUSTMENTS

3.1 Principle

The net rent to be paid by the tenant during the lease term will usually be fixed for the whole contract term. Moreover, restriction clauses on rent adjustments during the lease term are included in the contract (cf. section 3.2).

Since lease agreements for spaces in shopping centres are usually concluded whilst the building is still under construction, it is a common practice to agree that the tenant undertakes to pay the net rent only on completion of the premises to be leased.

Alternatively, the tenant may be granted a rent-free period of between 3 and 6 months. As Swiss tenancy law does not allow for combination of an index rent with a graduated rent (cf. section 3.2), a cautious tenant would insist that the rent-free period be construed not as a waiver of rent but as a separate incentive payment of the landlord to the tenant.

In the case of a fixed-term lease the landlord has no statutory right to make rent adjustments during the lease term. Forms of rent adjustment may be contractually agreed upon, though these are strictly controlled by statute (cf. section 3.2).

3.2 Rent adjustments

Leases in shopping centres are normally indexed: in case of an indexed rent the contractual parties both agree that the rent is periodically adjusted according to the index. For an index clause to be valid, there is a requirement that the lease agreement cannot be terminated—at least by the landlord—for 5 years or more. According to Swiss law, the rent may only be linked to the National Consumer Price Index (CPI) of the Swiss Federal Statistics Office. Further, the jurisdiction of the Swiss Federal Court allows for an agreement that the contractual net rent be considered a minimal rent that must apply under any circumstances, even if the CPI should fall below the original rent amount.

If the lease agreement provides for an index clause, the parties are, in principle, not allowed to agree upon further rent adjustment forms. However, rent adjustment is permitted to take into account any possible additional work carried out by the landlord that may increase the value of the investments. A complete overhaul or refurbishment of the building during the lease term may also lead to rent adjustments. Finally, rent adjustments as a result of implementation of new taxes and dues regulated by public law are permitted.

Instead of an index, the parties may agree upon an annual (maximal) rent increase by a predetermined amount after expiration of a certain period. Graduated rents are only allowed in leases for a term of at least 3 years, whereby it is deemed sufficient for the landlord to be bound to the 3-year contract term. A mixture of graduated rent and indexed rent is not permitted. Again, however, any additional work carried out by the landlord that increases the value of the investment or implementation of new taxes regulated by public law will give rise to an increase.

It is becoming increasingly common (and legally admissible) to agree on a turnover rent. The amount of the percentage of the turnover, upon which the turnover rent is based, depends on the respective industry and normally varies between 3 and 12% of the tenant's gross turnover in that location (as evidenced by the tenant's VAT returns). Agreement of a turnover rent does not require a minimal lease term. There are various ways to define a turnover clause. In the case of shopping centres it is common to agree on both an index rent and a turnover rent, whereby only the higher amount becomes due at a time.

4 TENANT'S RIGHTS OF USE

4.1 Tenant's exclusive rights of use

The tenant only has the right of exclusive use of the interior surfaces described in the lease. The use of exterior surfaces (e.g., for signage, etc.) is only allowed as far as the lease agreement provides for it.

4.2 Tenant's nonexclusive rights of use

The tenant is entitled to nonexclusive use of common areas of the shopping centre (especially the mall). Costs in connection with the operation and maintenance of common areas are transferred to the tenants to the extent to which this is admissible by tenancy law (cf. section 8.1).

5 ASSIGNMENT OF THE LEASE TO A THIRD PARTY AND SUBLETTING

5.1 Assignment of the lease to a third party

Assignment of the lease to a third party requires the written consent of the other party. According to mandatory statutory provision, the landlord may only withhold his consent on substantial grounds (e.g., lack of a new tenant's solvency).

5.2 Subletting

In principle, the tenant has the right to sublet the premises to a third party. According to mandatory statutory provision, the landlord may only withhold his consent to sublet on certain substantial, legally provided grounds.

The term of a subtenancy is limited in time by the term of the main tenancy.

6 REPAIRS AND ALTERATIONS EFFECTED BY THE TENANT/MAINTENANCE DUTIES

6.1 Repairs and alterations by the tenant

The tenant is only permitted to make repairs and alterations to the premises with the written consent of the landlord. If the landlord has given his written approval,

he may—according to pertinent nonmandatory statutory regulation—only demand restoration to the original condition at termination of the lease if this has been specifically agreed upon in writing. If at the time of termination of the lease the rented subject shows a substantial increase in value as a result of tenant's repairs or alterations effected with the landlord's consent, the tenant may demand a reasonable compensation.

In case of leases in shopping centres, the tenant usually undertakes to restore the premises upon termination of the tenancy to their original condition at the request of the landlord. Furthermore, the obligation of the landlord to recompense an increased value added by the tenant (if any) is waived.

6.2 Tenant's fitting out

The tenant's fitting out is usually to be completed prior to the opening date of the shopping centre. The specifications of the tenant's works (fitting out) is to be defined in the lease agreement and clearly show the variations/additions from and to the landlord's specification. The cautious landlord will demand proof of the tenant's financial status and its ability to fund the fit out. It is important to note that if the tenant does not pay the craftsmen he has contracted, they may register a so-called "builder's lien" (in German, *Bauhandwerkerpfandrecht*) on the property of the landlord.

6.3 Signage

The tenant is usually allowed to install signage according to the landlord's specifications. The tenant is allowed to display signs indicating the company name, advertising signs, placards, showcases, posters, etc., but only with the consent of the landlord (in the common parts) and only in places that are designated by the landlord.

6.4 Maintenance

By virtue of mandatory law, the landlord is responsible for the day-to-day maintenance of the premises, i.e., the upkeep of the premises in serviceable condition. The tenant is only in charge of minor maintenance work (such as minor cleaning and reparation work) and maintenance of the fittings and fixtures installed by him. However, the tenant can be given incentive to perform further maintenance duties by granting compensation for the tenant's respective efforts (e.g., in the form of an adequate reduction of the rent).

Costs for minor maintenance work in common areas may be charged to all tenants of the shopping centre by distribution in the context of a service charge by way of a floor area schedule obligation of continuous operation

6.5 Keep open

The tenant undertakes to ensure it will continue to trade from the premises during the whole lease term and to conduct his business during the centre's trading hours. If the tenant fails to meet this obligation, the landlord is entitled to compensation for resulting damage. Moreover, the landlord is entitled to an early termination of the lease under the abovementioned circumstances.

7 INSURANCE

It is commonly agreed that the landlord is to take out a fire insurance policy and a water damage insurance policy, as well as a building third-party liability insurance policy for the shopping centre. All other property or third-party liability related insurances are to be concluded by the tenant. The tenant is regularly required to take out a third-party liability insurance policy for self-induced damage to the premises. Furthermore, the tenant usually bears the risk of glass breakage.

8 ADDITIONAL COSTS/MARKETING/ TENANTS ASSOCIATIONS

8.1 Additional costs

Additional costs for the premises (especially heating, hot water, etc.) as well as common parts of the centre (cleaning, heating, hot and cold water, air conditioning, electricity, security facilities and controlling, drainage and disposal, etc.) have to be paid pro rata by the tenant. Expenditures of the landlord or third parties are only chargeable to the tenant if they are in connection with the use of the premises. Costs not incurred in connection with the lease (e.g., impersonal taxes) are not chargeable to the tenant. Furthermore, services performed by the landlord in connection with his maintenance duties (e.g., repair and renewal of facilities) may not be charged to the tenant.

These additional costs, according to Swiss tenancy law, are only chargeable to the tenant if they are specified clearly and in detail as additional costs in the lease agreement. Because of their importance, special attention has to be paid to the regulation of additional costs in the lease agreement. The transfer of additional costs to tenants of the shopping centre has to be effected according to an appropriate floor area schedule (considering the area occupied by the premises in square metres).

For the settlement of these specified additional costs, lease agreements in most cases provide for payments on account (advance payments) by the tenant. The landlord is allowed to charge only additional costs that are actually incurred and must, therefore, reimburse the tenant for amounts higher than the actual costs. This will be dealt with by way of reconciliation at the end of the appropriate accounting period.

8.2 Promotions and marketing/tenants associations

In the event that the landlord decides to establish in accordance with the shopping centre's tenants a tenants association or a joint advertising arrangement,

it is common that individual tenants are obligated under the lease agreement to join this association or the joint advertising arrangement and to attend respective meetings and share corresponding costs to be charged by reference to the floor area occupied (excluding storage). The same principle applies to distribution of the costs of advertising, etc.