



ISSUES RELATING TO COMMERCIAL LEASING

SWITZERLAND Pestalozzi

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1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.

The creation or assignment of real estate leases is not subject to any national or local taxes. This is in contrast to the transfer of title in real estate, which triggers cantonal and communal transfer taxes.

When leasing real estate, the tenant is not subject to any particular taxes payable on the rent. The landlord has to pay ordinary gains on his gains from business leases or income taxes on the rent; in certain instances, he may opt for VAT.

2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).

The Swiss Code of Obligations (CO) does not limit the maximum term of a lease. It is allowed to conclude lease agreements for a very long duration, for instance for the lifetime of one of the parties or for 25 years. On the other hand the "eternal" lease is null and void under Swiss law and the particular circumstances of each individual case are decisive for the question whether the parties enter into excessively long commitments.

Pursuant to the CO, lease agreements may be concluded either for an indefinite period of time or for a fixed term. Since indefinite leases do not determine the duration of the agreement in advance and since they can be terminated upon a termination period of usually six or twelve months, the length of such agreements is no issue. In the case of fixed term leases, the

agreement is often concluded for the duration of five to ten years, sometimes for 20 years and more, with one or several optional or automatic renewal periods at the end of the initial term.

3. Describe any laws requiring landlords to allow a tenant to renew its lease.

A tenant may request the extension of a lease if the termination results in an undue hardship that is not justified by the interests of the landlord. In the case of commercial leases, the practice acknowledges such a hardship only in severe cases, in particular if the termination endangers the existence of the tenant's business. The extension of a commercial lease is limited to six years, that of a residential lease to four years. Within this limit, at most two extensions may be granted.

Any extension is excluded if a tenant is in arrears with the payment of rent, in the case of serious violations of a tenant's obligations of care and consideration, in the case of a tenant's bankruptcy, and for leases that explicitly have been concluded for a limited period of time.

4. Describe any restrictions on rent that may be charged for to a tenant.

A landlord may not charge a tenant for abusive rent. A rent is considered abusive if it results in excessive returns from the leased object or if it is based on an obviously excessive purchase price.

As a general rule, under the following circumstances a rent is not considered abusive: (a) if it lies within the range of rents that are customary in the concerned area, (b) if it is based on increased costs or additional benefits provided for by the landlord, (c) if, in the case of relatively new buildings, it lies in the range of a cost-covering gross return, (d) if it only serves to compensate for a previously granted lower rent based on deferred market conform financing costs and if it is set out in a payment plan that was disclosed to the tenant in advance, (e) if it merely compensates a cost increase with regard to the risk bearing capital, (f) if it does not go beyond the extent recommended by landlord and tenant associations or organizations safeguarding similar interests in their general agreements.

5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.

A tenant may terminate the lease with immediate effect if the landlord is in default and thereby excludes or seriously impacts the tenant from using the leased premises. Such defaults are given for instance if the landlord does not remedy severe deficiencies of the leased object.

Also, both parties may extraordinarily terminate the lease for cause. In this case, the terminating party must observe the legal notice period. Each party has this right if valid reasons make the continuation of the agreement unreasonable.

Further, a tenant may return the leased object to the landlord prior to the end of the contractual term and without observing the notice period. In this case, the tenant must present to the landlord another reasonable tenant who is solvent and willing to enter into the lease on identical terms.

6. Describe any laws allowing tenants to assign or sublease without landlord's consent.

Both the assignment and the sublease of real estate by the tenant are subject to the landlord's consent. The landlord, however, may withhold its consent for particular reasons only (see next question).

7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.

Even though subleases and assignments of leases are subject to the landlords' consent, the landlords may withhold their consent for particular reasons only.

In the case of an assignment, the landlord may withhold its consent for valid reasons only. Valid reasons are given for instance if the assignee is not solvent or intends to use the premises in a way that violates the lease agreement.

In the case of a sublease, the landlord may withhold its consent only if (a) the tenant does not disclose the terms and conditions of the sublease, (b) the terms and conditions of the sublease are abusive compared to the main lease, or (c) the sublease results in significant disadvantages to the tenant.

8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?

The enforcement in general and the eviction of tenants in particular are governed by the specific procedural provisions of the CO, the Federal Statute on Debt Enforcement and Bankruptcy and by the federal and cantonal laws concerning the execution.

The landlord seeking to evict a tenant must first file with the competent local court a substantiated request. Following the court's order to the tenant to leave the premises and if the tenant still refuses to do so, the landlord must file with the enforcement authority in charge the legally binding order together with a request for eviction. The authority in charge then executes the eviction.

Such a proceeding may take about four weeks from filing the first request with the court until the actual eviction of the tenant.

9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?

A tenant may pledge leasehold interests as security for financing provided that the lease agreement does not explicitly exclude such an assignment. Lease agreements usually do not exclude the assignment of leasehold interests. To validly pledge leasehold interests, a written pledge agreement is required.

10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.

Landlords must deposit all securities received from tenants on separate bank accounts. It is not sufficient to deposit these securities on one account that is separate from the landlord's

accounts. Rather, landlords must deposit the security deposits from each tenant on a particular bank account in the name of the concerned tenant. Thus, security deposits must be strictly separated by tenants.

11. Describe any required statutory or other legal disclosures to be made to all tenants.

If, at the end of the previous rental relationship, a report of return has been drawn up, the tenant may request disclosure of such report. This enables the tenant to identify previous deficiencies of the leased premises and to determine whether or not the landlord did remedy them. Also, the tenant may request disclosure of the previous rent.

12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.

The rent itself is not subject to a particular tax. Landlords may not collect from tenants anything else than the agreed-upon rent and ancillary costs.

13. Describe any limitations on the ability of landlords to exercise self-help.

As a basic rule, exercising self-help is allowed only under extraordinary circumstances, in particular in the case of urgencies where it is not justified to take legal steps by involving the competent authorities.

Under normal circumstances, landlords must enforce their claims against tenants by taking the appropriate legal steps. This applies for instance to the enforcement of claims for rent, to the prevention of misuse of the leased premises and to the eviction of the leased premises.

14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.

A rent may be staggered or linked to a particular index. Either case must be expressly stated in the lease agreement, both cases may not be combined in the same lease agreement. In addition, such clauses must comply with the following requirements.

The rent may only follow an index if it is based on the official Swiss Index of Consumer Prices and if the agreement has a minimum term of five years. A staggered rent requires that the rent is increased once a year at most, that the agreement states the amount of increase in Swiss Francs and that the agreement has a minimum term of three years. In both cases, only the landlord is bound to the minimum terms: the parties may agree that the tenant has the right to terminate the agreement earlier.

In addition, a landlord may at any time increase the rent as of the next possible termination date. For this purpose, he must notify and justify the increase of rent to the tenant at least ten days before the beginning of the notice period.

In any of these cases, the landlord must use a particular official form to announce the increase. If the landlord does not use the said form, then the increase of rent is null and void.

15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.

If the tenant is in default with the payment of rent or ancillary costs, the landlord may in writing set an additional payment period of at least 30 days, combined with the threat of termination upon expiration of this period. If the tenant does not pay within the said period, the landlord may terminate the lease upon 30 days notice by the end of a calendar month.

16. Describe any formal requirements for the execution of a lease.

Lease agreements do not require any specific form. Oral agreements are valid. Lease agreement may also be entered into by way of implied behavior. In practice, most real estate lease agreements are set out in writing, frequently on a form that is supplemented to the extent necessary.

If a landlord wants to exercise certain rights under a lease agreement, he must comply with certain formal requirements. In particular, the landlord must use an official form approved by the authorities of the canton where the leased object is located. This applies to any increase of the rent (including indexed and staggered rents) as well as to the termination of the lease by the tenant.

17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.

Basically, a lease is only enforceable among the parties thereto. To make a lease enforceable against third parties, an annotation of the lease in the land register is required. Such annotations are regularly made in the case of medium and long term lease agreements.

18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?

A lease agreement does not restrict the landlord's right to transfer the ownership in the concerned property to a new owner.

If such a transfer occurs during the term of a lease or if, during the term of lease, the landlord disposes of the property in a debt enforcement or bankruptcy proceeding, then the rental relationship is transferred to the acquirer together with the ownership of the property.

Such transfers do not directly affect the tenant's rights or obligations. However, if the new owner demonstrates urgent own needs (including urgent needs of relatives and in-laws), he may terminate the lease upon the legal notice period (in the case of commercial leases: six months) and by the next legal termination date (i.e. as per the end of a three months rental period, subject to different local custom). The acquirer has no such termination right if the lease is annotated in the land register.