

Real Estate

Contributing editor
Joseph Philip Forte



2018

GETTING THE
DEAL THROUGH

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Real Estate 2018

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Austria

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General

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

Austria has a civil law system. Private law is primarily governed by the Austrian Civil Code (ABGB), which codifies the basic principles of private law such as transfer of ownership, forms of representation or liability. Besides the ABGB, there are more specialised laws, such as the Act on Tenancy Law (MRG), the Consumer Protection Law and the Austrian Commercial Code. Property law and contractual law are national in scope, as are the laws regarding the Land Register. However, certain other legal areas that can be of importance to real estate projects (such as construction law, planning law and laws regarding the purchase of real estate by foreigners) differ for each province.

Judicial precedent law is not absolutely binding in Austria. The principle of legal certainty requires, however, that identical cases are decided identically. Case law is not considered an official legal source in Austria, but in general courts tend to follow the prevailing precedents of the Austrian Supreme Court.

In principle, oral contracts are enforceable. However, most rights relating to real property (eg, ownership), can be acquired only upon execution of a written deed and its registration in the Land Register.

The Austrian legal system allows for several forms of injunctions to warrant temporary legal protections.

2 Land records

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Austrian real property law is based on the registration principle (ie, real property is registered in the Land Register). Rights with respect to real estate, such as ownership and mortgages, are recorded in the land title register. Subject to certain exemptions, ownership and other property rights can be acquired only by registration in the Land Register. To obtain ownership of real property, an obligation (eg, a purchase agreement) and an act of disposal (ie, the entry in the Land Register) are required. Title transfer deeds are deposited at the Land Register. Therefore, parties often conclude a transaction with two contracts: a small contract governing the title transfer, which is deposited in the Land Register, and a comprehensive contract governing all the details of the transaction.

The Land Register is available online and can be accessed by anyone for a small charge. Generally, the 'trust principle' applies to entries in the Land Register. The facts registered in the Land Register are deemed to be correct. As a result, entries in the Land Register are to be regarded as valid, whereas nonexistent entries are seen as without consequence for a real property. This means that the bona fide purchaser still acquires ownership of a real property even if the seller is wrongfully entered in the Land Register as the owner, providing that the legal transaction involved valuable consideration. If circumstances exist that, on proper notice, give rise to doubts as to the correctness of the Land Register status, the purchaser is under an obligation to carry out an examination; failure to do so invalidates the good faith. If a

suspicion thus arises that the actual legal situation is not depicted correctly in the Land Register, it is not possible to apply the trust principle.

Mortgages have to be registered in the Land Register to become effective. A lease is a consensual contract (ie, no registration in the Land Register is required). Registration of a lease contract is nevertheless possible.

3 Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

To constitute property rights on real estate an application must be filed with the competent Land Register court. The application does not have to be filed by a lawyer, although it is highly recommended to take legal advice, owing to the strict formal requirements of the Land Register legislation. In addition to that application, several documents are required, eg, the purchase agreement with the signatures of all contracting parties certified by either a court or notary.

While European Union citizens generally enjoy equal rights as residents, mandatory approval is required for a third-country citizen to purchase a right to a property or an apartment. However, all nine Austrian provinces have established different regulations under which the acquisition of real estate, and certain rights with respect to real estate are subject to the approval of land transfer authorities. The restrictions imposed vary from province to province and mainly depend on how the real estate is zoned.

The application fee is €44, rising to €62 if not paid electronically. Additionally, 1.1 per cent of the property value (which usually equals the purchase price) has to be paid to register the new ownership in the Land Register. If the purchase is financed via a loan, an additional fee, amounting to 1.2 per cent of the total mortgage, is required for entering the mortgage in the Land Register along with the property.

Real estate transfer tax amounts to 3.5 per cent (in principle, there are certain exemptions) of the property value or purchase price. Although both the seller and the purchaser are liable for the payment of the tax, it is common practice for the purchaser to pay. Often, the actual payment of the tax is done by an escrow agent involved in the transaction.

A registration in the Land Register (including the corresponding fees) can be avoided if the transaction is structured as share deal. However, for acquisitions from 1 January 2016 onwards, the transfer or unification of at least 95 per cent of the shares in a company holding Austrian real estate is a taxable transaction, triggering a 0.5 per cent real estate transfer tax, based on the land value.

4 Foreign owners and tenants

What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction?

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Mandatory approval is required if a third-country citizen (ie, a non-EU citizen) intends to acquire a right to a property or an apartment. The provinces have jurisdiction in a matter of legislation and enforcement over this field. Hence, all nine Austrian provinces have established regulations under which the acquisition of real estate, and certain

rights with respect to real estate, by foreigners (and, in some cases, by Austrians) are subject to the approval of land transfer authorities.

The responsible authorities are either the provincial authority or the district administration authority, depending on where the property is located. The documents required for approval include:

- a request of approval;
- a contract or draft contract;
- a declaration on the use of the property;
- the surveyor's plan;
- an up-to-date abstract from the land register; and
- the prospective purchaser's passport.

Differences exist between the individual federal provinces with regard to the depth of the investigation into the indirect participation of foreign nationals. If the purchaser is a legal entity, a current extract from the company register, the company deed and a trade licence are also required.

If the purchaser is an association, an extract from the register of associations and the association statutes, as well as proofs of citizenship for the members of the association's board have to be filed. In addition to that, proof of income has to be shown upon request by the respective authority.

Fees can differ from province to province.

5 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

After payment of all taxes, foreign investors are free to repatriate profits from Austria. There are no exchange control limitations with respect to real property. Apart from certain embargo provisions aimed at combatting money laundering and terrorism, all domestic and foreign investors are treated equally.

6 Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Austria's civil law system has two types of liabilities: claims based on a breach of contract and claims based on tort. In both cases, the injuring party owes the injured party compensation for the endured damage but no punitive damages. As a principle, only unlawful behaviour constitutes liability. However, strict liability applies in certain cases.

A special liability is, for example, set forth in section 1319 ABGB, pursuant to which the possessor of a building (a term that is broadly interpreted by Austrian courts) is liable for damage caused by a collapse of the building or parts thereof coming off (eg, falling roof tiles). Contrary to the general principles of Austrian tort law, in these cases the owner of the building has to prove that he or she has done everything (acting reasonably) to avert danger, reversing the usual onus of proof.

If real estate is contaminated, authorities might require the landowner to remediate the contaminated land. In this case, the landowner might have warranty or tort claims against the seller of the real estate or the person responsible to the contamination (respective warranty provisions are common practice in real estate purchase agreements).

7 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Private liability can be avoided by incorporating an Austrian legal entity with limited liability, such as a GmbH or AG (see question 15). Furthermore, it is recommended to take out various insurance policies to minimise the investor's risk (eg, building insurance or environmental liability insurance). Regarding environmental risks, a register of contaminated sites is available online. Since not all contaminations are listed, checking this register does not provide sufficient protection.

Legal, tax and technical due diligence and properly drafted transaction documentation may also reduce the purchaser's risk.

8 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Parties to a transaction may choose any governing law. However, rights to Austrian real property, including the form of contracts related to real property, must be governed by Austrian law. Ancillary provisions of the contract may be governed by any law.

9 Jurisdiction

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Austrian civil courts have exclusive jurisdiction over in rem rights relating to Austrian real property.

District courts have jurisdiction over conflicts concerning rental or leasing contracts. In some municipalities, a claimant may also appeal to one of the regional mediation bodies before filing a claim. The mediation bodies are free of charge and their decision is binding if none of the parties appeals to the district court within four weeks.

Disputes concerning the purchase of real estate belong to the regional courts. Commercial courts have jurisdiction over commercial matters (eg, conflicts concerning the purchase of a company). Parties may also opt for the competence of an arbitral committee.

Austrian law acknowledges the legal capacity of foreign persons. Accordingly, it is possible for foreigners to file a claim and enforce remedies. However, courts may require an Austrian address for service and impose a security deposit from foreign plaintiffs.

10 Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Austrian tenancy law is governed by the ABGB and the MRG. Three categories of lease agreements can be distinguished, namely:

- lease agreements that are subject to the MRG in their entirety ('full scope');
- lease agreements that are only subject to the MRG in part ('partial scope'); and
- lease agreements that are not subject to the MRG (these are exclusively subject to the ABGB).

Simplified lease contracts for rented apartments in a building constructed before 1 July 1953 and rented freehold apartments in a building constructed before 9 May 1945 are subject to the strictest – 'full scope' – regulation (eg, the rental fee is regulated and the landlord must not terminate the lease contract without a reason).

The MRG stipulates detailed requirements in respect of the basic features of lease agreements, in particular with regards to:

- rent calculation;
- operational costs;
- maintenance;
- terms of agreement;
- notices of termination;
- protection against eviction; and
- contractual deviations, which may only be affected in the tenant's favour.

Most other lease contracts, including contracts on commercial properties, are only partly regulated – 'partial scope'. The most notable restriction, is that the landlord's right to terminate a lease contract is limited.

Lease contracts on holiday flats, apartments located in a building that is not comprised of more than two rental objects, and some other exceptional cases are the least regulated.

11 Planning and land use

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Construction has to be in accordance with zoning and development plans. Access to these documents is granted at municipal offices. In addition to this, building permits are required. Every province in Austria has its own building code. The municipality's mayor is, generally, the competent authority for granting these permissions. Usually, construction negotiations are scheduled, during which neighbours, among others, can raise objections if they believe their subjective public rights are violated (eg, regarding the distance of the construction from the neighbour's property).

Preservation orders can constitute a further restriction to planned construction in Austria.

12 Government appropriation of real estate

Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

Legal instruments of expropriation exist in Austria. However, they are subject to strict requirements, as property itself is protected by the constitution. Foreigners can rely on this right as well. Expropriation is permitted only if it serves the public interest. Therefore, specific need, suitability of the object to cover that need and impossibility of any other measures are mandatory. In addition, expropriation has to comply with the principle of proportionality and there are no exemptions to the payment of compensation, as an appropriation without compensation violates the Austrian constitution. Further details are governed by laws on expropriations in specific cases (eg, for railway construction). Usually the owner of the real estate is granted adequate (although rather low) compensation. Mutual agreements between the state and the landowner are possible and common in practice.

13 Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

The Austria Criminal Code provides measures to forfeit real estate property. A criminal court can seize property in order to prevent an illegal activity from happening. Furthermore the Austrian law provides the option for the criminal court to forfeit assets gained by criminal acts.

14 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The Insolvency Code contains provisions for bankruptcy proceedings as well as reorganisation proceedings, the latter being either conducted with a liquidator or with self-administration. Illiquidity and over-indebtedness are the main legal requirements to initiate an insolvency procedure. The motion can be prepared by either the debtor itself or its creditors. A delayed insolvency application can make the director and, under certain circumstances, even the shareholders of a company personally liable for damages. The opening of the proceedings is published by the court and the debtor loses its power of disposition. Thenceforward, the debtor cannot make any payments with debt-discharging effect. During the insolvency procedure creditors are treated differently, depending on their state of their claims (eg, mortgage creditors enjoy a privileged position compared with subordinate creditors).

Investment vehicles**15 Investment entities**

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Austrian commercial law recognises following legal entities, which are also available to foreigners:

- General partnership (OG): shareholders, but not the partnership, face full liability and pay income tax.
- Limited partnership (KG): similar to an OG; has at least one shareholder; the shareholder(s) only has limited liability.
- Private limited company (GmbH): shareholders have limited liability; minimum share capital of €35,000.
- Corporation: limited liability of shareholders; minimum share capital of €75,000; can be a joint-stock company.

Less commonly used forms include:

- the *Societas Europaea*;
- silent partnerships;
- cooperatives; and
- those of other EU member states that can exist in Austria (eg, the Irish limited company).

16 Foreign investors

What forms of entity do foreign investors customarily use in your jurisdiction?

In general, foreign investors prefer private limited companies, mainly for two reasons: limited liability for the investors as corporate assets are separate from personal and low formality compared with the joint-stock company, where, for example, a supervisory board is compulsory. In real estate, single-purpose entities often take the form of a 'GmbH & Co OG' or a 'GmbH & Co KG'. Both are partnerships, in which the partners who have unlimited liability are private limited companies. Accordingly, these forms combine the flexibility of partnerships with limited liability.

17 Organisational formalities

What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

Registration with the Commercial Register is a mandatory requirement for creating the above-mentioned entities. In addition, a partnership agreement is required for capital companies in the form of a notarial deed. Private limited and joint-stock companies can be established by a single founder. Minimum registered capital for a private limited company is €35,000 (it is possible to make use of 'founder privilege', which reduces the required capital to €10,000 in the beginning) and €70,000 for joint-stock companies. At least half of this amount has to be paid into the bank account of the company.

A private limited or joint-stock company needs to hold a shareholders meeting at least once a year. Furthermore, corporations and partnerships that have no individual as a partner with unlimited liability are subject to reporting duties, namely they are obliged to file an annual financial statement to the commercial court of their registered seat within nine months after the balance sheet date (eg, if the balance sheet date is 31 December, the annual financial statements have to be disclosed before the following 30 September at the latest). If disclosure of the annual financial statements is delayed, the register courts will order – by way of automatically generated court orders – a fine, which both the company and its executive bodies are subject to (ie, if a GmbH with three managing directors fails to comply with the disclosure duties, this will trigger four fines). If the disclosure duties are not complied with further fines can be imposed.

The corporation tax for private limited and joint-stock companies is 25 per cent, while capital gains tax has been 27,5 per cent since the beginning of 2016. That results in a tax load of 45,625 per cent. Compared with that, partners of a general partnership and a general partner of a limited partnership are taxed on a personal level.

Austria's taxation system is subject to progressive rates. The top taxation rate is 55 per cent (which will be reduced to 50 per cent in 2020).

There are no special taxes imposed on foreign entities. Individuals planning to reside in and conduct business in Austria, except for EU nationals, need a residency permit.

Acquisitions and leases

18 Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Austrian law recognises freehold as permanent unrestricted ownership and leasehold as tenancy for a definite or indefinite period of time, which may involve a right to derive profit from leased property.

Austrian property law recognises the principle of *superficies solo cedit*: the owner of a plot of land is automatically the owner of the buildings erected on it. This principle of the inseparability of land and building ownership is overruled by two exceptions: the existence of a superstructure (building on third-party land) and the building right.

A superstructure is a building on third-party land, built without the intention to remain infinitely. It is popular owing to tax-related aspects, but rarely used as collateral, among other things because it is not registered in the Land Register.

The building right is the right to build on foreign land owing to a contract between the landlord and the owner of the building. After a stipulated period of time, the landlord becomes owner of the building.

Austrian legislation recognises two types of easements: easement in rem and in personam. The former benefits all owners of a particular real property to which an easement is created and survives transfer of such real property. The latter is created solely for the benefit of a particular person.

19 Pre-contract

Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?

There are two forms of binding pre-contracts mentioned in the ABGB: a *Vorvertrag* (article 936 ABGB) is a binding contract that enables a party to sue the other party for entering into the main agreement, and a *Punktation* (article 885 ABGB) is a contract that already includes the main rights and duties the parties wish to create. If the parties fail to enter into a (more detailed) main contract, the rights and duties included in the *Punktation* become enforceable.

Practice, however, has invented several new types of contract not provided by statutory law. Especially in larger transactions and when a due diligence will be conducted, letters of intent are commonly used. Depending on their content, they can be either binding or nonbinding, but the Austrian Supreme Court typically considers them as nonbinding. Parties can agree upon a contractual penalty, but unreasonable break-up fees may be reduced by the court.

20 Contract of sale

What are typical provisions in a contract of sale?

The sale contract must be agreed in writing and includes, at the least, a description of the transferred property (property type, cadastral area and plot identification number) and the price (or the price calculation method). Representations and warranties are not mandatory but highly advisable. Typically, the seller gives at least representations and

warranties regarding ownership, third-party claims, encumbrances and compliance with relevant building regulations. It is common practice to also include a provision containing the specification of the property and the seller's express consent to the registration of the purchaser as new owner of the property. Often, real estate transactions include escrow payment mechanisms, which can be conducted by the advising lawyer.

21 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Liability in the case of contaminated properties is regulated by several acts, the most important ones being the Water Rights Act (WRG) and the Waste Management Act (AWG). Both acts stipulate a primary responsibility of the actual polluter and a subsidiary responsibility of the property owner.

The subsidiary liability of the property owner passes to the legal successors if the contamination was known, or should have been known to the acquirer in the case of reasonable care having been taken. Both the WRG and the AWG nonetheless limit the liability of the property owner to contaminations that occurred before 1 July 1990, unless the owner explicitly allowed the respective contamination and has benefited in the form of consideration for the use of his property.

Contaminations may entitle the purchaser to claim damages from the seller. The Austrian High Court, however, has ruled in several decisions that the purchaser of a former industrial site must expect certain contaminations and thus cannot claim damages for 'average' contaminations. To prevent disputes on what kind of contaminations were to be expected, it is highly advisable to include respective warranty provisions in the sales contract.

22 Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

With respect to existing leases, sellers usually grant representations concerning the:

- rent roll;
- validity and enforceability of existing lease agreements;
- existence of all agreed cash deposits or bank guarantees;
- nonexistence of any defaults under the lease agreements;
- nonexistence of any pending or threatened terminations;
- nonexistence of (pending or threatened) litigation regarding the lease agreements;
- compliance with tenant improvements;
- correctness of past invoices for incidental costs; and
- payment of all stamp duties.

Between signing and closing, sellers usually covenant to not execute new leases or amend or terminate existing leases without the buyer's consent or to not carry out any unforeseen tenant improvements or other major investments without the buyer's consent.

Brokerage agreements are separate from lease agreements and are not transferred together with the property unless the parties agree otherwise.

Estoppel certificates from tenants are not common or required as a condition to the obligation of the buyer to close under a contract of sale.

23 Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease is not subordinate to a security instrument. When a debtor fails to repay the debt and the debtor's property, which includes leases, is sold, the new owner becomes the landlord. As a fundamental rule, the Austrian legislature provides that the purchaser of a property has to take over existing tenancy relationships (article 1120 ABGB). This applies even if the purchaser had no knowledge of the existence of the lease agreement. He or she enters into the existing tenancy relationship with all rights and obligations. However, both the purchaser and the tenant cease to be bound by fixed terms or agreed waivers of termination. Thus they are both entitled to terminate the tenancy adhering to the statutory period of notice.

Exceptions to this fundamental rule exist when the tenancy relationship was registered in the Land Register (the landlord is bound by the term of the tenancy relationship as entered in the Land Register) or in cases where the full scope of the Austrian Tenancy Act applies. (See question 10.)

24 Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

Security deposits are commonly used to secure future claims against the tenant. There are no statutory regulations with respect to the permitted amount of such deposits. Court rulings suggest an amount of not more than six months' gross rent as the upper limit; three months is a common limit.

If the security is provided in cash, the landlord is obliged to put the money in a savings account and return it to the tenant immediately after the contract has expired, including the interest earned. Often, the deposit is not provided in cash, but in the form of a bank guarantee. We recommend potential purchasers examine whether existing bank guarantees are assignable to a new owner (if not, the tenant should be contractually obliged to issue a new bank guarantee in favour of the new owner).

The majority of tenancy agreements are subject to indexation. Within the full scope of the Austrian Tenancy Act (see question 10), statutory law stipulates precise rules for the value adjustment, which can only be linked to the consumer price index published by Statistics Austria. If the full scope of the Tenancy Act does not apply, parties are free to decide upon the type, scope and quality of the indexation clause.

Threshold clauses with a 3 per cent to 5 per cent threshold are customary. In any event, the indexation clause must be explicitly agreed.

25 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Facts registered in the Land Register are deemed to be correct. Thus a purchaser with good faith acquires ownership of real estate, even if the seller is wrongfully registered as the owner in the Land Register. If circumstances exist that on proper notice lead to doubts as to the correctness of the Land Register, the purchaser has to carry out an examination on the ownership of the real estate. Failure to do so invalidates the good faith.

The rank of priority of securities is defined by the order of their registration in the Land Register (previously registered securities having a higher rank and priority if the security is realised).

Governmental confirmation can generally be obtained by viewing the Land Register. Zoning reports are generally available online and can be reviewed with very little time and effort. Legal opinions are a possible instrument in Austrian law but not customarily used with regard to the legal use and occupancy of real estate.

26 Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Regarding environmental risks, it is recommended to review the register of contaminated sites available online. However, because not all contaminations are listed, this register does not provide sufficient protection.

Engineering and environmental reviews are advisable, especially in large transactions or in transactions where difficulties in this regard are to be expected (eg, the purchase of a former industrial site). Standard representations regarding the technical condition of the transferred buildings as well as representations and indemnities regarding environmental matters are customary. Environmental liability insurance is available.

27 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lease agreements are usually reviewed by lawyers and tax consultants; the business side is often covered by the investor itself. The legal analysis is based, among other things, on:

- an examination of the scope of the Austrian Tenancy Act (see question 10);
- the right to rent increases and change of control clauses;
- rent indexation;
- lease termination clauses;
- payment of stamp duties; and
- maintenance obligations by the landlord.

Whether property and facility management agreements are transferred to the new owner depends on the structure of the deal (asset or share deal) and possible change of control clauses in the respective agreements.

28 Other agreements

What other agreements does a lawyer customarily review?

- Agreements establishing pre-emption rights;
- mortgage and other financing agreements;
- easement agreements authorising a specific person (easement in personam) or an owner of a particular real property (easement in rem) to use the land (eg, a right to pass through the land);
- utility supply agreements;
- property insurance agreements;
- articles of association and other corporate documents in the case of a share deal; and
- brokerage agreements.

29 Closing preparations

How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

Lawyers usually prepare a detailed closing checklist to verify whether all closing conditions and deliverables have been met. Typically, lawyers check whether all required corporate certificates, extracts from the Commercial Register and deeds of ownership have been presented, whether all existing mortgages and other charges have been properly released and whether all the relevant agreements and project and design documentation have been delivered. Proration of costs and revenues from the property as of the closing date is also customary.

In an asset deal, signing and closing usually happen at the same time.

30 Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

The parties' signatures on the purchase agreement must be verified by a notary public. Also, mortgage deed signatures are to be notarised. Except for this, no government representative is required.

31 Contract breach

What are the remedies for breach of a contract to sell or finance real estate?

Usually the parties to a purchase agreement or finance agreement stipulate the remedies for a breach of contract and do not rely on statutory law in this regard. Usually a breach of contract entitles the injured party to terminate the contract or request compensation for damage (payment of a contractual penalty is a possible consequence as well, but less frequently used in this regard). Often, different remedies are set forth for different types and severity of breaches.

32 Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

Depending on its type and gravity, a breach of lease terms may entitle the injured party to claim damages, termination of the lease contract or both (even if the contract is nonredeemable); the tenant may also be entitled to pay less rent until the breach is cured. Additionally, a landlord has statutory retention and pledge rights over tenants' assets located in the leased premises to secure claims for unpaid rent. Tenants using premises after the termination of the lease may be evicted through customary judicial proceedings.

The remedies for commercial leases (which in Austria are understood as leases of pre-existing businesses or farms) and residential leases vary only slightly. Most importantly, as commercial leases often do not fall under the scope of the MRG, the landlord has more freedom (eg, regarding termination of the lease).

Financing**33 Secured lending**

Discuss the types of real estate security instruments available to lenders in your jurisdiction.

Lenders usually require a mortgage on the financed real estate. Such mortgage is established through (notarised) signature of a mortgage deed and registration of the mortgage in the Land Register. Different types of mortgages exist: a fixed-amount mortgage secures a numerically defined liability (plus ancillary charges and interest for up to three years), while a maximum-amount mortgage secures all receivables under a contractual relationship up to a maximum amount.

In addition to that, lenders often require pledging or assignment for securities of shares, receivables, rights under property purchase agreements, bank accounts and insurance certificates.

34 Leasehold financing

Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In Austrian law, it is possible, but rare, to finance ground or head leases. According to our experience, it might be very difficult to find a bank doing this kind of financing.

35 Form of security

What is the method of creating and perfecting a security interest in real estate?

A mortgage is established through signature of a mortgage deed and registration of the mortgage in the Land Register by filing the deed with the documents archive. The signature on the mortgage deed has to be notarised.

In some financings, already registered mortgages are taken over by the financing party. A registered mortgage is not automatically cancelled with the repayment of the secured debt; thus 'debtless' mortgages may arise, of which the owner can dispose. However, the entry of a new creditor for the already registered mortgage would trigger the same costs as a new mortgage entry. Thus, in order to avoid costs, taking over existing mortgages is usually only done by taking over the secured obligation. The old creditor remains creditor in relation to the debtor (and remains registered in the Land Register), but he or she undertakes to hold debt and mortgage in trust for the new creditor. The credit risk is borne by the new creditor.

36 Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?

Banks usually require real property valuations for granting a loan. Valuations are prepared either by in-house valuation departments of the banks or third-party professionals, who may, but need not, be registered with the relevant state authorities.

37 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Lenders from another jurisdiction can provide loans secured by Austrian real property collateral under the same conditions and ramifications as Austrian lenders. This is, of course, subject to any banking or financial services regulations that may be applicable.

38 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set (with reference to Libor, central bank rates, etc)? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are usually set with reference to Euribor; references to Libor are possible, but usually avoided.

If the interest rate is very high, the loan agreement might be considered as *contra bonos mores* and thus be void. If the financing party exploits the improvidence, dilemma situation, lack of intellectual power, inexperience or disconcertion of the other party to stipulate an unreasonably high interest rate, the contract is void in any case. However, it is difficult to examine what interest is still legally permissible. Court decisions on this question do not name a fixed maximum rate, but explain that the maximum rate depends on the circumstances of the financing (eg, the securities available), the other terms of the contract (eg, the duration of the loan) and the market situation; thus they may vary by the type of lender or borrower.

Fees and lender costs are also taken into consideration when deciding whether an interest rate is *contra bonos mores*.

There are no fines for impermissible rates. If an interest rate is too high, it is void and a reduced interest rate becomes applicable. These consequences do not differ in general for different types of lenders.

39 Loan default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Secured creditors can enforce a mortgage or pledge when the underlying secured claim is not duly and timely paid. To realise the mortgage, an execution title from the district court is required, while non-judicial realisation is available for pledges only on moveables.

40 Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

If the amount recovered in the foreclosure is less than the outstanding loan balance, the deficiency between both amounts is still outstanding and accordingly has to be paid by the lender. This obligation by the lender is similar to any other obligation.

41 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

In Austrian law, the establishment of a pledge requires not only a pledge agreement but also the performance of the required act of publicity, which grants the lender possession or similar protection. The following acts of publicity are most commonly used:

- book entry if the receivables are recorded in the pledgor's books;
- notification of third-party debtors (eg, tenants); and
- handover in the case of corporeal property.

42 Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Security documents may only provide recourse to specified assets (ie, it is not possible to grant a pledge over 'all assets').

43 Cash management and reserves

Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

Lenders usually require that all cash traffic of the borrower is directed through bank accounts opened with that lender. Similarly, lenders often demand lock-box mechanisms linked to specific financial covenants or other triggers.

44 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Several different types of credit enhancements are common in Austria (eg, personal securities, cumulative assumption of debts or comfort letters).

45 Loan covenants

What covenants are commonly required by the lender in loan documents?

Loan agreements contain all kinds of covenants, depending mostly on the target and the conducted due diligence, similar to most other central European countries.

46 Financial covenants

What are typical financial covenants required by lenders?

Financial covenants usually do not differ from those used in most other central European countries.

47 Secured moveable (personal) property

What are the requirements for creation and perfection of a security interest in moveable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

See question 41.

48 Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

SPEs are commonly used in real estate transactions. With respect to possible forms, see questions 15 and 16. The managing director of an SPE can be a managing director of the parent company at the same time.

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Renewable Energy
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